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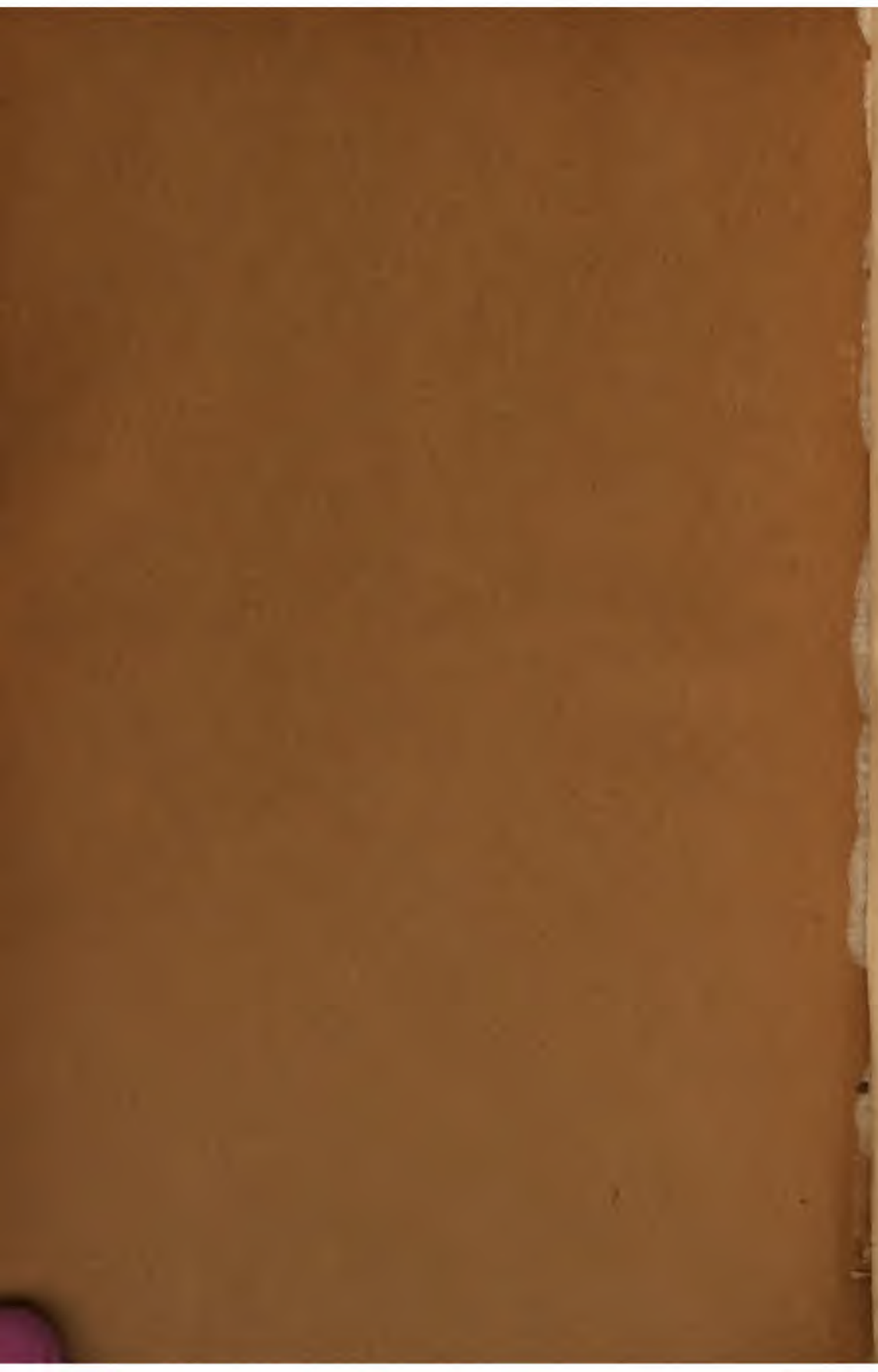


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EDITORS

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MISSOURI SUPREME COURT. (Division No. 1.)

DANIEL F. BLAKE, Trustee, etc., of
Thomas J. Meadows & Company, Bank-
rupt, Respt.,

v.

SUSIE L. MEADOWS, Appt.

(225 Mo. 1, 123 S. W. 868.)

Bankruptcy — trustee's title — out- standing equities.

1. A trustee in bankruptcy takes title to the bankrupt's property which has been conveyed in fraud of creditors, and contrary to the terms of the bankruptcy act, subject to outstanding equities not lost by estoppel or fraud, to which the title was subject in the hands of the bankrupt.

Same — trust for wife — enforcement.

2. The conveyance by a bankrupt to his wife of real estate which he had purchased with her funds, but held in his own name,

cannot be interfered with by the bankruptcy trustee, in the absence of anything to estop her from claiming the benefit of the trust.

Same — estoppel — failure to enforce trust.

3. The mere failure of a woman immediately to enforce the promise of her husband to convey to her real estate which he has purchased with her funds, and the title to which he has taken, without authority, in his own name, does not, in the absence of fraud, estop her from relying on a deed in execution of the promise, made after he became bankrupt, although he was in business, and credit was given him, without her knowledge, on the faith of the property.

Same — creditors with notice — rights.

4. Persons with knowledge that a man purchased real estate with his wife's funds, and took the title thereto in his own name, cannot raise an estoppel against her right to claim the property as against their claims arising out of credit extended to him.

Note. — Estoppel of one who permits title of real property to stand in another's name, to assert title as against the latter's creditors.

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VI. Negligence in extending credit, 13.

I. Introduction.

Earlier cases on the subject of this note than those collected here will be found in a note to *Breeze v. Brooks*, 22 L.R.A. 257, on "Estoppel of landowner by allowing record title to remain in another." For rights of one leaving his chattels in another's possession, to claim title as against the latter's vendees or creditors, see note to *Davis v. First Nat. Bank*, 25 L.R.A. (N.S.) 760. 30 L.R.A. (N.S.)

This note is not intended to cover cases in which there is some positive act or representation on the part of the real owner of the property, intended to mislead a creditor or of the apparent owner, nor will it include cases turning upon the interpretation of special statutes governing the subject. The question discussed here is whether the owner who lets the title to his real property stand in the name of another thereby so places it in the power of the holder of the legal title to deceive the latter's creditors, that the owner will not be allowed to assert his rights as against their claims. The rights of bona fide purchasers and mortgagees are not considered.

In *Ludwig v. Highley*, 5 Pa. 132, the facts that the debtor was the ostensible owner of the premises by the sufferance of the real owner, and that the debtor was thereby placed in a position to deceive the world, and thus to acquire a false credit, were held not to affect the rights of the owner. The court said: "The principle which forbids the divorce of the real ownership and the actual possession of personal chattels has never been extended to

Fraud — statement of debtor's property — reliance.

5. Reliance upon ownership of a certain parcel of land, sufficient to overturn a deed by the debtor to a third person, is not shown by the fact that the creditor had before him commercial reports showing that the debtor was "said" to own, or "credited" with owning, the land, or that he has good farm or town property of a certain value, without any particular reference to the land in question.

(November 27, 1909.)

APPEAL by defendant from a judgment of the Circuit Court for Clay County in plaintiff's favor, as trustee in bankruptcy, in an action brought to set aside a deed of certain real estate, alleged to be

voidable as a preference under the bankruptcy act. Reversed.

The facts are stated in the opinion.

Mr. Wash Adams, for appellant:

When the husband used the money of defendant, his wife, which had come to her by inheritance from her father, and was her separate property, in the purchase of the farm in controversy, a trust thereby resulted in her favor, and the land, in equity, belonged to her.

Broughton v. Brand, 94 Mo. 169, 7 S. W. 119; Seay v. Hesse, 123 Mo. 450, 24 S. W. 1017, 27 S. W. 633; Hoffmann v. Hoffmann, 126 Mo. 486, 29 S. W. 603; Jones v. Elkins, 143 Mo. 651, 45 S. W. 261; Stickney v. Stickney, 131 U. S. 237, 33 L. ed. 142, 9 Sup. Ct. Rep. 677.

corporeal hereditaments. That principle rests on the impolicy of permitting collusive transfers of the legal ownership, which would put the property beyond the reach of the debtor's creditors, rather than on the ground that a false credit is given by a retention of possession. But this species of legal fraud, which may vitiate a real transaction, is in its operation, strictly confined to the case of a sale or pledge of chattels. For obvious reasons, it would produce the most mischievous consequences to apply it to the possession of lands. The most usual mode by which real property is enjoyed is by permitting others to occupy it, and it has never been thought, in the absence of actual fraud, that, so far as third persons are concerned, it makes any difference whether the occupancy be by virtue of a demise for years, or under an absolute conveyance, coupled with a secret, bona fide trust. To hold otherwise would be materially to interfere with, in a great variety of cases, this species of equitable estate, which our laws distinctly recognizes. Our books furnish numerous instances in which the possession of trust property remained in the trustee, and yet, until now, it has never been claimed that such possession subjected the land to the burden of his debts. In the case of personal chattels, possession is said to be the only *indicia* of ownership to a stranger, but this cannot be said of hereditaments. In short, the reasoning applicable to one species of property is wholly inapplicable to the other, and *cessante ratione legis, cessat ipsa lex*. To introduce a new rule of property, without some stringent reason calling for it, would be utterly unjustifiable."

But it has often been held that the true owner may be estopped by letting his title stand in the name of another. In *Trenton Bkg. Co. v. Duncan*, 86 N. Y. 230, the court said: "The authorities establish the doctrine that the owner of land may, by an act *in pais*, preclude himself from asserting his legal title. But it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and

equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles, if they were allowed to be affected by parol evidence of light or doubtful character. To authorize the finding of an estoppel *in pais* against the legal owner of land, there must be shown, we think, either actual fraud, or fault or negligence equivalent to fraud, on his part . . . as to render it just that, as between him and the party acting upon his suggestion, he should bear the loss. Moreover, the party setting up the estoppel must be free from the imputation of laches, in acting upon the belief of ownership by one who has no right."

For the application of the doctrine of estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as amounts to constructive fraud, by which another has been misled to his injury. Where the estoppel relates to the title of real property, it is essential to the application of the doctrine that the party claiming to have been influenced by the conduct or declarations of another was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel. *Brant v. Virginia Coal & I. Co.* 93 U. S. 327, 23 L. ed. 927.

In *Gillean v. Witherspoon* (Tex. Civ. App.) 121 S. W. 909, it is said that it has been repeatedly held in Texas that to estop a married woman from asserting her rights to land, it is essential that she should be guilty of some positive fraud, or else of some concealment or suppression which in law would be equivalent thereto.

To estop a married woman from asserting her right to land, she must have been guilty of some positive act of fraud, or of an act of concealment or suppression which, in the law, would be equivalent thereto, which act, representation, or concealment was intended

The land being, in equity, her property, the conveyance to defendant was not a fraud upon his creditors, but was valid and lawful.

DeBerry v. Wheeler, 128 Mo. 85, 49 Am. St. Rep. 538, 30 S. W. 338; *Marston v. Dreesen*, 85 Wis. 530, 55 N. W. 896; *Seay v. Hesse*, supra; *Payne v. Twyman*, 68 Mo. 339; *Clowser v. Noland*, 133 Mo. 221, 34 S. W. 64; *Medsker v. Bonebrake*, 108 U. S. 66, 27 L. ed. 654, 2 Sup. Ct. Rep. 351; *Bennet v. Strait*, 63 Iowa, 620, 19 N. W. 806; *Garner v. Second Nat. Bank*, 151 U. S. 420, 38 L. ed. 218, 14 Sup. Ct. Rep. 390; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. ed. 1075.

The trustee in bankruptcy takes just

to cause another to alter his position or condition, and which has actually had such effect. *Matador Land & Cattle Co. v. Cooper*, 39 Tex. Civ. App. 99, 87 S. W. 235.

But the doctrine that there must be actual fraud is not borne out by the authorities. In *Galbraith v. Lunsford*, 87 Tenn. 89, 1 L.R.A. 522, 9 S. W. 365, the court said: "It is true that there is a theory which makes the essence of equitable estoppel to consist of fraud, but this theory is not sustained by principle or authority. There are many well-settled cases of estoppel, familiar to courts of equity, which do not rest upon fraud, and instances are admitted, even by the courts which maintain this theory, which cannot be said to involve any element of fraud unless by a complete perversion of language and misuse of terms. The confusion to be found in some of the books on this subject is due doubtless to the fact that the fraud referred to has its origin in the effort afterward to set up rights contrary to the conduct of the party, although, at the time of the act constituting the estoppel, there was the most perfect good faith. The term, as used in such cases, is, as Mr. Pomeroy expresses it, virtually synonymous with 'unconscientious' or 'inequitable.' It is in this sense that it may be said that it is a fraud, or fraudulent, to attempt to repudiate the conduct which has induced the other party to act, and upon which the estoppel is predicated; but it is entirely another thing to say that the conduct itself,—the acts, words, or silence of the party,—constituting the estoppel, must be an actual fraud, done with the then intention of deceiving. It may therefore be safely said that although fraud may be, and often is, an ingredient in the conduct of the party estopped, it is not an essential element if the word is used in its commonly accepted sense; and the use of the term is unnecessary, and often improper, unless applied to the effort of the party estopped to repudiate his conduct, and to assert a right or claim in contravention thereof."

It is not necessary that the wife should have been an active participant in any scheme of fraud known to her to be such, 30 L.R.A. (N.S.)

such title as the bankrupt had, and no better or greater title, and subject to estoppel and all liens or equities to which the title was subject in the hands of the bankrupt.

Bush v. Export Storage Co. 136 Fed. 920; *Hood v. Blair State Bank*, 3 Neb. (Unof.) 432, 91 N. W. 705; *Duplan Silk Co. v. Spencer*, 53 C. C. A. 321, 115 Fed. 690; *Loveland, Bankr.* 2d ed. § 173; *Stewart v. Platt*, 101 U. S. 731, 25 L. ed. 816; *Cook v. Tullis*, 18 Wall. 332, 21 L. ed. 933; *Dudley v. Easton*, 104 U. S. 99, 26 L. ed. 668; 5 Cyc. Law & Proc. p. 341; *Re Standard Laundry Co.* 53 C. C. A. 644, 116 Fed. 478; *Brandies v. Cochrane*, 112 U. S. 344, 28 L. ed. 760, 5 Sup. Ct. Rep. 190; *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254;

in order to estop her from asserting her equitable title to real estate in her husband's name, as against his creditors. *Hopkins v. Joyce*, 78 Wis. 443, 47 N. W. 722. The court said that, having voluntarily put it in the power of her husband to obtain credit, and he having obtained it thereby, it would be a fraud upon those who dealt with him on the faith of his apparent ownership to permit her to assert her alleged equitable interest in the property.

II. Title in another with acquiescence of owner.

a. In general.

If the equitable owner has actual or constructive notice that the title to the property stands in the name of another, and that it is liable to lead to the extension of credit to the apparent owner, and steps are not promptly taken to disclose the real title, it is generally held that the true owner will be estopped to assert his rights as against one actually deceived by the appearance of ownership.

Where the controversy is between the husband and the judgment creditor, it is a material circumstance whether the wife has permitted the husband to hold himself out as the owner of the property, and thereby gain credit on the strength of such ownership, and by permitting her husband to hold the title to property, knowing that he is engaged in mercantile business, and in the constant purchase of goods to carry on that business, she consents that he may obtain credit on the strength of his apparent ownership, as it appears of record. *Hauk v. Van Ingen*, 196 Ill. 20, 63 N. E. 705, affirming 97 Ill. App. 642.

A woman who has allowed the title to real estate to stand of record in the name of her husband for over twenty years cannot assert title thereto as against a creditor whose right accrued while the title—of which fact she had either actual or constructive notice—stood in her husband. *Steel v. Fitzhenry*, 78 Ill. App. 400.

Where real property was originally bought

Re Mullen, 101 Fed. 413; Re Hanna, 105 Fed. 587.

Fraud, actual or constructive, is a necessary element to give the trustee in bankruptcy a right of action.

Bush v. Export Storage Co. *supra*.

A married woman cannot lose her land, separate or not separate estate, by estoppel (*in pais*) without actual fraud, if even by it.

Waldron v. Harvey, 54 W. Va. 609, 102 Am. St. Rep. 959, 46 S. E. 603; Brant v. Virginia Coal & I. Co. 93 U. S. 327, 23 L. ed. 927; Baker v. McInturff, 49 Mo. App. 509; Hyde v. Powell, 47 Mich. 156, 10 N. W. 181.

Mere passive conduct or silence will not estop a married woman.

Ingals v. Ferguson, 138 Mo. 358, 39 S. W. 801; Dull v. Merrill, 69 Mich. 49, 36 N. W. 677; Marston v. Dresen, *supra*; Bank of United States v. Lee, 13 Pet. 107-119, 10 L. ed. 81-87; Brant v. Virginia Coal & I. Co. *supra*; Burke v. Adams, 80 Mo. 514, 50 Am. Rep. 510; Garner v. Findley, 110 Fed. 123; McClain v. Abshire, 72 Mo. App. 390; Matador Land & Cattle Co. v. Cooper, 39 Tex. Civ. App. 99, 87 S. W. 235.

The alleged declaration of the husband that the land was his was not admissible.

Maffi v. Stephens (Tex. Civ. App.) 93 S. W. 158.

Estoppel cannot be invoked as to those creditors who had knowledge of the transaction.

with the wife's money, and afterwards sold and other property purchased, and that was repeated several times for a period of ten years, the business being transacted in the name of the husband, and the purchases being made by him in his name, it was held that the wife was estopped from asserting title as against those advancing credit on the faith of such ownership. Hockett v. Bailey, 86 Ill. 74.

If a woman permits her husband to take her money and invest it in land in his own name, and to deal with it as his own, and he obtains credit upon the strength of his apparent ownership of it up to a time when he fails in business, she will not be allowed then to claim it against his creditors, having permitted him to represent it to be his own, and upon the apparent ownership of which he has obtained his credit and standing in business. George Taylor Commission Co. v. Bell, 62 Ark. 26, 34 S. W. 80.

A woman, by permitting her husband and son to operate a sawmill in their own names, which she must have known formed the basis of credit extended by those who dealt with them, will be estopped from claiming title as against creditors who extended credit on the faith thereof. Roberts v. Bodman-Pettit Lumber Co. 84 Ark. 227, 105 S. W. 258.

If a wife's money is paid for land, and the deed is made to her husband, and the husband asserts that the land is his, and by her direction he returns it for taxes as his own, and he so represents it to a creditor in order to obtain credit, which is given him on the faith of such statement, and without notice of the wife's right, the land is subject to the debt, notwithstanding the wife's equitable right therein, and notwithstanding the fact that she afterwards procures the first deed to be canceled, and a deed to be made to her by the vendor. Kennedy v. Lee, 72 Ga. 39.

Where a wife knew that title to land bought with her money was taken in her husband's name, and allowed it so to stand for over two years, it was held that it was liable for his debts. Keady v. White, 168 Ill. 76, 48 N. E. 314.
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Real estate having been permitted to stand for a period of fifteen years in the husband's name, during which time he erected a dwelling house and other valuable improvements upon it with his own means, holding possession and dealing with the land as his own, and contracting debts on the faith of such ownership, it was held that a conveyance of the property to the wife would not be allowed to stand against the claims of the husband's creditors. Miller v. Payne, 4 Ill. App. 112.

Where a wife advanced various sums of money to her husband from time to time, for a period of twenty years, permitting him to use the money in his business operations, and to buy land, and certain land was purchased by him in his own name, and was so held by him for a period of six or seven years, under an understanding that he would protect her by putting the land in her name when it was paid for, it was held that she could not set up her claim to the land to defeat a creditor who had trusted him on the faith of the property which he held with his wife's knowledge and consent. Maddox v. Epler, 48 Ill. App. 265.

Where a woman for nearly two years suffered a deed of her property to remain on the public records in her husband's name, and allowed him to receive credit on the faith of his ownership of the land, it was held that she would not be allowed to assert title as against creditors of her husband who relied fully upon his title in extending credit, without knowledge of her rights. Minnich v. Shaffer, 135 Ind. 634, 34 N. E. 987.

A woman, by permitting the legal title to her land to remain in the name of her husband unquestioned, and by allowing him to procure credit on the faith of such title, and thereby to improve her property, she having knowledge of such facts, is estopped from setting up her title against creditors of her husband, deceived by the apparent ownership. Le Coil v. Armstrong-Landon-Hunt Co. 140 Ind. 256, 39 N. E. 922.

Where a woman for nearly eighteen years had suffered the title to her land to remain on the public records in the name of her

Hequembourg v. Edwards, 155 Mo. 523, 56 S. W. 490.

Mr. Frank P. Divelbiss also for appellant.

Messrs. James M. Sandusky, Lavelock & Kirkpatrick, and Karnes, New, & Krauthoff for respondent.

Lamm, P. J., delivered the opinion of the court:

Thomas J. Meadows, merchant in the village of Lawson, Ray county, Missouri, doing business under the name and style of Meadows & Company, on May 10, 1905, was adjudged a bankrupt by the district court of the United States for the western division of the western district of Missouri. On due steps taken, Daniel F. Blake was

husband, joining also with him in the execution of mortgages upon the same as his land, and allowing innocent persons to become his creditors on the faith that he was the owner of the land, she cannot assert title as against such creditors. *Pierce v. Hower*, 142 Ind. 626, 42 N. E. 223.

In *Lyman v. Cessford*, 15 Iowa, 233, it was said, *obiter*, that if it had appeared in the case that the recorded title of the land sought to be reached by creditors was in the husband at the time of the contracting of the debt, and that the creditors, actually or constructively, gave credit to the husband on the faith of that fact, the court would be inclined to hold that they were entitled to the rights of a prior creditor as against a voluntary unrecorded conveyance, and especially so if it should appear that the wife fraudulently or negligently withheld the deed from record.

Where it appeared that the wife wanted her husband to give her a deed to her land, but that she could not make him do it; that she knew within a short time after the conveyance was made to him that the title was in his name, and that the record showed he was the equitable as well as the legal owner; that she also knew he was of a speculative turn of mind, and was engaged in operations on the board of trade; that he did not acknowledge the trust she claimed, and she nevertheless stood idly by, knowing well that creditors might be deceived, and would give credit to her husband on the strength of his apparent financial ability; that she did not bring suit or do anything to notify persons dealing with her husband of her claims, and allowed him to become involved to such an extent that he was forced to suspend; and that she, at the last moment, when everything seemed to be slipping away from them, accepted a conveyance, knowing that suits had been commenced against her husband, which, in a few days, would ripen into judgments, and absorb the land.— it was held that she could not assert title to the property as against her husband's creditors, her acquiescence and laches, as well as her implied consent to the ostensible ownership of the 30 L.R.A. (N.S.)

appointed trustee of the bankrupt estate, and took upon himself the burden of administering the trust. Presently said Blake lodged his bill in equity in the Clay circuit court, charging (among other things) that Meadows in March, 1898, by a deed duly executed by the then owners, became seised in fee of the S. W. $\frac{1}{4}$ and the S. $\frac{3}{4}$ of the N. W. $\frac{1}{4}$, section 35, township 54, range 30, in Clay county; that he took possession under his deed, and thenceforth represented himself, with the knowledge and consent of defendant, as the owner; that subsequently he became indebted to divers persons in sundry sums, proved and allowed against his estate in bankruptcy; that in February, 1905, intending thereby to hinder and defraud his creditors, he, by a

land, estopping her from claiming title. *Iseminger v. Criswell*, 98 Iowa, 382, 67 N. W. 289.

A wife, having for twenty years allowed her land to stand in her husband's name, to be held by him in secret trust for her benefit, the husband occupying the premises, and treating them in all respects as his own, credit being extended to him in reliance upon such ownership. it was held that she must be presumed to have known that, in the ordinary course of business, he would be likely to obtain credit by reason of his ostensible ownership, and that, having consented that the land stand in his name, she ought not to be heard to say, as against those extending credit in reliance on the security, that she, rather than he, owned the property. *McCormick Harvesting Mach. Co. v. Perkins*, 135 Iowa, 64, 110 N. W. 15.

In *Rieschick v. Klingelhoefer*, 91 Mo. App. 430, it was held that property paid for and improved by daughters, in their mother's name, was liable for the satisfaction of those debts of the apparent owner, contracted on the faith of the apparent ownership.

Although real estate may have been purchased with the money of the wife, the intention being to have the title in her name, if, after the title is taken in the name of her husband, she permits it so to remain for several years, knowing that her husband is engaged in mercantile business, she will be estopped from asserting title as against creditors extending credit on the faith of such ownership. *Roy v. McPherson*, 11 Neb. 197, 7 N. W. 873.

In *Laing v. Evans*, 64 Neb. 454, 90 N. W. 246, it was held that a wife who, in 1881, procured her husband to buy land for her in his own name, and left the contract in his name until 1896, when the property was paid for and the deed made to her, and who had, in the meantime, permitted the husband to lease the land, take notes for rent in his own name, and manage it as his own, was estopped to claim as against a creditor who had, with knowledge of such management, but with no actual knowledge of the

deed put of record, conveyed said farm to his wife, the defendant, Susie L., said deed reciting a consideration of \$8,000; that the deed was without any consideration in fact, but on the pretended consideration that Susie L. had paid the purchase price at the time of the conveyance to Thomas J. in 1898, and that the conveyance to her was an execution of a pretended trust arising on such payment of the original purchase money; that such pretended consideration should not avail as legal or valid, because Susie L. at the time had no intention of claiming the land as her own, or claiming any indebtedness due her by Thomas J. by reason of her furnishing such purchase money; that if she furnished the purchase money, it was not paid upon a purchase

of the land in her own behalf or for her use and benefit, but in order to have the land conveyed to Thomas J. as his own, and to enable him to obtain and have credit in carrying on business; further, that such pretended consideration should not prevail as a valid or legal one, for the reason that the title was allowed to remain in Thomas J. of record from April, 1898, to the 9th day of February, 1905, with the knowledge and acquiescence of defendant, during which time Thomas J., with her consent, held possession of the land, controlled and dealt with it as his own, held himself out as the owner, and was recognized as the owner while engaged in business as a merchant, which required him to incur liability and to obtain and have credit on the faith of

contract, loaned the husband money in 1894, on the faith of his ownership of the land.

If a wife vests her property in her husband, and permits him to appear to the world to be the owner thereof, and he contracts debts in the course of business, while he is apparently such owner, she is estopped to deny, as against the creditors, that he is the owner. *Mertens v. Schlemme*, 68 N. J. Eq. 544, 59 Atl. 808.

Where a woman voluntarily permits her husband to retain the apparent title to her property, and to deal with it as his own for twenty-eight years, she is estopped from afterwards asserting her claim as against creditors of the husband, who have dealt with him upon the faith of his apparent ownership. *Sears v. Davis*, 40 Or. 236, 66 Pac. 913.

Where a mother conveyed property to her son for the purpose of avoiding confiscation during the Rebellion, it was held that, by making the conveyance valid and effective on its face, and permitting the same to be registered, she thereby held her son out to the world as the owner of the property, enabling him to obtain credit on the strength thereof, and that she would be estopped to deny his title, to the prejudice of persons so extending credit. *Susong v. Williams*, 1 Heisk. 625.

But in *Bicocchi v. Casey-Swasey Co.* 91 Tex. 259, 66 Am. St. Rep. 875, 42 S. W. 963, the court was of the opinion that the question of estoppel was not really involved in the last-mentioned case, and that the whole case was disposed of on the question of its being a voluntary conveyance.

After title to land has remained in the owner's husband for a period of seven years or more, and by proper diligence she might have ascertained that fact, it was held that she would not be permitted to maintain title as against one who extended credit to the husband on the faith of his apparent ownership, and who had obtained a lien, especially where, after ascertaining the existence of the title in her husband, and securing a deed of the property from him, she had failed to record the deed for nearly a year, during which time the rights of her

husband's creditors had matured. *Smith v. Willard*, 174 Ill. 538, 66 Am. St. Rep. 313, 51 N. E. 835.

One who negligently allows the legal title to go to another, with the apparent power to convey and mortgage the land, will not be allowed to assert title as against one who innocently loans money on the strength of the apparent ownership, the rule of equity which controls being that where one of two innocent persons must suffer by the fraud of a third person, he who trusts the third person, and places the means in his hands to commit the wrong, must bear the loss. *Lawrence v. Guaranty Invest. Co.* 51 Kan. 222, 32 Pac. 816.

Where a husband knows of and acquiesces in the holding of property claimed by and in the name of his wife, he cannot assert his interest, to the prejudice of her judgment creditors. *Stewart v. Mix*, 30 La. Ann. 1036.

In *Greer v. Mitchell*, 42 W. Va. 494, 26 S. E. 302, the owner of land, having himself conveyed it to another, and allowed it to remain in the latter's name for years, was held estopped from asserting title as against third persons extending credit on the faith of the apparent ownership.

b. Constructive notice.

In *Crouse v. Morse*, 49 Iowa, 387, the doctrine that when property is intrusted to an agent, which he uses and controls as his own, and while so in his possession it is seized on execution for his debts, the owner is estopped from claiming the property, was held not to apply to a case in which real estate of the wife was deeded to her husband by mistake, and was reconveyed to her before the creditors of the husband who became such on the strength of the latter's apparent title, had obtained judgment and a lien upon the property. *Day, J.*, dissenting, however, said that if it had been shown that a deed was upon record, conveying the property to her husband, and that she had permitted it to remain there, proclaiming a falsehood to the world, there could be no question that she would be estopped to in-

his financial ability to discharge his obligations as they matured; that defendant well knew all this; that Thomas J. was thereby enabled to and did obtain credit upon the faith and belief of his ownership of said lands, and that the claims and demands allowed against his estate in bankruptcy were contracted and credit therefor extended on the faith and belief he was such owner; that the conveyance to Susie L. left him without sufficient assets to pay such debts, and the effect of it was to render him insolvent; and that, the premises considered, the deed is fraudulent and void as to such creditors, and void as to the plaintiff as trustee in bankruptcy. Wherefore, etc.

After sundry intermediate steps and in-

cidents, not material here, issue was joined by answer charging, among other things, that defendant's maiden name was Cummins; that she was the only child of Madison B. and Emma J. Cummins; that Madison B. died in February, 1898, Thomas J. Meadows becoming his administrator; that on the 6th of April, 1898, defendant and her said mother, acting through Thomas J. as their agent, purchased the land in controversy; that all of the purchase money (except \$2,500) was on deposit in the Commercial Bank of Lawson, in the names of defendant and her said mother, respectively, came from the estate of Madison B., and had been paid over to them by Thomas J. as administrator; that the purchase price of the land (except said \$2,500) was

sist upon the truth against a person misled to his prejudice by the falsehood. The difficulty in applying the doctrine of estoppel grew out of the fact that she did not know that the property was deeded to her husband, but the husband was general agent of his wife, and the agent knew that the deed was made to him by mistake when it was procured from the recorder's office. That it was his duty to communicate that fact to his principal, and that, for his neglect or omission to do so, the party who reposed confidence in him, and intrusted him with the powers and duties of an agent, should suffer rather than an innocent third person. The knowledge of the agent was the knowledge of the principal. There was nothing peculiar in the doctrine of estoppel, which required that the conduct creating the estoppel must be that individually of the party sought to be affected by it. "It would, indeed, be a strange doctrine," he continued, "if a party could entirely surrender the active control and management of his property to an agent, remain personally ignorant of everything respecting it, and then escape, solely upon the ground of ignorance, all application of the doctrine of estoppel."

But the weakness of this position was pointed out in *Huot v. Reeder Bros. Shoe Co.* 140 Mich. 162, 103 N. W. 569, in which it was held that knowledge of the husband, acting as agent of his wife, that he had taken title to her real estate in his own name, is not the knowledge of the wife, so as to estop her from asserting title thereafter, since the doctrine which imputes to the principal the knowledge possessed by his agent does not apply where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal.

III. Title in another without acquiescence, laches, or fraud of owner.

It is usually held that the mere fact that property stands in the name of another is not sufficient to estop the owner from setting up his title as against the cred-

itors of the apparent owner. Nor will mere knowledge of the fact that title is in another, if there is no intention to deceive, and no acquiescence amounting to laches on the part of the owner, stand in the way of his title. It is often difficult, however, to draw the line at the point where failure to act after knowledge becomes negligent or fraudulent as to creditors of the holder of the legal title.

In *Bennett v. Strait*, 63 Iowa, 620, 19 N. W. 806, it was held that a wife would not be estopped from asserting equitable title to her land as against creditors of her husband merely because title was taken in the name of the husband, and while thus held the debts were contracted. The court said that the law of estoppel has no application from the mere fact of the husband's holding the title when the debt was contracted.

That money was loaned on the faith of the apparent ownership of land of the wife, held in the husband's name, will not prevent the wife from asserting title as against the creditor, where she did not know that her husband was engaged in any hazardous business, or in any business transacted, in whole or in part, on credit, since the wife, by permitting the husband to hold the title to her land by recorded deed in his own name, will not, without other act or representation on her part, be estopped to deny the title as against a creditor who, without her knowledge, gave credit to the husband upon the faith of his ownership as it appeared of record. *De Berry v. Wheeler*, 128 Mo. 85, 49 Am. St. Rep. 538, 30 S. W. 338. The court said it must be conceded that the wife, by permitting record title to the land to remain in her husband, represented to the public that her husband was the owner of it. Yet in this alone no one could be defrauded. The fraud and consequent estoppel would only exist when she knew, or, from all the circumstances, ought to have known, that others, relying upon what she permitted to record to tell them, were dealing or might deal with the husband in such a manner as to cause them to alter their previous condition, to their injury.

paid by checks drawn by said Thomas J. against the said accounts of defendant and her mother, said checks being signed respectively by the names of defendant and her mother by said Thomas J.; that said \$2,500 was borrowed for defendant and her mother from one J. H. Roney, and was subsequently paid out of moneys belonging to defendant and her mother, derived from their separate estates; that defendant and her mother were wholly unfamiliar with legal blanks, documents, forms of conveyances, of the manner of executing deeds or mortgages, and business generally; that, without the knowledge or consent of defendant or her mother, said Thomas J. took title to the land in his own name, and that defendant's mother died in De-

cember, 1900, intestate, without knowledge of the fact that Thomas J., in violation of his trust, had taken title in his own name, she at all times supposing that title to be in herself and Susie L., her only heir; that this defendant did not learn for a long time that the title had been taken in the name of Thomas J., and, as soon as she found it out, demanded of him that he put the title in her name and that of her mother, where it belonged; that frequently, before and after her mother's death, she requested that the deed be corrected and the title placed in the names of the rightful owners; that Thomas J. at all times expressed a willingness and promised to comply with such request, but failed to do so until he executed a deed to defendant in

The fact that a town site corporation temporarily placed the title of land in the name of a natural person, in order to have certain corrections made on the plats, was held not to prevent it from asserting its title as against a creditor of such person, induced to make a loan to him upon the faith of his apparent ownership of the property, there being no evidence that there was any fraudulent intent on the part of the company to permit the title of the property to remain in him. *Hickox v. Eastman*, 21 S. D. 591, 114 N. W. 706.

A wife who furnished one half of the money with which to purchase land, under an agreement with her husband, who furnished the other half, that the deed was to be made out to them jointly, was held not estopped from asserting, as against the husband's creditors, her title to such land, which, without her knowledge, had been put in the name of her husband, who became a bankrupt, there being nothing to show any act whatever on her part to induce persons to give credit to her husband as the sole owner of the land. *Garner v. Findley*, 110 Fed. 123.

A conveyance in good faith to a wife, of land equal in value to money advanced for the purchase thereof, the title to which was first taken in the husband's name, will stand as against the claim of a creditor of the husband, who obtained judgment thereon after such conveyance, it not appearing that the wife had ever said or done anything to mislead the creditor, or warrant him in believing that she treated the property as her husband's exclusive property, and it not being shown that she permitted him to use it as such. *Bell v. Stewart*, 98 Ga. 669, 27 S. E. 153.

Where the debtor had nothing but the naked legal title to land, the owner remaining in possession, and it did not appear that there was any fraud or concealment, or that the debtor's deed was of record, even, or that the owner had knowledge of the credit extended to the debtor, it was held that the fact that goods were sold to the debtor on the faith of his ownership would not estop the owner from asserting title. *Hays v. Reger*, 102 Ind. 524, 1 N. E. 380. 30 L.R.A. (N.S.)

Where land was conveyed to a daughter of the purchaser, it was held that the latter would not be estopped from asserting title as against a creditor of the daughter, extending credit on the strength of the apparent ownership, where it was not shown that the purchaser knew anything of the dealings between the daughter and the creditor, or knew that he had obtained a judgment against the daughter, until after the land had been conveyed to the purchaser by the daughter. *Moore v. Scruggs*, 131 Iowa, 692, 117 Am. St. Rep. 437, 109 N. W. 205.

Where the wife's land is conveyed to the husband by mistake, the wife is not estopped to claim it as against a subsequent creditor of the husband, where she has done nothing to mislead the creditor. *Huot v. Reeder Bros. Shoe Co.* 140 Mich. 162, 103 N. W. 569.

The wife will not be estopped from asserting her title to her land as against her husband's creditors unless her conduct has been such as to lead them to believe that the husband was the actual owner of the property, and to extend credit to him on that ground. *Cleghorn v. Obernalte*, 53 Neb. 687, 74 N. W. 62.

In *Moulton v. Haley*, 57 N. H. 184, where land was purchased with the wife's money, and the deed was, without her knowledge, taken in the name of her husband, it was held that she could not be estopped by what was done without her consent and against her will.

That the wife permitted her husband to have title to her land in his own name will not estop her from asserting title as against her husband's creditors, where she believed that her husband had purchased the property in her name, and did not learn until some time afterwards that it was not in her name, there being no element of participation on the part of the wife in the fraud of the husband. *Mayer v. Kane*, 69 N. J. Eq. 733, 61 Atl. 374.

Where a wife did not know that title to her property had been taken in the name of her husband, and she did not discover

February, 1905; that Thomas J. paid none of the consideration for the purchase of the land; that the conveyance to defendant in February, 1905, was only doing what in law, equity, and good conscience he ought to do, for that he held the title in trust for defendant and her mother, and, after her mother's death, for this defendant alone; that said conveyance was and is no fraud upon the creditors of Thomas J., nor was it made for the purpose of hindering, delaying, or defrauding anyone, but, to the contrary, was made solely for the purpose of executing the trust resulting as aforesaid; that Thomas J. did not engage in a business necessary for him to incur debts with the knowledge or consent of defendant or her mother, nor hold out

to the world their consent, or acknowledge the land as his property, nor was he extended credit upon the faith of such ownership; that defendant had good cause to believe and did believe that Thomas J. was free from debt and in a prosperous financial condition, and that defendant at no time knew or had reason to believe that he was in debt or had incurred liability, or that anyone was extending him credit upon faith of apparent ownership of said land, and that while the mother lived, she and defendant, and, since the mother's death, this defendant, at all times claimed to be the absolute owners of said property, received the rents, paid the taxes, and exercised the usual and ordinary rights, dominion, and control over the property in-

this fact until after credit was extended to him on the strength of the apparent ownership, it was held that she was not estopped from asserting her title. *Woolsey v. Henn*, 85 App. Div. 331, 83 N. Y. Supp. 394.

A married woman in joint possession of land with her husband was held not bound to record her deed, under pain of losing the land if seized by the husband's creditors, though they had no actual or constructive notice of the title at the time they gave credit, or filed judgments against the occupant. *Feig v. Meyers*, 102 Pa. 10.

The wife is not estopped from setting up her title to land as against the creditors of her husband, because of the fact that she joined with him in a deed of one half of the tract standing in his name. *Hay v. Martin*, 2 Monaghan (Pa.) 526, 14 Atl. 333.

Nor will the fact that the husband had made declarations to the effect that he owned the land, the fact that he had erected improvements on it, and the fact that he had leased it and paid the taxes and insurance in his own name, prevent her from asserting title. *Ibid*.

The fact that a fraudulent grantee of property represented it to be his own, and obtained credit on the faith of the ownership, will not estop the fraudulent grantor, after a reconveyance of the property to him, from asserting his title. *Bicocchi v. Casey-Swasey Co.* 91 Tex. 259, 66 Am. St. Rep. 875, 42 S. W. 963.

Where property was paid for by the wife's father, and intended to be conveyed to her, the title to which, however, being, by collusion between the husband and the grantor, put in the husband's name, it was held that the fact that the wife did not promptly assert her rights therein did not estop her as against creditors of her husband, it not appearing distinctly that she knew how the legal title stood, or exactly what her father's intentions were until after his death, and where she was under the disabilities of coverture, and asserted her title long before it was assailed. *Steagall v. Steagall*, 90 Va. 73, 17 S. E. 756.

A wife, in the absence of bad faith, was

held not estopped from claiming property, the record title to which was in her husband at the time he contracted the debts sought to be fastened upon the land. *Kemp v. Folsom*, 14 Wash. 16, 43 Pac. 1100. The court thought it would be too harsh a rule to announce that, under any circumstances, the wife should be estopped from claiming her interest in realty which had been held in the name of the husband, as against the creditors of the husband, for credit obtained during the time such land was so held, notwithstanding the fact that the intimate relations existing between husband and wife render the perpetration of a fraud upon creditors in this sort of a transaction more probable than in cases where the parties do not stand towards each other in such relations. The court thought the better rule would be to insist upon the most clear and convincing proof of good faith in the transaction; but that when it did conclusively appear from the testimony that the property in dispute was actually the separate property of the wife, her interest ought to be protected by the courts, notwithstanding the fact that the record title was allowed to remain for a while in the husband.

Mere silence on the part of the wife, who is the equitable owner of land, even if she knows of the mistake by which a deed thereto was placed in the name of her husband, will not estop her from asserting title as against a creditor of the latter, since this involves no representation or act on her part by which the creditors could be misled to their prejudice. *Smith v. Gott*, 51 W. Va. 141, 41 S. E. 175.

In *Byers v. Prewitt*, 4 Ky. L. Rep. 991, where land paid for by the wife's money was conveyed to the husband, who afterwards conveyed to the wife, the court refused to subject the land to the husband's debts.

A house and lot having been purchased with the means of the wife, under an agreement by which the title was to be made to her, the title having been taken in the name of the husband, it was held that, as between his creditors and his wife, he must be re-

cident to absolute ownership, and made improvements thereon. The reply, pleading no new matter, denied seriatim the averments of the answer. At a trial on the merits, a decree went in favor of plaintiff, and defendant appeals.

The record is of great volume, and no good purpose would be subserved by spreading on the pages of our reports the evidence in detail. It appears therefrom that Emma J. Cummins was a very old lady (three score and ten), and died two years after her husband; that her husband, Madison D., died out of debt and seised of considerable estate in Ray and adjoining counties, leaving her as his widow and defendant as his only child and heir; that Thomas J. Meadows, married to defendant

some seven or eight years, was about thirty-eight years old, and was possessed of no estate; that he was appointed administrator of his father-in-law's estate and subsequently of that of his mother-in-law; that, there being ready money on hand on the death of Madison B., the question of safely investing it became a matter of family discussion, with the result that Thomas J. acted on behalf of his wife and mother-in-law in the purchase of the land in question in Clay county for \$9,600, taking title in himself. Not a penny of the purchase money was paid by him out of his own means, but all of it came from the separate estates of his wife and mother-in-law, share and share alike. There was abundant evidence showing that this pur-

was held that a secret trust arising in favor of the husband as the real owner. *Darnaby v. Darnaby*, 1 Ky. L. Rep. 399.

Permitting real estate purchased with partnership money to stand in the name of one of the partners will not estop the partnership from claiming the title as against one giving the partner credit on the faith of the apparent title of the property. *Goldthwaite v. Janney*, 102 Ala. 431, 28 L.R.A. 161, 48 Am. St. Rep. 56, 15 So. 560.

A wife's participation in the fraud of her husband, who obtained credit by representing himself to be the owner of his wife's land, is not shown by the fact that she permitted the property to stand in her husband's name, thereby giving him a fictitious and deceptive credit, in the absence of any knowledge on her part that her husband was doing business on credit, or that, in order to secure credit, he represented himself to be the owner of the property. *Alkire Grocer Co. v. Ballenger*, 137 Mo. 369, 38 S. W. 911.

Where title to property was taken in the husband's name, with the understanding that he was to convey it to the wife when she desired, and he having conveyed it when solvent, and without fraudulent intent on the part of either, neither the husband nor the wife knowing that credit was extended on the faith of such ownership, it was held that the wife would not be estopped from asserting her title. *Marston v. Dresen*, 85 Wis. 530, 55 N. W. 896, distinguishing *Hopkins v. Joyce*, 78 Wis. 443, 47 N. W. 722, *supra*, I.

Where the wife, as soon as she learned that the deed to her property had been taken in the name of her husband, at once took steps to have it set aside, it was held that there was no laches or delay on her part that would defeat her rights as against a creditor of her husband, and that she was entitled to relief against a purchaser at an execution sale, who purchased *pendente lite*, with full notice of her equities. *Keller v. Keller*, 45 Md. 269.

But in *Citizens' Bank v. Burrus*, 178 Mo. 30 L.R.A. (N.S.)

716, 77 S. W. 748, it was assumed that a surety induced to extend on the husband's representation that he owned property of his wife's, standing in his name, might assert estoppel against the wife if he had first paid the debt.

IV. Judgment Lien.

That credit is extended on the faith of the fact that the title to property is in the name of a woman, who, however, holds it in trust for her children, will not enable creditors to set aside the conveyance to the children before they acquire a lien thereon, merely because of the intention to defeat, by such conveyance, the claims of such creditors. *Dodd v. Bond*, 88 Ga. 360, 14 S. E. 581. The court said: "Whatever may be the true view of the law, where a debtor conveys his own property to a creditor, we are satisfied that where one conveys property not his own, which he wrongfully holds, to the rightful owner, the law does not require the latter to yield his rights and decline taking it because the person who has withheld it wrongfully may, in returning it, intend thereby to keep his own creditors from getting it. One who takes merely what is his own is not punished for considerations which may operate upon the mind of the party who gives it up. In this case the wrongful holder of property was performing a legal and moral duty—was doing that which, in the eyes of the law, ought to have been done—in placing the property where it belonged."

Where land was bought for a woman with her money, and the title taken in the name of her husband, under the assurance that it would be changed by deeding it to a third person, who would reconvey to her, and the property was afterwards conveyed to her under this agreement, it was held that it was not subject to sale under execution by a creditor, having, at the time of conveyance, no judgment to become a lien upon it. *Van Dorn v. Leeper*, 95 Ill. 35.

But in *Zimmer v. Dansby*, 56 Ga. 79, it

chase was on behalf of the two women, who, unfamiliar with business forms and ways, trusted the whole transaction to him as their agent, and lived with him under one roof as one family. They took no part in negotiating the purchase, in concocting or delivering the deed, or in making payment, and were not present at any step. They expected the title to be taken in their names. Mrs. Cummins died without knowing it was not. The defendant knew no better until a month or so after the deed was returned, after record, by the recorder of Clay county, at which time she first saw it and read it over. It was shown (and not contradicted) that defendant, on then ascertaining the title did not stand in the names of her mother and herself,

but in her husband's, requested him to correct the deed and put the title in the rightful owners, and he promised to do so. Ascertaining subsequently he had neglected to perform his promise, the same request was again made and the same promise given. These requests and promises were renewed from time to time under similar circumstances, until finally, in February, 1905, the deed was made. The mother was not told, because she was old, and defendant did not want to worry her. If this were the whole case, there could be no question about the law of it. Under such circumstances there was a resulting trust in favor of those who furnished the purchase money for the land, and a clear equity to have the same enforced. Equity consider-

of the wife out of the fact that the title to her land was taken in her husband's name will not prevail against a judgment lien obtained without notice, actual or constructive, of the existence of such trust.

V. Extension of credit on faith of apparent ownership.

It is well established that a creditor of the holder of the legal title to land is not in a position to invoke the doctrine of estoppel against the real owner, in any event, unless credit has been extended on the faith of the apparent ownership. *Smith v. Gott*, 51 W. Va. 141, 41 S. E. 175; *Cleghorn v. Obernalte*, 53 Neb. 687, 74 N. W. 62.

The true owner will not be estopped from asserting ownership as against creditors of a person in whom the record title appeared, where it is not shown that the credits were induced or extended on the basis that the latter was the owner of the land. *Hagerly v. Goodland*, 70 Kan. 734, 79 Pac. 664.

A creditor having knowledge of the equity of the real owner can have no better right to the property than he who holds the legal title. *Taylor v. Smith*, 54 Miss. 50.

The courts agree that it must appear that the credit was extended to the husband on the faith of his apparent ownership of his wife's land. *Standard Mercantile Co. v. Ellis*, 48 W. Va. 309, 37 S. E. 593.

The debt must not have been contracted before the debtor had any apparent interest in his wife's property. *Bangert v. Bangert*, 13 Mo. App. 144.

The equity of the husband's creditors will not be superior to that of the wife to a piece of property, the title to which is taken in his name, if it is not shown that the creditor relied on the ownership of the property in extending credit. *Goldsmith v. Fuller*, 30 Neb. 563, 46 N. W. 712.

Where the creditor extends no credit to the husband on the supposition that he is the owner of the property, because of the fact that the record title is in his name, the wife's equity as real owner is superior to that of the creditor. *Hews v. Kenney*, 43 Neb. 815, 62 N. W. 204.

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Manifestly, where the claim against the apparent owner is founded in tort, the doctrine of estoppel cannot be invoked. *Lillis v. Gallagher*, 39 N. J. Eq. 93.

In *Brown v. West*, 70 Ga. 201, land having been purchased with the wife's money, and title taken in the name of her husband, it was held that, in an effort to subject the land by a mortgage creditor of the husband to the payment of indebtedness, the controlling question was whether the creditor gave credit to the husband on the faith of his apparent ownership of the property, and without notice of the wife's equity; that, if so, he could subject it to the payment of the debt; but that if not, and he knew of the wife's equity, he could not subject it thereto, since, if credit were given on the faith of other property, he would not be injured by the existence of a secret equity in the wife.

A husband cannot, without his wife's consent, convey land belonging to her, to a third person, even for the purpose of securing her own debt, or indemnifying one who stands security for her, when such person has knowledge as to the true ownership of the land. *Latham v. Latham*, 98 Ga. 477, 25 S. E. 505.

Land bought by a husband for his wife, and paid for with her money, is equitably her property; and though he takes the legal title to the same, it cannot, as against the claim by her, be lawfully subjected to the satisfaction of a judgment against him, if, at the time of the creation of the debt on which the judgment is founded, credit was not given to the husband on the faith of his apparent ownership of such land. *Burt v. Kuhn*, 113 Ga. 1143, 39 S. E. 414.

The wife was held not estopped from asserting title to her property, title to which was in her husband's name, as against a creditor of the latter, extending credit on the faith of his apparent ownership, where, long before the debts were contracted, she was in exclusive possession by her tenants under a conveyance from her husband, and an inquiry from those in possession would have disclosed the ownership, and where the deed was not withheld from the record

ing that done which should have been done, the execution of the trust by the conveyance of the husband to the wife would be but an act of tardy justice, absent any evidence that the farm, or its purchase money, was an out-and-out gift to Thomas J. Meadows, and we see no competent evidence of that sort. But there is something else in the case, and that something else is claimed by learned counsel for plaintiff to estop the wife from the right to have the trust executed, and to make the conveyance void as in fraud of the creditors of her husband. This contention seeks other facts, viz.:

The suit was brought on behalf of those creditors claiming to extend credit on the faith of Meadows's ownership of the land. The decree proceeds on that theory, and, omitting some creditors from its benefits, enumerates a list entitled to a lien for their

debts, aggregating \$14,387.04. One of these is the Commercial Bank of Lawson, having claims aggregating \$7,901.93; another is one John Roney, having a claim for \$675. In taking the laboring oar in proof of the allegation that faith and credit was given by the respective creditors to Meadows's ownership of the land, plaintiff put in some evidence pertinent to the bank, other evidence pertinent to Roney, still other pertinent to the other members of the favored class of creditors, and some common to all. It will serve a useful purpose to preserve that line of distinction. Accordingly, under (a), (b), (c), and (d), we will severally state the tendency of the testimony common to all, that pertinent to the bank, that pertinent to Roney, and that pertinent to creditors other than the bank and Roney.

(a) Common to all: Keeping in mind facts already disclosed, it seems that, for

with any purpose on her part of aiding her husband in incurring indebtedness on the strength of the title as it appeared of record. *Ray v. Teabout*, 65 Iowa, 157, 21 N. W. 497.

A wife cannot be estopped from setting up title to land standing in the name of her husband for seventeen years, as against a creditor of the husband, if credit was not extended to him on the strength of his apparent ownership. *DeVore v. Jones*, 82 Iowa, 66, 47 N. W. 885.

The doctrine that where the apparent title to real property belonging to a wife is by her permitted to be in her husband, and third persons, on the strength of such apparent title, and in good faith, extend credit to him, she will be estopped to deny such title, does not apply so as to estop a wife as against a purchaser of a dishonored note of her husband, given before he obtained title to her property. *Moore v. Rawlings*, 137 Iowa, 284, 114 N. W. 1040.

In *Holthaus v. Farris*, 24 Kan. 784, it was said that no grounds of estoppel against a wife existed where the record title had not passed into the name of her husband with her knowledge and consent, and the debt sued on was not created on the faith of such ownership.

The wife is not estopped from asserting her title as against her husband's creditors, where it does not appear that credit was extended on the strength of the apparent ownership of the property in the husband, and it is not shown that the wife knew, or ought to have known, that credit was extended because of the fact that the title was in her husband's name. *McAdow v. Hassard*, 58 Kan. 171, 48 Pac. 846.

A wife is not estopped to claim that property is in fact hers if her husband's creditor, when he gave credit, had such notice or information as to the actual ownership of the property as would put a man of ordinary business prudence upon inquiry. *Chadborn v. Williams*, 45 Minn. 294, 47 N. W. 812.
30 L.R.A. (N.S.)

Where the wife did not know at the time credit was extended to her husband that the title to her land was in the husband's name, and where the creditor did not extend credit on the strength of the apparent ownership, the wife will not be estopped to assert her title. *Scrutchfield v. Sauter*, 119 Mo. 615, 24 S. W. 137. The court said that, in order to constitute an estoppel, there must have been not only a false representation or concealment of the facts, but they must have been knowingly made by the one to be estopped, and believed and acted upon by the one claiming the estoppel.

The payee of a note, not misled by the wife's act in permitting title to her real estate to be in the name of her husband, cannot invoke the doctrine of estoppel against her, since no one can invoke estoppel to stay the assertion of a truth by another who is not himself misled by, or induced to do some act or thing to his injury on account of, such false act, conduct, or deed of the other, which otherwise he would not have done, or when he who invokes the rule had no knowledge of the false action of the other at the time he acted. *Citizens' Bank v. Burrus*, 178 Mo. 716, 77 S. W. 748.

Where the wife permitted her husband to hold title to certain lands for over ten years, during which time no debts were contracted on credit of his ownership, and when, after that, her husband was about to embark in business, she requested that the title should be put in such form that no one could be deceived or misled, and where the fact that the deeds were not put on record at once was satisfactorily explained, and no part of the creditor's debt was contracted until the deeds had been on record for more than a month, and credit was not given to the husband on the faith of his ownership of the land, it was held that the lands were not liable for the husband's debts. *City Nat. Bank v. Hamilton*, 34 N. J. Eq. 158.

Where credit was extended because the creditor had known the debtor for many

the rise of four years after the purchase of the land, viz., from April, 1898, to December, 1902, Meadows was not engaged in the mercantile business. The record shows that during the lifetime of his mother-in-law he filled the role of man of affairs to her and to his wife, renting out not only the Clay county land, but other tracts of cultivating land in Ray county, belonging to the Cummins estate, collecting the rents, attending to improvements of some magnitude, and administering on the estate of Madison B. The mother-in-law died in 1900, and Meadows added to his occupation that of administering on her estate. The record does not disclose that his relations with the two women were in anywise strained. He seems to have had their full confidence and trust. They lived in the village of Lawson. The lands belonging to the Cummins estate were else-

where. In paying taxes his habit was to take tax receipts in his own name on all these lands, including that in dispute. There is no contention that he used his own money to pay the taxes on other land, or that he appropriated the rents of any other land, but it is contended that he, as proprietor, appropriated the rents of the Clay county land, and paid the taxes out of his own means. On this score it may be said that the testimony did not disclose that he had a very definite or settled idea of *meum et tuum*, or of maintaining a line of cleavage between his own and his wife's separate means. It is shown that he drew checks to pay the taxes on the Clay county land against his own bank account, but how that account was made up is not clear. Defendant testified that she furnished the money to pay these taxes. For the first two or three years he put the rent money

years, and had done business with him, and knew him to be a man of commercial standing, and reputed to be the owner of a great deal of property, and not on the strength of the debtor's apparent ownership of a parcel of his wife's land, it was held that the wife would not be estopped from asserting her title as against the creditor. *Rawson v. Bogen*, 6 Ohio Dec. Reprint, 1022.

In *German Ins. Co. v. Bartlett*, 188 Ill. 165, 80 Am. St. Rep. 172, 58 N. E. 1075, a married woman was held not estopped from asserting title to a homestead as against execution creditors of her husband, because she did not at once put a declaration of trust under which her husband held the property on record, and because, after deeds conveying the title to her were delivered, they were not recorded for a period of thirty days, where it did not appear that the creditors were in any way misled, or that the declaration of trust and deeds were withheld from record by reason of any agreement made by her with her husband, and where she secured title to the property, of which she was justly and equitably the owner, before they reduced their claims to judgment.

The equity of a creditor who has not been misled or defrauded by any voluntary act of the wife, who has permitted her property to rest in her husband's name, the creditor having failed to assert his claim before the completion of the wife's legal title, cannot be permitted to prevail over her equity. *Campbell v. Campbell*, 3 Ky. L. Rep. 15.

VI. Negligence in extending credit.

In *Gallagher v. Northrup*, 215 Ill. 563, 74 N. E. 711, an estoppel was held not applicable against the equitable owner of land title to which was placed in the name of her son for the purpose of having a conveyance of it to her, and in favor of one who had accepted the son as surety on a bond, on the strength of his apparent ownership, 30 L.R.A. (N.S.)

where tenants were in possession of the premises, and the rents were collected by the equitable owner, and the facts as to the ownership could have been ascertained by inquiry of the tenants.

Where a conveyance of real property is obtained from the owner by fraud, and a general creditor of the fraudulent grantee asserts that he gave credit upon faith in such apparent ownership, and claims that the owner should be estopped to deny the title of the fraudulent grantee, such estoppel will be denied when the reliance upon such apparent ownership is not clearly established, and the creditor appears to have been as negligent in extending credit as was the owner in the original transaction. *Rihner v. Jacobs*, 79 Neb. 742, 113 N. W. 220.

Where the creditors relied on the mere fact that one to whom credit was extended lived on the land, and claimed in his conversations with them that the property was his, and the fact that he was insolvent and that the real owner of the property knew it, this was held not to estop the real owner from asserting title, it being shown that the creditors did not rely on any statement made by the owner that the person to whom credit was extended owned the land, and it was not shown that they examined records which might have disclosed the real interests of the parties. *Breeze v. Brooks*, 71 Cal. 169, 9 Pac. 670, 11 Pac. 885.

The mere fact that a person equitably entitled to real property permits the legal title to remain in another will not estop him from asserting title thereto where no act, conduct, or admission is shown upon his part by which creditors were induced to give credit to him who had the legal title, and where it does not even appear that the creditors knew that the legal title stood in the latter's name, or that any means were taken by them to ascertain the true state of the title. *Murphy v. Clayton*, 113 Cal. 150, 45 Pac. 267. H. C. S.

of the Clay county land in the bank to his own credit. It is not clear that she knew such to be the fact. For several years next before he conveyed the land to her, such rent was put to her credit in the bank. At all times prior to the conveyance, Meadows assumed to rent the land out in his own name as landlord. The tenant dealt with him alone, and the only time the name of Mrs. Meadows was mentioned between them was when the tenant asked some improvements, and Meadows told him he would see his wife about it. It seems that improvements of some magnitude were made on the farm at the expense of the wife. While there was testimony to the effect that Meadows assumed to control the Clay county land as proprietor, it also seems he assumed the right (without any express authority shown, and without her knowledge) to sign her name to promissory notes, and, without any express authority shown, to draw checks against her bank account, signing her name to such checks. Knowledge that he was claiming the land was not brought home to the defendant. No creditor inquired of her in that behalf, and no statements of hers tending to prove she considered the land her husband's were shown. In December, 1902, Meadows bought into a small mercantile concern in Lawson. She states she was opposed to his doing so, and put her objection on the ground that he had other business to attend to. If she feared his business capacity, the fact is not shown. She acquiesced in his wishes, and furnished him a small amount of money (\$350) to buy into the business with one Walker as a partner. The partnership lasted a little while, when she furnished, at his request, the money to buy Walker out,—the entire purchase cost being \$750. After buying Walker's interest, the business ran in the name of "Meadows & Company." There were some admissions of Thomas J.'s to the effect that his wife was the "Company." But these statements were not made in her presence, nor did she know of them, nor was she consulted about the style of the firm. No creditor applied to her for information, and she gave out none. So far as appears to us, the even tenor of her domestic life, engrossed with the duties of a wife and housekeeper, unvexed with business affairs, flowed on until at a certain time she was asked to sign a statement that she was her husband's partner. This she refused to do, claiming it was not the fact. While the evidence is somewhat vague in some phases, yet it is substantially shown that from time to time her husband, under pretenses of needing to increase his business or enlarge his stock, applied to her

for money. Covering the space of two years she furnished him so much as \$3,000. Whether he used it to increase his stock in accordance with his pretense, or to pay bills as they matured, is somewhat dark. But there is no testimony that she actually knew he was incurring liabilities, or running in debt, or establishing a line of credit with wholesale houses, unless an inference to that effect is to be drawn from the mere fact that he was conducting business as a merchant. As against this inference is her positive testimony that he informed her he was out of debt, keeping out, and doing a prosperous business. In 1905 Meadows & Company failed. The stock on hand was the rise of \$4,000; the accounts (good, bad, and indifferent) several thousand, of which \$2,000 were collectable; and the mercantile debts were, as said, \$14,387.04 in the favored class, plus several thousands more, which the trial court excluded from that class. It appears that defendant paid all the running expenses of the Meadows household; and during the years her husband was in business, dealt at the store and paid the bills like any other customer. So much for the evidence common to all.

(b) As to creditors other than the bank and Roney: Summarizing the testimony pertinent to such creditors, it was directed to establishing in favor of nine of them the allegation of the petition that credit was extended to Meadows on the strength of his ownership of the Clay county farm. Meadows always refused to make a statement to any commercial agency as the basis of credit. In June, 1903, the R. G. Dun & Company Commercial Agency compiled the following memoranda and forwarded it to its offices, a copy of which for the next year or so was supplied to any wholesale house desiring one, viz.: "T. J. Meadows is married and aged about thirty-seven years. He is an old resident of the place. Considered of good general character, fair habits and ability. At one time he was associated with one 'Walker' under the style of Meadows & Company. In December, 1902, he started his present venture, succeeding to the business of John C. Wright. The 'Company' of the firm is supposed to be his wife, Susie L. Meadows. The investment in the business is thought to represent a capital of about \$1,500, stock in trade averaging \$1,500 to \$2,000. T. J. Meadows is credited with owning a farm in Clay county, besides some town property, estimated worth, all told, \$8,000 or \$9,000. Mrs. Meadows is considered worth between \$10,000 and \$15,000, independent of her husband. Of what her means consist is not stated. They are entitled to home-

stead exemptions of \$1,500, and while it is not known in just what shape all the real estate is, after allowing for exemptions and other contingencies, there is thought attached to the firm a net responsibility of between \$8,000 and \$10,000. Stock of merchandise, said insured. They appear to be doing reasonably well, obligations are reported met in a reasonably prompt manner, and prospects generally are considered good." All or most all of the creditors got the foregoing report at one time or another.

In August, 1904, the following was furnished by a commercial agency to one creditor:

"Missouri, Ray county.

"December 26, 1902.—He is a married man, aged about forty. Is an old resident of the place and is considered of good character, habits, and fair ability. This business was formerly owned and operated by John C. Wright. For a short time he was associated with one 'Walker' under the style of Meadows & Company. Quite recently Walker withdrew and L. J. Meadows is alone in the business.

"He does not respond to written requests for a statement. The investment is estimated at about \$1,000, stock in trade running \$1,000 to \$1,200. He is said to have considerable outside means, but nature of same is not stated, and a definite estimate of net responsibility is not determined. His stock of merchandise said to be insured.

"He has never failed in business, so far as known, and locally he is reported prompt pay so far as known."

"1903. Ray county.

"January 13, 1902.—Upon further investigation it is found that he has good farm and town property valued at from \$7,000 to \$8,000 in own name and partly exempt. Also has ready cash, and, making all due allowance, he is considered a net worth of from \$5,000 to \$7,000.

"It is said doing a good business at this time, and to be meeting obligations in a prompt and satisfactory manner. Considered honest and industrious and believed worthy of confidence."

In 1904 the following special report was made to one creditor by an attorney:

"Supposed net worth? \$10,000. Prompt, fair, or slow pay? Prompt. Individual names (if a firm)? T. J. Meadows. Married or single? Married. Reputation for ability? Good. Honesty? Good. Age approximately? Forty years. Moral character? Good. Ever failed? No. Been sued? No. How long in business? Two years. Business seem prosperous? Yes. Value of stock on hand (estimated)? \$5,000. Insurance? \$2,500. Is there any real estate 30 L.R.A. (N.S.)

in his own name, above homestead and encumbrance? Yes. Value? \$5,000. Do you know of any unsatisfied obligations, chattel mortgages, judgments, or claims in hands of attorneys? No."

The same creditor got the following report from R. G. Dun & Company:

"Meadows, T. J. & Company, G. S. Lawson, Missouri, July 9th, 1903. He is aged thirty-eight years, married, and has been engaged in this business here for some eight months, prior to which he was engaged in farming. He is in very good standing personally, and thought to be of very fair business ability.

"Declines a statement, but upon investigation it is learned that he carries a stock of some \$6,000 or \$7,000. Aside from this he is said to own two or three good farms, and some residence property. After allowing for exemptions and shrinkages, he is conceded a net worth of some \$8,000 to \$10,000 as a basis for credit.

"Locally he meets his bills in a prompt and satisfactory manner, no complaints are ever heard from abroad, is doing a very good business, and prospects are thought to be very favorable at this time. G. 3.

"February 17th, 1904.—Considered of good general character, fair habits and ability. Appear to be doing reasonably well. Meets obligations in a prompt and satisfactory manner. Estimated worth \$8,000 to \$10,000. Has good prospects for success."

We find at least one creditor received the following under date of October 16, 1903, from a commercial agency:

"This business is conducted by Thomas J. Meadows and his wife, Susie L. Meadows, and they have been in the trade since September, 1902, when they succeeded J. C. Wright. It is strictly a partnership as between husband and wife.

"Previous to engaging in trade, Mr. and Mrs. Meadows resided at Lawson.

"Information obtained by our representative regarding the investment and resources is as follows:

"Merchandise stock on hand, \$4,000.

"Real estate title in name of Thomas J. Meadows and Susie L. Meadows, and free of encumbrances, \$25,000 to \$30,000.

"Other assets, yes, but subject to exemptions, \$34,000.

"Total net worth, exclusive of exemptions, as a basis for credit (estimated), \$20,000.

"Ever failed? No.

"Ever burn out? No.

"Insurance carried on merchandise stock? Yes.

"Bank with Commercial Bank, Lawson, Missouri.

"About \$10,000 of the real estate is in the name of Thomas J. Meadows, and the balance is in the name of his wife, Susie L. Meadows. Together, Meadows and his wife own three farms that are worth \$10,000 each. They also own their home in town and have some money loaned out, besides personal property of some value.

"Competent authorities state that Mr. and Mrs. Meadows have a financial responsibility over exemptions safely of \$20,000 to \$25,000. They are conducting the business upon a cash basis and are prompt in their payments.

"Authorities consulted:

"No. 1. We consider them good for any credit they might ask. We frequently loan them money without security, but as a matter of fact, they have money to loan. Probably worth \$25,000, and good pay.

"No. 2. We do not think anyone need hesitate to grant them credit as they are amply responsible. Are worth \$20,000 to \$25,000 easily. Payments are prompt and frequently discounted."

And in 1904 the following report was furnished to at least one creditor:

"Meadows & Company.....general store.....Lawson, Missouri, Ray county.

"T. J. Meadows, age forty-one, married.

"Mrs. Susie L. Meadows, age thirty-two, married.

"Statement asked for August 10th, 1904, but no answer received. This business was commenced under style of Meadows & Walker in the fall of 1902, R. J. Walker being a partner, sharing the profits. Later the style of the firm changed to above, and is composed of T. J. Meadows and his wife. They are now reported to have \$6,000 invested. Their stock is estimated worth \$3,500 to \$4,000; it is insured, but the amount is not learned. Said to own homestead in the name of Susie L. Meadows, worth \$3,000, clear, and other real estate worth \$15,000 to \$20,000 in the name of the members of the firm, located in Clay and Ray counties, Missouri. They are reported to be using \$5,000 borrowed money.

"They are highly regarded personally, and Mr. Meadows, who has charge of the business, is considered a good business man. All bills, as far as learned, are promptly met, and prospects appear fair. Authorities at the present time offer \$15,000 as an estimate of their net worth."

One creditor, Mr. Henderson, testified that Thomas J. Meadows told him he owned a good farm over in Clay county, and was all right financially in every way; also that a Mr. Hurt told him he knew it to be a fact that Meadows owned a farm in Clay county in his own name. The first remark

was made to Henderson by Meadows after he had established a line of credit, and during a talk about increasing it. When Hurt gave Henderson his information does not appear.

The "credit men" of firms dealing with Meadows & Company testified that they passed on the credit given Meadows on the information disclosed upon the fact that Susie L. Meadows was a partner, and upon the fact that Meadows was said to own a farm. There is no proof of any land in his name except the farm in question.

(c) Of the Commercial Bank of Lawson: Meadows's chief creditor is the Commercial Bank of Lawson. It received no commercial reports. It did business with Meadows on the theory his wife was a partner. The officers of the bank knew she had inherited a large property. When he became involved largely with the bank, and before the renewal of some of his existing indebtedness, coupled with an increase thereof, it tried to get Mrs. Meadows to admit her partnership. She lived for years in the same little village, did business with the bank as a depositor, and occasionally visited its counting room on business. The evidence discloses that the bank's dealings with Mrs. Meadows were as remarkable for what was omitted as for what was done. None of its officers did her the courtesy to consult her at any time. They gave her no pass book indicating the state of her accounts for quite a while after she became a depositor, and when they did give her one, it did not cover all her transactions with the bank, or give her much light on the disposition of her funds. Seemingly anxious about her account and the checks signed by her husband against it, the bank officers retained them for many years against a day of need. Finally the bank caused a statement to be prepared in writing, an admission of her partnership in the mercantile business with her husband, and sent it to her to be signed. She refused point blank to sign it. The matter dropped at that. Meadows's indebtedness to the bank was evidenced by notes, and to these notes were signed the names of Thomas J. Meadows and Susie L. Meadows. The original notes were not signed in that way, but the name of Susie L. appeared on the renewals. Her name was signed by Thomas J. without a particle of authority appearing in the record, and without her knowledge or consent. She seems to have been treated as a mere cipher on all hands, except when pay day came. Not only did the bank deal on the credit of the name of Mrs. Meadows that is, on the theory she was a member of the firm of Meadows & Company,—but it claims to have dealt on the faith and

credit of Meadows's ownership of the Clay county land. It seems that when the land was bought, Mr. Hurt, cashier of the bank, knew that Meadows did not have a dollar on deposit, knew that he checked the money belonging to his mother-in-law over to the account of his wife, and then checked from his wife's account in payment of the land, signing her name to the checks. In fact, Mr. Hurt drew these checks and brooded over and somewhat molded this transaction. He was the leading spirit in the bank. It had no discounting board but him. He had authority to loan its money and make discounts. At the time the land was purchased and Hurt was writing the checks, he remarked to Meadows: "Tom, you are buying a nice farm here." Thereat Thomas J. chestily replied: "Yes, and it's mine too; the folks are paying for it for me." There is no contradiction to that conversation, and the case may proceed on the theory that the officer of the bank, Hurt, who opened up a line of credit with Thomas J. Meadows, knew that the money of Mrs. Cummins and Mrs. Meadows bought the land, and at the same time was informed by Meadows, in the absence of his wife and mother-in-law, that the land was intended for him,—that the folks were buying it for him. Such is the basis of the bank's credit on the strength of the farm. Subsequently, Mr. Hurt, becoming solicitous about the title to the farm, wrote a letter to the recorder of Clay county to know whether the land still stood in Meadows's name, and was told in reply that it did. Subsequently he wrote another letter, asking if the land was transferred to Mrs. Meadows, and was told that it had been.

(d) Of the Roney claim: Coming to the Roney transaction, it may be told shortly: The Clay county farm belonged to a family by the name of Smith. Roney married one of the Smiths. His wife, being an heir, united with the other Smith heirs in making a deed to Meadows. Roney was one of the chief actors in this sale. While he does not admit that he knew that the money of Mrs. Meadows and Mrs. Cummins paid for the land, yet we have no doubt from the disclosures of the record that he was fully aware of that fact at the time of the purchase. The purchase money fell short \$2,500, but of this \$2,500, \$1,200 was coming to Roney's wife. He took a deed of trust on the land, which secured his wife's share plus \$1,300 cash advanced. This indebtedness was paid off, and we think Roney is shown to have known it was paid by the money of Mrs. Meadows, as in fact it was. Subsequently Roney, at the instance of Meadows, loaned one Rhodus \$475, and Mr. Meadows signed the note as security. That

note, with its accumulation, is allowed against the bankrupt estate, and constitutes the claim known as the Roney claim. He testified that he considered Mr. Meadows good at the time, but that, as a precaution, he undertook to find out whether Meadows still owned his farm, and found out that he did. It further transpired that the steps Roney took to ascertain that fact consisted in going to Mr. Hurt at the Commercial Bank and asking him. Asked in chief whether he would have loaned him the money if he had known the land had not belonged to him, he answered: "Well, I considered Mr. Meadows good, and I don't know whether I would have or not. I could not say now what I would have done then."

So much for the facts.

The case may proceed upon the theory that a trustee in bankruptcy, under the present act, does not stand precisely in the shoes of the grantee in a deed or an assignee under our statute on assignments. The bankrupt law once for all arrests the individual action of the creditor in the collection of his debt, but it only arrests him not his rights. The estate and subject-matter being *in custodia legis*, the law takes care of the creditor, and the trustee in bankruptcy, as the arm of the court, acts for and on behalf of the creditor in that particular, so that whatever the creditor might do in avoiding the deed of his debtor for fraud, the trustee in bankruptcy may do under the present bankrupt act as a sort of *alter ego*. Such trustee takes title to the bankrupt's property, including that conveyed in fraud of creditors, contrary to the terms of the bankrupt act, but he takes it subject to outstanding equities (not lost by estoppel or fraud) to which the title was subject in the hands of the bankrupt. While there are some uncertain and some discordant notes struck in the case,—learning on the foregoing propositions, elaborated by diligent counsel in their briefs,—yet we think the foregoing formulation of the law asserts sound doctrine (see authorities in brief of counsel). Without further exposition in that behalf, we pass to a consideration of the main proposition in the case, *viz.*: Is Meadows's wife estopped to assert the equity of a resulting trust in the Clay county land, arising from the fact that it was purchased with her inheritance money,—her own estate and that of her mother, whose heir she was? In other words, does such assertion of her right operate by way of a fraud on his creditors, and make her deed fraudulent and void in a court of conscience?

It may be conceded that unless the confidential relation of husband and wife af-

fects estoppel, or unless the facts relied on to establish the estoppel are insufficient, the decree should stand. Is estoppel applied to a married woman in her dealings with her husband precisely as to other persons? Counsel for respondent argue that way. Orally at this bar it was stoutly and with animation exclaimed that (in that regard) old things had passed away and all things had become new; that there issued from the married woman's enabling acts a still, small voice of command to courts, viz., "Forward! March!" That in the "gladsome light" of modern jurisprudence the wife appeared from head to foot armed as a *feme sole*; that she takes the bitter with the sweet, hence her new power to contract and control her estate invokes a new responsibility and danger, to wit, estoppel *in pais*, now to be applied to her unsparingly with rigid, stern, and unaccommodating vigor. We think no consideration of this question can justly proceed by overlooking the fact that estoppel *in pais* is not the creature of statutory law. It was the creature of elevated and refined ethics administered in a court of equity. Moreover, when, in former days, it was held that estoppel *in pais* (except as to her separate equitable estate) did not lie against a married woman at all, the grace of freedom from that burden did not spring from statutory mandate, but was a product of judicial reasoning to attain justice. Since that grace was not given by statute, even though an order has come to "Forward! March!" may we at least not look about a little to inquire if statutes (silent as ours in the giving or denying of it) take it quite away? and to inquire: Who issued such order? On what road are we to march? How far? Where? If we are to march blindfolded, we might say with a certain unhappy person who once hesitated long and doubted much in a certain crisis:

If it were done when 't is done, then 't were well
It were done quickly,

—and have the thing over with. Estoppel *in pais*, created by the reason of the thing, should rest in reason, and we are not called upon to write the law relating to the estoppel of a wife one inch beyond where reason and common sense compel us to go; because, absent a statute on estoppel, if any command has come to march, it is from the forum of reason, and nowhere else. Statutes giving to the modern wife the right to contract, the right to her estate, and to sue and be sued, were intended as a benefit to her, and, rightly applied, they subserved a wise and good purpose. They were not intended to injure her. If she permit or encourage her husband to hold himself forth

as the owner of property, if she voluntarily put the title to her property in him, thus knowingly clothing him with *indicia* of ownership, or by conscious acts acquiesce in his apparent ownership, knowing, or having good cause to know, that he is using the property to obtain credit, or if she conspire with him to that end, or if (when applied to for information) she lie, deceive, or mislead, it is not unreasonable to estop her to claim the property when such claim makes her husband insolvent. But the case made on this record is no such case as that. This wife was wronged by her husband. Although the statute forbade him to reduce his wife's estate to his possession except by her written consent, this husband proceeded to take her estate in the teeth of the law. The facts in this regard were open to the Commercial Bank and Roney at least. Neither of them had the right to believe that Mrs. Meadows was making an out-and-out gift of \$10,000 to an impecunious husband, because such course of dealing as that is not usual. Those two creditors knew the equities of the wife, and had the means at hand of knowing; and he who knows cannot be deceived. As to the other creditors, when this wife found she had been wronged, what was the measure of her duty to herself and to the world at large? Was she required to post her husband? Did she have to sue him *instantly*, although the statute of limitations still treats her as under disability? Shall she quarrel and fuss with him, and, what is more, blazon their squabble abroad in order that creditors may know how the matter stands? If the order to march requires that the peace of the household must be sacrificed in order to protect her property rights, that the love, honor, and trust at the very root of the marriage relation shall be turned into the bitterness and gall of dissension and strife, then is the reform a reform? Do we march forward or retreat? This wife did what she could in a gentle way to protect her interests, having in mind the fact that her husband was the head of the household, that she loved him, and trusted him to comply with her requests and his own promises, and that concord in the household was a wifely duty. We do not think she was estopped as to his creditors, absent a fraudulent intent on her part. We agree that in a given case estoppel *in pais* may now be applied to a married woman. Her right to contract and to control her estate results by necessary inference in that conclusion. But we cannot agree to apply the rule of estoppel harshly and with close particularity under any and all circumstances where the marital relation is involved. Such holding would injure the very class the married wom-

en's acts were intended to protect, and would not subserve the welfare of society. The personnel of those involved in estoppel must not be lost sight of, and it is not unreasonable to hold that facts sufficient to estop a Socrates or other "lord of creation" would not estop Susan, Jane, and Mary,—good Missouri mothers all.

Whatever the motives of the husband may have been in this transaction, there is no evidence implicating Mrs. Meadows in his fraud, and this court has shown a disposition to sustain conveyances made under circumstances similar in some respects to those disclosed here. *De Berry v. Wheeler*, 128 Mo. 85, 49 Am. St. Rep. 538, 30 S. W. 338; *Alkire Grocer Co. v. Ballenger*, 137 Mo. 369, 38 S. W. 911; *Hudson v. Wright*, 204 Mo. 412, 103 S. W. 8; *Scrutchfield v. Sauter*, 119 Mo. 615, 24 S. W. 137; *Columbia Sav. Bank v. Winn*, 132 Mo. 80, 33 S. W. 457. We accordingly rule that she was no party to any fraud of her husband, that she had a clear equity in the land, that the conveyance attacked was the execution of a trust, and not made in fraud of his creditors, and that she was not estopped to claim the right to such conveyance. This holding disposes of the case.

But we may as well say a word further. We have held in a line of cases (*Berry v. Rood*, 168 Mo. loc. cit. 333, 67 S. W. 644 et seq.; *Colonial Trust Co. v. McMillan*, 188 Mo. loc. cit. 567, 107 Am. St. Rep. 335, 87 S. W. 933 et seq.; *Meyer v. Ruby Trust Min. & Mill. Co.* 192 Mo. 162, 90 S. W. 821) that creditors charged with knowledge that corporation stock was issued as fully paid up to persons who paid for their stock in simulated values, or creditors who participated in such scheme, could not maintain an action against such stockholders for the difference between the par value of the stock and the amount paid, on the theory that they dealt with the corporation on the faith and credit that the stock was fully paid for in money or money's worth. How much less, then, can Roney and the bank, through the trustee in bankruptcy, sue Mrs. Meadows on the theory that they relied on Meadows's ownership, when they must be held to know that he was not the true equitable owner of the property? Their knowledge of her elder and better equity defeated the running of estoppel under the peculiar facts present.

Again, plaintiff alleged and must be held to prove that the commercial creditors in the class favored in the decree extended credit on the faith of Meadows's ownership of the land in question. In order to maintain their case in this regard, the commercial reports set forth are relied upon. Those reports do not describe the land, nor

do they state that a deed is recorded in Clay county, putting the title in Meadows. Nor do they, as a rule, positively assert ownership in Meadows of any land in Clay county. They do suggest and hint at such ownership. He is "said" to own; that is, there is a rumor or talk to that effect. He is "credited" with owning; that is, there is a belief to that effect. If confidence and trust were to be put on actual ownership of a valuable farm in Clay county, it is inconceivable why more accurate information was not demanded than was received. Can a substantial commercial credit be predicated of such mere fog and guesswork? The credit men testifying to that effect were speaking at long range; i. e., a long time after the event itself. There is internal evidence in their depositions that they were construing on the stand the language of the commercial reports, rather than testifying to a distinctly remembered fact,—a sort of *nunc pro tunc* exposition. In that view of it, they were no better able to construe the language of the reports than this court. Construing that language for ourselves, it cannot escape attention that much is made of the fact that Susie L. Meadows is a partner, and that her credit and her property, as well as the property of the supposed firm, were a large and possibly controlling element in stiffening the credit of Meadows & Company. A credit on the faith of ownership, to be so effective as to overturn a deed, must reasonably produce substantial faith and confidence. Mere conjecture, hearsay, supposition, rumor, and such brood of uncertainties, are not the foundation upon which genuine faith is built in the business world. There was a copy of one report furnished to one creditor in August, 1904, which report bore date January 13, 1902,—obviously a mistaken date. Assuming the original data were furnished in January, 1903, the report says: "Upon further investigation, it is found that he has good farm and town property valued at from \$7,000 to \$8,000 in own name and partly exempt." That is the nearest to a statement of fact worthy to be the basis of credit we can find. The report itself is made of and concerning one "L. J. Meadows." It either does not concern defendant's husband, or mistakes his name. Admitting the name as well as the date are wrong, then the report does not locate the farm and town property in any of the four quarters of the globe, let alone as within the reach of an execution levy and sale. Shall we say it meant a clay county farm? If so, was the farm in the mind of the commercial agency large enough or valuable enough to be a substantial element in es-

tablishing a mercantile credit? Is the valuation of \$8,000 or \$7,000 referable to the town property said to be owned by Meadows or to the farm? We do not rule that creditors must see for themselves the actual record of an actual deed in their debtor's name; for faith, says a sound lawyer (Heb. xi. 1, *q. v.*), is the substance of things hoped for, the evidence of things not seen. But this whole bundle of reports, including the one last under exposition, is so palpably vague and uncertain in relation to the ownership of the actual land in dispute that we cannot see how faith and credit could be reasonably predicated on the information. Therefore we are inclined to the belief that the commercial reports should be rejected as a basis of credit, because of uncertainty and vagueness. With that holding, the mainstay of plaintiff's case is taken away.

The judgment is reversed and the cause is remanded, with directions to enter a judgment in favor of defendant, dismissing plaintiff's bill as on a hearing on the merits.

All concur; Valliant and Woodson, JJ., in separate opinion.

Valliant, J., concurring:

Whilst concurring in all that my learned Brother Lamm has said in the opinion in this case, there is one fact in the evidence on which I feel compelled to say a few words, lest, if it be passed over in silence, an improper inference might be drawn from it; I refer to the reports of the commercial agencies, which seem to have been received in evidence without objection. The reports of commercial agencies have for so long been relied on in commercial transactions, and are really of so much value, that they cannot be dispensed with, but referring to them and trusting them as a guide or help in a business transaction is one thing, while bringing them into court as evidence is another thing. They are frequently admitted, and properly so, in evidence when the proper foundation for their admission is laid. The information from which those reports are furnished by the commercial agencies to their subscribers is not infrequently, perhaps usually, furnished by the merchant himself; and when that fact is shown in a suit against the merchant charged with obtaining credit on a false showing, the commercial report is competent evidence against him. Other instances might be supposed where the reports would be competent, but unless guilty knowledge or notice of the contents of the report is brought home to the party sought to be affected, they are mere hearsay. A merchant has a

right, if he sees fit to do so, to consult the agency report, and give or refuse credit on it; but that is his own private affair; if the report is false, and he has been misled by it to his injury, he cannot charge it as a badge of fraud on someone who is in no way responsible for the information on which the report was founded, and had no notice that trust was being placed on it. The records of the commercial agencies are not public records of which all the world is required to take notice. They are private matters, and to a certain extent are secret. They are given out only to subscribers, and the subscribers are pledged to secrecy. Mrs. Meadows had no notice of those reports. It is not sure that she ever heard of such an institution as a commercial agency. The reports on their face showed that her husband had refused to give the information, but, even if he had given it, it would not be evidence against Mrs. Meadows, unless, on further evidence, it was shown that she knew it.

The reports were incompetent as evidence against Mrs. Meadows, and if objection had been timely interposed, no doubt the learned trial court would have excluded it. All the Judges concur in the views here expressed.

Woodson, J., concurring:

I fully concur in all that my associates, Judges Lamm and Valliant, have written in this case; and in doing so I wish to emphasize what is said regarding the admission of the commercial reports preserved in the record. They are admissible in evidence in the first instance solely for the purpose of showing that the merchandise was sold upon the faith and credit given to them by the vendor, and not for the purpose of showing fraud on the part of the vendee,—that must be done later and by other evidence. In order for the reports to be of any benefit to the vendor, he must not only show he sold the goods upon his faith in the truthfulness of the same, but he must go one step further, and show that the vendee had knowledge or notice of their existence, and that he (the vendor) relied upon the vendee's knowledge or notice of their existence in selling same. Both of those facts must be shown before the reports become vitalized; but, nevertheless, they are admissible in evidence in the first instance without first showing said knowledge or notice.

It would be impossible for the vendor to show that he relied upon the vendee's knowledge or notice of the existence of said reports without first showing that they did in fact exist. As before stated, proof of notice of their existence on the part of the vendee, and that the vendor relied upon

that knowledge or notice, vitalized the reports, and gave them potential force as evidence; but until that is shown they are inanimate, and binding upon no one; and, if said notice is not subsequently shown, then the proper practice is to either move the court to strike out the reports, or request an instruction withdrawing them from the consideration of the jury.

The same practice prevails in the trials of causes involving fraudulent conveyances. The plaintiff must not only show fraud upon the part of the transferrer of the property, but he must go one step further, and show that the transferee had knowledge or notice of that fraud before the fraud of the former is visited upon the latter; but the moment that is done, the fraud of the transferrer becomes the fraud of the transferee, and gives to it life and potentiality. If knowledge or notice of the former fraud is not brought home to the latter, then all evidence of the fraud of the former, previously admitted, should be stricken out or withdrawn from the consideration of the jury.

I understand both opinions so hold.

Petition for rehearing denied December 23, 1909.

ARKANSAS SUPREME COURT.

EWING-MERKLE ELECTRIC COMPANY,
Appt.,
v,
LEWISVILLE LIGHT & WATER COM-
PANY.

(92 Ark. 594, 124 S. W. 509.)

Set-off — equity — claim against non-resident.

Equity will enforce against a claim of a nonresident for goods sold and delivered, a set-off of a claim of the purchaser against the seller for breach of warranty in another transaction between them, where satisfaction of such claim cannot be secured by action without compelling defendant to seek the courts of the state where the seller resides.

(December 13, 1909.)

APPEAL by plaintiff from a decree of the Lafayette Chancery Court in defendant's favor in an action brought to recover for certain merchandise sold and delivered.

The facts are stated in the opinion.

Messrs. T. M. Pierce, Paul W. Farley, and Bradshaw, Rhoton, & Helm for appellant.

Messrs. Warren & Smith, for appellee:

The cross bill seeks to recover unliquidated damages for breach of contract from a foreign corporation having no agent or 30 L.R.A.(N.S.)

property in this state, and chancery is the only forum of jurisdiction in such matters.

Forbes v. Cooper, 88 Ky. 285, 11 S. W. 24; Taylor v. Stowell, 4 Met. (Ky.) 175; Matthews v. Weiler, 57 Ark. 606, 22 S. W. 569.

Battle, J., delivered the opinion of the court:

Ewing-Merkle Electric Company, a corporation organized under the laws of the state of Missouri, sold to the Lewisville Light & Water Company, a corporation organized under the laws of the state of Arkansas, an alternating current generator complete and switch board transformers for an electric light plant for \$1,150, all secondhand machinery, but guaranteed to be in strictly first-class order and in good operative condition. The sale was made under a written contract dated May 10, 1904. The Lewisville Light & Water Company purchased of the Ewing-Merkle Electric Company sundry items of merchandise between July 1 and October 1, 1904, amounting to \$488.04, and on the 5th of October, 1904, paid thereon \$300, leaving a balance of \$188.04.

On the 13th day of July, 1905, the Ewing-Merkle Electric Company brought an action against the Lewisville Light & Water Company in the Lafayette circuit court for \$188.04.

The defendant answered and admitted that it purchased the merchandise mentioned in the complaint, and that the sum of

Note. — Nonresidence as ground of equitable set-off.

Although there is a marked conflict in the authorities as to whether the nonresidence of the party against whom set-off is sought to be asserted is good ground for equitable interference to allow the set-off, it must be said that the majority of cases in which nonresidence was alleged have held it sufficient to warrant the application of the doctrine.

Cases of this nature are Plattner Implement Co. v. Bradley, A. & Co. 40 Colo. 95, 90 Pac. 86 (claims for unliquidated damages for defective goods sold; for failure on the part of the plaintiff to deliver certain merchandise, in conformity with the terms of the contract; and for certain credits, sought to be set off against a judgment obtained in a foreign jurisdiction); Fitzgerald v. Wiley, 22 App. D. C. 329 (damages consisting of loss of profits by the mortgagor of an invention on the sale of the patent, set off against suit to foreclose the mortgage); Porter v. Roseman, 165 Ind. 255, 112 Am. St. Rep. 222, 74 N. E. 1105, 6 A. & E. Ann. Cas. 718 (claim for money wrongfully paid to plaintiff by defendant's agent set off against claim of plaintiff for goods sold and delivered); Carson v. Carson, 2 Met. (Ky.) 96 (award in

\$188.04 remains unpaid, "but by way of set-off and cross bill defendant states: That on the 10th day of May, 1904, it entered into a contract with plaintiff for the purchase of certain goods, machinery, and material for an electric light plant.

"That the said machinery and appliances were guaranteed to be in strictly first-class order, as set out in the complaint, and defendant agreed to pay the sum of \$1,150, and plaintiff guaranteed the machinery to be in good operative condition. That plaintiff knew at the time of the contract of purchase that defendant desired to use them solely for the purpose of operating an electric plant, and guaranteed it to be in first-class order for that purpose. That defendant bought and paid for said machinery re-

lying solely upon plaintiff's representations and guaranty as to its quality and condition. Defendant was inexperienced in the matter of such machinery, which plaintiff knew, and defendant relied on plaintiff's representations.

"That after defendant had installed said machinery, it was found to be defective and unsound, and not in strictly first-class order, nor in good condition. The armature in the generator was worthless and burned out, and the insulation rotten, and the machinery utterly worthless for the purpose of the defendant.

"That because of the defective condition of the machinery, it was not worth more than \$100, and the defendant had been damaged in the sum of \$1,050.

arbitration set off against suit to recover money collected on a judgment afterwards reversed); *Taylor v. Stowell*, 4 Met. (Ky.) 175 (demand for unliquidated damages for breach of warranty of the quality of lumber set off against a note for its price); *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24 (demand for unliquidated damages arising from the nonperformance of a building contract set off against claim for the price of merchandise); *Gregory v. Hasbrook*, 1 Tenn. Ch. 218 (claim for hire of slave set off against judgment on note for merchandise); *Edminson v. Baxter*, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751 (claim for loss of rum set off against claim for payment of freight); *Fleming v. Stansell*, 13 Tex. Civ. App. 558, 36 S. W. 504 (joint and several debt against two offset against action on bond); *Piotrowski v. Czerwinski*, 138 Wis. 396, 120 N. W. 268 (sums due several defendants set off against note signed by all of them in favor of payee, who afterward assigned to third person; the payee in this case being insolvent as well as a nonresident); *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.* 152 U. S. 596, 38 L. ed. 565, 14 Sup. Ct. Rep. 710 (claim for unliquidated damages arising out of breach of contract set off against claim for sale of ore.)

The above doctrine seems also to have been recognized in *Smith v. Field*, 6 Dana, 361; *Aldridge v. Birney*, 7 T. B. Mon. 344, 18 Am. Dec. 183; *Wallenstein v. Selizman*, 7 Bush, 175.

In *Moss v. Rowland*, 1 Duv. (Ky.) 321, it was held that a claim for usury was available as a set-off against a judgment, where, subsequent to the rendition of the judgment, the judgment plaintiff became a nonresident.

In *Abernathy v. Myer-Bridges Coffee & Spice Co.* 30 Ky. L. Rep. 844, 99 S. W. 942, it was held that under a statute defining a counterclaim to be a cause of action in favor of the defendant, against the plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action, a person 30 L.R.A. (N.S.)

could not set up against an action for debt and an affidavit of attachment, damages as a counterclaim arising out of the fact that, under the attachment, the defendant's store had been locked and their trade broken up, and further, that the plaintiff had itself taken charge of the attached property, and sold it privately. On petition for rehearing it was noted that the plaintiff was a nonresident, and the court in 30 Ky. L. Rep. 1236, 100 S. W. 862, said: "As the plaintiff is a nonresident, the claim relied on by defendant for the conversion of the goods is allowable as a set-off." This was reaffirmed in 31 Ky. L. Rep. 807, 103 S. W. 342.

The nonresidence of the complainant is sufficient to warrant the application of the doctrine of equitable set-off even where the defendant had the opportunity of pleading his set-off as a defense to a suit at law. *Gregory v. Hasbrook* and *Edminson v. Baxter*, *supra*.

To the same effect is *Quick v. Lemon*, 105 Ill. 578, the holding of which is sufficiently set out in *EWING-MERKLE ELECTRIC CO. v. LEWISVILLE LIGHT & WATER CO.* In this case, after a judgment against a corporation, and execution returned unsatisfied, an action was brought by a nonresident creditor of the corporation to hold certain stockholders liable on their unpaid stock subscription, the corporation being also made a party. It appeared that the corporation had a claim against the complainant, arising out of the same transaction, which however, could have been interposed as a set-off in the suit against the corporation.

And even where the defendant's claim has arisen after the commencement of the action, the nonresidence of the plaintiff has been held to constitute good ground for equitable set-off. *Bibb Land-Lumber Co. v. Lima Mach. Works*, 104 Ga. 116, 30 S. E. 676, 31 S. E. 401.

In *Livingston v. Marshall*, 82 Ga. 281, 11 S. E. 542, it was held that where the plaintiff in an action on a bond against two defendants, one as principal, the other as surety, is a nonresident of the state, and without property there, a debt due

"The plaintiff is a nonresident of the state, and has no agent upon whom service can be had, nor any property in the state, and that it has no adequate remedy at law, and prays for the recovery of the damages, and asks that the cause be transferred to the chancery court of Lafayette county for hearing, and prayed for judgment."

On October 9th, the defendant filed an amendment to its answer and cross bill, as follows:

"That the exciter purchased from plaintiff failed to excite the fields and armature, and thus rendered it impossible to operate the said machine.

"The bearings on the dynamo were worn and rubbed, and caused the boxes to heat so that it was impossible to operate the ma-

chinery. The transformers were not in first-class order nor in good operative condition, but were worn and worthless."

On motion of the defendant, the cause was transferred to the Lafayette chancery court.

The plaintiff answered the cross complaint of the defendant and denied the allegations.

Much evidence was adduced by both parties, and the court found upon hearing that plaintiff is a nonresident and has no property in this state, that the defendant is indebted to plaintiff on the account sued on in the sum of \$188.04, and that the plaintiff is indebted to the defendant "on account of damages for breach of warranty in the contract for the sale of machinery and appliances, as alleged in the defendant's answer and cross bill, in the sum of \$1,050;

from him to the principal may be set off in equity against the judgment obtained.

Barrow v. Mallory Bros. 89 Ga. 76, 14 S. E. 878, has also been cited as supporting the above doctrine, it merely being held in that case, however, that in an action of trover, unless there be some special equitable ground, such as nonresidence or insolvency of the plaintiff, for allowing the defense, the damages sustained by the defendant from a breach of contract by the plaintiff are not the subject matter of set-off, and cannot be so pleaded. To the same effect is *Harden v. Lang*, 110 Ga. 392, 36 S. E. 100.

In *Brown v. Pegram*, 149 Fed. 515, it was held that a debtor cannot be prevented from maintaining a suit in equity to enjoin the collection of a judgment, where its enforcement would be inequitable, by the fact that the ascertainment of the amount due on an assessment and the liquidation of an unliquidated claim for damages in an action of tort, as items of set-off, are involved, especially where the parties against whom the set-off is claimed are all nonresidents of the United States, and one of them is insolvent.

So, in *Hannon v. Hilliard*, 83 Ind. 362, it was held that, as against a suit to set aside a void satisfaction of a judgment of foreclosure, and to have execution issued thereon, a person may set up as a set-off and counterclaim a claim for the rents and profits which had accrued while the purchaser under the foreclosure sale, and before its setting aside, was in possession, especially where the complainant was a non-resident and insolvent.

Several of the above cases have been cited, and some are freely quoted, in *EWING-MERKLE ELECTRIC CO. v. LEWISVILLE LIGHT & WATER CO.*

There are a number of cases, however, in which it has been held that the mere inconvenience of being compelled to resort to a foreign jurisdiction is not sufficient to call into operation equitable interference to allow the set-off.

Thus, in *Murray v. Toland*, 3 Johns, Ch. 569, where it was insisted that set-off

should be allowed, because the complainant might have difficulty in obtaining satisfaction of his demand from a party who resided in Spain, the chancellor said: "The inconvenience of following a party to his place of residence abroad does not appear to me to be, of itself, a sufficient ground for departing from the settled doctrines of the court. The court cannot be governed by the mere question of comparative convenience. What would be proper if the party resided in a country where there was no regular law or justice, or where he was absolutely inaccessible, is not a point before me. A residence at Cadiz is surely not such a case; nor is Spain, with all her infirmity, to be put out of the pale of civilized nations."

To the same effect is *Tone v. Brace*, 8 Paige, 597, where a lessee, evicted, sought to be allowed an equitable set-off against the lessor, suing for rent.

So, in *Isenburger v. Hotel Reynolds Co.* 177 Mass. 455, 59 N. E. 120, it was said generally that nonresidence is not a sufficient ground for allowing an equitable set-off.

In *Braithwaite v. Akin*, 3 N. D. 365, 56 N. W. 133, where it was sought to set off a claim in tort against a claim in contract, the court held generally that the mere nonresidence of the plaintiffs does not warrant the application of the doctrine of equitable set-off. The court continued further: "But, even if we should hold that a special equity in favor of the defendant was created by the fact that the interveners resided in another state, our conclusion would not be different. The doctrine of set-off, as applied in equity, relates only to claims arising on contract. Equity has never set off a cause of action for tort against a debt. The doctrine was borrowed from the civil-law doctrine of compensation."

So, in *Ingram v. Jordan*, 55 Ga. 356, it was intimated that the mere fact that the plaintiff is a citizen of another state is insufficient to warrant the application of the doctrine of equitable set-off, since, as the court said, he might reside in the state where suit is brought in a way to be sued,

that defendant is entitled to judgment for said sum; and that the amount found for plaintiff should be set off against the amount found for defendant *pro tanto*, leaving due defendant the sum of \$861.96," and rendered judgment for that amount in favor of the defendant; and plaintiff appealed.

The evidence was sufficient to sustain the findings of fact by the court. At law appellee was not entitled to set up in this action, by way of set-off or counterclaim, the \$1,050 damages suffered by it by a breach of contract made by appellant. Was it entitled to set it up as an equitable set-off?

In 2 Story's Equity Jurisprudence, 13th ed. § 1437a, it is said: "It has been already suggested that courts of equity will extend the doctrine of set-off and claims in the nature of set-off beyond the law in all cases where peculiar equities intervene between the parties. These are so very various as to admit of no comprehensive enumeration."

In North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. 152 U. S. 596, 616, 38 L. ed. 565, 572, 14 Sup. Ct. Rep. 710, 716, it is said: "By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference. . . . In addition to insolvency, it is held by many well-considered decisions, including those of Illinois, that the nonresidence of the party against whom the set-off is asserted is good ground for equitable relief. Quick v. Lemon, 105 Ill. 578; Taylor v. Stowell, 4 Met. (Ky.) 175; Forbes v. Cooper, 88 Ky. 285, 11 S. W. 24; Robbins v. Holley, 1 T. B. Mon. 191; Edminson v. Baxter, 4 Hayw. (Tenn.) 112, 9 Am. Dec. 751; Davis v. Milburn, 3 Iowa, 163."

In Forbes v. Cooper, supra, it is said: "It is certainly unconscientious for an insolvent party to coerce the payment of his claim when he is owing the other party an equal or larger sum, and thus leave the latter

remediless, nor should a nonresident be allowed, under like circumstances, to enforce through the agency of the courts the collection of his debt, and compel the other party to seek a foreign jurisdiction for relief, and then perhaps find the debtor insolvent. If the object of litigation be the attainment of justice, assuredly such results should be prevented. Indeed, the doctrine of equitable set-off to the extent it was formerly applied was based upon moral justice, and to meet such cases as the above, thus preventing wrong. It was then not uncommon to stay an insolvent or nonresident debtor in the collection of his claim until damages to which the complainant might be entitled against him were liquidated under the order of the chancellor, and then apply them in satisfaction of his independent debt."

In Quick v. Lemon, supra, it is said: "It would seem to be inequitable to require the corporation to go to another state to collect its demand in an action at law, and we are inclined to hold that the nonresidence of the complainant, in connection with the fact that he calls upon a court of equity to enforce his judgment, is sufficient to allow the defendant corporation to prove and set off its demand set up in the cross bill against the judgment of the complainant."

To the same effect, see Porter v. Roseman, 165 Ind. 255, 112 Am. St. Rep. 222, 74 N. E. 1105, 6 A. & E. Ann. Cas. 718, and note to that case and cases cited.

The rule announced in these cases is a just rule, and should be enforced. We see no good reason for sending a citizen of this state to a foreign jurisdiction to obtain justice when the courts of this state can afford relief. They are as fully competent to afford relief to the citizen as to the nonresident. Why should one in cases like this be accorded greater rights than the other?

Decree affirmed.

Petition for rehearing denied.

or have property there accessible to legal process.

In Birdsall v. Fischer, 17 Minn. 100, Gil. 76, where it was sought to set off in equity a separate debt against a joint debt, merely because the plaintiff was a nonresident, the court said: "There are two grounds upon which this question must be answered in the negative. In the first place, 'courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or, conversely, of a separate debt against a joint debt, or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights.' . . . In the second place, there is no allegation in the answer showing that defendant Fischer has not an adequate remedy at law upon his claim against the plaintiffs. There is no allegation of plain-

tiffs' insolvency, and no reason to suppose that Fischer may not have a remedy at law in the courts of the state of New York, where he alleges that plaintiffs reside. And to constitute an adequate remedy at law, it is not necessary that such remedy should be attainable within the jurisdiction where the defendant resides, or where suit is brought against him."

So, in Smith v. Washington Gaslight Co. 31 Md. 12, 100 Am. Dec. 49, it was held that an unliquidated claim for damages, growing out of the same transaction, cannot be set up as a set-off in equity against a judgment recovered and about to be enforced by one, merely because such person seeking to enforce the judgment is a nonresident.

In Beall v. Brown, 7 Md. 393, it was held that the mere fact that a plaintiff who

sues and recovers a judgment is a nonresident does not give a court of equity jurisdiction at the behest of the defendant, who has a cross action at law upon a warranty growing out of the same transaction, to restrain such plaintiff "from collecting his judgment, until he shall have come within this state and signified his presence and willingness to have a suit instituted against him, and have the matter adjusted at law or in this case." The court said: "The appellee rests upon his judgment at law. He does not ask the aid of equity, in which case a complainant will be required to do equity. Having come here to enforce a right, and obtained a judgment, we do not perceive by what authority a court of equity can deny him the fruits of his judgment, because the defendant in that judgment has a cause of action at law against him, growing out of the same transaction on which the judgment was founded. If he had a subject-matter of set, or a defense in mitigation of damages, or in bar of the action, he might have relied on it in the action against himself, and taken his appeal, if improperly rejected by the court; but if he prefers to treat it as a substantive cause of action, the nonresidence of the party cannot give him a standing in court, as upon an equitable claim, when otherwise his remedy would be at law."

In *M'Kinney v. Bellows*, 3 Blackf. it was held that the rule that a joint demand cannot be set up as a set-off against a separate demand could not be affected by the fact that the persons against whom the joint demand existed were nonresidents.

In *Barnes v. McMullins*, 78 Mo. 260, although it was recognized that insolvency and nonresidence of the plaintiff, and his assignment of the claim without value, furnish proper grounds for equitable interference, provided the demand in behalf of which it is invoked is of such a character as will justify the assistance and aid of a court of equity, it was held that equity will not interpose its aid in behalf of the defendant when he asserts an action in tort by way of cross demand when sued upon his promissory note, and therefore in this case the defendant could not set off a claim for unliquidated damages arising out of alleged fraud in connection with the sale of certain merchandise, against a note not connected with that transaction, and in fact assigned to a third person by the payee.

In *King v. Goddard*, 8 Ky. L. Rep. 150, it was held that the rule that, in an action by an assignee, a demand against the assignor, not matured at the time of notice to the defendant of the assignment, is not the proper subject of set-off, is not affected, so far as equitable set-off is concerned, by the nonresidence of the assignor.

In *Stonemetz Printers' Machinery Co. v. Brown Folding-Mach. Co.* 48 Fed. 854, it was held that the fact that the plaintiff is a foreign corporation is not sufficient to sustain a cross bill seeking relief for an alleged infringement of defendant's patent in a suit where the plaintiff sought relief

on account of interference and infringement.

In two jurisdictions it appears that the legislature, by statute, has conferred upon the defendant, in an action where a non-resident is plaintiff, the right to set up, by way of counterclaim or set-off, any cause of action he may have against such non-resident, regardless of the plaintiff's cause of action.

Cases which depend upon these statutes, of course, are not in point in this note. Attention, however, is called, among possibly other cases, to *Phoenix Mut. L. Ins. Co. v. Walrath*, 53 Wis. 669, 10 N. W. 151; *Aultman Co. v. McDonough*, 110 Wis. 263, 85 N. W. 980; *Rigney v. Monette*, 45 La. Ann. 940, 13 So. 201; *Spinney v. Hyde*, 16 La. Ann. 250; *State Nat. Bank v. Evans*, 32 La. Ann. 464; *Mayo v. Savory*, 4 Rob. (La.) 1; *Senecal v. Smith*, 9 Rob. (La.) 418. G. V.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES COBB VAN RIPER, Exr., etc.,
of Joseph A. Seffarlen, Deceased,
v.
ELIZABETH A. WICKERSHAM.

(— N. J. —, 76 Atl. 1020.)

Specific performance — doubtful title — effect.

1. It is the uniform rule in this state to decline to decree specific performance where reasonable doubt concerning the title exists, though rested on grounds merely debatable, but which might visit upon the purchaser litigation in that regard, and that, too, where at law the title might in fact be declared good.

Same — defective title — time to perfect.

2. When the vendor in a suit for specific performance, by reason of the silence or the conduct of the vendee regarding the title to be conveyed, during the negotiations or in the progress of the cause, has lost an opportunity to perfect his title before decree, this opportunity will still be afforded to him by the allowance of a reasonable time, even after the entry of the decree, if it can be done without hardship to the vendee.

(Vroom, J., dissents.)

(June 20, 1910.)

Headnotes by VOORHEES, J.

Note. — Allowing vendor reasonable time to perfect title by decree for specific performance.

It appears from the cases that it is at least within the discretion of the court to allow a vendor in a suit for specific performance a reasonable time in which to perfect his title, where time is not of the es-

CROSS APPEALS from a decree of the Court of Chancery in complainant's favor upon condition, in a suit to compel specific performance of a contract to purchase certain real estate; the complainant appealing from so much of the decree as required him to remove an alleged defect in his title, and the defendant appealing from so much as decreed specific performance upon the perfecting of the title by complainant. Affirmed on both appeals.

Statement by Vorhees, J.:

These are cross appeals from a decree of the chancellor for specific performance, advised by Leaming, vice chancellor. The bill is filed by Charles Cobb Van Riper, executor and trustee under the last will and testament of Joseph A. Seffarlen, deceased, and is founded upon an agreement dated October 7, 1907, whereby the executor agreed to sell

sense of the contract, and to do so will not work an injustice to the vendee.

In *Pulliam v. Pulliam*, 4 Dana, 123, which was a suit by a vendee for title or the return of purchase money, where it appeared probable that married women who were not legally bound to convey would do so voluntarily, so that the title could be perfected, the court said: "It was within the discretion of the court to have allowed reasonable time for this purpose when the case was heard, and to have suspended final decree upon the result."

In *Logan v. Bull*, 78 Ky. 607, it was held that the chancellor would give a reasonable time for a vendor who sought specific performance, to complete his title, when time was not of the essence of the contract, and this rule is recognized in *Gaither v. O'Doherty*, 11 Ky. L. Rep. 594, 12 S. W. 306, and *Smith v. Cansler*, 83 Ky. 367.

But it appears that this favor should be asked before going to trial under a claim of perfect title, for in *Beckwith v. Marryman*, 2 Dana, 371, where plaintiffs endeavored to perfect their title during the suit in the circuit court for a specific performance, and, believing that they had done so, went to trial and were defeated, the court says: "Had they, instead of going to trial when they did, asked for further time to perfect their title, or to prove that it was already unquestionable, and such indulgence had been refused, we should have been inclined to reverse the decree. But the decree must be tested by the proofs as they are now exhibited by the record; and, thus considering it, we are compelled to affirm it."

In *Grillenberger v. Spencer*, 7 Misc. 601, 27 N. Y. Supp. 864, where the defense alleged that the deeds were insufficient, but it appeared that the plaintiff acted in good faith, believing them to be sufficient, the hearing was held open to permit him to perfect his title.

In *Merchants' Bank v. Thomson*, 55 N. Y. 7, an order for specific performance was 30 L.R.A.(N.S.)

and convey certain premises in Atlantic City to Elizabeth A. Wickersham. This instrument provided that the premises to be conveyed should be clear of encumbrances and the title good and marketable; that the settlement should be made within thirty days after authority of a court shall have been obtained authorizing the sale, time to be of the essence of the agreement. The agreement was executed upon the express condition that the proper court having jurisdiction should authorize the sale to be made, the vendor covenanting that he would with due diligence apply to the court to make the sale. The peculiar provision of the will of the testator gave rise to the covenant inserted in the agreement, regarding the application to the court for authority to sell. The testator's will provided as follows:

"I also give to my said daughter Mary

granted on condition that, in thirty days, plaintiff procure a deed which was necessary to complete his title.

In *Coffin v. Cooper*, 14 Ves. Jr. 205, the court said that where the master's report showed that the vendor could procure a good title, the court would put him under terms to procure it speedily, instead of granting the vendee's motion to be discharged from his contract.

In *Devenish v. Brown*, 26 L. J. Ch. N. S. 23, where it was necessary for plaintiff to procure an act of Parliament to validate his title, and the contract was made with this defect in view, the court refused to throw the case out on demurrer.

And in *Clay v. Rufford*, 5 De G. & S. 784, where plaintiff failed on hearing to prove such title as to justify a decree, because of a defect which was not raised by the pleadings, the bill was dismissed without prejudice.

But there must be some certainty that the vendor will be able to make good title to warrant the granting of additional time for him to do so. Thus, in *People v. Open Board*, 92 N. Y. 98, reversing 28 Hun, 274, it was held that the court would not hold an action open to enable a vendor seeking specific performance to bring suit against other parties, and try the experiment of an effort to secure good title at some uncertain date in the future.

And the giving of additional time for a vendor to perfect his title is a matter of favor, to be granted only when it will not prejudice the vendee; and it will not be granted when the defect was known to the plaintiff or his attorney, and concealed from the purchaser at the time the contract was made. *Christian v. Cabell*, 22 Gratt. 82; *Kenny v. Hoffman*, 31 Gratt. 442.

But where plaintiff asserts and defendant denies good title, and both refer the question to the court, it should determine the question at once, and not give the vendor time to perfect his title. *Jackson v. Ligon*, 3 Leigh, 161.

R. L. S.

Regina C. McCloskey the right and privilege to occupy my cottage at Atlantic City, New Jersey, which is used by me principally as a summer residence, without any charge for rent, taxes, or water rent, and if she desires to so occupy the said property, she may do so during the term of her natural life, and during her occupancy of said property my executors and trustees are authorized to keep it in good order and repair, to pay all taxes, water rent, and charges thereon, as they shall periodically fall due.

"Second. I also give my daughter Laura Agnes Seffarlen the same right and privilege to occupy my aforesaid Atlantic City cottage, and to share the same with Mary Emma Rothenberger during the term of the natural lives of both the said Laura Agnes Seffarlen and Mary Emma Rothenberger, and the same benefits and advantages that I have given my said daughter Mary Regina C. McCloskey regarding the said cottage are also given to my said daughter Laura Agnes Seffarlen and the said Mary Emma Rothenberger. And I direct my executors and trustees to permit the said Mary Emma Rothenberger to take care and full charge of my said daughter Laura, and if my daughter Mary Regina C. McCloskey does not desire to occupy the Atlantic City cottage during the winter months, it is my wish and desire that my daughter Laura Agnes Seffarlen and Mary Emma Rothenberger shall occupy the same, and whatever costs and expenses are necessary for the proper care, keep, and comfort of my daughter Laura shall be paid by my trustees as a primary charge out of the income of my residuary estate.

"And if neither of my said daughters desire to occupy my Atlantic City cottage, my executors and trustees are directed not to rent it, but they are authorized and directed to sell the cottage at public or private sale, under the general power of sale of my real estate, hereinafter delegated to them."

The executors and trustees under the will were made guardians of the estate of the testator's daughter Laura, who was of feeble mind, and the will further directed: "And I hereby authorize and direct my said trustee to see that the comfort of my said daughter Laura Agnes Seffarlen is in every way provided for so long as she shall live, and I direct that they employ proper persons for that purpose, preferably my trusted servant Mary E. Rothenberger, and if necessary other persons under them, and that they make liberal compensation out of said income for that purpose." All the parties to the contract had notice that Laura was of feeble mind and incompetent to express a desire not to occupy the premises. Therefore, the complainant, in pursu-

ance of the provision in the agreement, filed his bill on January 23, 1908, but did not make Mary Emma Rothenberger a party defendant thereto. On the 11th day of May in the same year a decree was entered in said cause which, after reciting that, in the opinion of the chancellor, the said Laura Agnes Seffarlen was not mentally competent to express her desire not longer to occupy said premises, and the court being of the opinion that it is for her best interests that the agreement should be performed and the sale consummated, adjudged that Mary Regina C. McCloskey does not desire longer to occupy said premises, and that said Laura Agnes Seffarlen is not mentally competent to express her desire in the premises, and that the executor and trustee under the will be and is authorized and directed to sell the premises under the terms of said agreement, and that the purchaser need not look to the application of the purchase money. A deed was prepared and tendered to the vendee on July 7, 1908, within thirty days after the decree, but was refused by her. The defendant did not object to accepting the deed because of any alleged outstanding interest of Mary Emma Rothenberger in the premises, but solely because due diligence in procuring the above-mentioned decree authorizing the sale had not been used, and of laches in tendering the deed.

This bill was filed July 22, 1908. The defendant filed her answer thereto September 18th following, in which she admitted the tender of the deed and her refusal to perform, basing such refusal upon the delay by the complainant in instituting suit for authority to make sale of the premises, because time was of the essence of the agreement. The cause came on for hearing on December 30, 1908, when the defendant asked leave upon affidavits to amend her answer by setting up therein that the title as tendered to her was not good and marketable, because Mary Emma Rothenberger had not been made a party defendant in the proceedings in the court of chancery to obtain leave to sell the premises, and her rights were in no way affected by such proceedings; that she did not join in the deed tendered, and that she, under the will of Joseph A. Seffarlen, had an outstanding interest in the premises. Leave was given and such answer was immediately filed. The vice chancellor rendered his decision at the conclusion of the hearing on the same day, and a decree thereon was entered January 13, 1909, ordering specific performance of the agreement, and that the complainant, within thirty days from the date of the decree, deliver a good and sufficient conveyance to the defendant, and if the defendant require

it, cause a deed of release of any interest which Mary Emma Rothenberger might have in the premises to be executed by her, releasing to the defendant such interest, and deliver the release to the defendant contemporaneously with the conveyance.

From this decree cross appeals were taken; by the complainant, from that part of the decree adjudging that the complainant procure a release from Mary Emma Rothenberger, on the ground that Mary Emma Rothenberger possessed no interest in the premises; and by the defendant, because the complainant was not entitled to have the agreement specifically performed, by reason of his delay in acquiring authority from the court to make the conveyance, and by reason of his not tendering a marketable title prior to the filing of his bill, and that the defendant was entitled to have the bill dismissed upon the pleadings and proofs.

Messrs. S. Stanger Iszard and Clarence L. Cole for complainant.

Messrs. Grey & Archer, for defendant:

Specific performance of a contract for the sale of land the title to which is alleged to be defective will not be decreed, even though the court may be of opinion that the objection to the title is not well founded, where the engagement is to give a marketable title, if the doubt is of such a nature that purchasers are likely to object to the title. *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Boylan v. Townley*, 62 N. J. Eq. 591, 51 Atl. 116; *Cornell v. Andrews*, 35 N. J. Eq. 7; *Zane v. Weintz*, 65 N. J. Eq. 214, 55 Atl. 641; *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. 305.

Voohees, J., delivered the opinion of the court:

Whether the complainant was in laches in procuring the authority from the court of chancery to make the conveyance under the will was a question of fact. Between the execution of the agreement and the filing of the bill, the defendant consulted a conveyancer in Philadelphia, who in turn consulted a title company, and in October notified the complainant that a commission in lunacy for Laura and the appointment of a guardian would be required by the title company. The complainant was not willing to take proceedings of that character, which would consume more time, and New Jersey counsel was called in, advising that such proceedings were not necessary, and thereupon took up the matter with the title company selected by the defendant, and finally reached an understanding some time in December with the title company that the proceedings as they were finally taken should 30 L.R.A. (N.S.)

be commenced. We agree with the conclusion of the vice chancellor that the complainant was reasonably diligent, and is not chargeable with laches in the commencement of those proceedings under the circumstances evinced by the proofs. That being admitted, it follows that the tender of the deed was within the time prescribed by the contract,—namely, within thirty days after the decree was entered in the court of chancery.

The next question to be determined relates to the title tendered,—whether it was unmarketable because of a possible interest outstanding in Mary Emma Rothenberger. The principle adopted by courts of equity in matters of specific performance is that they will not compel a purchaser to take a title of which there is a reasonable doubt, and such doubt is held to exist if the purchaser, desiring to sell the lands, would be adversely affected by such doubt. *Fry, Spec. Perf. chap. 17*. Professor Pomeroy, in his work on Specific Performance, at § 198, says: "In suits by a vendor, the purchaser will not be forced to complete the contract unless the title is free from any reasonable doubt. . . . If, however, there arises . . . a reasonable doubt concerning the title, . . . the court, without deciding the question, . . . regards the existence of this doubt as a sufficient reason for not compelling the purchaser to carry out the agreement." So it is the uniform rule in this state to decline to decree performance where such doubt exists, though rested on grounds merely debatable, but which might visit upon the purchaser litigation in that regard, and that, too, where at law the title might in fact be declared good. The following cases are in point: *Vreeland v. Blauvelt*, 23 N. J. Eq. 483; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Tillotson v. Gesner*, 33 N. J. Eq. 313; *Cornell v. Andrews*, 35 N. J. Eq. 7, s. c. 36 N. J. Eq. 321; *Paulmier v. Howland*, 49 N. J. Eq. 364, 24 Atl. 268; *Lippincott v. Wikoff*, 54 N. J. Eq. 107, 33 Atl. 305; *Day v. Kingsland*, 57 N. J. Eq. 134, 41 Atl. 99. We agree with the learned vice chancellor that the objection raised to the title tendered should be decided in favor of the vendee.

The decree below allowed to the complainant thirty days in which to procure the release of the alleged outstanding interest, and to tender it within that time, together with the executor's deed. While this allowance of time is not made a specific ground of appeal by the defendant, yet the point has been argued. The complainant, however, alleges as ground of appeal that he should not be compelled to obtain the release of Mary Emma Rothenberger. A material allegation of the bill is that the complainant

executed and tendered to the defendant a good and valid deed of conveyance, and that the complainant was ready and willing to deliver a good and valid conveyance in accordance with the agreement. In her original answer, the defendant admits the tender made to her of the deed mentioned by the complainant, and her refusal to accept is placed, not upon the ground that the title thus offered was unmarketable, but because of the laches of the complainant in making the tender. This ground is set out in the answer with extreme minuteness. If the defendant did not thus, by failing to answer the material allegation of the tender of a good title, confess that fact (*Sanborn v. Adair*) 29 N. J. Eq. 338; *Lee v. Stiger*, 30 N. J. Eq. 610; *Jones v. Knauss*, 31 N. J. Eq. 609; *Pinnell v. Boyd*, 33 N. J. Eq. 190; *Halsey v. Ball*, 36 N. J. Eq. 161; *Heyde v. Ehlers*, 10 N. J. Eq. 283; *Tate v. Field*, 56 N. J. Eq. 35, 37 Atl. 440), she lulled the complainant into inactivity and a feeling of security as to any objection that might be urged on the score of title, and she furthermore allowed this condition of affairs to remain undisturbed until the day of the final hearing excusing her delay, however, upon the ground that the true state of the title was unknown to her until about the time of the hearing. Furthermore, in March, 1908, two months before the decree, the defendant served notice of rescission of the contract on account of delay. No objection was then made to the character or the validity of the proceedings for obtaining an order authorizing the complainant to sell. This conduct of the defendant likewise had a natural tendency to raise in the mind of the complainant a reasonable belief that the point of difference between the parties was laches, and not the character of the title. Now, if the defendant had promptly specified that objection would be made to the title, the complainant would have had all the time existing between the disclosure of that defense to him and the entry of the decree in which to remove the defects complained of. So that we do not need to press to its extreme result, the effect of the failure to answer the material allegations of the bill as to a good title being tendered, but may rest upon the fact that the silence of the defendant in this particular has raised an equity in favor of the complainant, entitling him to such reasonable time for completing the title, not exceeding that which he might have had if the defendant had urged this defense promptly.

The English rule seems to be that laid down in *Langford v. Pitt*, 2 P. Wms. 630, by Sir Joseph Jekyll, M. R., that it is sufficient if the party entering into articles to sell has a good title at the time of the decree.

The cases are collected under *Seton v. Slade*, in 2 White & T. Lead. Cas. in Eq. 4th Am. ed. 529. It has been said that the courts have never directed performance by the vendee if the title, at the time of the decree, was still defective. The English rule, however, holds that if the master's report on title is that the vendor, upon getting in a term or getting administration, etc., will have a title, the court will put him under terms to procure that speedily. *Coffin v. Cooper*, 14 Ves. Jr. 205. In a note to *Cooper v. Denne*, 1 Ves. Jr. 567, it is said that the rule has been productive of great hardship, and Lord Eldon, who decided *Coffin v. Cooper*, declared that he would never extend it to any case to which it had not been previously applied.

The difference, however, between the practice of the English courts and those of our own, makes it illogical to apply their rules with exactness to all cases arising in our courts. They have the matter of title first referred to a master to report upon, and then comes the decree. They hold that perfection of the title by the time of the decree—that is, after its adjudication by the master—is sufficient. Now, with us, the title is not adjudicated until the final hearing, upon which a decree may be entered and signed immediately. Thus we see that the English rule is even more lenient than ours; for it allows the necessary time intervening between the master's determination of the title and the time of the entry of the final decree. Professor Pomeroy, in his work on Specific Performance, at § 424, says: "There are many modes, however, in which the vendee, by his acts or omissions, will waive all right to object to the vendor's delay in making out a good title." And in *Seton v. Slade*, 7 Ves. Jr. 285, where specific performance was decreed, the abstract, though delivered very late, and under a notice that the vendee would insist on his deposit with interest if the title should not be made out and possession delivered by the time of payment, having been received and kept without objection, Lord Eldon, upon summing up the case, said: "Under the circumstances, therefore, whether the time is or is not an objection founded upon the authorities the reports of this court furnish,—which I will not discuss, let the authorities upon that point turn the scale either for the defendant or the plaintiff,—there is no authority that has not some reference to the conduct of the party in the meantime; and upon the conduct, this defendant has no right, under the circumstances, to say this contract was not performed within the two months."

In *Murrell v. Goodyear*, 1 De G. F. & J. 432, Lord Justice Turner said: "I am not

prepared to hold that in the case of bona fide conduct on the part of a vendor putting up property for sale in which he has a partial interest, supposing himself to have the entire interest, it is competent to a purchaser to say that the contract shall be no contract if the vendor is able ultimately to make a title to the property according to the more extended interest he has contracted to sell. I certainly have always thought that in such a case a purchaser could have no right to resist a specific performance of the contract. But I say without any hesitation that if a purchaser has any such right as has been contended for and insisted upon on the part of this defendant, it is a right he is bound to insist upon at the first moment."

In *Dresel v. Jordan*, 104 Mass. 415, it was said: "In all cases it is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of his agreement or by the equities of the particular case, he is required to make the conveyance, in order to entitle himself to the consideration."

The defendant concedes that there are precedents where a decree has been made on terms allowing a vendor to remove mortgages from the property (*Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495), and where the vendor has perfected his title before bill filed, or before the hearing, or before the decree, or even after that time, when the vendor held a contract entitling him to such outstanding interest (*Soper v. Kipp*, 5 N. J. Eq. 383), but it is contended that no cases can be found where additional time has been decreed to afford an opportunity to acquire an outstanding title over which the vendor had no control. When the vendor in a suit for specific performance, by reason of the silence or the conduct of the vendee, regarding the title to be conveyed, during the negotiations or in the progress of the cause, has lost an opportunity to perfect his title before decree, this opportunity will still be afforded to him by the allowance of a reasonable time even after the entry of the decree, if it can be done without hardship to the vendee.

It is apparent that, by reason of the defendant's delay in not bringing forth her objection until the very day of the hearing, an equity has arisen in favor of the complainant that he be not deprived of the period of time which he would have had under the ordinary rules, and therefore we are constrained to hold that the allowance of thirty days after the making of the decree within which to obtain a release for the alleged outstanding interest is not inequitable, and does not work hardship upon the defendant.

The decree should be affirmed.

Vroom, J., dissents.

NEW YORK COURT OF APPEALS.

WILLIAM H. CADDY, Resp't.,

v.

INTERBOROUGH RAPID TRANSIT COMPANY, Appt.

(195 N. Y. 415, 88 N. E. 747.)

Master — scaffolds — statutory liability.

1. A car 47 feet long and 16 feet high, jacked up 6 feet from the floor, is a structure within the meaning of a statute providing that a person directing another to perform labor in the repairing of a house, building, or structure shall not furnish, for the performance of such labor, unsuitable scaffolding.

Same — scaffold defined.

2. Planks placed 8 feet from the ground, on painter's horses, to be used as platforms for workmen in repairing a railroad car, are within the meaning of a statute requiring a person employing another to perform labor in the repairing of a house, building, or structure, to furnish for the performance of such labor safe scaffolding.

(June 1, 1909.)

Note. — What are scaffolds or structures within statutes relating to safety of scaffolds in connection with structures.

A search has failed to reveal a statute in any other state similar to the one construed in the *CADDY v. INTERBOROUGH RAPID TRANSIT Co.*, and consequently the American cases discussed below are confined to New York state. A very similar question, however, may arise under the English workmen's compensation act of 1897, and a number of English cases have passed upon the question.

Scaffolds.

The New York statute is sufficiently set out in the foregoing opinion. The following contrivances have been held to be scaffolds within the meaning of the statute:

—timbers placed on empty barrels, used to facilitate passing lumber to workmen higher up. *McLaughlin v. Eidlitz*, 50 App. Div. 519, 64 N. Y. Supp. 193.

—a plank on horses in a building in process of erection used to facilitate the work of securing a derrick, to be used in putting beams into position. *Warren v. Post & McCord*, 128 App. Div. 572, 112 N. Y. Supp. 960.

—planks placed on cross pieces resting on two rows of upright timbers. *Herman*

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of a Trial Term for Kings County, dismissing the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Lemuel E. Quigg, with Mr. Charles A. Gardiner, for appellant:

The car upon which plaintiff was working was not a "structure" within the meaning of the labor law.

2 Lewis's Sutherland, Stat. Constr. 2d ed. § 422; State v. Walsh, 43 Minn. 444, 45 N. W. 721; Monongahela Bridge Co. v. Pittsburgh & B. R. Co. 114 Pa. 484, 8 Atl. 233;

v. P. H. Fitzgibbons Boiler Co. 136 App. Div. 286, 120 N. Y. Supp. 1074.

—a board laid across stringers in the hallway of a building in process of erection. Convey v. Finn, 130 App. Div. 440, 114 N. Y. Supp. 864.

—planks laid across iron beams in a building in process of erection. Nixon v. Thompson-Starrett Co. 131 App. Div. 152, 115 N. Y. Supp. 130.

—platform made of planks laid across girders in building, and used for storage of materials and for mixing concrete. Swenson v. Wilson & B. Mfg. Co. 102 App. Div. 477, 92 N. Y. Supp. 849, affirmed in 186 N. Y. 555, 79 N. E. 1116.

—loose planks resting on stringers laid on angle irons about 3 feet from the floor, on each side of an open bin, and used to remove false work in the ceiling, about 5 feet above the planks. MacDonald Engineering Co. v. Manns, 101 C. C. A. 373, 177 Fed. 203.

—planks laid on braces extending diagonally across the inner corners of a steel grain bin, and used by workmen in building the bins higher. Anderson v. Milliken Bros. 123 App. Div. 614, 108 N. Y. Supp. 61, affirmed in 194 N. Y. 521, 87 N. E. 1114.

—planks laid across a pocket in the hold of a scow, for the purpose of placing a beam through the center of the pocket. Madden v. Hughes, 104 App. Div. 101, 93 N. Y. Supp. 324, affirmed in 185 N. Y. 466, 78 N. E. 167.

—a freight elevator in a building adjoining the one upon which the work was being done. Croce v. Buckley, 115 App. Div. 354, 100 N. Y. Supp. 898.

—scaffold used for installing heating apparatus. Tracey v. Williams, 127 App. Div. 126, 111 N. Y. Supp. 114.

—scaffold used to install machinery in a factory which was being fitted up by the defendants. Wingert v. Krakauer, 93 App. Div. 223, 87 N. Y. Supp. 261.

—scaffold in a subway, used for painting the interior, and constructed by placing planks on joists which were supported by hooks fastened to the iron work. Bower v. 30 L.R.A. (N.S.)

Robinson v. Metropolitan Street R. Co. 103 App. Div. 243, 92 N. Y. Supp. 1010; People v. Richards, 108 N. Y. 137, 2 Am. St. Rep. 373, 15 N. E. 371; Conley v. Lackawanna Iron & Steel Co. 94 App. Div. 149, 88 N. Y. Supp. 123, affirmed in 183 N. Y. 551, 76 N. E. 1092.

The staging upon which plaintiff was working was not a "scaffolding" within the meaning of the labor law.

Schapp v. Bloomer, 181 N. Y. 127, 73 N. E. 563; Sutherland v. Ammann, 112 App. Div. 332, 98 N. Y. Supp. 574; Stokes v. New York L. Ins. Co. 112 App. Div. 77, 98 N. Y. Supp. 135; Williams v. First Nat. Bank, 118 App. Div. 555, 102 N. Y. Supp. 1031; Rotondo v. Smyth, 92 App. Div. 153, 86 N. Y. Supp. 1103; Hutton v. Holdbrook,

Holbrook, Cabot & Rollins Corp. 125 App. Div. 684, 110 N. Y. Supp. 164.

—a patent ladder or scaffold, consisting of two ladders, placed perpendicularly, and a horizontal ladder extending between them. Schmidt v. Rohn, 127 App. Div. 220, 110 N. Y. Supp. 1086.

In some of the foregoing cases, it will be seen that there could be no question that the contrivance was a scaffold, the only question being whether the statute was intended to apply to scaffolds used in the manner and for the purpose indicated.

A scaffolding built by the plaintiff and his fellow workmen under the direction of the master's superintendent is one furnished by the master, within the meaning of the statute. Berthelson v. Gabler, 111 App. Div. 142, 97 N. Y. Supp. 421.

If a scaffold one side of which is supported by masonry and the other is swung from hooks or hangers suspended from a traveler is not, as a matter of law, embraced by the phrase "all swinging or stationary scaffolding," as used in the statute, it certainly may be found so as a matter of fact. Flannigan v. Ryan, 89 App. Div. 624, 85 N. Y. Supp. 947.

In Pursley v. Edgemoor Bridge Works, 56 App. Div. 71, 67 N. Y. Supp. 719, affirmed in 168 N. Y. 589, 60 N. E. 1119, the statute was held to have reference to a completed scaffold only, and not to one in process of erection. And to the same effect was the decision in Welk v. Jackson Architectural Iron Works, 184 N. Y. 519, 76 N. E. 1116, the court adopting the dissenting opinion in the court below, 98 App. Div. 247, 90 N. Y. Supp. 541.

A scaffold built around a house in the process of construction is being used for the erection of a house, within the meaning of the statute, although, at the time of the accident, the workman was using it to construct another scaffold higher up. Jones v. Gamble, 126 N. Y. Supp. 143.

A wooden box in which concrete is spread, so that when it hardens the box may be removed and the concrete become part of the floor of the building, and upon which the

C. & D. Contracting Co. 139 Fed. 734; Welk v. Jackson Architectural Iron Works, 98 App. Div. 247, 90 N. Y. Supp. 541, reversed in 184 N. Y. 519, 76 N. E. 1116.

Mr. Charles M. Davenport, with Mr. Harry E. Lewis, for respondent:

The car upon which plaintiff was working was a "structure" within the meaning of the labor law.

Chaffee v. Union Dry Dock Co. 68 App. Div. 578, 73 N. Y. Supp. 908; Wingert v. Krakauer, 76 App. Div. 34, 78 N. Y. Supp. 664; Flannigan v. Ryan, 89 App. Div. 624, 85 N. Y. Supp. 947; Madden v. Hughes, 104 App. Div. 101, 93 N. Y. Supp. 324.

The place where plaintiff was working was a "scaffolding" within the meaning of the labor law.

workmen are required to stand, cannot be considered a scaffold, but is a "mechanical contrivance," within the meaning of the statute. Michael v. Standard Concrete Steel Co. 55 Misc. 255, 105 N. Y. Supp. 131.

The following contrivances have been held not to be scaffolds within the meaning of the statute:

—staging 4 to 5 feet high above the floor, and used for attaching fixtures. Schapp v. Bloomer, 181 N. Y. 125, 73 N. E. 563.

—planks with one end resting on cleats nailed onto a building, and the other on horses, and used for the purpose of removing pipes connecting a boiler on the outside of the building with one on the inside. Conley v. Lackawanna Iron & Steel Co. 94 App. Div. 149, 88 N. Y. Supp. 123, affirmed in 183 N. Y. 551, 76 N. E. 1092.

—timber lashed at the ends to steel columns of a building, and intended to hold iron girders until the wall was built up for them to rest on. Welk v. Jackson Architectural Iron Works, 184 N. Y. 519, 76 N. E. 1116, reversing the court below on the dissenting opinion, 98 App. Div. 247, 90 N. Y. Supp. 541.

—platform used in erecting a temporary partition in a store to protect goods from dust. Sutherland v. Ammann, 112 App. Div. 332, 98 N. Y. Supp. 574, affirmed in 190 N. Y. 514, 83 N. E. 1133.

—a plank laid across two wooden horses, used to facilitate the work of putting a casing in a window frame. Williams v. First Nat. Bank, 118 App. Div. 555, 102 N. Y. Supp. 1031.

—the platform of a bridge in the process of erection. Brady v. Pennsylvania Steel Co. 134 App. Div. 372, 119 N. Y. Supp. 75.

It is to be noted that in a number of the foregoing cases, the contrivance was erected to facilitate the installation or removal of machinery or fixtures within the building.

So, in Schapp v. Bloomer, *supra*, the court, in holding that a scaffolding composed of horses, with planks thereon to furnish a platform for workmen to stand on in installing shafting in a completed building, was not within the meaning of the statute, said: "As we have seen, the 30 L.R.A. (N.S.)

Madden v. Hughes, *supra*; Chaffee v. Union Dry Dock Co. *supra*; Swenson v. Wilson & B. Mfg. Co. 102 App. Div. 477, 92 N. Y. Supp. 849; McLaughlin v. Eidlitz, 50 App. Div. 518, 64 N. Y. Supp. 893; Chiavaroli v. Union Bag & Paper Co. 131 App. Div. 372, 115 N. Y. Supp. 327; Anderson v. Milliken Bros. 123 App. Div. 614, 108 N. Y. Supp. 61; Tracey v. Williams, 127 App. Div. 126, 111 N. Y. Supp. 114; Warren v. Post & McCord, 128 App. Div. 572, 112 N. Y. Supp. 960; Croce v. Buckley, 115 App. Div. 354, 100 N. Y. Supp. 898; Schmidt v. Rohn, 127 App. Div. 220, 110 N. Y. Supp. 1086; Convey v. Finn, 130 App. Div. 440, 114 N. Y. Supp. 865; Nixon v. Thompson-Starrett Co. 131 App. Div. 152, 115 N. Y. Supp. 130.

statute limits the scaffolding to be constructed to certain specified cases, such as the erection, repairing, altering, or painting of a house, building, or structure. The limitation to specified cases shows that it was not intended to include scaffolding in all cases. What the legislature evidently had in mind was scaffolding on buildings or structures, where its use was obviously dangerous to life and limb of an employee thereon in case of a fall. If ordinary staging, put up in a room, from 4 to 6 feet above the floor, to facilitate the placing of fixtures, was intended to be included as among the specified cases, we should find it difficult to suggest a scaffold that would not fall within the limitation of the statute."

But placing machinery within a room in a building, and attaching the same firmly to the ceiling, was held in Wingert v. Krakauer, *supra*, to constitute an alteration of such room.

So, in Tracey v. Williams, *supra*, the court said: "The heating apparatus of a school building is a part of the building itself; it is a part of the realty; and whether the work upon which the plaintiff was engaged was being done as a part of the original construction of the building, or of its alteration or repair, we think the statute applied. The plaintiff was doing the kind of work contemplated by the statute; the danger from a defect in the scaffold upon which he was working was the kind of danger which the statute requires the master to guard against."

A temporary or false arch used to support and shape the permanent arch until that arch should be set and hardened sufficiently to justify the removal of the temporary structure does not become a scaffold because of the habit of the workmen of stepping on it while at work. Haughey v. Thatcher, 89 App. Div. 375, 85 N. Y. Supp. 935.

—English workmen's compensation act.

Section 7, subsec. 1, of the English workmen's compensation act 1897, is to apply to employment "on, in, or about any building which exceeds 30 feet in height," and is either being constructed or repaired by

Werner, J., delivered the opinion of the court:

The plaintiff was injured while engaged in repairing one of defendant's cars in its shop in the borough of Manhattan, in the city of New York. The car was 47 feet long, 8 feet 6 inches wide, and 16 feet high. It was "jacked up" about 6 feet above the floor, so that its height over all was about 22 feet. Around the car there had been placed a staging consisting of "painters' horses," constructed like ladders, with rungs about 12 inches apart. Upon these "horses" were placed planks about 8 feet above the floor. The plaintiff was standing at work upon a plank which formed a part of the staging on the south side of the car when it broke and precipitated him

to the floor, causing the injuries for which he seeks to recover in this action. At the trial term the complaint was dismissed. At the appellate division the judgment entered upon that decision was reversed and a new trial granted. Upon defendant's appeal to this court, the two principal questions presented are whether the staging upon which the plaintiff was standing when it gave way was a "scaffold," and whether the car upon which he was at work was a "structure," within the purview of §§ 18 and 19 of the statute commonly known as the "labor law" (Laws 1897, chap. 415, p. 467).

Before the enactment of that statute, it had been held that a staging or scaffolding

means of a scaffolding. Under this section the courts have, in a number of cases, passed upon the question what is a scaffolding within the meaning of the act.

Thus, in *Hoddinott v. Newton, C. & Co.* [1901] A. C. 49, it was held that a movable platform formed by boards resting on ledgers lashed to iron columns, and supported in the middle by trestles, was a scaffolding within the meaning of the act.

And in *Veazey v. Chattle*, [1902] 1 K. B. 494, it was held that the county court judge was justified in holding that a crawling board, which was described as being a plank 18 to 20 feet long and 10 inches wide, across which were nailed ridges of wood to give the workmen a grip on the board while at work on the roof, was a scaffolding within the meaning of the act.

So, ordinary painters' steps may be found to be a scaffolding within the meaning of the act. *Elvin v. Woodward & Co.* [1903] 1 K. B. 837.

And in *O'Brien v. Dobbie*, [1905] 1 K. B. 346, it was held that an ordinary ladder on which a workman was standing for the purpose of doing work might be properly found by the jury to be a scaffolding.

A plank with one end resting on one of the rounds of a ladder leaning against one of the walls of a building, and the other resting upon one of the roof principals in the center of the room, is a scaffolding within the meaning of the act. *Reddy v. Broderick* [1901] 2 Ir. Q. B. 329.

A scaffolding consisting of movable trestles inside the rooms of a building, with boards laid across the top, is within the act. *Maude v. Brook*, [1900] 1 Q. B. 575.

As the act is not confined to accidents in some way connected with the use of the scaffolding, and says nothing about the height, position, or extent thereof, the height of the scaffold from the ground or floor beneath it is of no consequence, so long as the building upon which the work is being done is over 30 feet, *Hoddinott v. Newton, C. & Co. supra.*

But in *Crowther v. West Riding Window Cleaning Co.* [1904] 1 K. B. 232, it was held that it could not be said that a ladder

used for a purpose for which scaffolding might be used must, as a matter of law, be a scaffolding. And to the same effect was the decision in *Marshall v. Rudeforth*, [1902] 2 K. B. 174.

And in *Ferguson v. Green*, [1901] 1 K. B. 25, it was held that a platform erected for the use of plasterers, and composed of trestles, with loose boards laid across the top, may be found, as a matter of fact, not to be a scaffolding.

A ladder used in the ordinary way by a painter in a building is not a scaffolding. *McDonald v. Hobbs* (1899) 2 F. 3, Ct. of Sess. cited in 2 *Butterworths's Dig.* 740. Nor is a ladder used in the work of silicating the walls of a house, although such work is usually done by means of a scaffolding. *Campbell v. Sillars* (1904) 5 F. 900, Ct. of Sess. cited in 2 *Butterworths's Dig.* 743.

And in *Wood v. Walsh*, [1899] 1 Q. B. 1009, it was held that, as a matter of law, ladders were not scaffolding within the meaning of the act. This decision, however, was rendered before the *Hoddinott Case* was passed upon by the House of Lords, and is spoken of in a number of the other English cases as being overruled by the latter case.

Structures.

The following were held to be structures within the meaning of the statute:

—a vessel in the course of construction in a shipyard. *Chaffee v. Union Dry Dock Co.* 68 App. Div. 578, 73 N. Y. Supp. 908.

—a vessel in a dry dock. *Gruner v. Texas Co.* 133 App. Div. 413, 117 N. Y. Supp. 741, motion for leave to appeal to the court of appeals denied in 134 App. Div. 931, 118 N. Y. Supp. 1110.

—a vessel to which iron plates were being attached. *Herman v. P. H. Fitzgibbons Boiler Co.* 136 App. Div. 286, 120 N. Y. Supp. 1074.

—a scow in which repairs were being made. *Madden v. Hughes*, 104 App. Div. 101, 93 N. Y. Supp. 324, affirmed in 185 N. Y. 466, 78 N. E. 167.

erected for workmen was not a place in which to do their work, but an appliance or instrumentality by means of which the work was to be done, and the logical corollary of that conclusion was that, when the master had exercised reasonable care in the selection of competent fellow workmen, and suitable materials for the proper construction of the appliance, he was not liable for injuries sustained by one workman through the fault or negligence of another. *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Kimmer v. Weber*, 151 N. Y. 417, 56 Am. St. Rep. 630, 45 N. E. 860. By the statute of 1897, the legislature established a different rule in specified instances where the employer assumes, or is charged with, the duty of furnishing scaffolding for the use of his employees. The statute provides that "a person employing or directing another to perform labor of any kind in the erection, repairing, altering, or painting of a house, building, or structure shall not furnish or erect, or cause to be furnished or erected, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable, or improper, and which are not so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed or engaged." Section 18. And the following section adds that "all swinging and stationary scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon, when in use. . . ." Section 19. In considering this statute in the case of *Stewart v. Ferguson*, 164 N. Y. 553, 556, 58 N. E. 662, this court held that § 18 lays upon the master a positive prohibition, from the violation of which neither his own ignorance nor the carelessness of his servants will shield him. In that case the statute as it now stands was compared with the provisions of an earlier one (Laws 1885, chap. 314, § 1, p. 539), under which the master was charged with responsibility for "knowingly and negligently" furnishing

defective scaffolding, etc., and the decision was predicated upon the obvious purpose of the legislature to impose upon the employer the affirmative and imperative duty to furnish to his employees stagings and scaffoldings for certain purposes that are safe, suitable, and proper, regardless of the employer's knowledge or negligence in the matter. This is absolute and unequivocal. Whenever a scaffold is furnished or caused to be furnished by an employer, to be used in erecting, repairing, altering, or painting a house, building, or structure, it must be safe, suitable, and proper, or the employer is liable.

Thus far there is no difficulty in ascertaining the legislative purpose; beyond it there is doubt and uncertainty. And the trouble arises from the inherent impossibility of defining in unequivocal phrase the physical objects mentioned in the statute. What is a "scaffold?" What is a "structure?" These are the vexed questions which the courts are constantly being called upon to answer in cases involving an infinite variety of practical conditions. Experience has shown that they are questions which cannot be solved by academic discussion, and that even when they are applied to concrete facts they often lead judicial minds to radically divergent conclusions. In the case at bar the question is whether the car above described is a "structure" within the meaning of the law. Counsel for the defendant, in a very lucid and forceful argument, invokes the rule of *ejusdem generis*. His contention, reduced to its shortest statement, is that the general word "structure" must be limited by and comprehended within the specific terms "house" and "building," and when thus construed it necessarily excludes all structures which do not fall within the generic description of houses and buildings. To this argument counsel for the plaintiff replies that the words "house" and "building" are in themselves so general and comprehensive that the word "structure" cannot possibly

But an upright boiler, standing on its own base, having no roof or shelter, and connected with the main building only by means of a pipe running through the wall, and connecting with another boiler, was held in *Conley v. Lackawanna Iron & Steel Co.* 94 App. Div. 149, 88 N. Y. Supp. 123, affirmed in 183 N. Y. 551, 76 N. E. 1092, to be a mere appliance, and not within the statute.

In *Chaffee v. Union Dry Dock Co.* supra, where it was held that a ship in the course of construction in a dry dock was a structure within the meaning of the labor law, the court said: "The injury of workmen falling by reason of defective scaffolds was the thing to be avoided. It was an entirely 30 L.R.A. (N.S.)

immaterial circumstance before this general purpose whether the scaffold should happen to be around a house, a barn, a vessel, or a flag pole. . . . It was against that injury that the legislature sought to guard by imposing additional responsibilities upon the employer in favor of the employee."

The statute applies to a vessel belonging to a foreign corporation, but in a dry dock in this state for repairs. *Gruner v. Texas Co.* 133 App. Div. 413, 117 N. Y. Supp. 741.

As to what is comprehended by the phrase "machinery of every description," in statutes imposing duty on master as to placing guards, see note to *Wynkoop v. Ludlow Valve Mfg. Co.* post, 36.

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broaden or amplify their meaning, and need not necessarily be associated therewith; that the term "structure" was used, not to make more definite the description of "house" and "building," but to enlarge to the fullest extent the list of artificial physical objects to which the reason of the statute can be applied. The question is not free from doubt, but we incline to the view that the rule of *ejusdem generis* does not apply. The term "house," as used in common speech, embraces every form of structure designed for human habitation; but in a legal sense it is even more comprehensive, as is shown by the statutes relating to burglary, arson, and other crimes which involve acts committed in or upon buildings or structures. A building is a structure which, of course, includes every form of artificial house, but also many structures not included in that more restricted term; and so the word "structure," in its broadest sense, includes any production or piece of work artificially built up or composed of parts joined together in some definite manner, and its extended legal signification can easily be gathered from the great variety of subjects to which it is applied in creating and penalizing what are known as "statutory misdemeanors." In cases like this, lexicographers' definitions are useful as guideposts, but they do not take us to our destination. The statutory meaning of a word or phrase must be gathered from the purpose for which the law containing it was enacted. Under the common law it was often difficult to fix the legal responsibility for accidents arising from defective scaffoldings and stagings. In many cases where the master should have been held liable, he escaped under cover of the fellow-servant doctrine; and in many more he was mulcted in damages for the negligence of others in details which he could not control. This was the evil sought to be remedied by a statute designed to charge the master with a more rigid and personal responsibility for the erection of scaffoldings and stagings, and to assure the servant, who takes no part in their construction, of greater safety in their use. A scaffold is no more dangerous when used in erecting, repairing, altering, or painting a house or building, than when used for the same purpose upon any structure where the same kind of a scaffold is necessary. The dangers to the employee are the same, and the evils of the common-law rule sought to be remedied by the statute are alike in each case. It is to be observed, moreover, that the word "structure" is not joined to "building" and "house" by the adjective "other," but by a simple "or," so that the language is "house, building, or structure." The word

"or" here takes the place of a comma, and this grammatical construction indicates that the word "structure" has as distinct and separate a meaning as "building" has from "house." This broad and practical view of the statute was taken by the appellate division in the fourth department in *Chaffee v. Union Dry Dock Co.* 68 App. Div. 578, 73 N. Y. Supp. 908, where it was held that a ship was a structure; by the second department in *Flannigan v. Ryan*, 89 App. Div. 624, 85 N. Y. Supp. 947, where one of the piers of the Williamsburg bridge was regarded as within the same category; and in *Madden v. Hughes*, 104 App. Div. 101, 93 N. Y. Supp. 324, where a scow 100 feet long, 30 feet wide, and 14 feet deep was thought to fall within the statute. These cases differ just enough in circumstance to indicate the limitless variety of objects which may be described as structures, and the comparatively narrow field within which the statute would be operative if it were confined to buildings and houses. The more carefully this statute is studied, the more apparent it becomes that it was clearly designed to cover many structures which are not *ejusdem generis* with houses and buildings, and that no hard and fast legal definitions can be framed of the many things which may be comprehended by its provisions. Within this broad construction of the statute, we think the car upon which the plaintiff was at work when injured was a structure. If it had been built of the same shape and dimensions upon wooden posts or stone piers sunk into the ground, and had been intended for a dwelling or a workshop, it would clearly have been a structure. The fact that it happens to have been a thing called a "railroad car" when in use does not exclude it from the category of structures when it is temporarily necessary to use scaffolding thereon in the process of erecting, repairing, altering, or painting.

When we undertake to define a scaffold or scaffolding, we meet even greater difficulties. It is like reasoning in a circle to attempt to define "scaffolding" and "structures" in their relation to each other. On the one hand, it may be argued that anything large enough to require the use of a scaffold in the work of erection or repair may very properly be dignified by the title of "structure," and the process need only be reversed to prove that a staging necessary to erect or repair a "structure" must certainly be of such dimensions and character as to constitute a scaffold. Upon this branch of the case we can add practically nothing to the foregoing discussion. The same reasoning applies. The reports of decisions in the appellate division are full of cases in which

the question has arisen in many forms, but they are of no use as authorities except where the facts are identical or so similar as to be controlling. The following cases disclose the wide range of things which the appellate division have held to be scaffolds within the statute: *Madden v. Hughes*, 104 App. Div. 101, 93 N. Y. Supp. 324, platform consisting of planks between divisions of hold of a scow; *Chaffee v. Union Dry Dock Co.* supra, timbers laid across hold of vessel and resting on chains; *Swenson v. Wilson & B. Mfg. Co.* 102 App. Div. 477, 92 N. Y. Supp. 849, platform used only for materials, made of planks laid across girders in uncompleted building; *McLaughlin v. Eidlitz*, 50 App. Div. 518, 64 N. Y. Supp. 193, planks laid across barrels which were placed on each side of a cable; *Anderson v. Milliken Bros.* 123 App. Div. 614, 108 N. Y. Supp. 61, unfastened planks placed upon braces which formed part of a grain bin then in course of construction; *Tracey v. Williams*, 127 App. Div. 126, 111 N. Y. Supp. 114, planks laid on horses placed one above the other; *Croce v. Buckley*, 115 App. Div. 354, 100 N. Y. Supp. 898, the top of an elevator upon which workmen were standing under directions from master. We cite these cases, not for the purpose of indorsing the conclusions reached in them, but to illustrate the variety and difficulty of the subject.

When we turn to the lexicographers, we find nothing much more definite. We all accept the definition that a "scaffold" is "a temporary structure of timber, boards, etc., for various purposes, as for supporting workmen and materials in building." *Webster's International Dict.* But when that is admitted we may still differ as to the height and other dimensions which mark the difference between a scaffold and a platform or staging. In *Schapp v. Bloomer*, 181 N. Y. 125, 128, 73 N. E. 563, 564, this court held that a staging from 4 to 6 feet high, used for the purpose of placing shafting and fixtures, and supported by large rolls of paper and brackets nailed to posts which upheld the roof, was not a scaffold within the meaning of the statute. That case clearly discloses the impossibility of fixing an arbitrary point at which a thing ceases to be a mere platform and becomes a scaffold. There Judge Haight said of the statute that "what the legislature evidently had in mind was scaffolding on buildings or structures where its use was obviously dangerous to life and limb of an employee thereon in case of a fall." (p. 128.) That is true, but it is just as impossible to exactly fix the point at which a thing may become obviously dangerous to life and limb in case of a fall as it is to say with dogmatic certainty

that a thing of one height, length, and breadth is a structure, while a thing of the same character, but of lesser dimensions, does not fall within that definition. The inherent difficulties of the subject are such as to finally compel us to work out each case upon its own peculiar facts, in the light of the manifest purpose of the legislature to secure greater protection to the employee, and to impose upon the employer directly a personal obligation which, under the common law, he had the right to delegate to competent employees. Upon the facts disclosed by the record, we think the conclusion that the car upon which the plaintiff was employed was a structure justifies the further conclusion that the temporary support which surrounded it was a scaffold.

Having reached this decision, the other facts of record present no obstacle to plaintiff's recovery, for the evidence was such as to support a finding that the scaffold was furnished by the defendant, that the plaintiff took no part in its erection, and that the defects in the plank which broke were not so obvious as to charge the plaintiff with responsibility for his own injuries. This disposition of the case renders it unnecessary to discuss the other questions argued orally and in the briefs.

The order of the Appellate Division should therefore be affirmed, and judgment absolute is ordered for the plaintiff upon defendant's stipulation, with costs to the plaintiff in all courts.

Gray, Vann, Willard Bartlett, Hiscock, and Chase, JJ., concur. Cullen, Ch. J., absent.

NEW YORK COURT OF APPEALS.

WILLIAM WYNKOOP, Respt.,
v.

LUDLOW VALVE MANUFACTURING
COMPANY, Appt.

(196 N. Y. 324, 89 N. E. 827.)

Master — statutory duty to guard machinery — tracks.

A statute requiring a master to guard all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws, and machinery

Note. — What is comprehended in expression "machinery of every description," in statutes imposing duty on master as to placing guards.

Cases have not been included in which it was admitted or apparently conceded that the particular contrivance or appliance was machinery within the meaning of the stat-

of every description, does not apply to an elevated track running near galleries in a factory, upon which run traveling cranes, so as to render the master liable to a servant injured by falling onto the track, in front of the crane, to his injury.

(November 9, 1909.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a Trial Term for Rensselaer County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Mr. Murray Downs, with Messrs. Rosendale & Hessberg, for appellant:

Masters are required only to guard

ute, and the decision turns upon other questions, as, for instance, whether the servant assumed the risk of the unguarded machinery.

This note is confined strictly to cases involving statutes which impose upon the master the duty of placing guards for the safety of his servants; and cases involving the proper construction of similar phrases in statutes not involving the placing of guards have been excluded.

A somewhat similar question arises under statutes making the master liable for defects in the ways, works, and machinery, but the word "machinery" in such a statute might well include various tools and contrivances which would not be embraced by the phrase "machinery of every description," in statutes making it the master's duty to place guards. As, for instance, in *Clements v. Alabama G. S. R. Co.* 127 Ala. 166, 28 So. 643, the court passed upon the question whether or not a crowbar was machinery within the meaning of the statute which makes employers liable for injuries caused by defects in the condition of their ways, works, machinery, or plant; of course, it would be utterly absurd to argue that a crowbar could possibly have been intended to be embraced within a statute making it the duty of the master to guard "machinery of every description." Again, in many cases of this kind it is impossible to tell whether the contrivance or appliance in question would be considered a part of the machinery or a part of the ways or works. Thus, in *Brouillette v. Connecticut River R. Co.* 162 Mass. 198, 38 N. E. 507, it was held that a wire used to connect the joints of the rails of an electric railroad, to facilitate the transmission of the electricity through the rails, was a part of the ways, works, or machinery of the railroad, within the meaning of the statute; but the court does not point out whether it was considered part of the machinery or part of the works or ways.
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against such dangers as it would occur to a reasonably prudent man are liable to happen.

Gleags Falls Portland Cement Co. v. Travelers' Ins. Co. 162 N. Y. 403, 56 N. E. 897.

Defendant did not fail in its duty of care, either at common law or under the employers' liability act.

Bauer v. Empire State Dairy Co. 191 N. Y. 547, 85 N. E. 1106, 115 App. Div. 71, 100 N. Y. Supp. 603; *Nolan v. Metropolitan Street R. Co.* 173 N. Y. 604, 66 N. E. 1112, 65 App. Div. 184, 72 N. Y. Supp. 501; *Knisley v. Pratt*, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986; *Stevens v. Gair*, 109 App. Div. 621, 96 N. Y. Supp. 303; *Buckley v. Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 540, 21 N. E. 717; *Welch v. New York C. & H. R. R. Co.* 43 N. Y. S. R. 958, 17 N. Y.

The following appliances or contrivances have been held to be embraced within the phrase "machinery of every description," as used in statutes imposing upon the master the duty of placing guards:

—a drop hammer used to break scrap iron into smaller pieces, the purpose of the guard being to prevent pieces of the iron from flying. *Green v. American Car & Foundry Co.* 163 Ind. 135, 71 N. E. 268; *Inland Steel Co. v. Kachwinaki*, 80 C. C. A. 571, 151 Fed. 219.

—a friction wheel and "rattlers" turned by it. *Whiteley Malleable Castings Co. v. Wishon*, 42 Ind. App. 288, 85 N. E. 832.

—a revolving fan placed in an inconspicuous position, although it was not usual to guard fans of that description. *Jones v. American Caramel Co.* 225 Pa. 644, 74 Atl. 613.

—a conveyor in a cement factory, consisting of a long, cylindrical, rotating rod, with flanges attached. *United States Cement Co. v. Cooper (Ind. App.)* 82 N. E. 981.

—a crane used to hoist molten metal, although portable, and capable of being used outside defendant's shop. *Crawford & McC. Co. v. Gose (Ind. App.)* 82 N. E. 984.

And a jointer used to "edge" boards, which consisted of two revolving knives about 16 inches wide, and projecting slightly above the surface of an iron table, was held in *Godwin v. Newcombe*, 1 Ont. L. Rep. 525, to be machinery within the meaning of the Ontario factories act, the dangerous parts of which are thereby required to be, so far as practicable, securely guarded.

And a commercial ice house which is extensively equipped with machinery, and in which numerous operatives are employed, is a factory within the meaning of the New York statute, so that the machinery therein must be guarded as required by that statute. *Rabe v. Consolidated Ice Co.* 51 C. C. A. 535, 113 Fed. 905.

But an emery wheel used for the pur-

Supp. 342; *Riceman v. Havemeyer*, 84 N. Y. 647; *McQuigan v. Delaware, L. & W. R. Co.* 122 N. Y. 618, 26 N. E. 13; *Clark v. Barnes*, 37 Hun, 389; *Koehler v. Syracuse Specialty Mfg. Co.* 12 App. Div. 50, 42 N. Y. Supp. 182, 1105; *Sheehan v. Standard Gas-light Co.* 87 App. Div. 174, 84 N. Y. Supp. 34; *Dene v. Arnold Print Works*, 181 Mass.

560, 64 N. E. 203; *Rooney v. Brogan Constr. Co.* 194 N. Y. 32, 86 N. E. 814.

Mr. J. W. Atkinson, for respondent:

The defendant was negligent in not properly guarding the track or rail upon which the electric crane was operated.

Glens Falls Portland Cement Co. v. Travelers' Ins. Co. 162 N. Y. 403, 56 N. E. 897;

pose of grinding is not within the statute. *National Drill Co. v. Myers*, 40 Ind. App. 322, 81 N. E. 1103.

—nor a machine described as a "liner," consisting of an iron frame on which rested a heavy, hollow, revolving roller, filled with steam, and heated to a high temperature, upon the top of which and revolving thereon was another and smaller solid iron roller. *Jenkins v. LaFayette Box Board & Paper Co.* 43 Ind. App. 463, 87 N. E. 992.

—nor the rapidly revolving cylinders of a printing press. *Bemis Indianapolis Bag Co. v. Krentler*, 167 Ind. 653, 79 N. E. 974.

—nor a square opening in a floor, below which was certain machinery consisting of an arrangement of rollers and knives which revolved at a high rate of speed, the purpose and use of which was to mix sawdust, damp clay, and other materials to the proper proportions and consistency for molding into shape for tiling and building material. *National Fire Proofing Co. v. Roper*, 38 Ind. App. 600, 77 N. E. 370.

The statute requires to be guarded only those parts of machinery which, in reasonable anticipation, may be a source of danger to the operatives. *Byrne v. Nye & W. Carpet Co.* 46 App. Div. 479, 61 N. Y. Supp. 741.

So, the statute is not intended to embrace shafting or set screws 14 or more feet above the floor, and reached only by a ladder. *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.* 162 N. Y. 399, 56 N. E. 897; *Dillon v. National Coal Tar Co.* 181 N. Y. 215, 73 N. E. 978.

Nor does the statute apply to shafting 8 feet from the floor. *Scialo v. Steffens*, 105 App. Div. 592, 94 N. Y. Supp. 305.

In *Laporte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277, the appliance in question was an emery belt used as a polishing machine, and in holding that the complaint did not show a cause of action, the court said: "There being nothing in the statute in question to indicate to the contrary, the general phrase, namely, 'and machinery of every description therein,' must, under the rule stated, be construed as meaning and including machinery or appliances belonging to or of the class or character designated as 'vats, pans, saws,' etc."

But in *Inland Steel Co. v. Kachwinski*, supra, it was held that the *Sullender* Case was decided merely upon questions of pleading, and that the emery belt in question might have been brought within the statute by averring and proving that it was of 30 L.R.A. (N.S.)

the same kind as an unguarded vat, pan, saw, etc., with respect to danger of operation and practicability of erecting guards. The language used in the *Sullender* Case does not tend to support this view, but it is supported by the fact that the plaintiff was given leave, upon request, to file an amended complaint.

A different view, however, was taken of the *Sullender* Case in *Pien v. Miznerr*, 41 Ind. App. 255, 83 N. E. 784, where it was held that the statute included a laundry mangle, and the appellate court believing that its decision was contrary to the rule of the *Sullender* Case, transferred the cause to the supreme court with the recommendation that the *Sullender* Case be overruled or modified; but when the case came before the supreme court in 170 Ind. 659, 84 N. E. 981, this question was not discussed at all, but the lower court was instructed to sustain a demurrer to the complaint upon the ground that the complaint disclosed contributory negligence on the part of the plaintiff.

The failure to provide a chute or conveyor to carry slabs of wood and other material from the second floor of a building, so as to remove the danger of a workman on the ground floor being injured by the refuse being thrown down, was held not to be a violation of the statutory duty to safeguard machinery, in *Crum v. North Vernon Pump & Lumber Co.* 34 Ind. App. 253, 72 N. E. 193, appeal dismissed in 163 Ind. 596, 72 N. E. 587.

A rather unusual view of a similar statute was taken in *Sutton v. Des Moines Bakery Co.* 135 Iowa, 390, 112 N. W. 836, where, in holding that the master was not liable for failing to place a safety hood on a dough mixer, the court said: "It is difficult to see how this statute imposes any greater duty upon the defendant than that which would rest upon it without special statute. The defendant would be negligent if it failed to properly guard these rollers for the purpose of preventing injury that would otherwise be likely to result to an employee, and it may be conceded that, on the question of defendant's negligence, it would have been proper to submit to the jury the issue as to whether the failure to provide a safety hood was negligence under the circumstances."

Upon the question, What are structures or scaffolds within statutes relating to safety of scaffolds, see note to *Caddy v. Interborough Rapid Transit Co.* ante, 30.

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Johansen v. Eastmans Co. 44 App. Div. 270, 60 N. Y. Supp. 708, 168 N. Y. 648, 61 N. E. 1130; Diamond v. Planet Mills Mfg. Co. 97 App. Div. 43, 89 N. Y. Supp. 635; Johnson v. Onondaga Paper Co. 112 App. Div. 667, 98 N. Y. Supp. 602.

The electric crane was a part of the "ways, works, and machinery," within the meaning of the employers' liability act.

Gunn v. New York, N. H. & H. R. Co. 171 Mass. 417, 50 N. E. 1031.

There was a defect in the condition of the ways, works, and machinery used in the business of the defendant.

Tate v. Latham [1897] 1 Q. B. 502; Wallace v. Cutler Paper Mills Co. 19 Sc. Sess. Cas. 4th series, 915; Morgan v. Hutchins, 59 L. J. Q. B. N. S. 197; Godwin v. Newcombe, 1 Ont. L. Rep. 525.

Chase, J., delivered the opinion of the court:

The plaintiff's fingers on his left hand were cut off by one of the wheels of the truck of a traveling crane in the defendant's factory. In the defendant's factory is a gallery about 20 feet above the ground floor, which extends around 3 sides thereof. There is a space between the side galleries of about 40 feet. Along the inner side of each side gallery there are timbers 12 inches square extending the whole length thereof, which are situated from 2½ to 3 feet above the floor of the gallery. On the center of these timbers are fastened rails like the heavy rails used for steam railroad tracks. The defendant maintains a crane for lifting and moving heavy weights in the lower part of the building, which is carried upon a truck extending across the space between the galleries and the wheels of said truck run upon said tracks. The machinery used by the defendant's employees faces the outside of the building. On the west gallery there is a long lathe near the center of the building, the back of which is about 3 feet from the timbers on which the rails are fastened, and near the end of such lathe, attached to a post, which is also west of the timbers, but partly east of the lathe, is a drill press with which the plaintiff was about to work on the morning of the accident. In the space surrounded by the lathe on the west, a cupboard on the north, the drill press on the south, and said timbers on the east, being a space about 3x12 feet, are kept certain form boxes and other things used in connection with the work conducted on said gallery. The plaintiff's work that morning was to drill certain brass valves with said drill press, and it was necessary for him in doing so to have one of the boxes or forms in which to hold such valves while they were being drilled, 30 L.R.A. (N.S.)

and he went to the space or room in which the boxes were stored, and looked over about 100 of them in an effort to find a form to fit the particular valves on which he was to work. As he returned through this small room, assorting the boxes, and continuing his effort to find a form, he thought he saw one that could be used by him, and, as he reached for it, he, in some way which does not appear, slipped or tripped, and as he did so, he put out his hand upon the top of the rail just as a wheel of the crane truck was passing, and his fingers were injured as stated.

The plaintiff had been employed in a machine shop for many years, and he was entirely familiar with the situation of the track and the use of the truck. The only question which is now before us for consideration is as to the alleged negligence of the defendant, under all the circumstances, in not guarding the rail. It is claimed by the plaintiff that the defendant failed to obey the labor law (Laws 1901, chap. 9, § 81), which requires that "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws, and machinery of every description, shall be properly guarded." There is no testimony in the record to show that it was practical to guard the rail, or that such a rail is now or ever has been guarded in any similar or other factory. The wheels of such truck were from 15 to 18 inches in diameter, and the structure of the truck extended above the wheels, so that it was not possible to guard the track by a covering and continue its use. It is not suggested, and it does not appear, how the track could have been guarded, except, perhaps, by the construction of a fence or partition at a point so far inside of the rail that it would not interfere with the truck, and at such a height as to prevent a person intentionally or by accident falling over it upon the track. The danger arising from unguarded vats, pans, saws, planers, cogs, gearing, belting, shafting, and set screws is more or less hidden, and consequently, when unguarded, they constitute special and unnecessary exposure to injury. The intention of the legislature in directing that certain things should be guarded was thereby to remove all unnecessary danger to persons employed upon or about such special dangers. Other mechanical appliances constituting similar hazards were doubtless included in the words "machinery of every description." Where, however, danger to employees does not exist or is not reasonably to be expected, it is not necessary, under the act quoted, for employers to guard even the

enumerated machines or appliances. *Dillon v. National Coal Tar Co.* 181 N. Y. 215, 73 N. E. 978; *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.* 162 N. Y. 399, 56 N. E. 897; *Scialo v. Steffens*, 105 App. Div. 592, 94 N. Y. Supp. 305. This court, in *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.*, said: "We think, however, that the legislature could not have intended that every piece of machinery in a large building should be covered or guarded. This would be impracticable. What evidently was intended was that those parts of the machinery which were dangerous to the servants whose duty required them to work in its immediate vicinity should be properly guarded, so as to minimize, as far as practicable, the dangers attending their labors. Human foresight is limited, and masters are not called upon to guard against every possible danger. They are required only to guard against such dangers as would occur to a reasonably prudent man as liable to happen." Page 403 of 162 N. Y.

There is no inherent danger in a track upon which a car or truck is run. The danger of remaining on a track when a car of any kind is approaching is neither hidden nor obscure. In this case, as we have seen, the track was elevated higher than an ordinary table, and the defendant's employees were not required to work upon or about it. Any contact with it would have to have been intentional and voluntary, or arise from some intervening accident. There was no defect in the floor of the room to precipitate an accident. The possibility of a person falling while in such room, and, in falling, of putting his hand in front of the wheel of the truck, was so remote that an ordinarily prudent man would not guard against it. The track has been maintained in the same way for several years, and no previous accident had occurred. An experienced man would not have anticipated such an accident. The remote possibility of a person falling in front of approaching wheels exists in every case where vehicles of any kind are moved, with or without trucks, about the floor of a factory building or otherwise, or where steam or other cars are propelled upon rails along unfenced passenger platforms. It is one of those necessary and obvious dangers not commonly guarded against by fences or partitions, and which should not be held to be within a general statute for the "protection of employees operating machinery." If the legislature require fences to be erected in such cases, it should so state in a more specific enactment.

The judgment should be reversed, and a 30 L.R.A. (N.S.)

new trial granted, with costs to abide the event.

Cullen, Ch. J., and Edward T. Bartlett, Haight, Vann, Willard Bartlett, and Hiscock, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

KLOTS THROWING COMPANY, Plff. in Err.,
v.
MANUFACTURERS' COMMERCIAL COMPANY.

(103 C. C. A. 305, 179 Fed. 813.)

Note — negotiability — terms of contract.

A note which, on its face, is subject to the terms of a contract between maker and payee, is not negotiable.

(June 14, 1910.)

Note. — Reference to extrinsic agreement as affecting negotiability of bill or note.

This note is confined in the main to cases where the reference is to an extrinsic agreement which must be consulted in order to ascertain its possible effect upon the obligation imported by the bill or note. It is not intended to cover cases where the bill or note itself embodies the whole agreement, *e. g.*, a case like *Siegel v. Chicago Trust & Sav. Bank*, 7 L.R.A. 537, where the note recited that it was given for the privilege of advertising in street cars, under conditions and for a term there definitely stated, the whole agreement apparently being embodied in the note itself.

The effect upon the question of negotiability of a reference in a bill or note to a mortgage or other instrument by which it is collaterally secured is not within the scope of this note. As to the negotiability of a note secured by mortgage, as affected by provisions in the mortgage, see note to *Brooke v. Struthers*, 35 L.R.A. 536.

For a note on the effect of a reference to account or fund as affecting negotiability of instrument, see *Hays v. Lapeyre*, 35 L.R.A. 647, and a supplemental note thereto on the same point in 8 L.R.A. (N.S.) 231.

On the question of reservation of title to property as affecting negotiability of note for purchase price, see note to *Choate v. Stevens*, 43 L.R.A. 277.

Where reference subjects paper to terms of agreement.

It may be stated as the general rule that wherever a bill of exchange or promissory note contains a reference to some extrinsic

Error to the Circuit Court of the United States for the Southern District of New York to review a judgment entered on a directed verdict for plaintiff in an action brought to recover the amount alleged to be due on a certain note. Reversed.

Statement by Noyes, Circuit Judge:

Writ of error to review a judgment entered upon a verdict directed by the court in favor of the defendant in error, who was the plaintiff below. In the following statement and opinion the parties are designated as in the circuit court.

The action was brought to recover upon a note† of which the following is a copy:

† If this instrument possesses the element of negotiability, it is, manifestly, a negotiable note. If it is non-negotiable, it is immaterial, for the purposes of this case, whether it should be described as a non-

contract in such a way as to make the bill or note subject to the terms of that contract, as distinguished from a reference importing merely that the extrinsic agreement was the origin of the transaction, or constitutes the consideration of the bill or note, the negotiability of the paper is destroyed.

National Council, K. & L. S. v. Hibernian Bkg. Asso. 137 Ill. App. 175 (bill of exchange providing "on presentation of certificate No. 32,004, issued by Knights and Ladies of Security, to James Kane, properly released"); Titlow v. Hubbard, 63 Ind. 6 (promissory note, "subject to certain conditions contained in a written agreement of this date between parties hereto"); Jenkins v. Caddo, 7 La. Ann. 559 (bill of exchange stipulating for payment according to a donation made by a certain company to the parish, "the same to be in accordance with a resolution of the police jury, passed October 6, 1840"); Goodenow v. Curtis, 33 Mich. 500 (promissory note to pay "according to a certain indenture of mortgage"); Grimison v. Russell, 14 Neb. 521, 45 Am. Rep. 126, 16 N. W. 819 (a condition on the back of a promissory note to the effect that it should not be payable in the event that a certain other note was paid); Dakin v. Graves, 48 N. H. 45 (promissory note payable when certain other notes are paid); Cook v. Satterlee, 6 Cow. 108, 16 Am. Dec. 432 (stipulation in bill of exchange to take up drawer's note for a certain amount); Rieck v. Daigle, 17 N. D. 365, 117 N. W. 346 (promissory note "subject to conditions of hotel purchase contract of even date herewith"); Reynolds v. Richards, 14 Pa. 205 (promissory note given "for consideration of the carpenter work in our article of agreement, for in-lot No. 126, November 3d, 1841").

In entire accord with this rule is *KLOTS THROWING CO. v. MANUFACTURERS' COMMERCIAL CO.*, wherein a promissory note 30 L.R.A. (N.S.)

New York, January 15th, 1906.

\$3,166.

Six months after date we promise to pay to the order of Regenerated Cold Air Company, thirty-one hundred and sixty-six 00/100 dollars at 487 Broadway, New York City, with interest at 6 per cent per annum.

Value received, subject to terms of contract between maker and payee of October 25th, 1905.

No. — Due July 15th, '06.

Klots Throwing Company,
H. D. Klots, Prest.

The complaint alleged that the note had been indorsed and assigned by said Regenerated Cold Air Company to the plaintiff,

negotiable note or as a written agreement for the payment of money. Therefore, without defining terms, and for convenience, it is designated as a note,—negotiable or non-negotiable.

contained a stipulation that it was "subject to terms of contract between maker and payee of October 25th, 1905," and the following additional cases which are sufficiently set out in that case:

McComas v. Haas, 107 Ind. 512, 8 N. E. 579; Cushing v. Field, 70 Me. 50, 35 Am. Rep. 293; Dilley v. Van Wie, 6 Wis. 209 ("subject to the provisions contained in an agreement this day made between said Carter and myself").

So, in *American Exch. Bank v. Blanchard*, 7 Allen, 333, Bigelow, Ch. J., in passing upon the question of the negotiability of a promissory note containing a provision that it was payable "subject to the policy," gave the reason for the rule: "It was clearly intended to be made subject to a policy of insurance then existing between the parties. This is the result, not of mere conjecture, but is a reasonable inference from the facts which are apparent on the face of the contract. Thus interpreted, it is too plain for discussion that the promise is in its nature contingent, and dependent for its fulfilment on other stipulations than those which are inserted in the body of the contract. To determine whether, at its maturity, any money would become due upon it, it would be necessary to have recourse to the policy therein referred to, and to ascertain whether any loss had occurred which would constitute a valid claim against the company in favor of the promisors, and operate as payment or set-off in whole or in part for the amount which the defendants had agreed by their promise to pay to the company. The legal effect of the stipulation was to incorporate the policy into the contract for the payment of the money, and to make the latter dependent on the contingency that no claim would arise on the policy against the company before the expiration of the time when the promise would mature. Such a contract clearly comes within the principle on which it is held that promises which are not ab-

which was the lawful owner and holder thereof. The answer alleged, among other things, that said Regenerated Cold Air Company had failed to perform its part of the agreement referred to in the note, and set up by way of counterclaim a demand for damages for such nonperformance. Upon the trial the court ruled that the note was a negotiable instrument, basing its decision upon the opinion of this court reported in 170 Fed. 311, 95 C. C. A. 203, reversing a judgment in the case sustaining a demurrer to the complaint. Consequently the court further ruled that the defendant was not entitled to establish defenses available as against the payee of the note, and directed a verdict for the full amount thereof.

Argued before Lacombe, Coxe, and Noyes, Circuit Judges.

Messrs. John L. Wilkie and Chester A. Jayne, with Messrs. Gould & Wilkie, for plaintiff in error.

Messrs. Robert Louis Hoguet and William L. Ransom, with Messrs. Ivins, Mason, Wolff, & Hoguet, for defendant in error.

Noyes, Circuit Judge, delivered the opinion of the court:

The trial judge misapprehended our former opinion in this case. We did not hold that the note in question was a negotiable note. We merely held that whether it was negotiable or not, its indorsement and assignment gave the plaintiff the right to recover thereon. If the note were negotiable, the plaintiff would recover as indorsee; if non-negotiable, as assignee. It was unnecessary to determine the question of negotiability. The case as now presented turns upon this question of negotiability. If the note was negotiable, the trial court properly directed a verdict for the indorsee, for the defendant was not entitled to establish against it the defenses offered. If, on

solute as to amount or event cannot be deemed negotiable. The necessity of certainty and precision in mercantile affairs, and the inconveniences which would result if paper securities were encumbered with conditions and contingencies, have led to the establishment of an inflexible rule that a promise, to be negotiable, must be absolute."

In *Kingston v. Long*, 4 Dougl. K. B. 9, wherein it appeared that an order was given to pay money, "provided the terms mentioned to them in letters of that date were complied with," it was held that it was not a negotiable bill of exchange, since it was made payable only upon a contingency. To the contention raised that, "as the drawer had given all the appearance of a negotiable bill to the instrument, it ought to be presumed that the condition was such as would not prevent its negotiability," Buller, Justice, said in answer: "It is not true that the drawer has given this instrument all the appearance of a bill of exchange; for it appears on the face of it that it is not to be payable at all events, but only upon a contingency."

In *First Nat. Bank v. Badham*, 86 S. C. 170, 68 S. E. 536, certain notes were held non-negotiable on account of the following reference contained therein: "For value received in one machinery, as per contract November 23, 1899." The court said: "This provision is notice to the commercial world of a contract made November 23, 1899, in connection with the purchase of the machinery for which these notes were given; the terms of the contract do not appear on the face of the notes, but it is sufficiently referred to and stated to inform those who deal with these notes they must take the contract into consideration in so doing."

In *Chicago Trust & Sav. Bank v. Chicago Title & T. Co.* 190 Ill. 404, 83 Am. St. 30 L.R.A. (N.S.)

Rep. 138, 60 N. E. 586, a promissory note payable in a certain time after the completion of certain work "according to the requirements of a certain agreement of even date herewith" was held not to be negotiable.

In *Hays v. Gwin*, 19 Ind. 19, a note contained the following provision: "Provided, however, that prior to the time when this note becomes due, said Ash [payee] shall pay and have satisfaction entered of record of a certain mortgage given by him to . . . , for \$250, dated August 26, 1851, which mortgage is on the lands for which this note is given." In a suit upon this note by an indorsee, it was held that it was not negotiable.

In *Kingsbury v. Wall*, 68 Ill. 311, the bill of exchange declared on was only payable in the event of the happening of a certain contingency, viz.: that the party to whom property to a certain amount was to be delivered should have in his hands, ready to be delivered, a deed from certain parties for specific property described therein. The court said: "The single question presented by this record is whether the instrument upon which the action is founded is assignable, so as to enable the assignee to maintain the suit in his own name. We think it is not. . . . It is indispensable that all bills of exchange or promissory notes, to be assignable under our statute or at common law, must be certainly payable, and not dependent on any contingency either as to the event or the fund out of which payment is to be made, or the parties by or to whom payment is to be made."

An ordinary promissory note with an added stipulation that "this note is given for part payment of rent of certain pasture fields, and is not to be paid unless I have the use of said premise, in accordance with a certain lease and agreement," is not

the other hand, the note was non-negotiable, the action of the court was manifestly erroneous.

In examining the question of negotiability, it is important to recognize at the outset the distinction between it and any question of pleading. The plaintiff, throughout its brief, insists that because a note contains no conditions precedent, performance of which must be alleged in suing upon it, it is a negotiable instrument. But this conclusion does not follow. The conclusion which does follow is that the plaintiff, upon proving the note, is entitled to recover the full amount thereof in the absence of defenses established by the defendant. Thus, in our former opinion, we said that performance of the contract referred to in the note was not made a condition precedent to the payment thereof; that, as a consequence, it was unnecessary to plead such performance, and that non-performance could be set up, if at all, only

by way of defense. But, as already pointed out, we did not hold that, on account of the absence of conditions precedent, the note was a negotiable instrument.

It is elementary that a promise to pay must be absolute and unconditional to make the instrument containing it a negotiable note. If payment be dependent upon a condition or contingency, the instrument is not negotiable. In many cases the contingency is expressed in the form of a condition precedent. But we do not think it necessary that it should be so expressed. In our opinion, when a note contains special stipulations, and its payment is subject to contingencies, it fails to possess the character of a negotiable instrument, and is subject in the hands of an assignee to any defense which would be available if it were still held by the original payee. See *McClelland v. Norfolk Southern R. Co.* 110 N. Y. 469, 1 L.R.A. 299, 6 Am. St. Rep. 397, 18 N. E. 237. And, as bearing especially

negotiable. *Jennings v. First Nat. Bank*, 13 Colo. 417, 16 Am. St. Rep. 210, 22 Pac. 777.

In *Baird v. Underwood*, 74 Ill. 176, where a note provided for the payment of a certain sum "on condition said amount is not provided for as agreed by J. Updike," it was held not to be negotiable.

In *Haskell v. Lambert*, 16 Gray, 592, it was held that a promissory note containing a stipulation that it was to be held as collateral security for certain specified debts for which different persons were liable was not negotiable, since, upon the payment of the debts by the principal debtors, the note would not be payable.

To the same effect, see *Robins v. May*, 11 Ad. & El. 213; *American Nat. Bank v. Sprague*, 14 R. I. 410; *Hall v. Merrick*, 40 U. C. Q. B. 566; *Sutherland v. Patterson*, 4 Ont. Rep. 565.

As indicated at the beginning of the note, the question whether a reference in a bill or note to collateral agreements or instruments by which it is itself secured affects the negotiability of the note, is not within the scope of this note.

In *Oatman v. Taylor*, 29 N. Y. 649, wherein several notes were given "for interest on a loan . . . according to the conditions of a certain writing," and others were "for value received, . . . according to the conditions of a certain agreement in writing" the effect of the stipulations upon the negotiability of the paper was not decided, Johnson, J., merely saying: "If it were necessary to determine the question whether these several instruments, with the exception of the first [which contained no qualifying words], were negotiable, so as to protect the holder taking them before maturity from the provisions of the contract, without any other notice than what appears upon their face, I should incline most decidedly to the opinion that they were not, but would

be affected and controlled by the contract, in the hands of any holder. . . . I have not thought it necessary, however, that this question should be passed upon here."

Anything put upon any portion of the face or back of a promissory note by the maker, before delivery, is a part of the contract. Hence it was held in *Costello v. Crowell*, 127 Mass. 293, 34 Am. Rep. 367, that the words, "Given . . . with agreement," written on the margin of a promissory note, destroyed its negotiability.

And in *Parker v. American Exch. Bank* (Tex. Civ. App.) 27 S. W. 1071, certain promissory notes, each indorsed on back, "This note is given in accordance with and subject to the terms of a contract made February 10, 1891," were held to be non-negotiable.

In *Van Zandt v. Hopkins*, 151 Ill. 248, 37 N. E. 845, affirming 40 Ill. App. 635, the words "Ctf. of stock No. 113 for 50 shares of stock . . . to be surrendered on payment of this note," were written after the signature of the makers, and the court held that the negotiability of the paper was impaired because the payment of the note was subject to a contingency.

Where reference to consideration or origin of transaction.

As has been stated, the reference in a bill or note to some extrinsic agreement, in order to destroy its negotiability, must be such as indicates that the paper is to be burdened with the conditions of that agreement. Where, therefore, the reference is simply a recital of the consideration for which the paper was given, or is merely a reference to the origin of the transaction, its negotiability is not affected thereby.

Ryland v. Brown, 2 Head, 270 (the notes recited the consideration as follows: "The same being in part for an 85-acre and

upon the facts in this case, we think that whenever the payment of a note is expressly made subject to the equities growing out of, and defenses based upon, an existing or contemporaneous agreement, a person taking such note holds it subject to such equities and defenses.

The distinction between conditions precedent, performance of which must be alleged in bringing the action, and contingencies and equities which must be set up by way of defense, and which yet serve to qualify the obligation to pay the note, and deprive it of negotiability, may be shown

by illustration. Thus, let us suppose that the note in suit contained the following stipulation: "This note in the hands of all holders is subject to all defenses which would be available to the maker, based upon the contract between the maker and the payee of October, 1905, in the same manner and to the same extent as if it were held by the payee."

Such a provision would not constitute a condition precedent. It would not be necessary to plead performance of the contract in a suit upon the note. And yet it could hardly be claimed that an assignment of

100-acre tract of land, this day bought of him"); *Doherty v. Perry*, 38 Ind. 15 (promissory note given for certain patent right); *Hubert v. Grady*, 59 Tex. 502 (promissory note "for part of the purchase money in a tract of land purchased" of certain parties); *Smilie v. Stevens*, 39 Vt. 315 (provision in instrument for return of the maker's guaranty of the payee's note to another); *Treat v. Cooper*, 22 Me. 203 ("contents of this note" to be paid on mortgage of third party to payee); *Wood v. Shaw*, 3 Lower Can. Jur. 169 (notes given for insurance premiums on certain vessels, containing such recital); *Elliott v. Smitherman*, 19 N. C. (2 Dev. & B. L.) 338 (promissory note reciting the purchase of another note).

In *First Nat. Bank v. Michael*, 96 N. C. 53, 1 S. E. 855, wherein it appeared in a promissory note that it was given as the balance of the purchase money for certain land "sold this day by . . . to me, and for which I hold a bond for title," Mr. Justice Merrimon said: "The defendant contends that the reference in the body of the bond to the consideration for which it was given rendered it non-negotiable. We do not think so. This inference does not imply a condition or limitation, affecting the promise to pay the sum of money specified; it simply recites the particular consideration, and is intended to mark the bond as of a particular transaction between the original parties to it, for their convenience. This view is strengthened by the fact that the bond is expressly in terms made payable to 'order,' thus indicating the purpose of the parties to make it negotiable. The mere fact that the particular consideration of the note is mentioned in it, and that it possibly might involve or give rise to equities between the parties to it, cannot prevent its negotiability by indorsement. To have this effect, it must appear from the reference to it in the note, that it qualifies the promise to pay the sum of money specified, and renders it conditional, or the amount to be paid uncertain. A different rule would much embarrass business transactions involving negotiable notes and bonds, and tend to impair the freedom and confidence that ought to prevail and be upheld in the course of general business and trade."

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Where the note contained a reference that it was "for a part of the third payment on the Garee plantation purchased of said Gregg, as per agreement of the 14th February, 1874," the court held that its negotiability was not affected. *Bank of Sherman v. Apperson*, 4 Fed. 25.

In *Stevens v. Blunt*, 7 Mass. 240, it was held that a promissory note payable on a certain named date, or when "he [payee] completes the building according to contract," was negotiable.

See to the same effect, *Goodloe v. Taylor*, 10 N. C. (3 Hawks) 458; *Garner v. Hall*, 114 Ala. 166, 21 So. 835.

In *Clanin v. Esterly Harvesting Mach. Co.* 118 Ind. 372, 3 L.R.A. 863, 21 N. E. 35, a recital that "this note is given to secure the payment of the Universalist church debt" was held not to render the obligation collateral or conditional, since it merely related to the consideration upon which the note was given.

In *Phelps & B. Windmill Co. v. Honeywell*, 7 Kan. App. 645, 53 Pac. 488, the note recited that it was given for the erection of certain improvements upon real property, "pursuant to previous written order in that behalf; and the execution, delivery, and acceptance of this note shall not in any way or manner be deemed a waiver of any lien [the payee] may have therefor upon said real property in said written order described." Apparently the court assumed that the reference to the written order in the note was merely a recital of the origin of the transaction, and therefore in nowise affected the negotiability of the instrument, for it said nothing about the effect of this particular stipulation.

And no question was raised as to the negotiability of the note in *Jewett v. Lyon*, 3 G. Greene, 577, where it contained a recital that it was in part payment for land which was deeded to the grantor by a certain party.

Nor was any raised in *Bringham v. Leighty*, 61 Ind. 524, where the provision in a promissory note was "given for purchase money on real estate; if title defective, note void."

In *Taylor v. Curry*, 109 Mass. 36, 12 Am. Rep. 661, it was held that a promissory note given to an insurance company is not rendered unnegotiable by bearing on its face

the note would shut out the defenses which the parties had stipulated should exist in the case of an assignment. Any such claim, if sustained, would deprive the parties of their right to make lawful contracts. The obligation to pay in such a case as this would be qualified and conditional, but would not depend upon the fulfilment of any condition precedent.

The real inquiry in the present case is whether the promise in the note should be treated as the substantial equivalent of the supposititious promise we have examined. Manifestly, if the provision "subject to

terms of contract between maker and payee" constitutes merely a reference to the agreement or a statement of the consideration for the note; it does not impair the negotiability of the latter. So, if it merely constitutes notice of the existence of the contract, and not of the breach thereof, it would not affect negotiability. But the evident purpose of the parties to this note was to go further, and make it subject to and to impress upon it the defenses to which the maker would be entitled under the contract. The assignee took it in that condition. To deprive the maker of those defenses, upon

the words, "on policy No. 33,386." The court said: "Such a reference may be for mere convenience, or for any other reason, but it cannot be interpreted as a modification of the promise."

To the same effect, see *Union Ins. Co. v. Greenleaf*, 64 Me. 123; *Barker v. Valentine*, 10 Gray, 341; *White v. Haight*, 16 N. Y. 310; *Bresce v. Crumpton*, 121 N. C. 122, 28 S. E. 351.

So, in *Pendleton v. Knickerbocker L. Ins. Co.* 7 Fed. 169, it was held that a note was negotiable where it contained a clause reading, "for premium on policy No. 2,346, which policy shall become void if this draft is not paid at maturity."

In *Williams v. Albany City Ins. Co.* 19 Mich. 451, 2 Am. Rep. 95; *Williams v. Republic Ins. Co.* 19 Mich. 469; *Roehner v. Knickerbocker L. Ins. Co.* 63 N. Y. 165; *Kirk v. Dodge County Mut. Ins. Co.* 39 Wis. 138, 20 Am. Rep. 39; and *Washington County Mut. Ins. Co. v. Miller*, 26 Vt. 77,—wherein it appeared that certain notes were given for premiums on insurance policies of certain numbers, the effect of the reference to the policies on the negotiability of the notes does not appear to have been considered.

And, in *Berenson v. London & L. F. Ins. Co.* 201 Mass. 172, 87 N. E. 687, where an instrument was held not to be negotiable because of a specified condition not involved in this note, it seems that a reference therein to a certain numbered insurance policy would not have affected its negotiability.

A promissory note containing a mode by which it may be discharged is not rendered non-negotiable by the fact that another contract is referred to; thus, in *Pool v. McCrary*, 1 Ga. 319, 44 Am. Dec. 655, it was held that a provision in a promissory note which was for a certain sum, payable unconditionally on a day named, enabling the makers thereof to relieve themselves from liability thereon provided they should secure the discharge of the payee from liability on a certain other obligation referred to in the note, did not render the note non-negotiable.

In *Markey v. Corey*, 108 Mich. 184, 36 L.R.A. 117, 62 Am. St. Rep. 698, 66 N. W. 30 L.R.A. (N.S.)

493, wherein the note contained a provision that it was "given in accordance with the terms of a certain contract, under the same date, between the same parties," the court held that the negotiability of the paper was not impaired; and apparently this is the effect of *Biegler v. Merchants' Loan & T. Co.* 164 Ill. 197, 45 N. E. 512.

In *Jury v. Barker*, El. Bl. & El. 450, the promise to pay in the note was, "as per memorandum of agreement." Lord Campbell, Ch. J., said: "The note here is an absolute and unconditional promise as to the payer, the payee, the amount, and the date. If the addition of the words in question make the promise conditional, it is on the defendant to show that, and he has not done so."

And a similar holding was made in *Brill v. Crick*, 1 Mees. & W. 232.

In *Bank of Louisiana v. Williams*, 21 La. Ann. 121, it seems that the instrument involved was a non-negotiable promissory note, and was questioned upon a point not involved in this note. It contained a stipulation, however, that the makers would "comply with all the conditions of the mortgage this day made by us, and also with the obligations of the charter of the said bank." It appears from what the court said, that the stipulation in the note would not have impaired the negotiability of the paper had it been of that nature. Howell, J., said: "The further stipulations, . . . impose no condition and propose no contingency on which payment is to depend, but recognize accessory obligations contracted or enacted for the security of the payment, and their omission would not have impaired the obligation to pay the money."

No case other than *KLOTS THROWING CO. v. MANUFACTURERS' COMMERCIAL CO.* appears to have expressly considered the question as to whether the reference to some extrinsic contract in the bill or note, in order to destroy negotiability, must disclose a condition precedent.

It will be observed that in many of the cases above cited, in which the reference was held to destroy negotiability, it did not disclose a condition precedent, but, at most, a defense.

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the ground of the negotiability of the note, would work great injustice. And we think that we are not required to reach such result. As between the maker and the payee of a note, payment is, as a matter of law, subject to existing equities and defenses, even in the absence of any statement to that effect in the note. It is not too much to hold that when a promise is expressly limited by a provision in the note itself, assignees should take it subject to such limitation. In our opinion, the special stipulation in the present note limits and qualifies the obligation to pay so that it is not absolute, but is a *prima facie* obligation, subject to be defeated by the maker's defenses.

Authorities cited by the plaintiff as well as by the defendant support these views. Thus, in *Jewett v. Lyon*, 3 G. Greene, 577, referred to by the plaintiff, it was said in a suit by the assignee of a promissory note containing a stipulation for a deduction from the amount thereof in a certain contingency: "The obligation to pay is in all respects a promissory note, and the stipulations attached to it do not change in any respect its character, or weaken the liability of the maker. It only provides for a certain contingency, the onus to establish which lies upon the defendant. Upon the introduction of this note in evidence, the plaintiffs made out a *prima facie* case, and in the absence of any rebutting testimony on the part of the defendant, the plaintiffs were entitled to recover, and hence the court did not err in overruling the motion for a nonsuit."

So, in *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293, it was held that a note payable to order, on the face of which was the following indorsement: "This note is subject to a contract made November 13, 1874,"—was not negotiable, and that an assignee took it subject to all the equities between the original parties.

In *American Exch. Bank v. Blanchard*, 7 Allen, 333, an instrument containing a promise to pay a stipulated sum at a fixed time, "subject to the policy," was held, in a suit by the indorsee, not to be a negotiable promissory note because the promise was not absolute. The court said: "Thus interpreted, it is too plain for discussion that the promise is in its nature contingent, and dependent for its fulfillment on other stipulations than those which are inserted in the body of the contract. To determine whether at its maturity any money would become due upon it, it would be necessary to have recourse to the policy therein referred to, and to ascertain whether any loss had occurred which would constitute a valid claim against the company in 30 L.R.A. (N.S.)

favor of the promisors, and operate as payment or set-off in whole or in part for the amount which the defendants had agreed by their promise to pay to the company."

In *McComas v. Haas*, 107 Ind. 512, 518, 8 N. E. 579, 582, the note contained the following clause: "This note is given in consideration of, and is subject to, one certain contract," etc., and the court said: "Although the note in suit was, by its terms, payable at a bank in this state, with the clause or condition quoted on its face, it was not negotiable as an inland bill of exchange, and was not governed by the law merchant; but the appellant, as the assignee thereof before maturity, took such note subject to all the equities existing between the appellee as its maker, and S. B. J. Bryant as the payee and assignor thereof."

In *Dilley v. Van Wie*, 6 Wis. 209, 212, a note contained the following provision: "Subject to the provisions contained in an agreement this day made between said Carter and myself." In a suit by the indorsee, the court said: "The instrument in writing on which judgment was rendered is not a promissory note. Its payment is made subject to a contingency, or rather to the equities between the parties, growing out of a contemporaneous agreement between the same parties. This is expressed upon the face of the (so-called) note, and deprives it of its commercial character."

In *Bringham v. Leighty*, 61 Ind. 524, a note contained the following provisions: "This note was given for purchase money on said estate. If title defective, note void."

In an action on the note by an indorsee, it was held that it was not necessary to allege in the complaint that the title to the real estate referred to was not defective, the subject of title in such connection being entirely a matter of defense.

Upon principle and upon what we regard as the weight of authority, we reach the conclusion that the note in question was not negotiable, and that the trial court erred in its rulings.

The judgment of the Circuit Court is reversed.

PENNSYLVANIA SUPREME COURT.

H. J. SHANK, Appt.,
v.

EDISON ELECTRIC ILLUMINATING
COMPANY.

(225 Pa. 393, 74 Atl. 210.)

Master — fellow servants — electrician
and lineman.

The electrician and engineer of an electric
light company are fellow servants of a

lineman, where they exercise no supervisory power over him or the work, so that the company is not liable for their negligence in turning on the current while he is in a position of danger, so as to cause injury to him.

(June 22, 1909.)

APPEAL by plaintiff from an order of the Court of Common Pleas for Lancaster County refusing to take off a nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The opinion of the trial court in discharging the rule to take off the nonsuit, which is referred to in the opinion, is as follows:

Note. — Who are fellow servants of linemen.

Cases are not included in this note in which, although the question of fellow servants may have been raised, it was unnecessary for the court to pass upon that question, as, for instance, where the plaintiff fails to show any negligence upon the part of the defendant, or where the servant was himself guilty of negligence which contributed to the injury.

So, too, where the question of fellow servants is determined by statute, a different question is presented, and cases involving that question have not been taken.

So, cases are excluded where, as in *Lord v. Wakefield*, 185 Mass. 214, 70 N. E. 123, no question is made of the negligent servant's being a superintendent.

So, too, cases have not been taken where the lineman was injured in the performance of some duty in no wise peculiar to his employment as lineman; as, for instance, while felling trees or digging holes.

In some cases the question of fellow servant, although raised, is eliminated by the finding that the duty of inspecting the poles in climbing which the servant was injured devolved upon the servant himself. Cases of this character will be found in a note to *Lynch v. Saginaw Valley Traction Co.* 21 L.R.A. (N.S.) 774.

A good example of this class of cases is *McGorty v. Southern New England Teleph. Co.* 69 Conn. 635, 61 Am. St. Rep. 62, 38 Atl. 359, where the court said: "We have no occasion, upon the facts found, to consider whether the foreman Phelps was a fellow servant of the plaintiff. . . . We must assume that, although he knew that, in obedience to the order of the foreman, he was required to do the work upon the pole, yet he was to rely upon his own judgment in determining whether it was safe to climb it without testing it or supporting it, and that it was his right to secure the pole before climbing it if he doubted its safety."

A few cases have been included in which 30 L.R.A. (N.S.)

"The testimony in the trial of this case showed that the plaintiff was in the employ of defendant company as a lineman on September 15, 1895, and had been so employed for several years. On that day there was some trouble with the wires of the company, which several attempts had been made to locate, at the switch board in the power plant. After ascertaining that the trouble was not on the circuit where they supposed it to be, the plaintiff returned to the power plant, and in the presence of the foreman of the linemen, the chief engineer of the company, and its chief electrician, or consulting engineer, he made another attempt, and did locate the circuit on which the trouble was. He then threw off the switch of the circuit, which turned the current from it, and told

the injured servant was not, strictly speaking, a lineman, but was employed in a somewhat similar capacity, and was injured by dangers similar to those incurred by linemen. In cases of this kind, however, the character of the workman and the nature and cause of the injury will be fully set forth.

The real bearing of different cases upon any given concrete question involving the doctrine of fellow servants cannot be determined without bearing in mind the fact that the term "fellow servant" is used in two distinct senses; and the yet more important fact that there are two entirely distinct tests applied in different jurisdictions to determine who are fellow servants in one of the two senses mentioned above.

Two servants in the employ of a common master may not be fellow servants within the meaning of the rule relieving the master from liability for injuries to his servant, caused by the negligence of a fellow servant, for two distinct reasons: First, the work in which one servant is engaged may be entirely disconnected with the work in which the other is engaged, so that it cannot be said that the employment is common, and one servant would have no knowledge at all of the conditions under which the other is working, could make no provisions for his own protection, nor in any way restrain the conduct of the other servant, so that none of the reasons upon which the fellow-servant rule is said to be based would exist; second, one of the two servants, although working in the same department with the other, may be intrusted with a certain degree of superintendence, so as to be, in the view of the law, a representative of the master, or, as it is commonly called a vice principal.

There are two well-recognized rules as to the determination of the question whether a servant is a vice principal or not; one of which depends upon the character of the act causing the injury, the other upon the grade of the servant.

As to what servants are deemed to be in the same common employment, apart from

these three people to leave it open. He, accompanied by the foreman part way, went over the line and found that the wire of defendant company had come in contact with the wire of another company on East King street, about 1½ miles from the power plant. He climbed a pole, and was about to properly adjust the wires, when he received a severe shock and was severely injured, for which injury he seeks to recover damages in this case.

"In his statement, as amended, the plaintiff alleges four acts of negligence: (1) 'that the wires were crossed in another portion of the city; (2) that the defendant had an inexperienced foreman; (3) that its wires were not properly insulated; and (4) 'that he turned or pulled the main switch

that conducted electricity over the line that he subsequently went over, and was injured, and at the time he did it, and previous to his starting away from said power house, the defendant had knowledge thereof, and the representatives or officials and persons in employ of said company were informed thereof by the plaintiff, and also requested not to move the said switch, but to leave the same in the condition in which the plaintiff put it; that he was going out on the line to search for the trouble on the same, and repair or correct it; that after the plaintiff left, and unknown to the plaintiff, the said defendant or its employees turned the said switch without the knowledge of or informing the plaintiff thereof, and caused the electricity to pass over the

statutes, where no questions as to vice principalship arise, see note to *Sofield v. Guggenheim Smelting Co.* 50 L.R.A. 417.

Upon the subject, Vice principalship considered with reference to the superior rank of a negligent servant, see note to *Stevens v. Chamberlain*, 51 L.R.A. 513.

Upon the subject, Vice principalship as determined with reference to the character of the act which caused the injury, see note to *Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 33.

I. Where no question of vice principalship is involved.

Members of the same gang, although performing somewhat different work, are fellow servants.

Thus, two members of a takeout gang of a telephone company are fellow servants while one is on a pole cutting the wire, and the other is on the ground, pulling it down. *Wight v. Cumberland Teleph. & Teleg. Co.* 137 Ky. 299, 125 S. W. 718.

So, linemen engaged in tying wires to the poles are fellow servants of the men engaged in pulling and stretching wires. *Eastern Kentucky Home Teleph. Co. v. Mellon (Ky.)* 116 S. W. 709.

And employees who are engaged in removing an electric wire, not under direction of any foreman, but acting in accordance with their own judgment, are fellow servants one with the other. *Wagner v. Portland*, 40 Or. 389, 60 Pac. 985, 67 Pac. 300.

A lineman engaged in resetting poles broken down by blasting by a crew engaged in repairing the roadbed is a fellow servant of the members of such crew, where he has a right to call upon them for any assistance which he may need, so that he cannot recover for injuries due to their negligence in connection with the work of repairing the roadbed. *Neal v. Northern P. R. Co.* 57 Minn. 365, 59 N. W. 312.

The negligence of a fellow servant is the proximate cause of injury to a lineman in the employ of an electric lighting company by the fall of a pole, which results from the selection by such employee, from among others, and the attempted use, of a pike pole

as a brace, the point of which has become blunted, so that it is no longer fit for the use to which he puts it. *Towne v. United Electric Gas & Power Co.* 146 Cal. 766, 70 L.R.A. 214, 81 Pac. 124, 2 A. & E. Ann. Cas. 905.

—linemen as fellow servants of members of gang erecting poles.

Linemen who are injured while at work on poles are generally held not to be the fellow servants of the employees who erected the poles originally.

Thus, linemen who set an electric trolley pole will not be held to be the fellow servants of a lineman who is injured two years afterwards because of their negligence in setting a defective pole, where there is no evidence that any of the linemen in defendant's employ at the time of the accident were employed in that capacity at the time the pole was set in the original construction of the road, or that they had any knowledge or means of knowledge of the original defect in the pole, except by taking it out of the ground. *Livingway v. Houghton County Street R. Co.* 145 Mich. 86, 108 N. W. 662.

So, the members of a gang of workmen digging holes and setting the poles for the construction of a telephone line, under their own foreman, are not the fellow servants of the members of a gang engaged in stringing the wires on the poles, under the supervision of a separate foreman. *Ault v. Nebraska Teleph. Co.* 82 Neb. 434, 130 Am. St. Rep. 686, 118 N. W. 73.

And a lineman injured by the pulling out of a pin which he grasped in climbing a pole is not a fellow servant of the employee who originally placed the pin in the pole. *Chisholm v. New England Teleph. & Teleg. Co.* 185 Mass. 82, 69 N. E. 1042.

A servant who nailed the bracket upon a pole to which the glass insulators are fastened is not a fellow servant of the lineman who subsequently climbs the pole to tie the wires to the insulators. *Eastern Kentucky Home Teleph. Co. v. Mellon*, supra.

The foreman of a construction gang, and his assistants, by whom a semaphore was

wire to where the plaintiff received his injuries,' etc. No testimony was produced to support the first two allegations of negligence, nor was there any testimony to show that the insulation of the wires was imperfect, or that any other kind of insulation was in general use, or, if another kind had been used, it would have prevented the accident. The testimony in support of the fourth act of negligence was that the chief engineer, who had charge of running the engines of the company in the same room in which the switch board was located, together with the chief electrician, or consulting engineer, some time after the plaintiff left to look for the trouble on the circuit on which he had located it, went to the switch board and tested for the trouble, which they did

not find. The engineer then changed the switch so as to turn the current on that circuit.

"We entered judgment of nonsuit at the trial because we were of the opinion that the turning on of the current into the wire upon which plaintiff was at work was the act of a coemployee, for which the defendant company was not liable. In this application to strike off the nonsuit, the only question for our consideration is whether the man who had charge of the engines in the room in which the switch board was located, and who turned on the current, or the chief electrician, or consulting engineer, who was with him, were coemployees of the plaintiff or not.

"The cases are numerous in Pennsylv-

constructed, are not the fellow servants of the plaintiff, who was engaged in operating the semaphore. *Welty v. Lake Superior Terminal & Transfer R. Co.* 100 Wis. 128, 75 N. W. 1022.

II. Fellow servants as dependent upon existence of vice principalship.

In Kentucky, where the superior-servant rule prevails, several cases have held that a telephone or telegraph company is liable for injuries caused to a lineman by the negligence of one in charge of the work, and superior to the lineman. *Cumberland Teleph. & Teleg. Co. v. Ware*, 115 Ky. 581, 74 S. W. 289; *Western U. Teleg. Co. v. Holtby*, 29 Ky. L. Rep. 523, 93 S. W. 652; *Cumberland Teleph. & Teleg. Co. v. Graves*, 31 Ky. L. Rep. 972, 104 S. W. 356.

In the majority of the jurisdictions, however, vice principalship is determined by the character of the act causing the injury, and much conflict exists, even among cases presenting facts very similar. With the exception of the two or three cases cited immediately below, the cases have been grouped so far as possible in accordance with the general nature of the alleged negligent acts.

The foreman of a gang of men engaged in stringing telegraph wires over live electric wires of third parties may be at times a fellow servant of the linemen, and at other times a representative of the master; and the question whether he is a fellow servant of the linemen in the doing of the alleged negligent act is ordinarily a question of fact, to be submitted with proper instructions to the jury. *Western U. Teleg. Co. v. Nolan*, 132 Ill. App. 427.

Testimony that an employee temporarily placed in charge of a gang of nine or ten men engaged in constructing a telegraph line does not receive any greater wages than the other linemen is not evidence to show that he is not a vice principal. *Fritz v. Western U. Teleg. Co.* 25 Utah, 263, 71 Pac. 209.

The negligence of a foreman in charge of a gang of men at work on a tower car on the defendant's electric railroad, in not protecting the men whom he had ordered to

proceed with the car over a bridge, from the danger of being struck by an approaching train, was the negligence of the company, for which it was liable. *Hillis v. Spokane & I. E. R. Co.* (Wash.) 110 Pac. 624.

Servants held to be vice principals by general nature of duties imposed upon them.

In a few cases, the general nature of the duties imposed upon a superintendent or foreman has been held such as to make him a vice principal of the master. It is to be noted that in these cases the superintendent or other employee has the absolute control of the work imposed upon him by the master.

Thus, a wire chief of a telephone company, to whom the company's system of business required all defects, either in wires or telephones, to be reported, was held in *Texarkana Teleph. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257, to be a vice principal, and not a fellow servant of a lineman injured by his negligence in failing promptly to repair a sagging wire that had been reported to him.

So, a foreman who has the management, superintendence, and control of a branch of an electric light company's work is not a fellow servant with the workmen under him, even while assisting in the manual work of removing lamps from poles, so that his negligence is that of the company. *New Omaha Thomson-Houston Electric Light Co. v. Baldwin*, 62 Neb. 180, 87 N. W. 27.

And a foreman who was given the entire charge and supervision of the work of taking down and removing a telephone pole, and who gave orders in every step in the process of taking it down, and which orders the employees were bound to obey, is the representative of the master, and is not a fellow servant of the employees under him. *Sandquist v. Independent Teleph. Co.* 38 Wash. 313, 80 Pac. 539.

Duties generally held to be nondelegable.

Certain primary duties of the master are generally held to be nondelegable, so that employees charged with the performance of

vania where the distinction between an employee and a vice principal is pointed out. In the recent case of *Hughes v. Leonard*, 109 Pa. 123, 48 Atl. 862, it was claimed that a superintendent of a certain piece of work for the defendants was a vice principal, and that his knowledge of the defective rope, which broke and caused the accident for which the plaintiff sought to recover damages, was the knowledge of the plaintiff's employer. In delivering the opinion of the court, Justice Brown says: 'No matter by what title called by those under him, and though he may have power to employ and discharge them, and, in directing them in their work, hold in his hands plans and specifications, the man selected by his employer simply to direct a set of men in

their performance of a special piece of work is their fellow workman; generally and properly known as their foreman. For the consequences of his incompetency his employer must respond to his coemployee; but the risk of his negligence is assumed by those who work with him. No incompetency of Sprague is charged, and his negligence, if he was negligent, was his own, and not that of his employers. He was not acting for them as their representative when the accident occurred. He was working for them. To have bound them by his negligence, his relation to them must have been that so clearly defined in *Prevost v. Citizens' Ice & Refrigerating Co.* 185 Pa. 617, 64 Am. St. Rep. 659, 40 Atl. 88: "A vice principal for whose negligence an employer will be

such duties are to be considered vice principals, and not fellow servants of other employees injured by their negligence in the performance of such duties.

—duty of inspection.

If the lineman is not himself charged with the duty of inspecting the poles before he climbs them, then the foreman charged with that duty is a representative of the master, and not a fellow servant of the lineman. *Cumberland Teleph. & Teleg. Co. v. Bills*, 62 C. C. A. 620, 128 Fed. 272; *Western U. Teleg. Co. v. Tracy*, 52 C. C. A. 168, 114 Fed. 282.

In the *Bills* Case the court said: "If the telephone company, by not instructing the lineman to inspect, assumed the duty itself of seeing that the poles were safe to work on, this was a positive duty. The company could not escape the obligation by delegating the duty to the foreman or anyone else. If the duty of inspection rested upon the foreman, the foreman was not a fellow servant, but a vice principal, and the company is responsible for his neglect."

And the master cannot, by delegating to a servant the duty of inspecting long ladders furnished for the use of employees in stringing wires, and replacing rotten rounds, escape liability for injuries caused by neglect of the duty, on the ground that the neglect was that of a fellow servant of the one injured by a fall caused by the breaking of a rotten round. *Twombly v. Consolidated Electric Light Co.* 98 Me. 353, 64 L.R.A. 551, 57 Atl. 85.

But see *Gibbons v. Brush Electric Illuminating Co.* 36 App. Div. 140, 55 N. Y. Supp. 378, *infra*.

—duty of instructing inexperienced men.

An inexperienced lineman is not the fellow servant of a foreman charged with the duty of instructing him. *Western U. Teleg. Co. v. Burgess*, 47 C. C. A. 168, 108 Fed. 28, writ of certiorari denied in 181 U. S. 620, 45 L. ed. 1031, 21 Sup. Ct. Rep. 924; *Sias v. Consolidated Lighting Co.* 79 Vt. 224, 64 Atl. 1104.
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A foreman directing and superintending the stringing of wires is a representative of the master, and the latter is liable for his sending an inexperienced lineman up a pole to encounter dangers from uninsulated wires of another company, of which the foreman had knowledge, but the lineman did not. *Postal Teleg. Cable Co. v. Likes*, 225 Ill. 249, 80 N. E. 136.

It is the duty of an electric company to warn of the danger an employee who is hired to dig holes, repair poles, and to do other work on the ground, and who, to its knowledge, is unacquainted with the dangerous character of the work of a lineman, upon ordering him to ascend a pole and scrape a wire, and it cannot relieve itself from liability for injuries caused by non-compliance with such duty by delegating its performance to a foreman who is, in a general sense, a fellow servant of the person injured. *Tedford v. Los Angeles Electric Co.* 134 Cal. 76, 54 L.R.A. 85, 66 Pac. 76.

Where one of the questions at issue is whether the plaintiff was experienced or was inexperienced and required instructions, and the alleged negligence of the master consisted in his failure to instruct him or to cause him to be instructed by another employee with whom he was working, the defendant is entitled to an instruction upon the doctrine of fellow servants. *Sias v. Consolidated Lighting Co.* *supra*.

—duty of selecting fellow servants, appliances, etc.

The foreman of a gang of men engaged in the construction of a telegraph line is a representative of the master in hiring men, and his negligence in employing incompetent men is that of the company. *Postal Teleg. Cable Co. v. Coote* (Tex. Civ. App.) 57 S. W. 912.

A foreman in charge of a gang of which the plaintiff, a lineman, is one, with power to hire and discharge the men, is not a fellow servant of the plaintiff. *Vicars v. Cumberland Teleph. & Teleg. Co.* 52 La. Ann. 2153, 23 So. 367.

A foreman charged with the duty of se-

liable to other employees must be either, first, one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him not merely authority to superintend certain work or certain workmen, but control of the business, and exercising no discretion or oversight of his own (*New York, L. E. & W. R. Co. v. Bell*, 112 Pa. 400, 4 Atl. 50); or, secondly, one to whom he delegates a duty of his own which is a direct, personal, and absolute obligation, from which nothing but performance can relieve him (*Lewis v. Seifert*, 116 Pa. 628, 2 Am. St. Rep. 631, 11 Atl. 514; *Ross v. Walker*, 139 Pa. 42, 23 Am. St. Rep. 160, 21 Atl. 157, 159; *Prescott v. Ball Engine Co.* 176 Pa. 459, 53 Am. St. Rep. 683, 35 Atl. 224)."

lecting guy wires and of determining when they should be replaced is not a fellow servant of a lineman injured by the falling of a pole because of the defective guy wires. *Sarno v. Atlantic Stevedoring Co.* 66 App. Div. 611, 74 N. Y. Supp. 578.

A servant to whom the master intrusts the duty of furnishing safe poles for the other servants to work upon is not, in the matter of performing that duty, a fellow servant of the other workmen. *Kelly v. Erie Teleg. & Teleph. Co.* 34 Minn. 321, 25 N. W. 706.

Duty in respect to having current cut off.

In some cases, where the lineman has, in the performance of his duty, to work on wires carrying high and dangerous voltage, the duty of having the current cut off, so as to make the place of work safe, is held to be a mere detail, and the negligence of a foreman in regard thereto, the negligence of a fellow servant.

Thus, the foreman of a construction gang, although charged with the duty of turning off the current, is a fellow servant of one of the workmen injured by his negligence in regard thereto, where the turning off of the current was but one of the details of the work. *Bridges v. Los Angeles P. R. Co.* 156 Cal. 492, 25 L.R.A.(N.S.) 914, 105 Pac. 586.

So, a foreman has no authority to bind the master by an agreement to watch a switch box and keep it open, so as to render safe the place of work of a wire man, where, in the absence of such an agreement, there was no rule of law making the defendant liable. *Guest v. Edison Illuminating Co.* 150 Mich. 438, 114 N. W. 226.

A foreman in charge of a gang of men engaged in stringing wires is a fellow servant of a lineman in regard to shutting off the current in an electric wire in close proximity to where he is at work, where the lineman knew how to shut off the current, and had a right to do so. *Anglin v. American Constr. & Trading Co.* 109 App. Div. 237, 96 N. Y. Supp. 49, affirmed in 186 N. Y. 590, 79 N. E. 1100.
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"Tested by this case, the chief engineer was a coemployee, and not a vice principal. He was not in entire charge of the defendant company's business, or a distinct branch of it that had anything to do with turning on or off the current into or from the wire which caused the accident. Nor does it appear that any other duty than running the engines had been delegated to him by the defendant. When he turned on the switch, he was meddling with something that was not part of his duties, as shown by the testimony; and if any accident resulted from such meddling, as did here, he was responsible for it to the injured party, but it did not bind the company. What the duties of the chief electrician, or consulting engineer, were, we are not told. It does not ap-

But in *Hough v. Grants Pass New Water, Light, & P. Co.* 41 Or. 531, 69 Pac. 655, it was held that the duty of notifying the servants in charge of the power house that linemen are at work upon the dead wires, and that the current is not to be turned on until further notice, cannot be delegated.

And a foreman who, in effect, tells a lineman that the current has been cut off, and directs him to go ahead and climb the pole, is, in so doing, in the performance of the master's duty, and is not a mere fellow servant of the lineman. *Crist v. Wichita Gas, E. L. & P. Co.* 72 Kan. 135, 83 Pac. 199.

Acts in respect to mere details of the work.

Where the question of vice principalship is determined with reference to the character of the act causing the injury, it is generally held that, if the act causing the injury is committed while the employee, however high his grade may be in other matters, is merely carrying out the details of the work, he is, in respect to that act, only a fellow servant, for whose negligence the master is not liable to other servants.

Thus, an employee of a telephone company is, in the act of jerking down a wire which had become lodged in a tree, a fellow servant of a lineman who was injured by being thrown from the tree against which the wire was lodged, although the first employee was the district manager, and placed by the defendant in entire charge of his plant, working force, and operations within that district, with power to employ and discharge subordinates, and at the time of the occurrence in question not only held a position of superiority to the plaintiff, but was actually exercising his authority by guiding and directing the plaintiff's movements at the moment of the accident. *Knutter v. New York & N. J. Teleph. Co.* 67 N. J. L. 646, 58 L.R.A. 808, 52 Atl. 565.

So, a foreman in charge of the construction and repair gang of a telephone company is, in climbing a pole and loosening wires, which caused other poles to fall, in-

pear that he had charge of the lines or switch board, or any particular branch of the defendant company's business, or what duties were delegated to him by it. The burden was on the plaintiff to prove this fact, and having failed to do so, we cannot assume that he had such powers and duties delegated to him by the defendant as made him a vice principal.

"The cases of other states cited by counsel for the plaintiff to sustain the position that those at work in the power plant of an electric light company are not coemployees of the linemen do not do so. In *Zentner v. Oshkosh Gaslight Co.* 126 Wis. 196, 105 N. W. 911, it was the superintendent of the

plant who turned on or failed to turn off the current. He was held to be a vice principal. It is stated in that case that, if he had been engaged as chief engineer and chief electrician, or consulting engineer, as here, in the common employment of ascertaining the trouble to the lines in order to repair them, he would have been a coemployee of the linemen. In *Crist v. Wichita Gas, E. L. & P. Co.* 72 Kan. 135, 83 Pac. 199, the person who turned on the current was the superintendent of the plant, who had previously told the linemen to go to work on the line, as the current had been turned off. The case also decides that a foreman is a fellow servant when laboring to ac-

quiring the plaintiff, a member of his gang, a fellow servant of the plaintiff, for whose negligence the master is not liable. *American Teleph. & Teleg. Co. v. Bower*, 20 Ind. App. 32, 49 N. E. 182.

And a master is not liable for the negligence of a foreman in making a splice in a "messenger" wire along which a lineman has to propel himself in order to fasten hooks for the suspension of the telephone wires. *Tweed v. Hudson River Teleph. Co.* 130 App. Div. 231, 114 N. Y. Supp. 607.

So, a superintendent of a gang of men engaged in setting poles for the defendant company is not, in giving the order to the men to "let go" the pole as they had it raised to be placed on a "dinkey" carriage, performing a duty legally imposed upon the master, and consequently is only a fellow servant of the workmen under his charge. *Morgridge v. Providence Teleph. Co.* 20 R. I. 386, 78 Am. St. Rep. 879, 39 Atl. 328.

The foreman of a repair crew of an electric light company engaged in putting up new frames, hoods, and lamps on the poles is, even in the matter of inspecting a pole and directing a lineman to climb it, a fellow servant of the lineman. *Gibbons v. Brush Electric Illuminating Co.* 36 App. Div. 140, 55 N. Y. Supp. 378. And see *Bridges v. Los Angeles P. R. Co.* supra.

The foreman of an electric railway repair gang and the driver of the wagon from the top of which the plaintiff was at work repairing a wire are both fellow servants of the plaintiff, so that the company is not liable for their negligence in handling the wagon. *Hayes v. Jersey City, H. & P. Street R. Co.* 73 N. J. L. 639, 64 Atl. 119.

A workman has no cause of action at common law against the company because of the negligence of a foreman in setting him to work at stripping the lead covering from certain electric wire cables, with the assurance that the work could be done safely, or that the cables were "dead," and further ordering him to use a chisel instead of a hammer in doing the work, the foreman in so acting being only a fellow

servant of the injured lineman. *Grebenstein v. Stone & W. Engineering Corp.* 205 Mass. 431, 91 N. E. 411.

Lineman as fellow servant of employee in control of the current.

SHANK v. EDISON ELECTRIC ILLUMINATING CO. presents the very important question whether the employee in control of the current is a fellow servant of a lineman. A few cases take the position that the duties of such an employee are of such a character that the master cannot delegate them.

One of the leading cases upholding this view is *Massy v. Milwaukee Electric R. & Light Co.* (Wis.) — L.R.A. (N.S.) —, 126 N. W. 544, in which it was held that an operator charged with the duty of connecting and disconnecting an electrical current from wires is not a fellow servant of a lineman whose duty is to work on the wires, so as to relieve the master from liability for injury to the latter by the negligence of the operator in turning the current on a wire upon which he was at work.

In distinguishing employees controlling the current, and other classes of employees, the court said: "Reasons which may have led to classing as fellow servants men employed in conduct of railroads may fail to control situations in this field, though apparently closely analogous. One distinction is in the sudden and unavoidable nature of the peril from a failure to take the proper and easy precautions, as in this case. A man at one moment is handling a cold and harmless wire which it is the duty of his master to keep so. The next, he is in contact with a deadly peril, unforeseeable and unescapable, by reason of the act of another whom his master has employed to perform the duty resting on the latter to make and keep safe the place of work. We think reasons to hold that the persons so employed are agents performing a nondelegable duty are very apparent." After reviewing other Wisconsin decisions involving the same question, the court lays down the following rule: "We hold, therefore, that a distinct and independent employee to whom is dele-

comply with a common object or purpose of the labor. In *New Omaha Thomson-Houston Electric Light Co. v. Baldwin*, 62 Neb. 180, 87 N. W. 27, the superintendent was held to be a vice principal.

"It is a question, also, whether, even though the person who turned the current into the wire on which plaintiff was working, and which caused the accident, was a vice principal, the plaintiff did not assume the risk of his employment, and would, on this account, be unable to recover. We will not discuss this, however, as we are firmly convinced that the person who turned on the current was a coemployee of the plaintiff, and that the defendant company is not

liable, but that the plaintiff must look to his coemployee, if the coemployee did what he should not have done, and thereby caused the injury.

"We therefore discharge the rule to show cause why judgment of nonsuit should not be stricken off."

Mr. B. F. Davis, for appellant:

The melting of a fuse at the power house of an electric light and power company is notice to the company that either a wire has been broken and grounded, or that a short circuit has been caused by the crossing of wires; and it is sufficient to put the company upon inquiry, and impose upon it the duty of refraining from sending a

gated the duty to disconnect and make safe the wires on which others must work is ordinarily a vice principal, and not a fellow servant with the lineman and other like workmen."

And the superintendent of a company is not a fellow servant of the lineman, either in turning on the current in the regular operation of the plant, or in negligently failing to turn off the current temporarily while the line was being repaired. *Zentner v. Oshkosh Gaslight Co.* 126 Wis. 196, 105 N. W. 911.

In *Smith v. Milwaukee Electric R. & Light Co.* 127 Wis. 253, 106 N. W. 829, it was apparently conceded that the defendant's superintendent was, so far as turning on or off the current was concerned, a vice principal.

Some of the earlier Wisconsin cases are not entirely in harmony with the rule as laid down in the *Massy Case*.

Thus, a superintendent of an electric light company is, in making repairs upon a dynamo, a fellow servant of the lineman who was injured by the turning on of the current to test the repaired motor. *Williams v. North Wisconsin Lumber Co.* 124 Wis. 328, 102 N. W. 589.

So, the turning on and off of the electric light in a mill, as the exigencies of the business may require under the varying conditions of the natural light, does not pertain to the personal duty of the master to furnish a safe place to work, but is mere operative detail, the performance of which may be delegated to a servant. *Miller v. Centralia Pulp & Water Power Co.* 134 Wis. 316, 13 L.R.A. (N.S.) 742, 113 N. W. 954.

The decision in the *Williams Case* is distinguished in the *Zentner Case* upon the ground that, in repairing the dynamo, the superintendent was merely attending to the details of the work; but, in the *Massy Case*, the court says there is no very clear distinction in principle between the *Miller* and *Williams Cases*, on the one hand, and the *Zentner* and *Smith Cases*, on the other, and apparently it was in view of the conflict in the ultimate decisions in those cases that the court in the *Massy*

Case laid down the clear and explicit rule given above.

An electrician clothed with and exercising authority as to the shutting down and repair of motors is not a fellow servant of a helper who was ordered by him to stop a defective motor, and assured that he would see that no one would start the motor or interfere with it until he had fixed it. *Marquette Cement Mfg. Co. v. Williams*, 230 Ill. 26, 82 N. E. 424.

Where a laborer was injured by striking the third rail of an elevated electric railway while it was alive, with a steel or iron tool, it was held in *Keeley v. Boston Elev. R. Co.* 192 Mass. 481, 78 N. E. 490, that the master would be liable for the injury if the current had been negligently turned on by one to whom the master had intrusted the control thereof; but it is apparently assumed that the foreman in charge of the gang, who directed the plaintiff to strike the rail with the chisel, was a mere fellow servant of the plaintiff, and if he had known that the current was on, the order would have been negligent, but the company would not have been liable therefor.

But the engineer of an electric light company and its linemen, being subject to direction and control by the same general master, in the same common enterprise, were held in *Brush Electric Light & P. Co. v. Wells*, 110 Ga. 192, 35 S. E. 365, to be fellow servants, though employed in different departments, and so far removed from each other that one could in no degree control or influence the conduct of the other; and granting that the lineman was killed by reason of the negligence of the engineer in failing to give a signal before the electric current was turned on, the defendant company is not liable for his death.

In *Malay v. Mt. Morris Electric Light Co.* 41 App. Div. 574, 58 N. Y. Supp. 659, it was apparently assumed that an employee in charge of the dynamos in a power house was a fellow servant of a lineman injured by the foreman's negligence, as the case turns principally upon the question of the company's knowledge of his incompetency.

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current through the wire until it has been ascertained that it is safe to do so.

Newark Electric Light & P. Co. v. McGilvery, 62 N. J. L. 451, 41 Atl. 955; 1 Joyce, *Electric Law*, 2d ed. § 454; *Keeley v. Boston Elev. R. Co.* 192 Mass. 481, 78 N. E. 490.

The negligence of an officer who has the care of a particular department is the negligence of the company.

Patterson v. Pittsburgh & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412; *Zentner v. Oshkosh Gaslight Co.* 126 Wis. 196, 105 N. W. 911; *Smith v. Milwaukee Electric R. & Light Co.* 127 Wis. 253, 106 N. W. 829; *Myhan v. Louisiana Electric Light & P. Co.* 41 La. Ann. 964, 7 L.R.A. 172, 17 Am. St. Rep. 436, 6 So. 799; *Knowlton v. Des Moines Edison Light Co.* 117 Iowa, 451, 90 N. W. 818.

The duty of turning the switch at the power house was one which devolved upon the master; and when the chief engineer (especially in the presence of the electrician and assistant engineer of the company) did that, he was acting on behalf of the company, and was a vice principal.

Crist v. Wichita Gas, E. L. & P. Co. 72 Kan. 135, 83 Pac. 199; *New Omaha Thomson-Houston Electric Light Co. v. Baldwin*, 62 Neb. 180, 87 N. W. 27; *Daltry v. Media Electric Light, H. & P. Co.* 208 Pa. 403, 57 Atl. 833.

Mr. W. U. Hensel, for appellee:

The engineer who turned on the switch and the linemen were fellow servants.

Zentner v. Oshkosh Gaslight Co. 126 Wis. 196, 105 N. W. 911; *Crist v. Wichita Gas, E. L. & P. Co.* 72 Kan. 135, 83 Pac. 199; *Hughes v. Leonard*, 199 Pa. 123, 48 Atl. 862; *National Tube Works Co. v. Bedell*, 90 Pa. 175; *Ricks v. Flynn*, 196 Pa. 263, 46 Atl. 360; *Weger v. Pennsylvania R. Co.* 55 Pa. 460; *Duncan v. A. & P. Roberts Co.* 194 Pa. 563, 45 Atl. 330; *Keystone Bridge Co. v. Newberry*, 96 Pa. 246, 42 Am. Rep. 543; *McGinley v. Levering*, 152 Pa. 366, 25 Atl. 824; *Prevost v. Citizens' Ice & Refrigerating Co.* 185 Pa. 617, 64 Am. St. Rep. 659, 49 Atl. 88; *Casey v. Pennsylvania Asphalt Paving Co.* 198 Pa. 348, 47 Atl. 1128; *McCool v. Lucas Coal Co.* 150 Pa. 638, 24 Atl. 350; *Velas v. Patton Coal Co.* 197 Pa. 380, 47 Atl. 360; *Carnegie v. Penn Bridge Co.* 197 Pa. 441, 47 Atl. 355; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432, 10 Mor. Min. Rep. 39.

Stewart, J., delivered the opinion of the court:

The plaintiff was a lineman in the employ of the defendant company. An interruption having occurred in the circuit, he ascertained by using the switch board at the power plant where the trouble was on the 30 L.R.A. (N.S.)

line. Before proceeding to make the necessary repair, in the presence of his foreman, the company's electrician, and the engineer in charge of the engine, he turned off the current, and told those present not to turn it on until he was heard from. He then started, in company with his foreman, to the place of interruption. Within a half an hour after he left, the electrician and the engineer went to the switch board and tested the circuit. No break being disclosed by the test, the engineer turned on the current, with the result that the plaintiff, then engaged with the wires in repairing the break, received the charge and was severely injured. Manifestly, the plaintiff was injured through negligence not his own. Was it the company's negligence or the negligence of a fellow employee? In the general business in which defendant is engaged, furnishing electric light and power, the interruption of the circuit from one cause and another is a matter of such frequent occurrence that it is necessary to keep steadily employed trained men whose business it is to make repairs in the line and maintain it in working condition. It is alike necessary to employ others of technical skill to co-operate in this general work. The whole business of repairing the line, whether regard be had to the actual work on the line, or the care of the circuit while men are so engaged, must necessarily be done by employees engaged in the general business, under the direction of the employer. It would be wholly impracticable for an employer to personally attend to such detail, and therefore it is that such work may be properly, and commonly is, intrusted to employees. Where this is so, the duty of the employer extends no further than to employ competent and suitable fellow servants, and supply them with everything needed for the work. In all such cases the employee is presumed to have contemplated that work incidental to that which he engaged to do would be done by fellow employees, and he is held to have assumed all risk for their negligence in doing it. Here the whole dependence of the plaintiff was on the faithful and intelligent co-operation of the electrician and engineer, both of whom were admittedly competent. Both were in the employ of the company. Neither of them, however, exercised any supervisory power over the plaintiff or the work. They simply assisted in the accomplishment of a common object, and were strictly coemployees. *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. 400, 4 Atl. 50; *Hughes v. Leonard*, 199 Pa. 123, 48 Atl. 862. What was done by them, or either of them, in the matter of the turning on of the current, could not be regarded as the act of the defendant com-

pany, except it be held to be an absolute nondelegable duty of the employer to keep constant watch upon the switch to prevent the current being turned on every time an employee attempts to repair a line. We know of no authority which enforces such obligation. The learned judge directed a nonsuit, which he afterwards refused to remove, on the ground that it nowhere appears in the evidence that either electrician or engineer had charge of the line or switch board, or any particular part of defendant's business, or what, if any, duty was delegated to either. The opinion filed in discharging the rule to take off the nonsuit amply vindicates the conclusion reached.

Judgment is affirmed.

WASHINGTON SUPREME COURT.

WILLIAM J. BEST and Wife, Respts.,
v.

JAMES W. OFFIELD and Wife, Appts.

(— Wash. —, 110 Pac. 17.)

Vendor and purchaser — misrepresentations of quantity — right to rescind.

The purchaser of real estate including an orchard of such irregular shape that it is difficult to ascertain its area without a survey, who is entirely unfamiliar with the fruit business, has a right to rely on the vendor's statements as to area, and may rescind the contract in case a represented area of 70 acres of orchard proves to be less than 49.

(August 5, 1910.)

APPEAL by defendants from a judgment of the Superior Court for Walla Walla County in complainants' favor in an action brought to rescind, for alleged fraudulent misrepresentations, a contract for the sale of land, and to recover purchase money paid and expenses incurred. Affirmed.

The facts are stated in the opinion.

Messrs. Cain & Hurspool, for appellants:

The parties were dealing at arm's length, and as the plaintiffs made an inspection for themselves, it cannot be said that they relied on the defendants' representation as to quantity of land, and therefore cannot rescind the contract.

Baker v. Bicknell, 14 Wash. 31, 44 Pac. 107; Van Horn v. O'Connor, 42 Wash. 513, 85 Pac. 260; Hulet v. Achey, 39 Wash. 91, 80 Pac. 1105; Lake v. Churchill, 39 Wash. 318, 81 Pac. 849; Griffith v. Strand, 19 Wash. 695, 54 Pac. 613; Washington Cent. Improv. Co. v. Newlands, 11 Wash. 212, 39 Pac. 366.

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Messrs. Skuse & Morrill, for respondents:

Where a contract is entered into and money is paid thereunder upon the representations that certain conditions exist, but which representations are untrue, but are relied upon, and the contract would not have been entered into and the money paid if it had been known to the party making the contract and paying the money that the conditions as represented were untrue, such party, if injured thereby, is entitled to a rescission of the contract and to recover the money so paid, and for any damages sustained therefrom.

Woody v. Benton Water Co. 54 Wash. 124, 132 Am. St. Rep. 1102, 102 Pac. 1054; Tacoma v. Tacoma Light & Water Co. 17 Wash. 458, 50 Pac. 55; Reilly v. Gottlieb,

Note. — Is fraudulent representation by vendor of extent or proportion of land of particular kind included within the tract sold, actionable where purchaser inspects the land.

In a note to Mabardy v. McHugh, 23 L.R.A. (N.S.) 487, the cases are gathered which consider the actionability of fraudulent representations as to area where the boundaries are correctly pointed out. On principle, the question is very similar to the one under consideration, as to the facts; the cases gathered in that note relate to false representations as to the area of the entire property, while in this note they relate to false representations as to the area of a portion of the property.

It is the general rule, subject to many exceptions, some of which will be hereafter considered, that a false representation, although fraudulently made, is not actionable unless relied on and acted upon by another, to his injury. Applying this general rule to the question under consideration, it may be said that ordinarily, where a person of judgment and experience personally inspects real estate before buying it, and is in no way prevented from forming an independent judgment as to the acreage of different portions thereof, and does form such a judgment, he will not thereafter be permitted to say that he relied upon the representations of the vendor as to the acreage, and recover his damages on the theory that such misrepresentation is actionable.

As said by the court in Farrar v. Churchill, 135 U. S. 609, 34 L. ed. 246, 10 Sup. Ct. Rep. 771: "Fraud is never presumed, and where it is alleged, the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false, and must be acted upon by the other party in ignorance of its falsity, and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate, and material. If the purchaser investigates for him-

43 Wash. 9, 85 Pac. 675; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811; *Lawson v. Vernon*, 38 Wash. 422, 107 Am. St. Rep. 880, 80 Pac. 559; *Mulholland v. Washington Match Co.* 35 Wash. 315, 77 Pac. 497; *Rathbone, S. & Co. v. Frost*, 9 Wash. 162, 37 Pac. 298; *West v. Carter*, 57 Wash. 699, 106 Pac. 900; *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514.

Dunbar, J., delivered the opinion of the court:

This is an action by William J. Best and wife for the rescission, for fraudulent misrepresentation, of a contract of sale, whereby plaintiffs agreed to purchase, and the defendants, J. W. Offield and wife, agreed to sell, a certain orchard and land in Garfield county, Washington; the plaintiffs seeking to recover the amount of the purchase money already paid, together with expenses incurred in connection with the purchase, and expenditures made upon the land while they were in possession. The misrepresentations set up in the complaint and relied on at the trial were (1) misrepresentations as to the amount of land in the different varieties of fruit in the orchard as a whole, and the amount of land in cultivation outside of the orchard; (2) misrepresentations as to the quality of fruit grown in the orchard; (3) misrepresentations as to the whole number of acres of fruit embraced in the orchard; (4) misrepresentations as to the sufficiency of water for irrigation; and

(5) misrepresentations as to the amount and character of the personal property included in the transaction. The defendants answered, denying the making of the misrepresentations alleged, setting up the fact that the plaintiffs inspected the orchard, made outside inquiries, and relied on their own judgment in making the purchase; and asking for a forfeiture of the contract of sale, on the ground that plaintiffs had failed to make the second payment under the contract, and had abandoned the land, and for damages for negligence and carelessness in pruning the vineyard and orchard. The case was tried to a jury on questions of fact. Certain special interrogatories were submitted to the jury, which, with the answers thereto, were as follows: "(1) Did the defendants, James W. Offield and Nettie Offield, or either of them, at or before the making of the contract in question, make the plaintiffs, or either of them, any positive statements by which they, or either of them, materially misrepresented to the plaintiffs the true facts regarding the lands, premises, and property which was the subject of the contract in question? Answer: Yes. (2) How much expense did the plaintiffs incur in caring for and making improvements upon said land and premises, and in caring for and feeding the stock while in possession thereof? A. \$416.70. (3) Were the plaintiffs, William J. Best and Emma L. Best, negligent in the care of said premises during the time they were in possession of

self, and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he has relied on the vendor's representations." Applying this rule to the facts, it was held that misrepresentations as to the number of acres of cleared land and the number subject to overflow did not constitute fraud, where the purchaser personally inspected the land before buying it, at the request of the vendor's agent. It is to be noted that the representations complained of were that there were 1,060 acres of land under cultivation, and that there were 800 acres above overflow, according to the owner of the property, and 500 above overflow, according to the levee engineer. The acreage was so great that it could hardly be expected that, without a survey, a person could form an approximately accurate estimate thereof. The theory of the court, however, was that the purchaser was informed by the vendor's agent he was not sure as to the accuracy of the representations, and hence requested the vendee personally to examine the land before purchasing, and it did not appear that the representations as made were not made in good faith, and with a belief in their truth.

In *Hall v. Thompson*, 1 Smedes & M. 443, the rule of *caveat emptor* was held to apply to misrepresentations by a vendor of real estate as to the quality thereof and the 30 L.R.A. (N.S.)

number of acres of cleared land, where the purchaser personally inspected the land before buying it. Here the misrepresentations complained of were that there were but 50 or 60 acres of untillable land in a tract sold, whereas there were about 300. This misrepresentation was treated by the court as relating to a patent defect, discoverable upon ordinary inspection, thus apparently recognizing that the rule of *caveat emptor* would not apply had the representations related to a matter not discoverable upon ordinary inspection.

Where the purchaser of real estate is a man of judgment and experience with reference to farm lands, and personally inspects a plantation before purchasing it, he cannot thereafter claim that he relied upon the representations of the vendor as to the quantity of cleared land or the number of acres in an orchard; the rule applicable under such circumstances being that where the means of information are accessible or are availed of, and a personal examination is made by a purchaser of property before purchasing, equity will not permit him thereafter to say that he was induced to purchase on the statements and representations of the vendor, which related to matters discoverable upon ordinary inspection. *Gridler v. Clopton*, 27 Ark. 244.

And where a purchaser of a farm person-

the same, and, if so, how much were defendants damaged thereby? A. None." The court adopted the findings of the jury, and found that James W. Offield made representations to the plaintiffs in regard to material facts concerning the lands and premises which are the subject of the agreement in question; to wit, among other things, in regard to the number of acres thereof growing to fruit and grapes, which were false; that such representations were known by defendants to be false when made, and were so made by said defendants to induce plaintiffs to enter into said agreement; that the plaintiffs, in acting on said representations, were ignorant of the falsity of the said representations, and reasonably believed them to be true; that the plaintiffs had expended \$416.70 in the care of the farm; that they were not negligent in the care of said premises and property during the time they were in possession of the same; that the defendants did not suffer any damages therefrom; that plaintiffs were not familiar with fruit growing, or with fruit trees, or with the kind of property which was the subject of the agreement in question; that this was known to the defendants during the time the negotiations were pending, and that as soon as plaintiffs ascertained that the representations made to them were false, they served notice upon the defendants of the rescission of the contract. Upon these findings, conclusions of law were found, and

judgment was entered in favor of the plaintiffs for recovery of the money paid, for a rescission of the contract, for the sum of \$416.70, with interest from and since the 1st day of March, 1909, and for costs. From this judgment this appeal is taken.

The testimony shows that the plaintiff William J. Best examined this farm in September; that at that time he stayed upon the farm about two days, in company with the defendant James W. Offield; that a great deal of the time it was raining hard, so that it was difficult to get around on the premises; that between that time and before the final execution of the contract, Emma L. Best visited the farm, her testimony being that she stayed there two days, and other testimony of the defendants being to the effect that she was there some days longer; that the contract was finally entered into in November, and that the parties plaintiff took possession of the farm about the 25th of November, and proceeded to go to work upon the orchard; that some time after taking possession, the plaintiffs began to suspect that misrepresentations had been made as to the number of acres embraced in the orchard, as to the quality of fruit trees, and as to the alleged representations that there was sufficient water to irrigate the premises; that in February, so strong had this conviction grown, that William J. Best, aided by an employee, undertook to survey the orchard by using a rude pole of some kind, and from such survey became satisfied that

ally inspects it before buying, and questions the vendor's accuracy of statement as to the number of acres of cleared land thereon, and himself makes an estimate thereof, he cannot say that he relied and acted upon the representations of the vendor in reference thereto. *Port v. Williams*, 6 Ind. 219.

So, where parties are dealing at arm's length, and the means of knowledge are as open to one as to the other, one of them, purchasing a farm from the other, and personally inspecting it before buying, cannot thereafter complain that the number of acres under cultivation and tillable were misrepresented to him. *Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260.

But the doctrine of *caveat emptor* does not apply to misrepresentations by a vendor of land as to the amount thereof susceptible of irrigation, although the purchaser examined the land, where the fact that a portion thereof could not be irrigated could only be ascertained by an accurate survey, which was not made by the purchaser, and which the vendor had caused to be made. Under such circumstances it is for the jury to say whether the purchaser acted with that degree of prudence and circumspection which would mark the conduct of a reasonably prudent man under similar circumstances. *Woody v. Benton Water Co.* 54 30 L.R.A. (N.S.)

Wash. 124, 132 Am. St. Rep. 1102, 102 Pac. 1054. And see *BEST v. OFFIELD*.

It is a question for the jury whether a purchaser of real estate relied upon and was deceived by fraudulent representations as to the value of a farm, the amount of land under cultivation, the amount of orchard, and the net income therefrom, where he personally examined the farm before purchasing. *Evans v. Duke*, 140 Cal. 22, 73 Pac. 732. Representations as to area complained of in this case were that not less than 80 acres of land were under cultivation, 40 acres with fruit and 20 in hay.

False representations as to the number of acres of bottom land and the number in crops may be actionable if believed and relied upon, although the purchaser personally inspects the land. Thus, where he alleges that he was not competent to form an opinion as to the size of different parcels of the land, of which fact the vendor had knowledge, and of which he took advantage, it becomes a question for the jury whether the purchaser actually believed and relied upon the representations made to him, and it is error for the court, upon the admission by the purchaser that he personally inspected the land, to hold as a matter of law that the representations were not actionable. *Speed v. Hollingsworth*, 54 Kan. 436. 38 Pac. 496.

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there was not the amount of land in orchard that had been represented, and gave notice to the defendants that he would rescind the contract; that subsequently to this, and prior to the trial of the action, a survey was made under the supervision of a competent surveyor, and it was ascertained and proven, we think, beyond a question, that the amount of land in controversy, instead of being 70 acres, was in reality 48.41 acres, which included the grapes and the orchard generally.

Without reviewing in detail this testimony, which we have particularly examined, we are satisfied that the special findings of the jury were justified, and that the findings made by the court were justified by the testimony; that, to say nothing of the representations concerning the quantity of water available for irrigation, and the quality of the trees, it was represented to the plaintiffs that there were 70 acres set out in orchard, and that they acted on this representation. This is positively sworn to by the plaintiffs and other witnesses who were present at the time the representations were made, and is in reality not denied by the defendant James W. Offield. But his contention is that he did not state as a positive fact that there were 70 acres, but that he believed there were; that he was solicited by the plaintiffs to guarantee to them that there were 70 acres, and refused to do so, but told them that there were 70 acres, or about 70 acres. This statement in relation to the guaranty is emphatically denied by the plaintiffs and by other witnesses who were present at the time of the conversation spoken of, and the jury evidently believed, and were justified, we think, in believing, that there was no such conversation had at that time, and that there was in effect a positive representation, upon which the parties plaintiff acted, that there were 70 acres cultivated to orchard.

In regard to the right of plaintiffs to act upon this representation there is quite a diversity of authority, and it is difficult to lay down a general rule, because there are particular circumstances controlling almost every individual case. *Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260, a case which is cited and relied upon strongly by the appellants, and which, in some of its circumstances, it must be said, is similar to the case at bar, was where O'Connor represented to Van Horn that there were 240 acres of land in cultivation in the half section which Van Horn was purchasing, that there were some 30 acres more which could be cultivated, and that there would be not over 50 or 60 acres of waste land. These statements proved to be not exactly correct, 30 L.R.A. (N.S.)

and it was shown that there was not as much land under cultivation as had been represented. The trial court found that Van Horn had no cause of action, and that judgment was affirmed by this court, the court saying: "It is clear from appellant F. M. Van Horn's evidence that he obtained all the land which was shown him, and some which was stated did not go with the half section purchased. But the important and controlling question in the case is whether, after examining the land, appellant may complain because there is not as much tillable land as was represented by the respondents. This court has frequently held that, where representations are made as a matter of opinion, there is no liability for misrepresentations, where the parties are dealing at arm's length, and the means of knowledge are as open to one party as to the other. . . . But where the representations made are of material facts within the knowledge of the vendor, and entirely without the knowledge of the vendee, and where the circumstances are such as reasonably call for a reliance thereon, the rule is that the vendee may rely upon the representations of the vendor." The court was of the opinion in that case that there was no confidential relation existing between Mr. O'Connor and Mr. Van Horn; that the representations made were expressions of opinion about facts which were as open and obvious to the appellants as to the respondents, and that appellants had an opportunity to obtain the facts about which representations were made, and for that reason dismissed the action.

Conceding here the correctness of the principles of law laid down in that case, we think this case falls within the second principle announced, viz., that the representations made were material facts within the knowledge of the vendor, and entirely without the knowledge of the vendee, and where the circumstances reasonably called for a reliance upon such representations. It makes no difference whether the representations made were known by the vendor, as found by the court in this instance, to be false, or not. The effect on the purchaser would be the same, and if he had a right, under all the circumstances, to rely upon them, and did rely and act upon them, he can recover. There is a difference between the right of a vendee to rely upon the representations of the vendor where the means of determining the truth of the representations are at hand and it is easily determined, as in the case just cited, and a case of this kind, where, as shown by the testimony, these plaintiffs were entirely unfamiliar with the fruit business, having come from a locality where orchards were not grown. They stated to the defendant

at the time of the transaction that they knew nothing about the business, and when they were down examining the orchard, told him that they did not know a peach tree from a cherry tree, and in many instances he pointed out to them the difference in the trees.

This case falls more squarely within the rule of law announced in *Woody v. Benton Water Co.* 54 Wash. 124, 132 Am. St. Rep. 1102, 102 Pac. 1054. There the action was instituted to recover damages for false representations made by the defendants in the negotiations leading up to the contract of sale, both as to the quantity of land to be conveyed and the number of acres susceptible of irrigation from the water company's canal by gravity flow. The defendants represented that the tract to be conveyed by the water company contained 60 acres in all, and that the 60 acres were so situated in reference to the water company's canal that the entire tract could be irrigated therefrom by gravity flow. It eventuated that in fact the tract contained only 52.64 acres, and 28.24 acres of this were above the level of the canal, and could not be irrigated therefrom. It also appeared that the purchaser visited the land, accompanied by certain of the grantors, and viewed the premises in a general way. But it appeared that the portion of the land which could not be irrigated from the canal could only be ascertained by an accurate survey, as, we think, it appears in this case that the area of this orchard could only be obtained by an accurate survey. The court, in the trial of that case, upon the close of the plaintiff's testimony, granted a nonsuit to the defendant. In reversing the judgment of the court, it was said: "Nor can we agree with the court below that the doctrine of *caveat emptor* applies to the representations made by the respondents, to the effect that the entire tract was under the level of the canal, and susceptible of irrigation therefrom. Strong language has been used by this and other courts in defining the duties of purchasers, from which it might be inferred that vendors have an unbridled license to lie and deceive, but such has never been the law, and the tendency of the more recent cases has been to restrict rather than extend the doctrine of *caveat emptor*,"—citing *Strand v. Griffith*, 38 C. C. A. 444, 97 Fed. 854, and *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069, where it was said: "The unmistakable drift is towards the doctrine that the wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of his victim." Also citing 14 Am. & Eng. Enc. Law, 2d ed. p. 120, 80 L.R.A. (N.S.)

where the rule is stated as follows: "By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representations are made may have an opportunity of ascertaining the truth for himself." The opinion concludes: "All the cases agree that the purchaser may rely upon representations of the vendor where the property is at a distance, or where, for any other reason, the falsity of the representations is not readily ascertainable."

It appears that the orchard in this case was in an irregular or zigzag shape, and that it was a very difficult matter to determine its area. It is claimed that it was easily within the power of the plaintiffs to ascertain whether there were 70 acres in the orchard; but such ascertainment could have been made only by scientific survey. It plainly appears from the testimony that either the representations made by the defendants were false, and were known by them to be false when made, or else it was a matter difficult of ascertainment, for the defendants had owned and operated this farm for thirty years, setting out in different years different portions of this orchard, and if they, in this long period of operation, were not aware of this discrepancy, it is unreasonable to hold these plaintiffs, who were entirely new to the business, to a speedy determination of the area. It was not a slight discrepancy in representation. The planting and rearing of an orchard to a bearing age is a costly business, and the difference between 70 acres of land planted to fruit trees and 48.40 is almost a third difference in area. When it is admitted that the purchase price of this land was \$35,000, and that practically all the value of the land was in the orchard, it is seen that the plaintiffs were deprived of nearly one third of the value of their purchase as they understood it. So that the only debatable question in this case is whether they acted with due diligence in ascertaining the falsity of the representations. An orchard of forty-odd acres of growing fruit, especially when it is in the irregular shape that this orchard was shown to be, is liable to mislead an inexperienced person concerning its area, and, under all the circumstances of this case, we think that there was no such laches on the part of the plaintiffs as would prevent them from bringing

this action for rescission upon the grounds alleged.

The judgment will therefore be affirmed.

Rudkin, Ch. J., and Mount, Crow, and Parker, JJ., concur.

Petition for rehearing denied.

COLORADO SUPREME COURT.

MARY LUNT, Plff. in Err.,
v.
POST PRINTING & PUBLISHING COMPANY.

(— Colc. —, 110 Pac. 203.)

Negligence — safe condition of property — sounding fire alarm — invitation.

1. An owner of property upon which indications of fire are present does not, by turning in a fire alarm, extend an invitation

Note. — Liability of owner of property for injury to fireman or policeman in discharge of duty.

In the absence of statutory provisions, the cases involving the liability of a property owner for injury to a fireman or policeman on the premises in the discharge of his public duties turn upon the question as to the status of such officer. If he is held to be an invitee, the case is within the rule regarding the property owner's responsibility to invitees for the safe condition of the premises; but if a mere licensee, as most of the cases hold, unless the case is within some statutory provision, the general rule as to liability to licensees applies. For the rule as to the duty of an owner of premises to protect a licensee against hidden dangers, see note in 17 L.R.A. (N.S.) 916.

Firemen.

The cases seem to hold unanimously that a member of a public fire department who enters a building in the exercise of his duties is a mere licensee under a commission to enter given by law, even though he is responding to an alarm turned in by the property owner himself; and, in the absence of any statutory provision, the owner or occupant of the building owes such fireman no duty to keep it in a reasonably safe condition. Many of the authorities are reviewed, and the reasons for this rule as to the status of a fireman in the discharge of his duty are fully set forth, in the opinion to LUNT v. POST PRINTING & PUB. CO.

In *Gibson v. Leonard*, 143 Ill. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182, affirming 37 Ill. App. 344, a member of a fire insurance patrol, authorized by statute to enter buildings that are burning or in danger, to save property, who had responded to an alarm, and broken into a

to the members of the fire department to enter the premises, within the rule regarding property owner's responsibility to invitees for the safe condition of the property.

Same — duty to warn of acid.

2. An owner of property owes no duty to firemen summoned to extinguish a fire which appears to have started upon it to warn them of the presence of quantities of acid in the room where the fire seems to be, the fumes from which may be dangerous to life.

Same — negligent breaking of acid container.

3. The negligent breaking by a property owner of a carboy of acid upon such property, which causes in the room where it is kept conditions indicating the presence of fire, is not such recklessness, wantonness, or willfulness with respect to firemen who are summoned to extinguish the supposed conflagration, as to render him liable for injury to them from the acid fumes.

Pleading — allegation of knowledge.

4. An allegation that a property owner

building which was on fire, and was engaged in protecting property therein, and who was injured by the fall of a counterweight on a freight elevator, between the main floor and basement, because of a defect in the rope, and a failure to box or guard the weight, was held to be a mere naked licensee under a license given by law, to whom the owner of the building owed no duty in respect to the condition of such elevator. The court said: "The owner of land and of buildings assumes no duty to one who is on his premises by permission only, as a mere licensee, except that he will refrain from wilful or affirmative acts which are injurious."

Other cases to the same effect as to the status of firemen responding to an alarm, and sufficiently set out on that point in LUNT v. POST PRINTING & PUB. CO., are *Woodruff v. Bowen*, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113, and *Beehler v. Daniels*, 18 R. I. 563, 27 L.R.A. 512, 49 Am. St. Rep. 790, 29 Atl. 6, on second appeal, 19 R. I. 49, 31 Atl. 582,—the latter case holding that the owner of a building is not liable to members of a fire department for a failure to guard an elevator well, or for so packing merchandise as to conduct them to such well, when entering under a license conferred by law to extinguish a fire. And see also *Hamilton v. Minneapolis Desk Mfg. Co.* 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693, set out in the opinion to LUNT v. POST PRINTING & PUB. CO.

In *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89, and *New Omaha Thomson-Houston Electric Light Co. v. Bendsen*, 73 Neb. 49, 102 N. W. 96, where firemen at a fire were killed by an electric shock received while lowering a truck ladder between two of defendant's wires, and alleged to have been due to defendant's negligence, it was held that such firemen were bare licensees; and

had knowledge, either actual or implied, of a certain fact, amounts merely to an allegation that he had implied knowledge thereof.

Negligence — unsafe premises — fire — acid fumes — duty of owner.

5. One summoning the municipal fire department to extinguish a fire which appears to have started on his property is under no obligation to its members to acquaint himself with the character of the smoke issuing from a room, whether it is caused by fire or is the fumes of acid which he keeps there.

Nuisance — acid fumes — liability to firemen.

6. The keeping by a printer of a quantity of nitric acid in carboys upon his premises, for use in his business, is not such a nuisance as to render him liable for injuries to a fireman, summoned to extinguish a fire which seems to have started in the room where it is kept, through the breathing of the acid fumes.

(July 5, 1910.)

the court, after reviewing authorities, said: "The cases seem to establish that, in the absence of any statute or ordinance prescribing a duty towards firemen on the part of the owner of premises, the latter is not liable for anything short of a designed injury."

And to same effect is *Eckes v. Stetler*, 98 App. Div. 76, 90 N. Y. Supp. 473, where a city fireman in a building for the purpose of extinguishing a fire therein was injured by reason of an elevator shaft not having been properly guarded, and the hatchway thereof not properly closed.

And in *Baker v. Otis Elevator Co.* 78 App. Div. 513, 79 N. Y. Supp. 663, it was held that, in the absence of any statute requiring elevator wells in factories to be guarded, the owner of a factory in a city is not liable to a city fireman who, while fighting a fire in the factory in the early morning, while it was still dark, stepped into an unguarded elevator well, especially where it does not appear that the fireman entered the building by any way which it was reasonable for the owner to anticipate anyone would enter, nor that the dangerous condition was not created by other firemen, who had entered the building ahead of the plaintiff.

In *Woods v. Miller*, 30 App. Div. 232, 52 N. Y. Supp. 217, where a city fireman went upon the roof of a burning building in the discharge of his duty, and while groping his way in the dense smoke and darkness, stepped over the parapet of the party wall between the burning building and the adjoining premises, and fell into an opening constituting the back yard or air shaft of the adjoining premises, it was held that the owner of such adjoining premises was not liable for the fireman's injuries by reason of its failure to cover its entire lot with a roof, or to fence along the top of the party wall adjoining the vacant portion of 30 L.R.A. (N.S.)

ERROR to the District Court for the City and County of Denver to review a judgment in defendant's favor in an action brought to recover damages for the death of plaintiff's husband, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Stephen W. Ryan and Richardson & Hawkins, for plaintiff in error:

The owner of premises owes a duty to a member of the fire department whom he invites onto said premises in the line of his duty, with respect to latent dangers existing in the said premises, known to such owner, and not to the person so invited.

Cameron v. Kenyon-Connell Commercial Co. 22 Mont. 312, 44 L.R.A. 508, 74 Am. St. Rep. 602, 56 Pac. 358.

As against a danger inimical to human life, the owner of property, with knowledge, owes to the guest, the licensee, and the trespasser alike, the duty of imparting informa-

its lot, to prevent anyone falling into such portion.

—violation of duty enjoined by a statute or ordinance.

In some of the above cases the property owner's violation of some statute has been alleged as an element of negligence for which he should be liable to a fireman injured as a result of such violation. Thus, in *Gibson v. Leonard*, supra, it appeared that there was an ordinance requiring elevators and other things "so located as to endanger the lives and limbs of those employed" in factories, etc., to be, so far as practicable, so covered or guarded as to insure against any injury to such employees. But it was held that such ordinance did not create any liability for noncompliance therewith in favor of a fire patrolman who was a mere licensee on the premises, as he was not within the class of persons for whose protection the ordinance was passed.

So, in *Woodruff v. Bowen*, supra, it was held that an ordinance requiring the owner of a dangerous or insecure wall or building to make it safe upon notice does not apply to a building which is safe for the purposes of commerce and trade, but falls by reason of the large quantities of water thrown into and upon it in extinguishing a fire, thus putting it to an extraordinary strain.

In *Hamilton v. Minneapolis Desk Mfg. Co.* supra, it was also held, as noted in the opinion in *LUNT v. POST PRINTING & PUB. CO.*, that the statute there involved imposed no duty as to firemen.

And in *Eckes v. Stetler*, supra, it was held, in regard to the alleged breach of statutory obligations, that the fireman injured was not a party authorized by the express terms of the statute to sue thereunder.

In *New Omaha Thomson-Houston Electric*

tion as to such danger, when it is within his power, where he has knowledge of their presence on the premises where the danger is situated.

Atlanta Cotton-Seed Oil Mills v. Coffey, 80 Ga. 145, 12 Am. St. Rep. 244, 4 S. E. 759; *Galveston Oil Co. v. Morton*, 70 Tex. 400, 8 Am. St. Rep. 611, 7 S. W. 756; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Beehler v. Daniels*, 18 R. I. 563, 27 L.R.A. 512, 49 Am. St. Rep. 790, 20 Atl. 6; *Croghan v. Schiele*, 53 Conn. 186, 55 Am. Rep. 88, 1 Atl. 899; *Toomey v. Sanborn*, 146 Mass. 28, 14 N. E. 921.

A mere passive acquiescence on the part

Light Co. v. Anderson, supra, it was held that an ordinance requiring those owning and operating overhead wires in time of fire to send one or more linemen to the scene of the fire, who should report to the chief of the fire department or the city electrician, and disconnect and remove any dangerous wires, imposed no further duty as to such wires than merely to furnish such linemen, who then became subject to the control of the city authorities.

In *Kelly v. Henry Muhs Co.* 71 N. J. L. 358, 59 Atl. 23, where a city fireman sought compensation from the owner of a factory for injuries received by the former while in the performance of his duties, by falling through an unguarded elevator shaft in the latter's factory, and the liability of such owner was predicated solely upon a statute relating to factories, etc., and the safety, etc., of operatives, and requiring, among other things, that all hoistways and elevators in factories should be protected by trapdoors or guard rails, it was held that the statute was exclusively for the benefit of the class named, and that accordingly the fireman could not recover thereunder.

The case of *Cameron v. Kenyon-Connell Commercial Co.* 22 Mont. 312, 44 L.R.A. 508, 74 Am. St. Rep. 602, 56 Pac. 358, in which the plaintiff was allowed to recover, is sufficiently set out and distinguished, and the ground of such recovery shown, in the opinion in *LUNT v. POST PRINTING & PUB. CO.*

Policemen.

"There is no logical distinction between the rights of a fireman and a policeman on private premises in the performance of duty, and I am of opinion that they are both licensees by operation of law, but may not be said to be upon the premises by invitation of the owner, express or implied." *Racine v. Morris*, 136 App. Div. 467, 121 N. Y. Supp. 146.

"It is now well settled that where a police officer or fireman enters upon premises in order that he may better perform his duties as such, but without any express or implied invitation of the owner of the premises, he

of the owner or occupant, in the use of real property by others, does not involve him in any liability to them for its unfitness for such use, unless the act is committed with notice of the fact that strangers are likely to approach, and without any effort to warn them of the danger, under circumstances which justify a belief that the owner was indifferent to the injuries which might happen to them.

2 *Shearm. & Redf. Neg.* § 705; *Caraskadon v. Mills*, 5 Ind. App. 22, 31 N. E. 559; *Plummer v. Dill*, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128; *Hart v. Cole*, 156 Mass. 475, 16 L.R.A. 557, 31 N. E. 644; *Eckes v. Stetler*, 98 App. Div. 76, 90 N. Y. Supp. 473; 21 Am. & Eng. Enc. Law, p. 473; *Herrick v. Wixom*, 121 Mich. 384, 80 N.

is a mere licensee, and such owner owes him no duty except to refrain from inflicting wilful or wanton injury upon him. The doctrine applies equally to cases where the license is given by law." *Thrift v. Vandalia R. Co.* 145 Ill. App. 414.

So, a police officer who accompanies an express wagon, to protect it from strikers, to a building, and who, upon its backing up to the elevator opening, to receive its load, steps into the opening, either to get out of the way of those loading the goods, or to protect the employees of the express company in taking possession of them, is either a trespasser or a licensee, to whom the owner of the building owes no duty except to refrain from wilfully or wantonly injuring him; and such owner is not, therefore, liable for the officer's death by falling down the shaft, although the opening was unlighted and unguarded, and the elevator not at the opening. *Casey v. Adams*, 234 Ill. 350, 17 L.R.A. (N.S.) 776, 123 Am. St. Rep. 105, 84 N. E. 933, affirming 137 Ill. App. 404.

And in *Creeden v. Boston & M. R. Co.* 193 Mass. 280, 79 N. E. 344, 9 A. & E. Ann. Cas. 1121, a police officer who entered defendant's train merely for the purpose of looking for and arresting certain "criminals" who, as he was informed and believed, were escaping on said train, was held to be at most a mere licensee, to whom defendant owed no duty to keep his premises in a safe condition, and was liable only for reckless or wanton misconduct on the part of itself or its servants; and accordingly defendant in this case was held not liable for the death of such officer, due to its alleged negligence.

But in *Learoyd v. Godfrey*, 138 Mass. 315, where a policeman who had entered upon premises at the request of a tenant, to arrest a person, was injured in consequence of the defective condition of the approach, the owner of the premises, in possession of the part where the defect existed, was held liable on the ground that the officer was an invitee. The last case is distinguished as to the nature of the place where the injury occurred in *Berry v. Boston Elev. R. Co.* 188 Mass. 536, 74 N. E.

W. 117, 81 N. W. 333; Beach, Contrib. Neg. § 50; Wharton, Neg. § 346; Marble v. Ross, 124 Mass. 44; Houston & T. C. R. Co. v. Symphkins, 54 Tex. 615, 38 Am. Rep. 632; Brown v. Lynn, 31 Pa. 510, 72 Am. Dec. 768; Needham v. San Francisco & S. J. R. Co. 37 Cal. 409; Davies v. Mann, 10 Mees. & W. 546, 19 Eng. Rul. Cas. 190; 1 Shearm. & Redf. Neg. § 99; Denver & R. G. R. Co. v. Buffehr, 30 Colo. 27, 69 Pac. 582.

It is the duty of those who use hazardous agencies to control them carefully, to adopt every known safeguard, and to avail themselves, from time to time, of every approved invention to lessen their danger to others.

Frankford & B. Turnp. Co. v. Philadelphia

933, where it was held that a street railway company was not liable for injuries to a police officer, caused by his stepping through a hole in the platform of an old, discarded car, used merely as a shelter for conductors when off duty, where he was called by a conductor, acting outside the scope of his employment, and as a practical joke, to arrest "two crooks."

Where a police officer who was in the habit of visiting a railroad station at the time of the arrival and departure of trains was negligently struck and injured by one of defendant's trucks while at such station, it was held in *Ingalls v. Adams Exp. Co.* 44 Minn. 128, 46 N. W. 325, that the defendant was bound to use reasonable care in the exercise of its business so as not to injure persons lawfully on the premises, and that plaintiff's evidence of defendant's negligence should have been submitted to the jury.

This holding, however, similarly to that of *Learoyd v. Godfrey*, supra, seems to be based upon the public nature of the premises and defendant's negligent breach of a duty to the public to exercise due care, and would apply to any other person as well as to a police officer.

So, in *Bradburn v. Whatcom County R. & Light Co.* 45 Wash. 582, 14 L.R.A.(N.S.) 526, 88 Pac. 1020, the defendant was held liable for injuries to a policeman riding on one of its cars on strictly city business, free of charge, in accordance with a municipal ordinance, but this holding was on the ground that plaintiff was a passenger, and would apply to any other passenger as well as to a policeman.

—violation of duty enjoined by statute or ordinance.

Most of the cases of injuries to policemen, however, involve statutory provisions. Thus, in *Ryan v. Thompson*, 6 Jones & S. 133, where a policeman on duty, seeing a window in defendant's store open at night, and suspecting something wrong, entered and was injured by falling through an open hoistway, the court said: "The city ordi-

& T. R. Co. 54 Pa. 345, 93 Am. Dec. 708; *Perham v. Portland General Electric Co.* 33 Or. 451, 40 L.R.A. 799, 72 Am. St. Rep. 730, 53 Pac. 14; *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, 19 Eng. Rul. Cas. 81; *Burkhardt v. Schott*, 101 Mo. App. 465, 74 S. W. 430; *Finnegan v. Fall River Gas Works Co.* 159 Mass. 311, 34 N. E. 523.

Messrs. Waldron & Thompson and John T. Bottom, for defendant in error:

An allegation of knowledge, either actual or implied, of the deadly nature of the fumes and vapors, amounts in law merely to a charge that the defendant ought to have known, and not that it did in fact know, what the noxious properties of such fumes and vapors were.

nance providing for railings around hoistways, and for their being closed on the completion of the business of each day, would seem to be a wise precaution in favor of policemen, firemen, and others who are often obliged to enter at night stores and warehouses, with which they are not familiar, to arrest burglars, extinguish fires, or for other lawful occasions, and the omission by the owner or occupant of a building to use the precaution indicated in the ordinance would reasonably subject him to an action for damages in favor of one lawfully on the premises, who should sustain injury through such omission. A breach of the ordinance under such circumstances would be negligence." But in that case the officer failed to recover, as the evidence did not establish that the defendant violated the ordinance in question.

Racine v. Morris, supra, while holding that an action would not lie at common law to recover for the death of a police officer who, on discovering the door of a building ajar at night, entered, in the performance of his duty, and fell down an unguarded elevator shaft, further held that a statute providing, among other things, that the guards and trapdoors of freight elevators shall be closed at the close of business each day, "was intended for the protection of policemen, firemen, and others lawfully on the premises," and that while no recovery could be had on account of the mere violation of the statute, such violation was prima facie evidence of negligence, which, while not conclusive, was sufficient to take the case to the jury, and to sustain a recovery upon the theory of negligence.

(Upon the general subject of private action for violation of a statute, see note to *Wolf v. Smith*, 9 L.R.A.(N.S.) 338.)

And the case of *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450, cited in *Racine v. Morris*, supra, conceding that a police officer who, in the performance of his duty, enters a building the doors of which are found open at night, is a mere licensee, held that a general statute providing that the openings of any hoistway, elevator, or well hole in any building in a certain city

Zieman v. Kieckhefer Elevator Mfg. Co. 90 Wis. 497, 63 N. W. 1021; O'Keefe v. National Folding Box & Paper Co. 66 Conn. 38, 33 Atl. 588; Durell v. Hartwell, 26 R. I. 125, 58 Atl. 448.

The deceased was a mere licensee upon defendant's premises, and as it does not appear that the defendant had any notice or knowledge that the members of the fire department then present were not cognizant, by the use of their senses of the nature of the conditions then existing, and the dangers incident thereto, he was under no active duty to such members of the fire department to impart any warning in their behalf.

Parker v. Barnard, 135 Mass. 116, 46 Am. Rep. 450; Mathews v. Bensel, 51 N. J. L. 30, 16 Atl. 195; Dixon v. Swift, 98 Me. 207, 56 Atl. 763; Flaherty v. Nieman, 125 Iowa, 546, 101 N. W. 280; 18 Am. & Eng. Enc. Law, 2d ed. p. 1136; Morgan v. Pennsylvania R. Co. 7 Fed. 79, 19 Blatchf. 239; Watson v. Manitou & P. R. Co. 41 Colo. 138, 17 L.R.A.(N.S.) 916, 92 Pac. 17; 3 Elliott, Railroads, § 1250.

A fireman who enters private premises for the purpose of extinguishing a fire or a supposed fire therein is discharging a public duty enjoined upon him by the nature of his employment and services, and while upon the premises for such purpose, stands in the relation of a mere licensee to the owner, and the latter is exonerated from all liability for accidents resulting from the dangerous condition of the premises, although the owner may have known of such dangerous conditions, and failed to give the fireman notice thereof.

Hamilton v. Minneapolis Desk Mfg. Co. 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 694; Gibson v. Leonard, 37 Ill. App. 349; Cooley, Torts, 304, 313; Woodruff v. Bowen, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Pollock, Torts, p. 426; Beehler v. Daniels, 19 R. I. 49, 31 Atl. 582; New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89; Kelly v. Henry Muhs Co. 71 N. J. 358, 59 Atl. 23; Baker v. Otis Elevator Co. 78 App. Div. 513, 79 N. Y. Supp. 663; Eckes v. Stetler, 98 App. Div. 76, 90 N. Y. Supp. 475; Kohn v. Lovett, 44 Ga. 251;

Frontier Steam Laundry Co. v. Connolly, 72 Neb. 767, 68 L.R.A. 425, 101 N. W. 997; 2 Cooley, Torts, 3d ed. p. 1268.

No contractual obligations, express or implied, exist between members of the public fire department and the owner of a building within which a fire breaks out.

Cooley, Torts, 2d ed. pp. 448, 450; School Dist. No. 80 v. Burreas, 2 Neb. (Unof.) 554, 89 N. W. 610; 2 Dill. Mun. Corp. 4th ed. § 976; Ralli v. Troop, 157 U. S. 386, 39 L. ed. 742, 15 Sup. Ct. Rep. 668.

Unexpected or unusual results do not constitute negligence in the failure to anticipate and provide against the same.

Deisenrieter v. Kraus-Merkel Malting Co. 97 Wis. 279, 72 N. W. 738; Lawless v. Laclede Gaslight Co. 72 Mo. App. 679; Purdy v. Westinghouse Electric & Mfg. Co. 197 Pa. 257, 51 L.R.A. 881, 80 Am. St. Rep. 816, 47 Atl. 237; Farmers' High Line Canal & R. Co. v. Westlake, 23 Colo. 29, 46 Pac. 134; Koontz v. Chicago, R. I. & P. R. Co. 65 Iowa, 224, 54 Am. Rep. 5, 21 N. W. 577; Texas & N. O. R. Co. v. McKee, 9 Tex. Civ. App. 100, 29 S. W. 544; Smith v. Texas & P. R. Co. 24 Tex. Civ. App. 92, 58 S. W. 151; Bock v. Grooms, 2 Neb. (Unof.) 803, 92 N. W. 603; Davis v. Chicago, M. & St. P. R. Co. 93 Wis. 470, 33 L.R.A. 654, 57 Am. St. 935, 67 N. W. 16, 1132; Armstrong v. Medbury, 67 Mich. 250, 11 Am. St. Rep. 585, 34 N. W. 566; Clegghorn v. Thompson, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; Sweeney v. Merrill, 38 Kan. 216, 5 Am. St. Rep. 734, 16 Pac. 454; Murphy v. New York, 89 App. Div. 93, 85 N. Y. Supp. 445; McKenzie v. Waddell Coal Co. 89 App. Div. 415, 85 N. Y. Supp. 819; Allison Mfg. Co. v. McCormick, 118 Pa. 519, 4 Am. St. Rep. 613, 12 Atl. 273; Wood v. Pennsylvania R. Co. 177 Pa. 306, 35 L.R.A. 199, 55 Am. St. Rep. 728, 35 Atl. 699; Woodruff v. Bowen, supra; Gould v. Slater Woolen Co. 147 Mass. 315, 17 N. E. 531; Converse v. Walker, 30 Hun, 596; Cutter v. Hemlen, 147 Mass. 471, 1 L.R.A. 429, 18 N. E. 398; Deane v. Roaring Fork Electric Light & P. Co. 5 Colo. App. 525, 39 Pac. 346; Benfield v. Vacuum Oil Co. 75 Hun, 209, 27 N. Y. Supp. 16; Lothrop v. Fitchburg R. Co. 150 Mass. 423, 23 N. E. 228; Zieman v. Kieckhefer Elevator Mfg. Co. supra; Stone v.

shall be protected by a railing and trap-door was intended for the benefit of all those upon the premises in the performance of lawful duties, even if but licensees, and that accordingly such officer might recover under the statute, where he was injured by falling down an unguarded elevator well.

In Thrift v. Vandalia R. Co. supra, where a police officer was run over by a train running backward without statutory precautions, as he was crossing a track in defendant's yard, in an endeavor to ap- 30 L.R.A.(N.S.)

prehend unknown persons who he had been informed were stealing property stored in freight cars there, it was held that the statute alleged to have been violated could have been intended only for the benefit of those who might go upon the defendant's private right of way upon its business, or by its solicitation or invitation, or by its authority, and that accordingly a mere violation of such statute did not support an action by a police officer, entering as a mere licensee.

A. C. W.

Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1.

Fire is such an unanticipated condition that defendant was not bound to foresee and provide against the happening thereof, growing out of the unexpected escape of nitric acid.

Gilmore v. Mittineague Paper Co. 169 Mass. 471, 48 N. E. 623; Pauley v. Steam Gauge & Lantern Co. 131 N. Y. 90, 15 L.R.A. 194, 29 N. E. 999; Bellino v. Columbus Constr. Co. 188 Mass. 430, 74 N. E. 684; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89; Ray Negligence of Imposed Duties, Personal, pp. 133, et seq.

Where premises are in a known dangerous condition, such as a house on fire or supposed to be on fire, the rule of exercising reasonable care to provide a safe place, etc., has no application.

Downes v. Elmira Bridge Co. 179 N. Y. 136, 71 N. E. 743; Poorman Silver Mines Co. v. Devling, 34 Colo. 37, 81 Pac. 252.

Use of nitric acid in defendant's business did not involve the employment of an agency or substance inherently dangerous *per se*, so as to subject it to any greater degree of care and diligence towards the plaintiff than would be the case if any other character of defect or danger in or about its premises were the subject of complaint.

Gibson v. Torbet, 115 Iowa, 163, 56 L.R.A. 98, 91 Am. St. Rep. 147, 88 N. W. 443; Means v. Southern California R. Co. 144 Cal. 473, 77 Pac. 1001, 1 A. & E. Ann. Cas. 206; Kilbride v. Carbon Dioxide & Magnesia Co. 201 Pa. 552, 88 Am. St. Rep. 829, 51 Atl. 347.

Musser, J., delivered the opinion of the court:

In this action there was a demurrer to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant. The demurrer was sustained. The plaintiff elected to stand upon the complaint, whereupon the complaint was dismissed, and judgment was rendered in favor of the defendant for costs. From this judgment the plaintiff brought the action here on error, assigning as error the action of the court in sustaining the demurrer to the complaint, dismissing the same, and rendering the judgment in favor of the defendant.

The complaint first alleges the corporate capacity of the defendant; that Frank P. Lunt was the husband of the plaintiff, and a member of the fire department of the city and county of Denver, and acting in that capacity on the 20th day of September, 30 L.R.A. (N.S.)

1904; that the defendant was occupying a portion of the building, particularly a room in the second story thereof, known as an etching room, near the corner of Sixteenth and Curtis streets, in the city of Denver. The complaint then proceeds as follows:

"Fourth. That at or about 3:30 o'clock in the afternoon of said day, the defendant company caused an alarm of fire to be turned in from the fire box at the corner of Sixteenth and Curtis streets, and thereby invited the fire department of the city and county of Denver, and its members, including the said Frank P. Lunt, to come to, upon, and in the premises so occupied by the said defendant, as aforesaid, as an etching room, for the supposed purpose of putting out the fire therein.

"Fifth. That in pursuance to said invitation, and in obedience to and in conformity with his duties as a member of the fire department of said city and county of Denver, said Frank P. Lunt did forthwith proceed to said etching room, at the place aforesaid, so occupied as aforesaid, from which said room large volumes of supposed smoke were issuing.

"Sixth. That there was no fire upon or in said premises, but the said supposed smoke was caused by the liberation of a large amount of nitric acid, then and there kept in the said etching room by the defendant company.

"Seventh. That the said Frank P. Lunt, supposing and believing that a fire existed in the said etching room, did enter the same in his capacity as a member of the fire department, and did seek for and attempt to put out the supposed fire therein contained, without any knowledge on his part of any dangers of any kind or character, other than those which were usually incident to his calling as a fireman in places where fire would be actually raging.

"Eighth. That while he was so engaged as aforesaid, he did breathe the said supposed smoke, so described as aforesaid, as it was necessary for him to do, in order to remain in the said room and assist in putting out the supposed fire therein contained.

"Ninth. That by reason of the said breathing, his eyes, mouth, throat, lungs, and stomach were filled with the said supposed smoke, repeatedly.

"Tenth. That the said supposed smoke was not in reality smoke at all, but consisted of fumes and vapors from the said nitric acid, so liberated as aforesaid, in the said etching room, all of which fumes and vapors were a deadly poison, inimical to human health and life, and disastrous in the highest degree to the mucous membranes and lung tissues of the human body; of all of which the said Frank P. Lunt was wholly

and absolutely ignorant at the time mentioned."

The complaint then proceeds and alleges that, within an hour after the said Lunt entered the said room, he was seized with a deadly nausea and paroxysms of vomiting, and within twenty-four hours he became afflicted with a violent case of traumatic pneumonia, and continued ill until the 12th day of October, when he died, and that his death was caused by the injuries which he had received from breathing the fumes. The complaint then further proceeds as follows:

"Fourteenth. That the said injuries were brought about solely by reason of the negligence of the defendant company, and without fault or negligence upon the part of the said Frank P. Lunt, and the said negligence consisted in each and every of the following particulars, to wit: (a) The defendant company negligently invited the said Frank P. Lunt onto its premises, by sending in, or causing to be sent in, a general alarm of fire, when in truth and in fact there was no fire in or upon the said premises. (b) The defendant company kept and maintained a large carboy of nitric acid, containing several gallons, in the said room, well knowing that the same was exceedingly dangerous, and further knowing that if anything should cause the carboy to become cracked, which contained said nitric acid, that the said nitric acid would then escape, no matter how slight the crack might be in the first instance. (c) In negligently and improperly so opening or attempting to open the said carboy of nitric acid that the same would be liable at any time to become, and the same did become, cracked, and the acid therein contained thereby became liberated, to the danger of those who might be called upon to enter the said room. (d) In failing to give the said Frank P. Lunt any warning of any kind or character of the deadly nature of the said nitric acid when liberated. (e) In failing to warn the said Frank P. Lunt, or cause him to be warned, that the fumes and vapors of the said nitric acid, if breathed into the human body, would destroy the mucous membranes and tissues, and result in the sickness and probably the death of anyone who breathed any considerable quantity of such fumes and vapors, with full knowledge upon the part of the said company, either actual or implied, of the deadly nature of such fumes and vapors."

The complaint then concludes with the allegation that the plaintiff is the widow of said Frank P. Lunt, and that by reason of the said negligence of the defendant, plaintiff was damaged in the sum of \$5,000, and prays judgment for that amount.

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It appears from the complaint, nothing being alleged to the contrary, and the statutes of the state requiring that the name of a corporation shall indicate its business, that the defendant was engaged in the printing and publishing business. It is alleged that the room in which the deceased was injured was known as an etching room and occupied by the defendant. It is nowhere alleged in the complaint, directly or by implication, that the nitric acid was unlawfully, wrongfully, or unnecessarily in that room. It is alleged that there were several gallons of the acid in the carboy. The word "several" means "more than two, but not very many." Webster's International Dictionary. From this it appears that there were at least 3 gallons, and, in any event, not very many. It is not alleged that there was an unreasonable quantity of the acid, and, without such an allegation, that fact cannot be presumed. Unless conditions that are not alleged in the complaint to have existed be presumed, the acid, for aught that appears in the complaint, was lawfully and rightfully present in the carboy in a reasonable quantity and in proper form for legitimate use by the defendant in the etching department of its business of printing and publishing, and that it was not inherently dangerous to the public, nor to occupants of adjacent premises. These observations at once remove the question of actionable nuisance from the field of discussion, and the action appears, as is directly alleged, to be an action based solely on negligence.

It is apparent from the complaint that an endeavor is therein made to state a cause of action that would be within the rule announced in many authorities, and which is well stated in *Bennett v. Louisville & N. R. Co.* 102 U. S. 577-580, 26 L. ed. 235, 236, as follows: "The owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation."

While various other rules of law are referred to in plaintiff's brief, and attempts made to apply them to this complaint, it is apparent from the complaint that the position of plaintiff may be stated briefly to be: That the defendant, by turning in an alarm of fire, thereby extended an invitation to the deceased, and by such invitation induced, or led, or lured the deceased to

come upon the premises, to wit, the etching room, for a lawful purpose, to wit, to put out the supposed fire, and that the defendant is liable in damages for the injury inflicted by the unsafe condition of the premises, to wit, the presence thereon of the poisonous fumes, which condition was known, or ought to have been known, to the defendant, and was not known to the deceased, and was negligently suffered to exist without timely notice to the deceased, who acted upon such invitation. It must be admitted that if the complaint brings the cause of action sought to be alleged within the rule announced above, then the complaint is good; and it must be confessed that from a mere cursory reading of the complaint, one is inclined to believe that the alleged cause of action falls within the rule. However, from an analysis of the rule and the allegations of the complaint, in the light of the authorities, it appears that the complaint does not state a cause of action within the rule. It will be noticed that the rule itself, as announced in the case of *Bennett v. Louisville & N. R. Co.* supra, and in other cases cited by plaintiff (*Atlanta Cotton-Seed Oil Mills v. Coffey*, 80 Ga. 145, 12 Am. St. Rep. 244, 4 S. E. 759; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050; *Learoyd v. Godfrey*, 138 Mass. 315; *Beehler v. Daniels*, 18 R. I. 563, 27 L.R.A. 512, 49 Am. St. Rep. 790, 29 Atl. 6; *Hart v. Cole*, 156 Mass. 475, 16 L.R.A. 557, 31 N. E. 644), bases the question of recovery primarily upon the fact that an invitation, express or implied, was given to the injured party, by which invitation he was induced, or led, or lured, or enticed by the defendant upon the premises where the injury occurred.

Was the deceased induced, or led, or lured, or enticed into that etching room by any invitation, express or implied, of the defendant? In the fourth paragraph of the complaint it is alleged that the defendant caused an alarm of fire to be turned in from a fire box, and thereby invited the fire department, including the deceased, to come into the etching room, for the purpose of putting out the supposed fire therein. In subdivision "a" of the fourteenth paragraph, it is alleged that the defendant negligently invited the deceased onto its premises by sending in, or causing to be sent in, a general alarm of fire. While the pleader uses the word "invite" in the complaint, it is clear that this is but a conclusion of the pleader from the fact that the company turned in an alarm of fire. *Schoepflin v. Coffey*, 162 N. Y. 12, at page 16, 56 N. E. 502. So that whether or not the deceased was upon the premises by invitation of the 30 L.R.A. (N.S.)

defendant depends not upon any direct allegation of the complaint, but upon whether or not the turning in of a general fire alarm, or of any fire alarm, by the owner of premises, when indications of fire are present, constitutes an invitation for the fire department to come upon the premises and be there in the status of invited persons within the rule announced. What is the status of a fireman on premises in the discharge of his duty?

In 2 Cooley on Torts, 3d ed. p. 648, the learned writer says: "The third class of licenses comprehends those cases in which the law gives permission to enter a man's premises. This permission has no necessary connection with the owner's interest, and is always given on public grounds. An instance is where a fire breaks out in a city. Here the public authorities, and even private individuals, may enter upon adjacent premises as they may find it necessary or convenient in their efforts to extinguish or to arrest the spread of the flames. The law of overruling necessity licenses this, and will not suffer the owner of a lot to stand at its borders and exclude those who would use his premises as vantage ground in staying the conflagration." On page 1268 it is said: "Firemen who enter a building in case of fire are licensees merely, and the owner or occupant is not liable for their injury by reason of any defects or unguarded pitfalls, or other dangers." That a fireman who enters on premises in the discharge of his duty is a licensee is also held in *Gibson v. Leonard*, 143 Ill. 182, 17 L.R.A. 588, 36 Am. St. Rep. 376, 32 N. E. 182; *Woodruff v. Bowen*, 136 Ind. 431, 22 L.R.A. 198, 34 N. E. 1113; *Eckes v. Stetler*, 98 App. Div. 76, 90 N. Y. Supp. 473; *Beehler v. Daniels*, supra; *New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N. W. 89; 2 *Shearm. & Redf. Neg.* 5th ed. § 705.

If firemen are licensees, as these authorities say, then firemen are not invited persons, as the word "invited" is used in the rule announced in *Bennett v. Louisville & N. R. Co.* In all instances the firemen respond to a notice, call, or alarm of some nature, either by or from the occupant of premises, his servants, or another. This alarm apprises the firemen of the existence and location of conditions indicating fire, and the law, when such conditions exist, creates their right and imposes upon them the public duty to enter upon the premises. The right to enter exists before the alarm is sounded, and indeed exists without an alarm if the conditions are present. The right thus created extends not only to the particular premises upon which the conditions exist, but to adjacent premises which, in

the opinion of the firemen, it may be necessary to enter in order to facilitate the discharge of their duty. When the right to enter is dependent upon an invitation, it is the invitation, express or implied, that creates the right to enter, and without the invitation the right does not exist. Hence, as an alarm does not create the right to enter, and the right exists independent of the alarm, it cannot be an invitation. It is true the complaint alleges that the defendant turned in the alarm, or caused it to be turned in. In such a case, as in any other, the right of the firemen to enter when conditions indicating fire are present exists before the alarm. How, then, can the sounding of the alarm, in such a case, create the right to enter any more than though the alarm was given by a stranger to the premises?

When the alarm of fire is given, the department responds as readily when it is given by a stranger as by the occupant of the premises, and the powers and duties of the fire department are the same whoever may send in the alarm. Indeed, the occupant of the premises may object to the sending in of the alarm, yet it may be sent in over his objections. The occupant may stand at the boundary of his premises and forbid the entrance of firemen thereon, and he may attempt to keep the firemen therefrom, yet the firemen may brush him aside and with impunity enter the premises over his protests, in discharge of their duty. So that the occupant has no more to do with permitting the firemen to enter than any other of the public. The firemen are on the premises, not in discharge of any private duty due from them to the occupant, but of a public duty which they owe to the public. Indeed, it may be said that in populous cities the firemen are more concerned to keep a fire confined to the one premises, and prevent its spreading into a general conflagration, than they are in the preservation of the property of the occupant, although the latter also concerns them. The alarms are but a part of the general system of a fire department, designed to apprise the department of the existence and location of conditions indicating a fire. The general system of the department is one of service, to the public, and the turning in of the alarm is but a detail in this public service. The occupant of premises, observing a condition indicating fire therein, owes it to the public to turn in an alarm, and a stranger to the premises, observing a like condition, owes it to the public to turn in an alarm. In either event, the occupant or the stranger performs the same public service. Of course, the occupant, in addition to performing a public service, likewise

performs a personal one; but this difference cannot make the right of the firemen to enter dependent on the will or act of the occupant, when that right already exists by force of law.

In the case of *Baker v. Otis Elevator Co.* 78 App. Div. 513, 79 N. Y. Supp. 663, it appears that an alarm was sent in from the special fire box of the defendant; but that fact did not change the relation of the firemen.

In the case of *Woodruff v. Bowen*, supra, the complaint alleged that the defendant, "as a resident of the city, and as a constituent part of this government, and as entitled to the protection of the fire department, invited the decedent and his comrades, in their capacity as firemen, into and onto the building." And with respect to this allegation the court said: "The pleader evidently intended, we think, to charge that there existed a general implied invitation from the citizens of the city, including the appellee, to the firemen belonging to the fire department, to enter their houses in case of a conflagration, for the purpose of extinguishing the fire." The court, notwithstanding the allegation of the complaint, held on demurrer that the fireman was on the premises as a licensee, and not by invitation.

The case of *Beehler v. Daniels* reached the supreme court a second time and is again reported in 19 R. I. 49, 31 Atl. 582. Speaking with regard to averments of an invitation in the complaint, the court said: "The fourth count seeks to state a case of legal liability by averring an invitation to the plaintiff to enter the premises in question; but, as it is an implied invitation, the declaration, accurately drawn, sets out the facts as stated above, from which the invitation is to be implied. The idea is that the plaintiff is in the employ of the taxpayers collectively, and so of the defendants individually; that the relation sustains the invitation; and that he is thus invited to enter the premises of his employers in the discharge of his duty. This presents the same question which we considered in our former opinion; the only difference being that now the invitation is averred which was then claimed to be implied from the facts, and there is also now added the fact that the defendants are taxpayers in Providence. The question, however, is the same, and the answer must be the same, that the facts do not amount to an invitation. There is no relation between a fireman and a taxpayer to raise it. There is no individual employment nor responsibility in respect to public officers or servants on the part of taxpayers, and so no basis for an implication of service and invitation. Of course,

firemen have a right to enter premises to stop a fire; but it is under the same law which allows others to enter, called by Judge Cooley, "the law of overruling necessity."

The inevitable conclusion is that the turning in of the alarm by the defendant was not an invitation to enter the premises. The pleader seemingly endeavored to overcome this by alleging that the alarm was turned in "when in truth and in fact there was no fire in or upon the said premises." It will be noticed that nowhere in the complaint is it alleged that the defendant or its servants knew there was no fire in or upon the premises. The complaint alleges that large volumes of supposed smoke were issuing from the etching room, and that there was a supposed fire in the room. The word "smoke" in the complaint and in the opinion is used as it is ordinarily understood. The firemen supposed it was smoke, and it must be taken from the complaint, as nothing appears therein to the contrary, that the servants of the defendant, in good faith, also supposed it was smoke. If there were great volumes of supposed smoke present, the servants of defendant were certainly justified in believing with the old saying that, "where there is so much smoke, there must be some fire," even though that fire was occasioned by some unknown chemical action of the acid. If the supposed fire was occasioned by the acid, or something else, it called for investigation and action by the fire department, so that if fire was present, not only should the property of the defendant be saved, if possible, but, what was of more importance to the public, a general conflagration be prevented. Unless the contrary be assumed to have existed, it must be concluded that the servants of the defendant, in good faith, believed, and had the right to believe, that there was a fire, and in such a case they ought to turn in an alarm, or cause it to be turned in. It would not be a salutary rule to announce that a person, be he the occupant or a stranger, is bound, at his peril, to know that a fire in truth and in fact exists, when all indications point that way, before he turns in the alarm. In cities, especially, every equipment of a fire department is chosen, and every act thereof is done, to the end that every minute shall be utilized in order that the shortest possible time shall intervene between the breaking out of a fire and the arrival of the firemen. Ofttimes a few minutes will put a fire beyond easy control and convert it into a general conflagration. It is best, therefore, that a person be permitted to act quickly upon indications presented to him, and not lose what might be precious minutes in investigating, so as to be absolutely sure that a fire exists. Certainly when great

volumes of supposed smoke issue out of a room, any person is justified in believing that a fire exists, whether occasioned by nitric acid or otherwise, and is justified in acting upon that belief, and in turning in an alarm of fire without losing more time in investigation. It is therefore concluded that the servants of the defendant in good faith believed that a fire existed in that etching room, and that under these circumstances they turned in an alarm of fire, as they ought to have done, and that the alarm so turned in was not an invitation in the sense of the rule announced in *Bennett v. Louisville & N. R. Co.*, and that the deceased came upon the premises in the character of a licensee, under circumstances and conditions requiring his presence in the discharge of his duties.

In the case of *Watson v. Manitou & P. P. R. Co.* 41 Colo. 139, 17 L.R.A.(N.S.) 916, 92 Pac. 17, this court said that it was not the duty of a licensor to give a licensee notice of hidden dangers. No doubt the court in that case wished to limit the language used to cases where the failure to give such notice would not amount to wilfulness or wantonness, for the court quotes with apparent approval from § 1251, vol. 3, *Elliott on Railroads*, as follows: "We have endeavored to show in the preceding section that there is, ordinarily, no duty to a licensee except to refrain from wilful or wanton injury to him, and to use reasonable care to prevent injury to him after discovering his danger. If there is no duty to the plaintiff, or no violation of such duty, there is, of course, no liability."

While some of the authorities use stronger language in their expression of the rule than Mr. Elliott, the quotation from that author, for the purposes of this case, very well expresses the general conclusion of the authorities with regard to the duty which the owner of premises owes to a licensee thereon, and this rule is applied to firemen.

In the case of *Hamilton v. Minneapolis Desk Mfg. Co.* 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693, the plaintiff was a member of the fire department at Minneapolis, and he entered a building in the discharge of his duty, in response to a call, and while engaged in extinguishing the fire, he fell through an unguarded elevator shaft, and was injured. The court said: "By the rules of the common law, a fireman going upon the premises of another, under the circumstances appearing in this record, could not recover damages for such an injury. However hard such a rule may seem, it appears to be settled that the owner or occupant of a building owed no duty to keep it in a reasonably safe condition for members of a public fire department who might

the opinion of the firemen, it may be necessary to enter in order to facilitate the discharge of their duty. When the right to enter is dependent upon an invitation, it is the invitation, express or implied, that creates the right to enter, and without the invitation the right does not exist. Hence, as an alarm does not create the right to enter, and the right exists independent of the alarm, it cannot be an invitation. It is true the complaint alleges that the defendant turned in the alarm, or caused it to be turned in. In such a case, as in any other, the right of the firemen to enter when conditions indicating fire are present exists before the alarm. How, then, can the sounding of the alarm, in such a case, create the right to enter any more than though the alarm was given by a stranger to the premises?

When the alarm of fire is given, the department responds as readily when it is given by a stranger as by the occupant of the premises, and the powers and duties of the fire department are the same whoever may send in the alarm. Indeed, the occupant of the premises may object to the sending in of the alarm, yet it may be sent in over his objections. The occupant may stand at the boundary of his premises and forbid the entrance of firemen thereon, and he may attempt to keep the firemen therefrom, yet the firemen may brush him aside and with impunity enter the premises over his protests, in discharge of their duty. So that the occupant has no more to do with permitting the firemen to enter than any other of the public. The firemen are on the premises, not in discharge of any private duty due from them to the occupant, but of a public duty which they owe to the public. Indeed, it may be said that in populous cities the firemen are more concerned to keep a fire confined to the one premises, and prevent its spreading into a general conflagration, than they are in the preservation of the property of the occupant, although the latter also concerns them. The alarms are but a part of the general system of a fire department, designed to apprise the department of the existence and location of conditions indicating a fire. The general system of the department is one of service, to the public, and the turning in of the alarm is but a detail in this public service. The occupant of premises, observing a condition indicating fire therein, owes it to the public to turn in an alarm, and a stranger to the premises, observing a like condition, owes it to the public to turn in an alarm. In either event, the occupant or the stranger performs the same public service. Of course, the occupant, in addition to performing a public service, likewise

performs a personal one; but this difference cannot make the right of the firemen to enter dependent on the will or act of the occupant, when that right already exists by force of law.

In the case of *Baker v. Otis Elevator Co.* 78 App. Div. 513, 79 N. Y. Supp. 663, it appears that an alarm was sent in from the special fire box of the defendant; but that fact did not change the relation of the firemen.

In the case of *Woodruff v. Bowen*, supra, the complaint alleged that the defendant, "as a resident of the city, and as a constituent part of this government, and as entitled to the protection of the fire department, invited the decedent and his comrades, in their capacity as firemen, into and onto the building." And with respect to this allegation the court said: "The pleader evidently intended, we think, to charge that there existed a general implied invitation from the citizens of the city, including the appellee, to the firemen belonging to the fire department, to enter their houses in case of a conflagration, for the purpose of extinguishing the fire." The court, notwithstanding the allegation of the complaint, held on demurrer that the fireman was on the premises as a licensee, and not by invitation.

The case of *Beehler v. Daniels* reached the supreme court a second time and is again reported in 19 R. I. 49, 31 Atl. 582. Speaking with regard to averments of an invitation in the complaint, the court said: "The fourth count seeks to state a case of legal liability by averring an invitation to the plaintiff to enter the premises in question; but, as it is an implied invitation, the declaration, accurately drawn, sets out the facts as stated above, from which the invitation is to be implied. The idea is that the plaintiff is in the employ of the taxpayers collectively, and so of the defendants individually; that the relation sustains the invitation; and that he is thus invited to enter the premises of his employers in the discharge of his duty. This presents the same question which we considered in our former opinion; the only difference being that now the invitation is averred which was then claimed to be implied from the facts, and there is also now added the fact that the defendants are taxpayers in Providence. The question, however, is the same, and the answer must be the same, that the facts do not amount to an invitation. There is no relation between a fireman and a taxpayer to raise it. There is no individual employment nor responsibility in respect to public officers or servants on the part of taxpayers, and so no basis for an implication of service and invitation. Of course,

firemen have a right to enter premises to stop a fire; but it is under the same law which allows others to enter, called by Judge Cooley, "the law of overruling necessity."

The inevitable conclusion is that the turning in of the alarm by the defendant was not an invitation to enter the premises. The pleader seemingly endeavored to overcome this by alleging that the alarm was turned in "when in truth and in fact there was no fire in or upon the said premises." It will be noticed that nowhere in the complaint is it alleged that the defendant or its servants knew there was no fire in or upon the premises. The complaint alleges that large volumes of supposed smoke were issuing from the etching room, and that there was a supposed fire in the room. The word "smoke" in the complaint and in the opinion is used as it is ordinarily understood. The firemen supposed it was smoke, and it must be taken from the complaint, as nothing appears therein to the contrary, that the servants of the defendant, in good faith, also supposed it was smoke. If there were great volumes of supposed smoke present, the servants of defendant were certainly justified in believing with the old saying that, "where there is so much smoke, there must be some fire," even though that fire was occasioned by some unknown chemical action of the acid. If the supposed fire was occasioned by the acid, or something else, it called for investigation and action by the fire department, so that if fire was present, not only should the property of the defendant be saved, if possible, but, what was of more importance to the public, a general conflagration be prevented. Unless the contrary be assumed to have existed, it must be concluded that the servants of the defendant, in good faith, believed, and had the right to believe, that there was a fire, and in such a case they ought to turn in an alarm, or cause it to be turned in. It would not be a salutary rule to announce that a person, be he the occupant or a stranger, is bound, at his peril, to know that a fire in truth and in fact exists, when all indications point that way, before he turns in the alarm. In cities, especially, every equipment of a fire department is chosen, and every act thereof is done, to the end that every minute shall be utilized in order that the shortest possible time shall intervene between the breaking out of a fire and the arrival of the firemen. Ofttimes a few minutes will put a fire beyond easy control and convert it into a general conflagration. It is best, therefore, that a person be permitted to act quickly upon indications presented to him, and not lose what might be precious minutes in investigating, so as to be absolutely sure that a fire exists. Certainly when great

volumes of supposed smoke issue out of a room, any person is justified in believing that a fire exists, whether occasioned by nitric acid or otherwise, and is justified in acting upon that belief, and in turning in an alarm of fire without losing more time in investigation. It is therefore concluded that the servants of the defendant in good faith believed that a fire existed in that etching room, and that under these circumstances they turned in an alarm of fire, as they ought to have done, and that the alarm so turned in was not an invitation in the sense of the rule announced in *Bennett v. Louisville & N. R. Co.*, and that the deceased came upon the premises in the character of a licensee, under circumstances and conditions requiring his presence in the discharge of his duties.

In the case of *Watson v. Manitou & P. P. R. Co.* 41 Colo. 139, 17 L.R.A.(N.S.) 916, 92 Pac. 17, this court said that it was not the duty of a licenser to give a licensee notice of hidden dangers. No doubt the court in that case wished to limit the language used to cases where the failure to give such notice would not amount to wilfulness or wantonness, for the court quotes with apparent approval from § 1251, vol. 3, *Elliott on Railroads*, as follows: "We have endeavored to show in the preceding section that there is, ordinarily, no duty to a licensee except to refrain from wilful or wanton injury to him, and to use reasonable care to prevent injury to him after discovering his danger. If there is no duty to the plaintiff, or no violation of such duty, there is, of course, no liability."

While some of the authorities use stronger language in their expression of the rule than Mr. Elliott, the quotation from that author, for the purposes of this case, very well expresses the general conclusion of the authorities with regard to the duty which the owner of premises owes to a licensee thereon, and this rule is applied to firemen.

In the case of *Hamilton v. Minneapolis Desk Mfg. Co.* 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693, the plaintiff was a member of the fire department at Minneapolis, and he entered a building in the discharge of his duty, in response to a call, and while engaged in extinguishing the fire, he fell through an unguarded elevator shaft, and was injured. The court said: "By the rules of the common law, a fireman going upon the premises of another, under the circumstances appearing in this record, could not recover damages for such an injury. However hard such a rule may seem, it appears to be settled that the owner or occupant of a building owed no duty to keep it in a reasonably safe condition for members of a public fire department who might

in the exercise of their duties, have occasion to enter the building." In that case it also appears that there was a statute of Minnesota requiring that elevators be guarded; but the court held that it appeared from the act that it was intended to protect employees, and imposed no duty to firemen.

The cases cited above from Illinois, Indiana, New York, Rhode Island, and Nebraska, all of which deal with injuries sustained by firemen while in the discharge of their duties, are to the same effect. It is not necessary in this case to go to the length of some of these authorities, but they fully sustain the doctrine as announced by Judge Elliott in his work on railroads, and apply it to firemen.

In the case of *Woodruff v. Bowen*, supra, determined on demurrer to the complaint, it appeared that, on account of the weakness and insecurity of the walls and foundations of a building, the roof fell in during a fire, and precipitated the deceased and eleven other firemen into the basement, killing them. The defendant knew of the insecure and dangerous condition of the wall, while the firemen did not. There was also an ordinance of the city of Indianapolis declaring it to be unlawful for any person to construct or maintain any unsafe, insecure, and dangerous wall or building within the city limits. To illustrate how strongly some courts express their ideas of the law, in evolving an application of it to firemen, the following quotation is taken from that case, on page 441 of 136 Ind.: "In the case of *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369, it was said: 'No doubt, a bare licensee has some rights. The landowner cannot shoot him.' He cannot lawfully set spring traps for him. The licensor is liable, even to a licensee, if he is guilty of what the civil law termed *dolus*. But beyond this the licensor owes the licensee no duty, certainly not the duty of active diligence to see that no harm comes to him, and when the latter, without any invitation, and pursuant to a mere license, enters the former's premises, he takes the risk of whatever dangers may be there. The law is so laid down in the text-books, and is established by a multitude of decisions." And on pages 442 and 443 of 136 Ind., the court said: "We are of the opinion that the owner of a building in a populous city does not owe it as a duty at common law, independent of any statute or ordinance, to keep such building safe for firemen or other officers who, in a contingency, may enter the same under a license conferred by law." The court further held that the ordinance did not apply to firemen in case of a fire, nor to the kind of a wall described in the complaint. The cracking of the car-

boy containing the acid, if caused by the negligence of the defendant, happened before the firemen were on the premises, and such negligence was not a breach of a duty which the defendant owed to the firemen, and the act which occasioned the cracking of the carboy, even if it was negligence on the part of the defendant or its servants, cannot reasonably be characterized as reckless, wilful, or wanton.

The authorities, in announcing the rule of nonliability to firemen, do not consider the origin of the fire at all. They announce the law, regardless of whether the fire was started by the negligence of the occupant or not. Some fires originate without the intervention of human negligence. Nearly all fires originate through somebody's negligence, and as, in the nature of things, the occupant or his servants have more to do with the premises than anyone else, it is fair to conclude that the majority of fires are caused by the negligence in some way of the occupant or his servants; yet the authorities do not mention this element of negligence in considering the liability of the occupant for injury to a fireman.

It is alleged in subdivision "e" of the fourteenth paragraph of the complaint that the defendant was guilty of negligence in failing to warn the deceased of the direful effect of breathing the fumes and vapors of the nitric acid, "with full knowledge on the part of the said company (defendant), either actual or implied, of the deadly nature of such fumes and vapors." It has been seen that, under the allegations of the complaint, the servants of defendant, in good faith, believed that the vapor in the etching room was smoke, whether such smoke came from fire started by some unknown chemical action of nitric acid or otherwise. It is not alleged that the defendant or its servants knew that this vapor was the fumes and vapors of nitric acid, and not smoke. Does the allegation of the complaint, that the defendant had knowledge, either actual or implied, of the deadly nature of the fumes and vapors, charge the defendant with actual knowledge thereof? Strictly speaking, this is no allegation of knowledge, for it neither says that the one kind nor the other was possessed. This strictness, however, is not to be applied, under the Code. The language of the allegation indicates that in the mind of the pleader it was immaterial whether the defendant actually knew or not, and makes paramount the idea of duty to know, and therefore the law raises an implication of knowledge. The intent and sense, therefore, to be drawn from the allegation, is that the defendant ought to have known.

In *O'Keefe v. National Folding Box &*

Paper Co. 66 Conn. 38, 33 Atl. 587, the complaint alleged that the plaintiff was negligently put to work in placing colored paper, saturated with poison, into a box greatly heated with steam, and then taking it out again, when softened, for more easy folding; that he did not know the paper was poisoned; that the steam and heat of the box caused the poison to exhale and mingle with the steam, which poisoned steam the plaintiff was compelled to breathe, while at work; that the poison also worked into his body, through the pores of the skin; that the defendant failed to give plaintiff notice of the poisonous nature of the paper, or of the danger that might result to his health from such work. With respect to the knowledge of the defendant, it was alleged that "the defendant knew, or ought to have known, the effect and result the placing of colored paper into a box greatly heated by steam, and then taking it out again, would have, or might have, upon the person employed in such work, to wit, the plaintiff." With respect to this allegation, the court said: "The plaintiff alleges that the defendant knew, or ought to have known, the effect that steaming colored paper in a hot box would or might have on the health of those who conducted the process. This (construed, as it must be, most strongly against the pleader) amounts simply to a charge that the defendant ought to have known the effect the work might have on those engaged in it." Though its language so declares, the court, in fact, did not construe the pleading against the pleader, but gave to the allegation the only intent and meaning it could have.

In *Durell v. Hartwell*, 26 R. I. 125, 58 Atl. 448, the plaintiff, while engaged in decorating a building, was knocked from a staging, on which he was standing, by an elevator. The staging projected into the elevator well. The complaint alleged that the plaintiff was ignorant that the staging projected into the well; but the defendants knew, or, by the exercise of due care, could have known, that it so projected, and that they, without warning to the plaintiff, so operated the elevator that it was driven against the staging. Referring to the allegation concerning knowledge, the court said: "The declaration states that the defendants 'knew, or, by the exercise of reasonable care, could have known, that a portion of the staging projected into the elevator well.' This is not an allegation that the defendants knew, but only that they might have known by the exercise of due care."

These authorities establish that the allegation in the complaint that the defendant had knowledge, either actual or implied, of the deadly nature of such fumes and vapors, 30 L.R.A. (N.S.)

amounts simply to an allegation that the defendant had implied knowledge of such fact, and not actual knowledge. The pleader attempts to impose upon the defendant the duty of exercising due care to acquaint itself with the deadly nature of the fumes and vapors. Under the authorities cited, no such duty to firemen is imposed, and it is not even made to appear that defendant knew that the vapor was the fumes and vapors of nitric acid, and not smoke. It follows, therefore, that there is not presented for determination the question whether or not the failure to apprise the deceased of the deadly nature of the fumes and vapors, when that fact was actually known to the defendant, was such recklessness, wilfulness, wantonness, or lack of reasonable care to prevent injury to the deceased, who was on the premises, as to subject the defendant to liability for the injury. A failure to communicate such knowledge, when it was not actually possessed by the defendant or its servants, as appears from the complaint, is not such recklessness, wilfulness, wantonness, or lack of reasonable care to prevent injury to the deceased on the premises, as to render the defendant liable. No intimation is intended to be given as to what facts would indicate recklessness, wilfulness, or wantonness. The facts present do not indicate such.

It is alleged in subdivision "b" of the fourteenth paragraph that the defendants knew that the nitric acid was exceedingly dangerous; but in what particulars it was dangerous is not stated. That allegation is qualified as to the danger arising from breathing the fumes and vapors, and as to that danger the knowledge is not actual, but implied.

On behalf of the plaintiff, it is urged that the case of *Cameron v. Kenyon-Connell Commercial Co.* 22 Mont. 312, 44 L.R.A. 508, 74 Am. St. Rep. 602, 56 Pac. 358, announces the law applicable to this case. In that case the defendant company kept in its warehouse, within the corporate limits of the city of Butte, a large amount of Hercules powder; that there was a law of the state of Montana forbidding the storing of such powder within the corporate limits of a city in excess of 50 pounds. It was shown that an amount of powder greatly in excess of that permitted by statute was stored in the warehouse; that the warehouse took fire; that the firemen responded to an alarm, and while they were at the warehouse, actually engaged in endeavoring to put out the fire, the powder exploded, and many persons were killed, including the plaintiff's intestate, who was

the chief of the fire department. The court, after stating the facts, and discussing the relation of directors to a corporation, says: "Now, bearing in mind that this case presents itself upon a motion for nonsuit, and that we must accordingly consider as true everything which the evidence tended to prove on the trial, we have before us a corporation guilty of a nuisance, by having kept in a frame warehouse within the limits of an incorporated city, in the vicinity of railroad depots and other buildings, an amount of Hercules powder in excess of the quantity—50 pounds—allowed to be stored therein by the laws of the state." And further on the court says: "The corporation, therefore, by maintaining this nuisance, became the subject of indictment for misdemeanor . . . as well as liable in civil action for injury to person or property caused by the nuisance. . . . These propositions are too plain for extended comment. They demonstrate a liability to this plaintiff—assuming always the evidence is uncontradicted."

No further comment is necessary to show that in that case the company was held liable because the injury was occasioned by a nuisance maintained contrary to the laws of the state of Montana. Under the circumstances present in that case, if it had been necessary, no quarrel could have been had with the court, if it had held that the company was guilty of maintaining a common-law nuisance, or that the company was guilty of such reckless, wilful, and wanton conduct as to render it liable to any person injured upon or off the premises, either as an invited person, a licensee, or a trespasser. There are no such conditions of nuisance or reckless, wilful, or wanton conduct present in the case at bar, nor any article whose dangerous qualities are so obvious and well understood as the explosiveness of Hercules powder.

The known ability of counsel for plaintiff warrants the assertion that the complaint, upon which it was elected to stand in this case, is as strongly drawn in favor of the plaintiff as the evidence at hand to prove its allegations would permit. Under the authorities, it does not state a cause of action. The rules announced may seem harsh; but they are founded in a public policy for populous districts to which the rights of individuals ought to bend. Fire departments are for the public. The service of its members is purely a public one. It must be so to assure the most effective work in fighting fire. In times of conflagration, or indications thereof, ordinary people lose their power of judgment and are not qualified to direct. Owners of

property whereon are indications of fire will and should be, for the time, suspended from control, and the trained firemen, as the representatives of the public, be in absolute command, unhampered by the wishes or directions of any individual. Firemen must form their judgment quickly from appearances before them, and they must swiftly execute this judgment if the best result be reached. Their time ought not be spent in determining what duties they owe to this man or that man. Hence, generally speaking, the law is that, in the discharge of their public duties, they owe no duty to individuals. Their business is to put out fires in the best and quickest way. When they have done this, they have performed their duty to the public, to whom alone is any duty due from them. If it be held that duties are due the firemen other than as stated in the quotation from Mr. Elliott's work, this would call for reciprocal duties from the firemen, and thus their work would be hampered and their minds diverted by the consideration of their private duties. The help of a fireman is always needed in times of stress and excitement, when danger surrounds the fireman on every hand, when quick destruction of life and property is threatened, when the necessities of the case call for cool, quick judgment and swift, untrammelled action. It is better that the situation be not further confused by the consideration of reciprocal private duties. The life of the fireman is an heroic one. Daily, in the discharge of his duties, he performs acts of the truest heroism, which go down unheralded and unsung. He consecrates his life to his work, and, when it becomes necessary, unflinchingly offers up, as a sacrifice to the public, his own well-being, his life, and the future welfare of his wife and children. The public, to whom he owes this duty and for whom he performs it, owes to him the reciprocal duty of providing generously, in some proper way, by public taxation, for the care and comfort of the fireman and those dependent on him, when, in the discharge of his duties, he becomes disabled, and for the care and comfort of his wife and children when he gives up his life for the public.

From what has been said, it appears that the demurrer should have been sustained, and the judgment is therefore affirmed.

Steele, Ch. J., and Campbell, J., concur.

Petition for rehearing denied July 5, 1910.

GEORGIA SUPREME COURT.

HUGH F. DAVIS

v.

MARIE A. DAVIS, Plff. in Err.

(134 Ga. 804, 68 S. E. 594.)

Divorce — grounds — condoned acts — subsequent acts.

1. If a husband is guilty of cruel treatment toward his wife, or of adultery, and with full knowledge thereof she condones the offense and cohabits with him, and he is not guilty of any further misconduct, she cannot thereafter, at her mere will, desert him, and, if suit is brought against her for a divorce on the ground of wilful and continued desertion for three years before the filing of the suit, set up the condoned acts, and thereby prevent the granting of a divorce.

(a) If, after the condonation, the conduct of the husband is such as to revive the condoned acts and give her a right to assert them, she is not debarred from so doing; nor is she prevented from setting up

misconduct on his part after the condonation, for the consideration of the jury in determining whether a divorce should be granted.

Same — alimony — to divorced wife — question for jury.

2. Under the statutes of this state (Civil Code 1895, § 2435), although a husband may obtain a divorce from his wife on the ground of wilful and continued desertion for more than three years before the filing of the suit, it is not an inflexible rule of law that the wife shall not be allowed alimony. On the other hand, it does not follow that the divorced wife would be entitled to alimony as of course, when her conduct has been grossly improper, and caused her husband to obtain a total divorce from her.

(a) Under the facts of the present case, the judge should have submitted to the jury the question of whether alimony should be allowed to the wife, if a divorce should be granted to the husband.

(Fish, Ch. J., and Atkinson, J., dissent from proposition 2.)

Headnotes by LUMPKIN, J.

(July 14, 1910.)

Note. — Right of wife against whom an absolute divorce is granted to permanent alimony.

The earlier cases on this question are discussed in a note to Ecker v. Ecker, 20 L.R.A.(N.S.) 421. Since the date of that note, but few cases on this question have come before the courts.

It will be observed from the earlier note that, under a statute directing a court, upon a decree of divorce being granted, to make such order touching alimony of the wife as, under the circumstances and nature of the case, shall be reasonable, it has been generally held that the court, if the circumstances in its opinion call for its allowance, has the power to grant the wife alimony, although the divorce was granted against her.

In Pryor v. Pryor, 88 Ark. 302, 129 Am. St. Rep. 102, 114 S. W. 700, where a statute provided that when a decree (of divorce) shall be entered, the court shall make such order touching the alimony of the wife and care of the children as, from the circumstances of the parties and the nature of the case, shall be reasonable, the court said that, whether dependent upon enlarged powers conferred by the statute or not, it is well settled that a court has the power to allow alimony to a wife against whom a divorce is granted on account of her misconduct.

Under a similar statute, a wife was granted permanent alimony in Vigil v. Vigil (Colo.) — L.R.A.(N.S.) —, 111 Pac. 833, although the divorce was granted against her for desertion. It appeared in this case that the wife's desertion was caused by the husband's extreme and repeated acts of

cruelty, and further, that the husband was able to pay, and that the wife was old, helpless, penniless, and almost blind.

So, in Pederson v. Pederson (Neb.) 128 N. W. 649, it was held that, under the Nebraska statute, sufficiently set out in the earlier note, the court, when the divorce is granted the husband, may allow the wife permanent alimony on any ground except where she is guilty of adultery. In this case the divorce was obtained on the ground of extreme cruelty, such cruelty consisting of repeated malicious accusations by the wife that the husband was guilty of incest. It appeared in this case that the husband had considerable property, and the wife, who was a dressmaker prior to the marriage, had but very little, and besides, on account of the marriage, her business had been broken up.

And where alimony is permitted to be granted the husband, under a statute providing that the court, on granting a divorce, may make such order in reference to the property as shall be right, he may be entitled thereto, although, so far as the record appears, at least, he was the guilty party, and the wife secured the decree of divorce. McDonald v. McDonald, 117 Iowa, 307, 90 N. W. 603.

The right of the wife to recover alimony upon a divorce being granted against her seems, in effect, at least, also to have been recognized in Cevene v. Cevene (Wis.) 127 N. W. 942, where the husband secured a divorce from his wife because of alleged cruel and inhuman treatment.

In Dailey v. Dailey, Wright (Ohio) 514, a wife against whom a divorce was granted for adultery was also granted alimony, it appearing that the property was earned by

ERROR to the Superior Court for Chat-ham Count to review a judgment granting plaintiff a divorce. Reversed.

The facts are stated in the opinion.

Messrs. Oliver & Oliver for plaintiff in error.

Mr. Robert L. Colding for defendant in error.

Lumpkin, J., delivered the opinion of the court:

Hugh F. Davis brought suit against his wife, Marie A. Davis, for divorce on the ground of wilful and continued desertion for more than three years. She denied the allegation of the plaintiff, and, by way of cross libel, alleged that the plaintiff had deserted her, had cruelly treated her, and had been guilty of adultery. She prayed that a divorce be granted to her, and that she have a judgment for alimony. The jury found for the plaintiff a total divorce. In the second verdict they declared: "We fix the rights and disabilities of the parties as follows: That neither of the parties be at liberty to marry again." The defendant moved for a new trial, which was denied, and she excepted.

1. "Condonation" has been defined to be the forgiveness, either express or implied, by a husband of his wife, or by a wife of her husband, for a breach of marital duty, with an implied condition that the offense shall not be repeated. Webster's Dictionary; Odom v. Odom, 36 Ga. 286. Voluntary condonation and cohabitation subsequently to the acts complained of, and with notice thereof, prevents the grant of a divorce on account of them. Civil Code 1895, § 2429. But if the implied condition be broken, the right to set up such

wrongful acts is revived, and the innocent party is not prevented from obtaining a divorce. What character of misconduct will serve to revive the right to rely upon acts previously condoned, and whether it is necessary that such reviving acts shall be sufficient to furnish a ground for divorce, is not here involved. Ozmores v. Ozmores, 41 Ga. 46; 14 Cyc. Law & Proc. p. 642. If, however, there is no breach of the condition after condonation and cohabitation, the forgiveness stands as complete and absolute. The condoning party cannot forgive the acts, and cohabit voluntarily with the forgiven one, and at the same time reserve the right to assert them as a means of obtaining a divorce, if there be no further misconduct, or as a screen to prevent a divorce being obtained on account of subsequent breaches of marital duty by such condoning party. To permit this would be to attach a different condition to condonation from that which the law attaches, and to make forgiveness such only in name. Condonation is not revocable at will.

It was argued that § 2429 of the Civil Code 1895, above cited, closes with the words: "And in all cases, the party sued may plead in defense the conduct of the party suing, and the jury may, on examination of the whole case, refuse a divorce." This statement follows certain provisions to the effect that "if the adultery, desertion, cruel treatment, or intoxication complained of shall have been occasioned by the collusion of the parties, and with the intention of causing a divorce, or if the party complaining was consenting thereto, or if both parties have been guilty of like conduct, or if there has been a voluntary condonation and cohabitation subsequent to the acts com-

them jointly, and, as the court said, she must not be turned out to prostitution or starvation.

In *Squire v. Squire* [1905] P. 4, a woman against whom a divorce was granted for adultery was granted an allowance, the object being, as the court said, to protect her from temptation, and induce her to lead a respectable life. In this case, for the reason that the husband should not be compelled to support a woman who is immoral, and also for the woman's own protection, the allowance was made only while she should remain chaste and unmarried.

Similar cases, and holding to the same effect, are *Edwards v. Edwards* [1894] P. 33, and *Bent v. Bent*, 2 Swabey & T. 392.

Lander v. Lander [1891] P. 161, is a similar case, though the court, because it was not a question of large income, but of a bare allowance for the wife's support and maintenance, did not think it necessary to insert a *dum sola et casta* clause.

But where the wife is the recipient of an

income sufficient for her support, in fact, much larger than the income that could be derived from the husband's property, and he, shortly before their separation, paid to her the entire amount of the income derived from her property during the existence of the marriage relation, it is not error to refuse her alimony in a suit for divorce granted the husband for her desertion. *Wilkins v. Wilkins*, 84 Neb. 206, 133 Am. St. Rep. 618, 120 N. W. 907.

So, where the husband in a cross complaint secures the divorce, and the findings show no equities whatever in favor of the wife, and it appears that by her marriage she designedly undertook to put herself in a legal position where she believed she could demand at the hands of the law a share of the husband's property, that there is no property requiring division, and that she is not in necessitous circumstances, it is error on the part of the trial court to allow her alimony. *Van Gelder v. Van Gelder*, (Wash.) 112 Pac. 86. G. V.

plained of, and with notice thereof, then no divorce shall be granted." The last clause of the section (quoted first above) was not intended to destroy entirely the effects of the condonation, so that a person, after condoning a ground for divorce, and cohabiting with the offender, could, at some later period, and with no further reason, desert the person so forgiven, persist in such desertion for the statutory period, and yet prevent a divorce by reason of the condoned acts. If there were a breach of the implied condition on the part of the person whose offense had been condoned, or if there were other acts or grounds authorizing the refusal of the divorce, this could be pleaded and proved for the consideration of the jury. The charge of the court on this subject was not erroneous.

2. The court charged the jury that, if they found a total divorce for the plaintiff, they would put their verdict in a certain form, "and, in that event, you would not allow the defendant alimony." This in effect instructed the jury, as a rule of law, that, if they should find a total divorce in favor of the husband against the wife, they would allow the latter no alimony. At common law (including in that term the canon or ecclesiastical law) the ecclesiastical courts did not grant total divorces except for such cause as rendered the marriage void *ab initio*. This was rather an adjudication that there had never been a binding marriage than a dissolution of one originally valid. Partial divorces were granted on account of adultery and cruel treatment. Prior to 1858, in England no judicial divorces dissolving the bonds of matrimony, if originally valid, were allowed. Parliament exercised that authority. In its origin, alimony was the method by which the spiritual courts enforced the duty of support owed by a husband to his wife during such time as they were legally separated. It was not an incident to declaring the marriage void *ab initio*, since, if there were no marriage, the duty of maintenance had not been undertaken. The question of awarding alimony upon the dissolution of a valid marriage for a postnuptial cause could not therefore have been decided in England prior to the time when the common law was adopted in this state. In regard to partial divorces, it has been declared that where the wife, by her fault, forfeited all claim upon her husband for necessities or other support, and he obtained a divorce from her on that ground, she could not, after this fact had been adjudged against her, have alimony from him. Thus, where a divorce was granted to a husband on account of the adultery of the wife, she was held to be entitled to no alimony. 3 Bl. Com. 94. 30 L.R.A. (N.S.)

As late as 1859, in *White v. White*, 6 Jur. N. S. 28, upon the granting of a petition for a judicial separation, presented by a man against his wife, on account of her violent and cruel conduct towards him, Cresswell, Judge Ordinary, held that the wife was entitled to no permanent alimony, saying that he found no precedent for granting it in such case. But in 1864, in *Prichard v. Prichard*, 10 L. T. N. S. 789, Wilde, Judge Ordinary, overruled the decision in the *White Case* and another similar case, saying: "I am aware of the cases to which you allude, but I think if there is no precedent, I ought to make one."

It has been decided by a number of courts that, in the absence of any statute, if a divorce be granted to a husband against the wife, she is not entitled to alimony. This at times worked a great hardship on the wife, especially under the common law, where the marital right of the husband attached to her property; and, while it was said to be strict justice, it was also said that it sometimes drove the wife to starvation or a life of shame. The English Parliament adopted a practice, when granting to a husband a total divorce, of requiring him to make some provision for his wife. In England, and in a number of the United States, statutes have been enacted which authorize the courts to grant alimony to wives against whom judgments of divorce are rendered, or to require some other provision to be made by the husbands, when the courts deem it best. In some of these statutes the provision is express; in others the terms are general; but the courts have construed them to have the effect above indicated. Where, under the statute, discretion is vested in the court, it is to be exercised with care. In such jurisdictions it has been said to be the exception, rather than the rule, that the wife shall cause the matrimonial tie to be sundered by reason of her own conduct, and still have alimony; but, on the other hand, that the wife may have collaborated with her husband in acquiring the property held by the latter, that she may have greatly aided in establishing his fortune, that her conduct may not have been justifiable, so as to prevent a divorce, and yet the conduct of the husband may not have been exemplary. She may have no property, and be broken in health. In other words, under such statutes, while the law does not hold out to a wife who deserts the matrimonial domicile the promise of a right to alimony, but rather discourages divorces coupled with pecuniary claims upon the part of the party at fault, yet there may be circumstances which may render it just and proper that some alimony should be allowed to the wife,

although the divorce should be granted against her. In such instances the judge or the jury, as the case may be, in passing upon the question of alimony, should take into consideration the situation and circumstances of the parties, the property owned by them respectively, the conduct of each, and all the facts which would throw light on the proper exercise of the discretionary power. 2 Bishop, Mar. & Div. §§ 861 et seq., and citations.

The question is: Where does Georgia take position on this subject? At first the legislature granted total divorces. The first general rule in regard to the matter which the writer has found laid down is contained in the Constitution of 1798 (art. 3, § 9), where it was declared: "Divorces shall not be granted by the legislature, until the parties shall have had a fair trial before the superior court, and a verdict shall have been obtained, authorizing a divorce upon legal principles. In such cases, two thirds of each branch of the legislature may pass acts of divorce accordingly." Marbury & C. Dig. 29. By the act of December 5, 1806 (Cobb's Dig. p. 224), it was declared that in all cases where the jury "shall determine in favor of a conditional divorce, they shall by their verdict or decree make provision, out of the property of which the husband may be possessed, for the separate maintenance and support of the wife and the issue of such marriage, which verdict or decree the said court shall cause to be carried into effect according to the rules of law, or according to the practice of chancery, as the nature of the case may require." By amendment to the Constitution, divorces were made final and conclusive upon the concurrent verdicts of two special juries, authorizing a divorce upon such legal principles "as the general assembly may by law prescribe." The last of these amendments doubtless resulted from the decision in *Head v. Head*, 2 Ga. 191. See also Cobb's Dig. 1123. By the act of February 22, 1850 (Cobb's Dig. p. 226), the grounds of divorce, both total and partial, were declared. These are now embodied in Civil Code 1895, §§ 2426 et seq. The Constitution of 1861 contained the following provision; "The superior court shall have exclusive jurisdiction in all cases of divorce, both total and partial; but no total divorce shall be granted except on the concurrent verdicts of two special juries. In each divorce case, the court shall regulate the rights and disabilities of the parties." Code 1863, § 4974. Thus the entire subject of granting divorces and alimony became fixed by constitutional provision in the superior court, and ceased to be a matter of legislative grant. By the act of 1806 (Cobb's 30 L.R.A. (N.S.)

Dig. p. 225), requirement had been made that the party applying for a divorce should file a schedule of the property owned by the parties respectively, and that, after all just debts had been paid, it should be subject to a division or equal distribution between the children of such parties, unless the jury should think proper to allow either party a part thereof. When the first Code was adopted, instead of providing for a division of the property, it was declared that "in all suits for divorce, the party applying shall render a schedule, on oath, of the property owned or possessed by the parties at the time of the application,—or at the time of the separation, if the parties have separated,—distinguishing the separate estate of the wife, if there be any, which shall be filed with the petition, or pending the suit, under the order of the court. The jury rendering the final verdict in the cause may provide permanent alimony for the wife, either from the corpus of the estate or otherwise, according to the condition of the husband and the source from which the property came into the coverture." Code 1863, § 1676. This language, "in all suits for divorce . . . the jury . . . may provide permanent alimony for the wife," has been preserved and again adopted in § 2435 of the Civil Code of 1895, although the husband's marital right no longer attaches to the wife's property. Perhaps the possibility that the labor and services of the wife may have contributed to build up the fortune of the husband may have been in the legislative mind. Thus it will be seen that the trend of legislation in Georgia has not been to restrict the powers of the jury, or to confine them rigidly to the rule that, if a divorce shall be granted to the husband against his wife, no provision for her support shall be made. The authority given to the jury by the act of 1806 to divide the property among the children, but to make an allowance to either party, should they think proper, and the later provisions in regard to the powers of the jury, negative the idea of an absolute limitation in regard to alimony if a divorce should be granted to the husband.

In *Campbell v. Campbell*, 90 Ga. 687, 16 S. E. 960, Mr. Justice Simmons said: "A wife is entitled to support by her husband until the right is forfeited by her own misconduct; and in some cases alimony has been allowed her even where the divorce was in favor of the husband." He also said that in this state the right of a wife to a provision by the husband in her favor is the same, whether the divorce is from bed and board only or a total dissolution of the marriage,—at least, if a valid marriage has

subsisted. In that case the divorce was granted on the application of the wife. We have not overlooked the fact that § 2462 of the Civil Code 1895 says that "if the jury, on the second or final verdict, find in favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children shall be entitled to for their permanent support, . . . and this they may also do if, from any legal cause, the wife may not be entitled to permanent alimony, and the said children are not in the same category." We do not think that the expression, "if the jury, on the second or final verdict, find in favor of the wife," means that in no event can alimony be awarded unless the wife shall obtain a divorce. In such a case, the law provides, in awarding alimony to her, for specifying the amount to which the minor children should be entitled; and also for finding alimony for the children, should she be debarred from obtaining it for any legal reason. That section was derived from the act of October 28, 1870 (Acts 1870, p. 413). Its title was, "An Act to Extend the Provision for Alimony to the Family of the Husband; to Provide for the Custody of the Children, and for Other Purposes Connected Therewith." Under § 2478 of the Civil Code, the husband is bound for necessities furnished to his wife when living separate from him; but, if she voluntarily abandons him without sufficient provocation, notice by the husband shall relieve him of all liability for necessities furnished to her. This deals with the authority of the wife, as matter of right, to charge her husband with necessities, when living separate from him. It does not deal with divorce cases, or the power of the judge to award temporary alimony, or absolutely prevent a jury from allowing permanent alimony in a proper case. They may allow it or refuse it, or may allow less than full maintenance, according to circumstances.

The construction of statutes of one state often throws little light on the construction of those of another, as a slight difference in language may make a great difference in construction. But an examination of the statutes of other states and their construction by the courts show that the trend of authority is in harmony with this decision. In *Deenis v. Deenis*, 79 Ill. 74, a statute was under consideration which declared that, "when a divorce shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care, custody, and support of the children, or any of them, as, from the circumstances of the parties and the nature of the case, 30 I.R.A. (N.S.)

shall be fit, reasonable, and just." It was held that alimony might be allowed, notwithstanding the divorce was granted for the fault of the wife. The opinion of Mr. Justice Scholfield strongly presents the grounds of equity and justice for such a construction. In *Spitler v. Spitler*, 108 Ill. 120, the former ruling was adhered to; but it was said that it was not the object of the legislature, in adopting the provision of the statute relating to alimony, to abrogate the general principles or policy of the law relating to that subject, but rather to clothe the court with power to mitigate occasional hardships that might otherwise occur. In *Graves v. Graves*, 108 Mass. 314, 317, a somewhat similar statute of Massachusetts was construed, and it was held that alimony might be awarded to the wife upon granting to the husband a divorce for her fault. Gray, J., clearly stated the reason for giving such a construction to the statute.

An application for temporary alimony is made to the presiding judge pending the litigation. He is vested with considerable discretion on the subject. It is sometimes granted where permanent alimony is ultimately refused, on the ground that the wife must be maintained and furnished reasonable opportunity for pressing her suit or defending herself against charges made against her. If she wilfully deserts her husband without cause, this may furnish a ground for refusing temporary alimony, in the discretion of the judge; and in some cases, where the separation was clearly shown to have resulted from the adultery of the wife, or to have been without any shadow of excuse, and there were other circumstances of hardship in requiring the husband to thus support her, it has been held to be an abuse of discretion to allow her alimony. *Vinson v. Vinson*, 94 Ga. 492, 19 S. E. 898; *Kendrick v. Kendrick*, 105 Ga. 38, 31 S. E. 115; *Williams v. Williams*, 114 Ga. 772, 40 S. E. 782.

In this case the evidence of the wife tended to show bad conduct on the part of the husband; that she had always helped support the family by sewing; that her eyesight was failing, and her health was becoming so poor that she was scarcely able to do any work, and was not able to support herself without assistance; and there was evidence tending to show that the husband was able-bodied and earned about \$18 per week. It was admitted in the pleadings that neither the husband nor the wife had any property. We do not mean that courts or juries should make matrimonial dissensions attractive as a source of profit. The reverse is true. It

was declared by McCay, J., as long ago as 1872 (Hill v. Hill, 47 Ga. 332, 336), that "suits for divorce and alimony ought not to be encouraged."

The jury might perhaps have found against the present plaintiff's application for alimony; but, under the evidence, the judge erred in declaring, as a fixed rule of law, that, if the jury found a divorce for the husband on the ground of desertion, the wife would be entitled to no alimony.

4. The verdict was somewhat unusual in form; but it is unnecessary to deal with that point, as the case is to be tried again on its merits.

Judgment reversed.

Fish, Ch. J., and Atkinson, J., dissent. The other Justices concur.

Fish, Ch. J., dissenting:

I am constrained to dissent from the proposition announced in the second head-note to the opinion of the majority of the court. I understand the rule to be that, in the absence of a statute to the contrary, permanent alimony will not be awarded a wife when a decree for divorce is rendered against her. 14 Cyc. Law & Proc. p. 767; 2 Am. & Eng. Enc. Law, p. 118 (3). The provisions of §§ 2435, 2462, and 2478 of the Civil Code of 1895, quoted in the opinion, when construed *in pari materia*, do not, in my opinion, change the rule. If, under the law of this state, a husband is not bound for necessities furnished his wife if she be living in adultery with another man (Civil Code 1895, § 2478), and if temporary alimony cannot be awarded a wife where the separation has been caused solely by adultery on her part (Williams v. Williams, 114 Ga. 772, 40 S. E. 782), I am unable to understand why the husband should be required to support her by the payment of permanent alimony when he procures a divorce from her because of her adultery, or because of her guilt in any other respect authorizing a divorce. I am authorized by Justice Atkinson to state that he concurs in this dissent.

MAINE SUPREME JUDICIAL COURT.

FLORA E. HAMMOND, Admr., etc., of
Harold E. Martin, Deceased,

v.

LEWISTON, AUGUSTA, & WATERVILLE
STREET RAILWAY.

(106 Me. 209, 76 Atl. 672.)

Action — for death — right to bring.

Under a statute creating a right of ac-
30 L.R.A. (N.S.)

tion for wrongful death, to be brought by an administrator, for the exclusive benefit of the widow, children, or heirs at law of decedent, no action can be maintained in case he dies childless, leaving a widow, who dies before action brought.

(December 7, 1909.)

Note. — Failure of beneficiary first entitled under death statute to bring action, as giving such right to beneficiary next entitled.

The great weight of authority and the reasoning of nearly all the cases seems to be in accord with the rule announced in HAMMOND v. LEWISTON, A. & W. STREET R. Co., that the failure of the beneficiary first entitled under the death statute to bring the action will not transfer such right of action to other persons for whose benefit the action might have been maintained if the person first entitled had not been living when the right or action accrued.

The reason for the rule is that the statutes giving a right of action for wrongful death for the benefit of specified persons are construed to create a single cause of action, which accrues immediately upon the death of the decedent, and exists for the exclusive benefit of the beneficiary in whom the action vests, so that it cannot be transferred to any other beneficiaries by the death or failure of the first beneficiary to sue, since there never was any right of action for their benefit, in the absence of statute providing for such contingency. Belding v. Black Hills & Ft. P. R. Co. 3 S. D. 369, 53 N. W. 750; Snyder v. Philadelphia & R. R. Co. 9 Pa. Dist. R. 3; Carden v. Louisville & N. R. Co. (Ky.) 37 S. W. 839; Waldo v. Goodsell, 33 Conn. 432; Lehigh Iron Co. v. Rupp, 100 Pa. 95.

So, in Louisville & N. R. Co. v. Jones, 45 Fla. 407, 34 So. 246, it was held that in actions for the recovery for death by wrongful act, the defendant may show in bar to the plaintiff's right to recover that there is *in esse* a person who is given by the statute a precedent right of action over the plaintiff. This case follows the reasoning of the court in Duval v. Hunt, 34 Fla. 85, 15 So. 876, where it was said, in construing the statute, that the existence or nonexistence of anyone having the precedent right of action under the statute enters into the very substance of the right of action itself when instituted by any one of the named classes of persons after the first.

The reasoning of the court in Louisville & N. R. Co. v. Bean, 94 Tenn. 388, 29 S. W. 370, holding that an action brought by the administrator of the deceased, for the benefit of the widow of the deceased, who, under the statute, was the sole beneficiary, abated as a consequence of her death pending a writ of error, was that the right of recovery, having once vested in the widow, could not revert in the next class of beneficiaries named in the statute, for the reason that no provision was made in the stat-

R EPORT by the Supreme Judicial Court for Kennebec County for the opinion of the full bench of an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Plaintiff nonsuited.

The facts are stated in the opinion.

Messrs. Williamson & Burleigh for plaintiff.

Messrs. Heath & Andrews, for defendant:

The statute is exclusive and in derogation of the common law. It is to be strictly construed, and an action thereunder cannot be prosecuted for the beneficiaries next in order.

Woodward v. Chicago & N. W. R. Co. 23 Wis. 400; Loague v. Memphis & C. R. Co. 91 Tenn. 458, 19 S. W. 430; Louisville & N. R. Co. v. Bean, 94 Tenn. 388, 29 S. W. 370.

Cornish, J., delivered the opinion of the court:

This is an action brought under Rev. Stat. chap. 89, §§ 9, 10, by the administratrix

ute for such contingency, but that the cause of action, on the death of the person to whom it survived, or for whose benefit it might have been prosecuted, was thereby extinguished.

So, also, in Woodward v. Chicago & N. W. R. Co. 23 Wis. 400, it was held, under a similar statute, that, upon the death of the decedent, the right of action vests solely and exclusively for the benefit of the survivor first entitled, and that the action abates upon his death, he being the real party in interest, although the administrator is the nominal plaintiff, and there are persons living for whose benefit the action might have been maintained if the persons first entitled had not been living when the right of action accrued.

To the same effect are Dillier v. Cleveland, C. C. & St. L. R. Co. 34 Ind. App. 52, 72 N. E. 271; Doyle v. Baltimore & O. R. Co. 81 Ohio St. 184, 90 N. E. 165; Loague v. Memphis & C. R. Co. 91 Tenn. 458, 19 S. W. 430.

But in Morris v. Spartanburg R. Gas & Electric Co. 70 S. C. 279, 49 S. E. 854, it was held that an action brought by an administrator of a son, for his wrongful death, for the alleged benefit of his father and brothers and sisters, did not abate on the death of the father, although he was the sole beneficiary under the statute when the action was commenced, but that, on the death of the father, the action might be carried on for the benefit of whoever might be entitled to participate in the recovery. The court said: "The statute is remedial, and should be liberally construed, so as to accomplish its object. It was designed to remove the common-law rule, founded on the maxim, *Actio personalis moritur cum persona*, as an obstacle to the recovery of

of the estate of Harold E. Martin, for the benefit of herself, as his sole heir at law at the date of the writ. Plaintiff's intestate was instantaneously killed by being struck by a car of the defendant at the date alleged in the declaration. He left a widow, but no children. Subsequently the widow died, no administration then having been taken out upon her husband's estate, and no suit having been brought for her benefit. After the death of the widow, the plaintiff, the sister of said Martin, and his sole heir at law, was appointed administratrix of his estate, and began this action. The case comes to the law court on report, and the single question presented is whether, on the foregoing facts, this action, if maintainable on the merits, can be maintained for the benefit of the plaintiff as such sole heir. If it can be maintained, the action is to stand for trial; if not, the entry of "plaintiff nonsuit" is to be made.

The language of Rev. Stat. chap. 89, §§ 9, 10, which is the basis of this action, is as follows:

"Sec. 9. Whenever the death of a person

damages for death of a party by a wrongful act, neglect, or default of another, and to create a right of action in the administrator of the deceased for the benefit of the persons named in the statute. . . . We think it would be too narrow a construction of the statute to hold that an action thereunder could abate as long as any beneficiary, person or class, named in the statute, existed. In this case, while it is true that the father would have been sole beneficiary in the event of his being alive at the time of recovery of damages, still, the statute had other beneficiaries in contemplation in the event of his death. The brothers and sisters of the deceased, named in the complaint, are his heirs at law, and, since they fall within the class of beneficiaries, while the action is still pending, the action should not abate for want of a statutory beneficiary."

As shown in HAMMOND v. LEWISTON, A. & W. STREET R. Co., under the provisions of the English statute and some of the state statutes of this country, the right of action vests at once, for the benefit of all the persons entitled to receive any part of the money recovered, and may be maintained so long as any of such persons survive. Woodward v. Chicago & N. W. R. Co. supra.

Upon the general question as to survival of the statutory action to personal representatives of original beneficiary, see note to Gilkeson v. Missouri P. R. Co. 24 L.R.A. (N.S.) 844.

In Scott v. Central R. Co. 77 Ga. 450, it was held that the children could not maintain an action for the homicide of their mother during the lifetime of their father, under a statute giving a prior right of action to their father, although he had

shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the persons injured and although the death shall have been caused under such circumstances as shall amount to a felony.

"Sec. 10. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then of her and them equally, and if neither, of his heirs. The jury may give such damages as they shall deem a fair and just compensation, not exceeding \$5,000, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought, provided, that such action shall be commenced within two years after the death of such person."

It is conceded that at common law no remedy by action existed for loss of life. The right of action set up by the plaintiff is a pure creature of statute, and upon the fair construction of that statute this case stands or falls. The plaintiff's contention is that § 9 creates a new right, and therefore should be construed strictly, as this court has heretofore interpreted it, limiting its scope to

cases of immediate death, including cases of both instantaneous death and of total unconsciousness following immediately upon the accident and continuing until death. *Perkins v. Oxford Paper Co.* 104 Me. 109, 71 Atl. 476. But the plaintiff further contends that § 10, determining in whose name and for whose benefit the action should be brought, should be construed liberally, and, applying such liberal construction, it may be said to have been the intention of the legislature in this action, first to vest a right of action in the administrator of the deceased, absolutely, and secondly, and of less importance, to provide for the distribution of the damages so recovered. In other words, the plaintiff's position is that the administrator is given a right of action in any event, and the beneficiaries should be determined, not as of the date of the death, but of the recovery. Such a construction cannot be adopted, as it strains the language of the statute beyond its tensile strength. Sections 9 and 10 are not independent acts of the legislature, but allied sections of one and the same act, passed originally as chapter 124 of the Public Laws of 1891. One is not to be construed strictly and the other liberally, but both are to be construed together, and as they create a liability unknown to the common law, their effect is to be limited to cases clearly within the terms of the act. No right of action is to be inferred, and no remedy is to be given except as specified in the statute. "It is a general principle [of construction] that, where a right is given by statute and a remedy provided in the

abandoned his children, and was totally insolvent and without property.

And in *Cole v. Mayne*, 122 Fed. 836, it was held that no action could be maintained by the children of the deceased where there was a widow *de jure* living, where the statute gave a separate and alternate right of action first to the widow, if there be one; that the allegation that the widow of the deceased was, at the time of the death of the decedent, separated from him, and living in open adultery with another man, did not show a right of action in the children, since, even if proof of such facts might defeat the recovery of damages by the widow, it would not destroy her right of action.

In *Webb v. East Tennessee, V. & G. R. Co.* 88 Tenn. 119, 12 S. W. 428, it was held that an amendment to a statute giving the widow a right of action, to be brought in her own name, for the wrongful death of her husband, did not take away the right of the personal representative to sue for the benefit of the widow and children when deceased left a widow, and that if the widow waived her right to sue, the right remained in the personal representative, since the object of the amendment was to entitle the

widow and children to bring the action in their own names, and without making out a case of declination on the part of the administrator, as they were compelled to do in the earlier statute.

In some of the states, the statute provides that if the beneficiary first entitled does not exercise the right of action within a given time, the next class may be substituted. As pointed out in *HAMMOND v. LEWISTON, A. & W. STREET R. Co.*, this seems to emphasize the necessity of a positive statute in order to effect such substitution.

Under such a statute, it was held in *Packard v. Hannibal & St. J. R. Co.* 181 Mo. 421, 103 Am. St. Rep. 607, 80 S. W. 951, that the election to sue by the beneficiary first entitled, whether successful or not, forever cuts off the right of action of those next entitled. In that case it was held that the election of the widow to sue one person, within the time limited, under the mistaken impression that he was the sole wrongdoer, though unsuccessful, was a bar to the right of the children to maintain suit against another person, on the ground that he was the real wrongdoer.

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same act, the right can be pursued in no other mode." *Flatley v. Memphis & C. R. Co.* 9 Heisk. 230; *Loague v. Memphis & C. R. Co.* 91 Tenn. 458, 19 S. W. 430.

The language of the statute under consideration is plain and unambiguous. Some beneficiary named therein must exist at the time of the death of the deceased, otherwise no right of action arises. The suit is not for the benefit of the estate, and creditors have no interest in it. True, such suit is brought in the name of the administrator, but he is merely the nominal party, and acts as trustee. The legislature could have given the right directly to the widow or children or heirs, had it seen fit to do so, as the legislatures of some states have done. But if none of the beneficiaries exist at the time of death, no right of action is created. *East Tennessee, V. & G. R. Co. v. Lilly*, 90 Tenn. 563, 18 S. W. 243; *Cooper v. Shore Electric Co.* 63 N. J. L. 558, 44 Atl. 633; *Topping v. St. Lawrence*, 86 Wis. 526, 57 N. W. 385.

Under § 10, the party for whose benefit the action is brought depends upon the nature of the family that is left, and four different conditions are provided for,—widow without children, children without widow, widow and children, heirs at law. But, in any event, the immediate, absolute, and final vesting of the right occurs at the time of the decease, not at the time of bringing suit or of recovery. The beneficiaries have a right of action then or not at all, and the facts of each particular case determine which beneficiaries have the right. If there is a widow, as here, she has the sole and exclusive right. It belonged to her immediately upon the death of her husband, and could not be transferred to any other beneficiary, either by her death or failure to bring suit. The statute provides for several possible claimants, but the facts in each case determine which of them is the actual and sole claimant. There is no life interest in the widow, with a remainder over to the heirs at law. One action is granted, not several. When the husband died, the sister had no cause of action, and the death of the widow has not given her one. It is well settled that the writ must show for whose benefit the action is brought. *Oulighan v. Butler*, 189 Mass. 287, 75 N. E. 726; *Louisville & N. R. Co. v. Pitt*, 91 Tenn. 86, 18 S. W. 118. The same was true of an indictment when that was the statutory remedy (*State v. Grand Trunk R. Co.* 60 Me. 145), because the judgment must follow the writ in the one case, and the indictment, in the other, and the amount recovered passes to the beneficiary named, the administrator in the one form of procedure and the state in

the other acting merely as a trustee or conduit.

Again, the cause of action accrues at death by the very terms of the statute. The last clause of § 10 makes the two-year limitation within which suit can be brought begin at that time. Whoever has a cause of action under this statute has two years within which to bring it. Can it be that if a widow is left who survives her husband one year and eleven months, the heirs would then have a right of action, but only one month in which to enforce it? The absolute vesting of the right in some beneficiary at time of death is further apparent from the fact that the damages vary according to the relationship of the deceased to the beneficiary, and the dependence of the latter upon the former. "The injury for which damages can be recovered must be wholly to the beneficiaries themselves, and it is limited to the pecuniary effect of the death upon them." *McKay v. New England Dredging Co.* 92 Me. 454, 43 Atl. 29. The pecuniary effect of the death of a husband upon his widow, and therefore the damages recoverable in an action for her benefit, would differ materially from the pecuniary effect of his death upon remote heirs at law, and from the damages recoverable by them.

Authorities from other states are helpful only as they are based on statutes similar to ours, but the principle of the exclusive right in the first taker is followed under analogous statutes in *Woodward v. Chicago & N. W. R. Co.* 23 Wis. 400; *Schmidt v. Menasha Wooden Ware Co.* 99 Wis. 300, 74 N. W. 797; *Loague v. Memphis & C. R. Co.* supra; *Louisville & N. R. Co. v. Bean*, 94 Tenn. 388, 29 S. W. 370; *Sanders v. Louisville & N. R. Co.* 49 C. C. A. 565, 111 Fed. 708, in all of which it was held that a pending action for the benefit of the widow abated at her death, under the statutes of those states, governing survival of actions; and in *Cooper v. Shore Electric Co.* supra, where it was held that such action did not abate, but the injury sustained would be limited in duration and extent to the lifetime of the beneficiary. The question of survival or abatement, however, is not under consideration at this time.

Under the peculiar provisions of Lord Campbell's act in England, which, in its general scope, is the foundation of the legislation in the various states of this country, the right of action vests at once for the benefit of each and all of the persons entitled to receive any part of the money recovered, and may be maintained so long as any one of such persons survives, the amount recovered being apportioned among the various parties "in such shares as the jury, by their verdict, may direct." *Blake*

v. Midland R. Co. 18 Q. B. 93; Woodward v. Chicago & N. W. R. Co. supra. In the case last cited, which arose under a statute providing that the amount recovered should be paid over to the husband or widow, if such relative survived, if not, then to lineal descendants, and if none, then to lineal ancestors, the deceased left a husband and a child. The court notes the clear distinction between actions under that statute and the statute of Wisconsin, which, in this respect, is similar to the statute in Maine, as follows:

"While it is apparent, under the English and New York statutes, that the right of action vests at once, for the benefit of each and all of the persons entitled to receive any part of the money recovered, and may be maintained so long as any one of such persons survives, it is equally apparent by our statute that it vests only for the benefit of the husband or widow, in case the deceased leaves such surviving relative; and if no such relative survives at the time of the death, the action may be prosecuted for the benefit of the lineal descendants of the deceased; and in default of these, then for the benefit of his or her lineal ancestors.

"The language of the statute is so plain that there seems to be no room for argument as to its meaning.

"In this case, the deceased, who was a married woman, left a husband, who survived until some time after this action was commenced. Upon her death, therefore, the right of action, by the statute, vested solely and exclusively for the benefit of her husband. He alone was entitled to the amount to be recovered, and could hold and dispose of the same at pleasure. The lineal descendants and ancestors of the deceased had no interest whatever in the action, and the damages to be recovered could not be estimated with reference to the pecuniary injury, if any, resulting to them, or any of them."

The statutes of New York and Pennsylvania and some other states follow Lord Campbell's act closely in the same respect. In some of the states, as in North Dakota and Colorado, the statute provides that if the beneficiary first entitled does not exercise the right of action within a given time, the next class, after due notice to the former, may be substituted. Harshman v. Northern P. R. Co. 14 N. D. 69, 103 N. W. 412; Hopper v. Denver & R. G. R. Co. 84 C. C. A. 21, 155 Fed. 273. This emphasizes the necessity of a positive statute in order to effect such substitution.

Our attention has been called to only one case as sustaining the contention of the plaintiff. *Morris v. Spartanburg R. Gas. & 30 L.R.A. (N.S.)*

Electric Co. 70 S. C. 279, 49 S. E. 854. That case was based upon a statute more nearly resembling that of England, New York, and Pennsylvania, above referred to, and, suit having been brought for the benefit of all the beneficiaries, the court held that the action did not abate because of the death of the father, *pendente lite*, although, had he survived, he would have been the sole beneficiary. It may therefore properly be distinguished from the case at bar.

Further discussion is unnecessary. The construction contended for wrenches too violently the plain language of the statute, while that adopted follows its natural and reasonable meaning. It is therefore the opinion of the court that this action cannot be maintained, and, according to the stipulation, the entry must be: Plaintiff nonsuit.

MAINE SUPREME JUDICIAL COURT.

GEORGE MUNROE

v.

CLARENCE N. CLARK et al.

GUY EMMONS

v.

SAME.

HERBERT CLARK

v.

SAME.

ALBERT WEBSTER

v.

SAME.

ALVIN CLARK

v.

SAME.

(— Me. —, 77 Atl. 696.)

Mechanics' lien — fitting material.

No lien exists against a building for labor performed for one who has contracted to furnish fitted stone for it, where the statute provides that whoever performs labor in erecting a building, by virtue of a contract with, or by the consent of, the owner, has a lien thereon.

(September 28, 1910.)

Note. — Right to a lien for labor in preparing materials in manufactured form, under a statute giving a lien for work or labor performed on the building or structure.

This note, of course, does not include cases arising under statutes specifically giving a lien for materials, nor cases dealing with the right to a lien under any form

REPORTS by the Supreme Judicial Court for Somerset County for the opinion of the full bench of suits to enforce certain alleged mechanics' liens on real estate. Judgments for defendants.

The facts are state in the opinion.

Messrs. Butler & Butler, for plaintiffs:

The contract of J. Palmer Merrill with Clark and Sawyer, requiring them to take the stone from the quarry, and to fit it according to minute specifications and drawings, was a contract for labor as well as for material.

Scannell v. Hub Brewing Co. 178 Mass. 288, 59 N. E. 628; Webster v. Real Estate Improv. Co. 140 Mass. 526, 6 N. E. 71.

The plaintiffs were laborers within the meaning of that word as used in the Maine

statute, and, as such, are entitled to their lien, although their employers may not have had a lien.

Littlefield v. Morrill, 97 Me. 505, 94 Am. St. Rep. 513, 54 Atl. 1109; Pluredé v. Levasseur, 89 Me. 172, 36 Atl. 110; Atwood v. Williams, 40 Me. 409; Dewing v. Congregational Soc. 13 Gray, 414; Clark v. Kingsley, 8 Allen, 543.

The labor, while not performed upon the premises, was performed with Merrill's knowledge and consent, in preparing material which was intended for use, and actually used, in the construction of his building, and entitles the plaintiffs to a lien.

Daley v. Legate, 169 Mass. 257, 47 N. E. 1013; Wilson v. Sleeper, 131 Mass. 177;

of statute, for materials as such, apart from the labor of preparing them. Nor does it cover cases, if any, where the lien is claimed for work in preparing material supplied by the owner or principal contractor.

It was held in *Re Montmorency Cotton Mills Co.* Rap. Jud. Quebec, 10 B. R. 158, that a manufacturer who undertook to furnish to a contractor certain completed cupboards for a structure which the latter was erecting was not a workman, within the meaning of a statute creating a lien. It was further held that to acquire a lien upon the premises, the work must be done upon the premises; and that therefore a workman engaged in fashioning the materials intended to be incorporated into the edifice was not entitled to a lien.

In *Arnold v. Budlong*, 11 R. I. 561, one who furnished sash and doors for a house was denied a lien as a laborer expending labor upon the improvement, the court saying that whatever labor he caused to be bestowed upon the improvement was as a seller of sash and doors.

And one who worked in making bricks for one who was furnishing them for a building was regarded in *Haynes v. Holland* (Tenn.) 48 S. W. 400, as not entitled to a lien as one employed "to work on the building."

And it was held in *St. Louis, A. & T. R. Co. v. Mathews*, 75 Tex. 92, 12 S. W. 976, that one who, at the instance of a contractor, furnished ties for a railroad, could not, because of the labor expended in preparing the ties for delivery, claim a lien upon the railroad, under a statute giving a lien to mechanics and laborers who should perform labor in the construction of a railroad, the court saying that the plaintiff was not a laborer, but a seller of ties. This case was indorsed and followed in *St. Louis S. W. R. Co. v. Lyle*, 6 Tex. Civ. App. 753, 26 S. W. 264.

While some language employed in *Bennett v. Shackford*, 11 Allen, 444, is to the effect that labor in one's planing and sawmill upon materials for a building is not labor performed in the erection of a build-

ing, the real decision is that the contract between the owner of the mill and the building contractor did not disclose that it was agreed that the materials were to be appropriated to the particular building, and that the latter, in the absence of such agreement, would be entitled to use them as he chose.

It was held in *Donaher v. Boston*, 126 Mass. 309, that a statute providing that, under specified conditions, a lien could be maintained for labor performed under an entire contract for labor and materials, was not intended to reach cases in which finished articles were sold at a fixed price, and that therefore no lien for labor in hammering granite existed in favor of one undertaking to furnish hammered granite for a building, at an entire price.

Following *Donaher v. Boston*, the Massachusetts court said that a contract to furnish and deliver certain articles "all prepared," even if it necessitated special manufacture, and called for things not to be found in the market, would have been satisfied by a delivery of such articles, by whomsoever prepared; that however likely it may have been that the materialman would have to prepare them himself, the contract did not require him to do so; and that therefore the contract was not for labor and materials. *Tracy v. Wetherell*, 165 Mass. 113, 42 N. E. 497 (followed in *Eisnor v. Dinand*, 165 Mass. 116, note 42 N. E. 498).

But the Massachusetts court held that a contract to "cut granite in buildings and set same in place" was expressly for labor and material, and that therefore a lien might be acquired for labor performed in a stone yard, upon the material furnished under such contract. *Daley v. Legate*, 169 Mass. 257, 47 N. E. 1013.

So, where the contract is for furnishing all the labor for constructing, erecting, and finishing certain appliances for a brewery, a lien thereon may include the value of labor in another city, employed in the construction of the appliances. *Scannell v. Hub Brewing Co.* 178 Mass. 288, 59 N. E. 628.

Dewing v. Congregational Soc. *supra*; Jones v. Keen, 115 Mass. 170.

Messrs. Merrill & Merrill, for defendants, and J. Palmer Merrill, owner:

Labor in preparing material does not give a lien on the completed structure and the land upon which it stands, for labor in erecting the building.

Baker v. Fessenden, 71 Me. 292; Shaw v. Young, 87 Me. 274, 32 Atl. 897; A. L. & F. F. Goss Co. v. Greenleaf, 98 Me. 442, 57 Atl. 581; Donaher v. Boston, 126 Mass. 309.

Even though the material furnished is specially designed for the building, it is a sale of goods, and not a contract for labor on the building, and the person so furnishing cannot maintain a lien for furnishing labor in the erection of the building.

Tracy v. Wetherell, 165 Mass. 113, 42 N. E. 497; Eisnor v. Dinand, 165 Mass. 116, note, 42 N. E. 498; Scannell v. Hub Brewing Co. 178 Mass. 288, 59 N. E. 628; Evans Marble Co. v. International Trust Co. 101 Md. 210, 109 Am. St. Rep. 568, 60 Atl. 667, 4 A. & E. Ann. Cas. 831.

Savage, J., delivered the opinion of the court:

These five suits are brought to enforce liens against the building and land of J. Palmer Merrill, under Rev. Stat. chap. 93, § 29, which provides that "whoever performs labor or furnishes labor or materials in erecting, altering, moving, or repairing . . . a wharf or pier, or any building thereon, by virtue of a contract with or by consent of the owner, has a lien thereon, and on the land on which it stands, . . . to secure payment thereof." The case comes up on report.

The defendants contracted with Mr. Merrill to furnish all the cut stone required for a building which he proposed to erect, and which he afterwards did erect, for the sum of \$900. The plaintiffs labored for the defendants in the various processes in preparing and fitting the stone for the building, according to specifications fur-

nished. Part of the labor sued for was quarrying in a quarry used by the defendants, part was cutting stone in their stone yard, and part was sharpening drills. The liability of the defendants is admitted in all the cases. The only question presented for our determination is whether the plaintiffs, or any of them, have mechanics' liens on the building and land of Mr. Merrill to secure the payment for their labor.

We think the plaintiffs have no liens. To bring the cause within the statute, it must appear that the laborer performed labor in erecting the building. The defendants were contractors. They contracted not to erect the building, or to do the granite work upon the building, but to furnish cut and fitted stone for the building. They were not to set it. Their contract was completed when they delivered the cut stone to the owner. They had nothing to do with the building itself. They did not even engage to cut the stone themselves, though doubtless that was contemplated. They engaged to furnish the cut stone. They would have satisfied their contract had they purchased the stone, all fitted, and then delivered it to the owner of the building.

The distinction is clear. Where one engages to erect a building, or to do certain things in the erection of the building, as, for example, the carpenter work, or the painting, or the plumbing, or the granite work, his employees have liens for their labor in doing these things. And if, in connection with doing these things, he agrees to furnish, and does furnish, the materials, the result is the same. It is not necessary that all of the labor should actually be done on the structure itself. To illustrate: The doors and windows may be made at the shop, the boards may be sawed and planed at the mill, or the iron work done at the blacksmith shop. These processes are all a part of the erection of the building. The work so done, in the contemplation of the statute, is done "in the erection of a building." Webster v.

In Evans Marble Co. v. International Trust Co. 101 Md. 210, 109 Am. St. Rep. 568, 60 Atl. 667, 4 A. & E. Ann. Cas. 831, where one furnished cut and carved marble for a building, it was held that he was entitled to a lien for the work done in his own shops, under a statute giving a lien for the payment of all debts contracted for work done on or about a building. Here the plaintiff's contract was not only to cut, carve, and furnish the marble, but completely to put it in place, and finish all the exterior marble work.

It was held in Emery v. Hertig, 60 Minn. 54, 61 N. W. 830, that the plaintiff was 30 L.R.A. (N.S.)

entitled to a lien for labor furnished and performed in polishing marble which his employer was furnishing for a building, under a contract with the owner, where the statute gave a lien to persons performing labor or furnishing skill for the erection of any building, by virtue of a contract with, or at the instance of, the owner of the building.

On food furnished contractor for employees and teams as materials giving lien on railroad, see the note to Carson v. Shelton, 15 L.R.A. (N.S.) 509.

L. A. W.

Real Estate Improv. Co. 140 Mass. 526, 6 N. E. 71.

But where one contracts to furnish completed articles for a building, and is to have no part in the erection of the building, his employees have no lien for their labor in preparing and completing the articles. Their labor is in no proper sense performed "in the erection of the building."

It would seem that these plaintiffs, or some of them, had a lien which they might have enforced, under Rev. Stat. chap. 93, § 27, which gives a lien for quarrying or cutting and dressing granite in a quarry. But that is immaterial in this discussion.

The plaintiffs are entitled to judgments against the defendants, but not to judgments for liens.

The entry in each case will be:

Defendants defaulted. Judgment that plaintiff has no lien. Judgment for J. Palmer Merrill against the plaintiff for his costs.

INDIANA SUPREME COURT.

INDIANAPOLIS NORTHERN TRACTION COMPANY, Impleaded, etc., Appt.,

v.

JAMES J. BRENNAN et al.

(— Ind. —, 87 N. E. 215.)

Mechanics' lien — contractor.

1. A title, "An Act Concerning Liens of Mechanics, Laborers, and Materialmen," is not broad enough to cover legislation extending the lien to contractors who do not themselves perform the labor.

Same — provision for laborer.

2. A statute conferring a right to a lien upon laborers does not include contractors who do not themselves perform some labor.

Appeal — evidence — equity case — duty to weigh.

3. The appellate court will not, under a statute requiring it to weigh the evidence in equity cases, do so where the testimony is oral, and there is a substantial conflict in it.

Building contract — hindering contractor — damages.

4. One who contracts for the performance of the labor upon his property, to be completed by a certain day, and obligates himself to furnish the necessary material, and prepare the property for the performance of the work, is liable to the contractor for the reasonable worth and value of the work which he performs, and for any loss sustained by him if he is delayed beyond the time specified in the performance of the work by the default of the owner.

Same — estimates — binding effect.

5. The engineer's estimates, which, by the 30 L.R.A. (N.S.)

terms of a construction contract, are to be binding in case of dispute, are not binding if he misinterprets or misconstrues the provisions of the contract.

Same — construction — material which cannot be plowed.

6. In an excavation contract providing that loose rock, which is not to be removed at the ordinary price, shall comprise hard shale, coarse boulders in gravel, cemented gravel, hardpan, or any other material which cannot be plowed in a specified manner, a provision that it is to be understood that the plowing test shall apply to all materials named herein does not apply to the substances specified, but only to "any other material" which cannot be plowed.

Same — definition.

7. A provision in an excavation contract taking material that cannot be plowed out of the class of ordinary earth, for purposes of compensation, means that cannot be plowed with reasonable facilities, and in-

Note. — Are contractors or subcontractors within the protection of statutes giving liens to "laborers," "mechanics," "workmen," and the like.

It should be noted at the outset that this note is confined to cases arising under mechanics' lien statutes, to the exclusion of decisions turning on the use of the words "laborers," "labor," and the like, in statutes giving preferences in assignments for creditors or insolvency proceedings, or creating exemptions generally, or their use in bonds of contractors and others. It is but consistent also to exclude English decisions construing and applying the truck acts. The foregoing statements apply particularly to that portion of this note which has to do with the matter of teams and teaming.

On the right to a statutory lien on the property of a third person for rental of personal property let to a contractor for use in work of a lienable nature, see the note in 16 L.R.A. (N.S.) 585.

A contractor or subcontractor who causes labor to be performed by persons employed by him is not a laborer, within the meaning of the mechanics' lien laws. *Vane v. Newcombe*, 132 U. S. 220, 33 L. ed. 310, 10 Sup. Ct. Rep. 60; *Frick Co. v. Norfolk & O. V. R. Co.* 32 C. C. A. 31, 57 U. S. App. 286, 86 Fed. 725; *Klondike Lumber Co. v. Williams*, 71 Ark. 334, 75 S. W. 854; *Cleveland, C. C. & St. L. R. Co. v. DeFrees (Ind.)* 87 N. E. 722; *Fleming v. Greener (Ind.)* 87 N. E. 719 (affirmed on rehearing in 90 N. E. 73); *Ward v. Yarnelle (Ind.)* 91 N. E. 7; *Chicago & N. W. R. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. 213; *Martin v. Michigan & O. R. Co.* 62 Mich. 458, 29 N. W. 40; *Lehigh Coal & Nav. Co. v. Central R. Co.* 29 N. J. Eq. 252; *McNab & H. Mfg. Co. v. Paterson Bldg. Co.* 71 N. J. Eq. 133, 63 Atl. 709 (case affirmed in 72 N. J. Eq. 929, 67 Atl. 103); *Johnston v. Barrilla*, 27 Or. 251,

cludes such material as hardpan, or that containing large and coarse boulders and cemented gravel, which frequently turns the plow out of its shallow furrow, or fastens it so firmly that unusual means are required to loosen and extract it.

Same — compensation — absence of provision.

8. In the absence of a provision in an excavation contract for the price at which a certain class of materials shall be moved, the contractor is entitled to the reasonable value of the work.

Same — use of plow — effect.

9. That the most feasible and available method of loosening material to be excavated under a contract which takes material that cannot be plowed out of the class of ordinary earth, for purposes of compensation, is the plow, does not re-

quire compensation at the rate paid for ordinary earth, if it cannot be plowed in the ordinary manner.

On Rehearing.

Trial — jury — right — raising question.

10. The question of the right to a jury trial cannot be raised by a demurrer to the complaint, which merely raises the question whether or not it states a cause of action, or by objection to the introduction of evidence.

Appeal — jury — waiver — presumption.

11. The appellate court will, when the record recites that the parties came and submitted the cause to the court for trial, without the intervention of a jury, presume that a jury trial was expressly waived.

50 Am. St. Rep. 717, 41 Pac. 656; Wentroth's Appeal, 82 Pa. 471; Burge v. Comer, 5 Pa. Co. Ct. 5; Wilson v. Gibson, 10 Pa. Co. Ct. 191; Richardson v. Norfolk & W. R. Co. 37 W. Va. 641, 17 S. E. 195.

A statute giving a lien to laborers or mechanics for labor performed has reference to persons by whom the labor is actually performed, and does not give one a lien for the labor performed by others. Savannah & C. R. Co. v. Callahan, 49 Ga. 506; Wooten v. Archer, 49 Ga. 388; Cochran v. Swann, 53 Ga. 39; Ely v. Stanton, 120 Pa. 532, 14 Atl. 441; Henry v. Sheaffer, 14 Pa. Co. Ct. 237; Diller v. Frantz, 17 Pa. Co. Ct. 306; Hoffa v. Person, 1 Pa. Super. Ct. 367.

A statute giving a lien to mechanics, laborers, and operatives does not entitle a contractor or subcontractor to a lien for the labor performed by those employed by him (Krakauer v. Locke, 6 Tex. Civ. App. 446, 25 S. W. 700; Parks v. Locke [Tex. Civ. App.] 25 S. W. 702; Eastern Texas R. Co. v. Foley, 30 Tex. Civ. App. 129, 69 S. W. 1030); but it has been held to entitle him to a lien for the value of such labor as is actually performed by him personally (Eastern Texas R. Co. v. Davis, 37 Tex. Civ. App. 342, 83 S. W. 883).

Mr. Justice Grier, writing for the United States Supreme Court, said in Winder v. Caldwell, 14 How. 434, 14 L. ed. 487: "The title to this act shows its policy and intention. It is to secure, to mechanics and others, payment for labor done and materials found; and the persons enumerated in the 1st section are plainly those mechanics and tradesmen whose personal labor or property have been incorporated into the building, and not the agents, supervisors, undertakers, or contractors who employed them. The act contemplates two conditions under which such labor and materials may have been furnished: First, on the order of the owner, who may act without the intervention of any middleman, and thus become indebted directly to his mechanics and tradesmen. Or, secondly, when they have been furnished on the order of a contractor 30 L.R.A. (N.S.)

or undertaker. In such cases, the mechanic, or materialman, if he intends to look to the credit of the building, and not to that of the contractor with whom he deals, must give notice to the owner of the building, within thirty days, of his intention to claim this security. The contractor, though mentioned in the act, is not enumerated among those entitled to its benefit. The aim and policy of this act is also obvious. Experience has shown that mechanics and tradesmen who furnish labor and materials for the construction of buildings are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and after the labor of the mechanic and the materials are incorporated into them, the owner becomes insolvent, and sells the buildings, or encumbers them with liens; and thus, one portion of his creditors are paid at the expense of the labor and property of others. Or, the solvent owner, who builds by the agency of a contractor or middleman, pays his price and receives his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is not to secure contractors, who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection of those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated. But the contractor is neither within the letter nor the spirit of the act."

Under a statute giving a lien upon a building for labor actually performed therein, it was held in Parker v. Bell, 7 Gray, 429, that a plasterer was entitled to a lien for his own services and those of his apprentices, but not for the labor of journeymen employed by him. The court said: "The object of the provisions of the statute is to create and preserve to the laborer security for the payment of the wages which he earns. It is manifest, from a consideration of the provisions of the successive stat-

Jury — failure to demand — equity suit — formality.

12. Defendants cannot avoid the effect of their neglect to demand a jury trial on the theory that, the suit being to enforce a lien, and therefore of equitable jurisdiction, a demand for a jury would have been an idle formality and of no avail.

Appeal — —failure to demand jury — wrong theory of case.

13. One who consents to the trial of a cause by the court without a jury cannot insist on appeal that it was, because of that fact, tried on a wrong theory, to his injury.

Mechanics' lien — contractor.

14. A statute giving a lien to one who performs work and labor for a railroad does not apply to one who contracts to do construction work by means of employees,

but who does not himself perform any work or labor.

(February 18, 1909.)

A PPEAL by defendant Indianapolis Northern Traction Company from a judgment of the Circuit Court for Howard County in plaintiff's favor in an action brought to recover the amount alleged to be due on a contract for services rendered, and to foreclose a mechanics' lien to secure the payment of such amount, and from a judgment in favor of defendant Jacob N. Bick, upon his cross complaint, for similar relief. Modified.

The facts are stated in the opinion.

Messrs. J. A. Van Osdel, Blackledge

utes in relation to the lien of mechanics upon the estates upon which their labor has been expended, that the legislature have regarded it as a sound and just principle that all those who have, by consent of the owner, or in pursuance of contracts with him for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services shall have been paid and discharged. The apprentice earns no wages for himself, and therefore he can have no lien; for, having no claim for personal compensation, he has no occasion for security; but the labor which he performs belongs to his master, in whose favor the lien arises the same as if he had himself executed the work. It is otherwise with the journeyman. He earns wages; he is entitled to payment for labor performed; and therefore he may have, in his own behalf, a lien upon the land upon which he has wrought."

A statute giving to persons who labor on cutting or hauling logs a lien for their personal services does not apply to a contractor, except to the extent to which he personally performs manual labor. *Hale v. Brown*, 59 N. H. 558, 47 Am. Rep. 224.

It was held in *Rogers v. Dexter & P. R. Co.* 85 Me. 372, 21 L.R.A. 528, 27 Atl. 257, that a subcontractor was not a laborer within the meaning of the statute, so as to be entitled to a lien even for his own personal labor in working with those employed by him.

On the other hand, it has been held that where he performed labor under his contract, he was, to that extent, entitled to a lien. *Klondike Lumber Co. v. Williams*, 71 Ark. 334, 75 S. W. 854.

Although the court does not expressly say so, the language of the decision in *Littlefield v. Morrill*, 97 Me. 505, 94 Am. St. Rep. 513, 54 Atl. 1109, seems to suggest that the test is not whether the contractor actually performs labor, but whether the contract requires that he do so. Here the plaintiff contracted to haul logs for another, and performed the contract largely through the services of men and teams hired by him. 30 L.R.A. (N.S.)

Referring to the statute providing that whoever labors at hauling logs shall have a lien, the court said: "It is now settled that the statute is designed solely for the protection of laborers performing physical labor with their own hands, and with their teams, under the direction of an employer, and for fixed wages, and that the subject matter of that protection is solely the wages earned by such laborers. . . . It is true, these plaintiffs performed some physical labor and also used their own teams to some extent on these logs and lumber, but they did not so do under the direction of an employer, and for mere wages. They had not merely hired out their personal labor. They had taken a contract to cut and haul all the logs on the tract, and were independent in their method of doing it, and were carrying out their contract largely through the labor of others employed by them. They were contractors engaged in a business enterprise from which they expected profits which might be more or less, according to circumstances. They were not mere laborers, working for fixed wages, the rate of which would not be varied by circumstances. When they labored themselves, it was not for wages, but to increase profits by saving wages. Had the enterprise proved profitable they could, and undoubtedly would, have retained all the profits, however much in excess of the customary wages in such work, and would have allowed no rebate to the owners of the logs. Hence, if the enterprise has proved unprofitable, they should not, and cannot, repudiate their position as contractors and recover wages as laborers."

Contractors for the work of loading of sugar cane onto cars at a certain price per ton are not workmen or laborers employed on a plantation, within the meaning of a statute giving preference to their wages. *Fortier v. Delgado*, 59 C. C. A. 180, 122 Fed. 604.

And a contractor for mining is not a laborer or employee within the meaning of an act giving a lien on the output of mines. *Malcomson v. Wappoo Mills*, 85 Fed. 907.

So, a contractor for threshing, who per-

& Wolf, and Miller, Shirley, & Miller for appellant.

Messrs. Bell & Purdum, King & Tracy, Frank Cutter, and Addison C. Harris, for appellees:

The appellate court will not weigh conflicting oral testimony, even in equity proceedings.

Maitland v. Reed, 37 Ind. App. 469, 77 N. E. 290; Polk v. Johnson (Ind. App.) 77 N. E. 1139; Nichols & S. Co. v. Berning, 37 Ind. App. 109, 76 N. E. 776; Over v. Dehne, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883; Tyler v. Davis, 37 Ind. App. 557, 75 N. E. 3; Doell v. Schrier, 36 Ind. App. 253, 75 N. E. 600; Hobbs v. Eaton, 38 Ind. App. 628, 78 N. E. 333; Parkison v. Thompson, 164 Ind. 609, 73 N. E. 109,

forms his contract through the labor of others, employed by him, is not entitled to invoke a statute giving a lien to persons who do labor upon any farm. Mohr v. Clark, 3 Wash. Terr. 440, 19 Pac. 28.

So, a statute giving a lien to one who performs labor upon logs and timber does not apply to one who personally performs no labor, but causes it to be performed by persons employed by him. Campbell v. Sterling Mfg. Co. 11 Wash. 204, 39 Pac. 451.

And one who contracted to furnish board to loggers at a stipulated price was held in Bradford v. Underwood, 80 Wis. 50, 48 N. W. 1105, not to be entitled to invoke the statute giving a lien to persons who should perform services in cooking food for loggers.

Distinguishing between "bestowed" and "performed," the court in Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312, seemed to think that a statute giving a lien on property upon which labor should be bestowed operated to give a lien to a subcontractor for labor that he caused his employees to perform.

It was held in Carver v. Bagley, 79 Minn. 114, 81 N. W. 757, that a contractor was within the meaning of an act giving a lien to persons who perform labor or services in cutting, hauling, and banking logs.

And in Barrett-Hicks Co. v. Glas (Cal. App.) 111 Pac. 760, it was held the lien for labor in favor of a subcontractor furnishing labor and materials for a building could not be confined to such labor as he personally performed.

Invoking the maxim, *Qui facit per alium, facit per se*, the court in Shaw v. Bradley, 59 Mich. 199, 26 N. W. 331, held that a contractor for running logs was entitled to liens under the log lien act giving such right to any persons that should perform labor in running logs. In this decision considerable stress was laid upon the fact that it was shown that the parties did not contemplate that the contractor should personally perform the services. Without expressly overruling this case, the Michigan court in Kieldsen v. Wilson, 77 Mich. 45, 30 L.R.A. (N.S.)

3 A. & E. Ann. Cas. 677; Hudelson v. Hudelson, 164 Ind. 694, 74 N. E. 504; United States Board & Paper Co. v. Moore, 35 Ind. App. 684, 72 N. E. 487, 74 N. E. 1094; Karges Furniture Co. v. Amalgamated Woodworkers Local Union No. 131, 165 Ind. 421, 2 L.R.A. (N.S.) 788, 75 N. E. 877, 6 A. & E. Ann. Cas. 829; Seiberling & Co. v. Porter, 165 Ind. 12, 74 N. E. 516; Ray v. Baker, 165 Ind. 90, 74 N. E. 619.

The constitutional provision that the subject of an act shall be expressed in the title does not apply in all its vigor where an act has remained on the statute books for sixteen years, and been incorporated into a subsequent statute without change, as a section thereof, because no legislator,

43 N. W. 1054, held that a contractor for hauling logs was not entitled to a lien under a statute which, it seems, gave a lien for labor and services performed. The Kieldsen Case, however, was overruled and the Shaw Case adhered to in Phillips v. Freyer, 80 Mich. 254, 45 N. W. 81, where the owner of a sawmill was held entitled to a lien for the sawing of lumber under a contract calling for compensation by the thousand feet, by virtue of the statute giving a lien to persons performing labor or services in manufacturing lumber. This statute is the same as the one involved in the Kieldsen Case.

Under a statute giving a lien to every workman, laborer, or other person who should do or perform any labor by virtue of a contract with any incorporated company, it was held that a corporation was entitled to a lien for the performance of its contract to supervise, by the services of its officers and employees, a part of the construction of a railroad, to furnish labor, and become primarily responsible for the wages, to furnish tools, and to be at all times under the supervision of the railroad's supervising engineer. Wetzel & T. R. Co. v. Tennis Bros. Co. 75 C. C. A. 266, 145 Fed. 458, 7 A. & E. Ann. Cas. 426.

Ordinarily, however, a contractor with a corporation is not an employee thereof within the meaning of an act giving a lien to employees for work and labor done or performed for the corporation. Vane v. Newcombe, 132 U. S. 220, 33 L. ed. 310, 10 Sup. Ct. Rep. 60.

Contractors who do not personally labor or work upon a railroad are not entitled to a lien, under a statute giving a lien to every mechanic, builder, artisan, workman, laborer, or other person who shall do or perform any work or labor upon the road. Little Rock, H. S. & T. R. Co. v. Spencer, 65 Ark. 183, 42 L.R.A. 334, 47 S. W. 196.

So, contractors for building a railroad are not employees or laborers within the meaning of a statute giving liens to laborers and employees for their services in carrying on the business of the railroad, although the contract is to furnish laborers,

in voting for the latter act, could have been tricked into voting for something of which he was ignorant.

Continental Improv. Co. v. Phelps, 47 Mich. 299, 11 N. W. 167.

Where a statute has remained on the books for many years, been acquiesced in, property rights acquired thereunder, and sanctioned by repeated decisions of the supreme court, the failure of the legislature to observe mere forms in its enactment will be cured by such lapse of time and acquiescence.

Hall v. Bunte, 20 Ind. 304; Continental Improv. Co. v. Phelps, supra; State v. Bosworth, 13 Vt. 402; Cooley, Const. Lim. 7th ed. p. 106, note 3; 26 Am. & Eng. Enc. Law, p. 634.

tools, and teams by the day, for which certain sums per day are to be paid, with 10 per cent additional for superintendence and the use of tools. *Tod v. Kentucky Union R. Co.* 18 L.R.A. 305, 3 C. C. A. 60, 6 U. S. App. 186, 52 Fed. 241.

The case of *Couper v. Gaboury*, 16 C. C. A. 112, 30 U. S. App. 325, 69 Fed. 7, is sometimes cited as deciding that a statute giving a lien to persons performing labor upon, or for the benefit of, any railroad, extends to a contractor for construction work. It really does not so hold. The precise ground of the decision is shown by the following language of the district court, whose position was upheld in a *per curiam* affirmation: "The only question in this case that seems to demand a very careful investigation is whether or not § 2 of chapter 3747 of the Laws of Florida (the act of June 3, 1887), which gave a lien to any person performing any labor upon or for the benefit of any railroad, gave a lien to a contractor who performed such labor by others. At the time the contract in this case was made, this act was in force. Subsequently, by a special act, legislative commissioners were appointed to prepare and cause to be printed the laws of Florida then in force, and they prepared and caused to be printed and published what is known as the 'Revised Statutes of the State of Florida,' which were finally approved June 8, 1891. In this revision, the commissioners, in § 1727 of such revision, provided that any person performing, by himself or others, any labor upon any railroad, should have a lien upon the property of said road. It is under this provision that petitioner Couper claims a lien, his contention being that, as the law stood before the revision, no contractor had a lien, but under the revision such right was given. There was no legislation upon his subject in order to effect the change of right given under the statute, and, if such change was made, it must be held to be in violation of the intention of the legislature. The presumption is, therefore, that there was no change in the force and effect of the former statute, but the revision only more clearly and plainly ex-

The provisions that the judgment of the chief engineer of the company should be final and conclusive as to the classification of material, and that his construction of the contract should be final and conclusive, are not binding on plaintiff, because against public policy.

Fulton County v. Gibson, 158 Ind. 487, 63 N. E. 982; *Maitland v. Reed*, supra; *Louisville, E. & St. L. R. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. 153; *Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460; 30 Am. & Eng. Enc. Law, p. 1205.

Where the classifications of the engineer of the company are the result of mistakes, lack of care, fraud, or mere arbitrary judgment, they are not binding

Louisville, E. & St. L. R. Co. v. Donne-

pressed the intention in enacting the law of 1887. This revision and construction was approved by the legislature, very many members of which had been members of the legislature which had passed the original statute. This construction is supported by the language of the 8th section of the act of 1887, which provides that contractors or subcontractors shall furnish a list of all persons employed to the person having the work done, under the penalty of having such contractors' or subcontractors' lien barred. It is an elementary principle in the construction of statutes that the entire statute shall be considered together, and not one particular section of it; and, examining the 2d section of this law in the light of the language of the 8th section, it is impossible to conclude that it was the intention of the legislature to confine the benefits of such act to the wage workers, excluding contractors, although the courts of numerous other states have given such construction to somewhat similar statutes."

A contractor for the construction of a section of railroad cannot look to the stockholders, under a provision rendering the latter individually liable for all labor performed for the corporation (*Peck v. Miller*, 39 Mich. 596); the contractor is not a laborer, within the meaning of an act of this kind (*Aikin v. Wasson*, 24 N. Y. 482).

Teams and teaming.

A claim for the use of teams hired to haul lumber does not come within the meaning of an act giving "to laborers on lumber a lien thereon." *McCrillis v. Wilson*, 34 Me. 286, 56 Am. Dec. 655; *Coburn v. Kerswell*, 35 Me. 126.

It was held in *Sparks v. Crescent Lumber Co.* 40 Tex. Civ. App. 222, 89 S. W. 423, that under a statute giving a lien to laborers who should perform any services in a mill, one who hauled lumber with his team, at a certain rate per thousand feet, was not entitled to a lien for the use of his team, because, in that respect, he was a contractor, and he was not entitled to a lien for the services rendered by him per-

gan, 111 Ind. 183, 12 N. E. 153; Kistler v. Indianapolis & St. L. R. Co. 88 Ind. 463; Carroll County v. O'Connor, 137 Ind. 631, 35 N. E. 1006, 37 N. E. 16; McCoy v. Able, 131 Ind. 423, 30 N. E. 528, 31 N. E. 453.

If the chief engineer misconstrues the contract, as by applying the plow test to hardpan, coarse boulders in gravel, etc., his classifications will be corrected by the court.

Williams v. Chicago, S. F. & C. R. Co. 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 633; Lewis v. Chicago, S. F. & C. R. Co. 49 Fed. 708, 30 Am. & Eng. Enc. Law, p. 1271.

The "plowing test" is not applicable to shale, soapstone, cemented gravel, and hardpan, or other hard, earthy substances.

Lewis v. Chicago, S. F. & C. R. Co. 49

Fed. 709; Williams v. Chicago, S. F. & C. R. Co. supra.

A contractor who furnishes labor, material, and equipment used in making a railroad grade is within the words of the title, "An Act Concerning Liens of Mechanics, Laborers, and Materialmen."

Midland R. Co. v. Wilcox, 122 Ind. 84, 23 N. E. 506; Morris v. Louisville, N. A. & C. R. Co. 123 Ind. 489, 24 N. E. 335; Dean v. Reynolds, 12 Ind. App. 97, 39 N. E. 763; Cincinnati, R. & M. R. Co. v. Shera, 36 Ind. App. 319, 73 N. E. 293; Louisville, N. A. & C. R. Co. v. Boney, 117 Ind. 501, 3 L.R.A. 435, 20 N. E. 432; Pere Marquette R. Co. v. Baertz, 36 Ind. App. 413, 74 N. E. 51; State ex rel. Pitman v. Tucker, 46 Ind. 355; Maule Coal Co. v. Partenheimer, 155 Ind. 107, 55 N. E. 751, 57 N. E. 710.

sonally, where the contract furnished no means of determining the separate value of such services.

So, one letting his team for hauling logs, but not performing any labor himself, cannot invoke a statute giving a lien to persons who labor at hauling logs. Richardson v. Hoxie, 90 Me. 227, 38 Atl. 142.

And such a person was denied a lien for the use of the horse, in McMullin v. McMullin, 92 Me. 336, 69 Am. St. Rep. 510, 42 Atl. 500, although he subsequently worked for the person to whom he hired the horse, where such labor was unconnected with the labor of the horse.

A statute providing a lien for the wages of persons employed as laborers on threshing machines gives a lien to one so employed for his personal services, but not for the value of the use of his horses, although the contract is entire. Clark v. Brown, 141 Cal. 93, 74 Pac. 548.

A statute making railroads liable to laborers for work done under the employment of its contractors does not protect a person who furnishes wagons and drivers for hauling materials. Groves v. Kansas City, St. J. & C. B. R. Co. 57 Mo. 304; Atcherson v. Troy & B. R. Co. 1 Abb. App. Dec. 13; Cummings v. New York & O. M. R. Co. 1 Lans. 68.

Possibly, if he personally labors with one of the teams, he may assert his claim for such personal services. Balch v. New York & O. M. R. Co. 46 N. Y. 521.

And it has been held that although a teamster was a laborer, he was not entitled to a lien for the work of teams owned by him, whether they were furnished in connection with his services or not. To the same effect is Wilson v. Whitcomb, 100 Pa. 547, where a lien for hauling materials was claimed under a statute giving a lien for labor performed on or about an engine house, derrick, etc. Mann v. Burt, 35 Kan. 10, 10 Pac. 95.

Teamsters have been held to be within the meaning of an act concerning the liens of mechanics and laborers. McElwaine v. Hoesy, 135 Ind. 481, 35 N. E. 272. 30 L.R.A. (N.S.)

Under a statute giving a lien to laborers, and declaring that the word "laborers" should be construed to include all persons doing labor or service of whatever character, as workmen or employees, it was held in Watson v. Watson Mfg. Co. 30 N. J. Eq. 588, that a drayman contracting to do all the carting for a manufactory was entitled to a lien not only for his personal services, but for the value of the use of his team and wagon.

It is held in Klondike Lumber Co. v. Williams, 71 Ark. 334, 75 S. W. 854, that a contractor for cutting and hauling timber is not entitled to a lien for the labor of others employed by him, under a statute giving a lien to laborers who perform work and labor, but that he is entitled to a lien for his own actual labor, and for the value of the use of a team and wagon used by him therein.

And a lien for the value of the use of horses, as well as for personal services rendered under an entire contract, was allowed in First Nat. Bank v. Kirkby, 43 Fla. 376, 32 So. 881, under a statute giving a lien to clerks, agents, porters, and other employees of corporations. And see also Klondike Lumber Co. v. Williams, supra.

The court in Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490, is of opinion that one may have a lien for the services of his teams and servants under a statute giving a lien for services and labor, where it is further provided that the lien may be claimed by any company or corporation, which provision, the court thinks, indicates that the statute was intended to embrace services not personally and manually performed. But the court subsequently refused further to extend the construction of the act, holding that a person who let his ox or horse to another, to be used by the latter, and not by himself or his servant, was not entitled to a lien. Lohman v. Peterson, 87 Wis. 227, 58 N. W. 407; Edwards v. H. B. Waite Lumber Co. 108 Wis. 164, 81 Am. St. Rep. 884, 84 N. W. 150. L. A. W.

The legislature used the words "laborers and materialmen" to embrace those who furnished labor as well as those who furnished material.

Continental Improv. Co. v. Phelps, 47 Mich. 299, 11 N. W. 167; Cincinnati, R. & M. R. Co. v. Spera, supra.

Jordan, Ch. J., delivered the opinion of the court:

Appellees James J. Brennan and Arthur B. Hogue, as plaintiffs below, commenced this action to recover a money judgment, and to enforce a lien against appellant, which is alleged and shown to be a railroad company, duly incorporated and organized under the laws of this state for the purpose of constructing and operating an electric railroad extending from the city of Indianapolis, through several intervening counties to the city of Peru, with certain lateral railroads or lines extending from the city of Kokomo, in Howard county, to the city of Logansport, in Cass county, and also the construction and operation of other electric traction lines from the city of Anderson, and embracing a series of other cities and towns, as mentioned in the amended complaint filed by the aforesaid parties. The complaint is based on a working contract executed by the Indianapolis Northern Traction Company (appellant herein) and the firm of Brennan & Nelson, contractors. By this contract, that firm agreed to install and to complete what is denominated as the "overhead construction" of the railroad in question along that portion of appellant's line which extends from the city of Tipton to the city of Logansport. This work consists of placing poles and trolley wires, and also other wires for the proper transmission of electricity as a motor power, together with all the equipment connected therewith. At the time this action was commenced, Brennan and Hogue had acquired and succeeded to whatever rights the firm of Brennan & Nelson originally had under the contract in question. The plaintiffs, Brennan and Hogue, alleged and claimed that there was due to them, on the contract in suit \$15,000. This included certain extra work and labor mentioned in the complaint, and they demanded judgment for that amount, together with a foreclosure of a mechanics' lien, notice of which had been previously filed, as required by law, in the recorder's office of the several counties through which the road extended. Other persons, in addition to appellant, were made codefendants, to answer in respect to their several interests in the lien against the railroad property involved. Among these parties was appellee Jacob N. Bick. He appeared

to the action, and on September 16, 1904, filed a cross complaint, consisting of three paragraphs, to which cross complaint the plaintiffs, Brennan and Hogue, and all of Bick's codefendants, were made cross defendants. Bick was the contractor for the construction of the grade of the railroad in question under two working contracts with the Indianapolis Northern Traction Company. One of these contracts bore date of December 6, 1902, and embraced or included that part of the road's grade designated as section 1, station 20, to section 16, station 980. This part extended from a point near the city of Kokomo to the city of Peru. The other contract, known as No. 2, bore date of March 1, 1903, and covered that part of the road between points mentioned as section station 1,100 and section station 1,740, all in Hamilton county, Indiana. Bick, by his cross complaint, sought to recover a remainder alleged to be due to him from appellant, the Indianapolis Northern Traction Company, under contract for the construction of the railroad bridge, as well as other damages alleged to have been sustained by him. He also sought to enforce or foreclose a mechanics' lien to secure the payment of the amount due him. It will be noted that the action was in two branches; one branch based on the complaint of Brennan and Hogue, and the other founded upon the cross complaint of Bick. Under the issues joined, the two branches were tried together. The cause was submitted to the court for trial and a general finding; there being no request by either party for a special finding. Upon evidence given in the cause, the court found that appellees Brennan and Hogue should recover upon their complaint against the Indianapolis Northern Traction Company in the sum of \$5,044.88, and further found that they were entitled to be allowed the sum of \$1,200 for attorneys' fees, in the aggregate \$6,244.88, and that this amount was a lien upon the property described in the complaint, and a foreclosure of the lien was awarded. On the issues joined upon the cross complaint of appellee Bick, the court found that said cross complainant was entitled to recover from the Indianapolis Northern Traction Company the sum of \$57,969.02, together with attorneys' fees, making a total amount of \$61,969.02. Of the total amount awarded in favor of Bick, the court found that he was only entitled to hold and enforce a lien to the amount of \$52,539.34 upon the property described in the cross complaint and that he was entitled to a foreclosure in payment of said sum of \$52,539.34, but denied his right to a lien upon the remainder,

\$9,429.68. Over a separate motion for a new trial by the Indianapolis Northern Traction Company, wherein it assigned statutory grounds and other reasons, the court rendered its judgment against said traction company in favor of the respective appellees on the above-stated findings. To review this judgment appellant prosecutes this appeal. The Indianapolis Northern Traction Company, separate and apart from its codefendants, assigns errors.

The two branches of the case herein may be said to present two questions in common with each other: First, whether or not, under the statute of the state of Indiana, appellees Brennan and Hogue, and Bick, the cross complainant, could acquire any lien upon appellant's electric railroad; second, whether we will yield to the contention of counsel for appellant, and weigh conflicting evidence given at the trial upon the issues tendered in each branch of the case.

We here state, in substance, what is averred in the three paragraphs of the amended complaint of Brennan and Hogue, upon which their branch of the case was tried.

The first paragraph discloses that, in order for the said contractors successfully to prosecute the work undertaken by them, it was necessary that the railroad company should have all poles and overhead material on hand, ready for use, and the grade prepared, not later than the month of March, 1903; that immediately after entering upon the performance of their contract, these plaintiffs arranged to begin work on or before the aforesaid month of March, and so notified the company; that the latter did not, however, have its poles, grades, and other material in condition for said contractors to proceed until about the 1st of May, 1903, at which time they were notified to have their men at work on the job; that although said contractors complied promptly with the request of the company to begin work, they were constantly impeded, hindered, and interfered with in the performance of their contract by reason of the failure of the company to furnish the necessary poles and materials at the storehouse agreed upon, and by reason of the grade not being finished, and because of the fact that the company's engineer capriciously required the work to be reconstructed after it had been completed in a proper manner; that because of the incomplete condition of the grade, absence of stakes, and other alleged failures on the part of the traction company to put its property in condition for the work of overhead construction, these contractors were put to unreasonable and unnecessary expense in breaking camp from time to time, and mov-

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ing from one place to another in order to complete the work in fragments, instead of completing it as one continuous line. It is also alleged that the company's engineer in charge of the work "fraudulently" failed to give the contractors estimates on the amount of work performed at the time prescribed by the contract, and that he did so with the intention thereby of compelling these contractors to abandon the work; that finally, on the 27th day of November, 1903, the company served notice upon them (said contractors) that on the 1st day of December, 1903, it would take possession of the uncompleted portion of the work, because the contractors had been negligent in carrying the same forward, and that on said last-mentioned date the company did in fact take charge of and complete the work, excluding the contractors from the performance thereof. It is further averred that from time to time it was developed that there was much of the construction required which was not included under the provisions or terms of the contract, for which said contractors would be entitled to extra compensation; that in view of these conditions, and in view of the necessity of promptly performing said extra work, it was mutually agreed that the performance of the working contract, requiring all orders for such extra work to be reduced to writing, and requiring the contractors to give notice in writing of the amount of extra compensation claimed, should be mutually waived, and that in lieu thereof the engineer in charge would, from time to time, give verbal directions concerning such extra work, which the contractors should thereupon proceed to do, and that the company would pay a fair and reasonable price for the performance of such work; that under the contract as modified the engineer required much extra work to be done, and required statements of its value to be rendered from time to time to the traction company and allowed; that the entire value of the work done under the contract by the contractors amounted to \$11,786, of which payment to the amount of \$5,583 had been made before the commencement of the action. It is shown that the extra work done for which no compensation had been received was of the value or worth of \$2,048.80, and that said company had refused to pay any part of the balance due. It is further disclosed that notice to hold a mechanics' lien upon the property was filed in the offices of the recorders of Howard, Tipton, and Cass counties within the time prescribed by the statute. An additional amount of \$5,000 damages is shown as resulting from the delay of the company in failing to have the material on hand, etc., whereby the cost

of the work actually done in the completion of the overhead construction was increased to the latter amount. Judgment against the Indianapolis Northern Traction Company was demanded in the sum of \$15,000, including attorneys' fees and a foreclosure of the lien in question.

The second paragraph of the complaint alleges substantially the same facts as the first, but does not count upon a mechanics' lien.

The third paragraph is based upon a *quantum meruit*, charging the performance of certain work and the construction of the overhead system, as shown by a bill of particulars filed, and it is alleged that there is still due plaintiffs for this work \$9,000 in addition to \$2,000 attorneys' fees. A foreclosure of the lien against the property is prayed for, as in the first paragraph of the complaint.

The three paragraphs of the cross complaint of Bick may be summarized as follows:

The first is based on the working contract of December 6, 1902. Among other things, it is averred that it was stipulated in the contract that the work in question should commence on or before the first week in March, 1903, and be completed on or before the 1st day of July of the same year. It was provided that if there should be any delay on account of the failure of the traction company to procure all necessary rights of way, said contractor should have a reasonable time to complete the work after the necessary rights of way had been acquired; that said contractor was put in possession of the same, and that he commenced his work in season, and carried the same forward vigorously until its completion on the 1st day of January, 1904. It is charged that, by reason of the neglect and default of the company in procuring the rights of way, and in failing to put him in possession of portions thereof until the middle of November, 1903, he was put to additional expense in having to use picks, shovels, and dynamite to explode and excavate large quantities of frozen earth; that it became necessary to, and he did, clear 25.37 acres of land, which work was worth \$20 per acre; that he grubbed 22.30 acres, which was reasonably worth \$35 per acre, and that it became necessary for him to use, and that he did use, as authorized under the contract, certain quantities of tile of different sizes, all of which are duly set forth in the pleading; that he performed certain other extra work, known as the "force account," the aggregate value of which was \$2,051.64, and it was necessary in the completion of his work to, and he did, excavate material classified by said 30 L.R.A. (N.S.)

contract as earth to the amount of 134,341 cubic yards; that the "overhaul" necessary to be done, and which was done by him, amounted to 1,867,543 cubic yards, aggregating, at the contract price, the sum of \$18,675.43; that he excavated 16,616.3 cubic yards of material which was classified as loose rock under the contract, the excavation of which was worth \$1 per cubic yard, and he excavated 75,168 cubic yards, classified under said contract as loose rock, which was worth 70 cents per cubic yard; that the total sum accruing to him by reason of doing said work is \$122,851.13, a part of which has been paid, leaving a remainder or balance of \$61,513.28 due and unpaid. It is further shown that the partial estimates which were made from time to time during the progress of the work, as provided by the contract, were grossly erroneous in this: That the overhaul was estimated only at 1,347,380 cubic yards, for which he was allowed only \$13,473.08; that the chief engineer of the traction company, during the progress of the work was a stockholder in, and an officer and employee of, said company; that said engineer, in estimating the quantity of, and in determining what was, "overhaul" within the meaning of the tests and terms agreed upon in the contract, acted erroneously, fraudulently, arbitrarily, and with great abuse of judgment and discretion. It is further shown that such engineer failed and neglected, "in determining the overhaul," to apply the test prescribed by the contract, but that he arbitrarily, purposely, and with intent to injure said contractor, failed to classify as overhaul that which clearly was such by the terms of the contract; that he grossly erred and underestimated the quantity of overhaul made by plaintiff; that he also neglected and refused to carefully and honestly estimate the loose rock excavated; that he purposely and wrongfully estimated the quantity of loose rock to be only 5,505 cubic yards, and only allowed 35 cents per cubic yard for excavating the same. The provisions of the contract under which it is charged in the complaint plaintiff was entitled to the classification insisted on by him are set forth and embodied in the complaint. It is further shown that the classification made by said engineer, as well as the computation of overhaul, was so made over the protest of said contractor, and that because of the bias, interest, ignorance, fraud, mistake, and dishonesty of the engineer, as charged, such classification and estimates are void, and in no manner binding upon the contractor. It is further shown that notice of said cross complainant's intention to hold a lien upon the railroad in the several

counties mentioned was filed in the manner and at the places prescribed by the statute. The prayer is for judgment against the traction company in the sum of \$75,000 and a foreclosure of the lien.

The second paragraph of the cross complaint relies upon the same contract, and is quite similar to the first, except that it is alleged therein that part of the contract is reduced to writing, and that part remained in parol.

The third paragraph recites the history of the traction company's organization substantially as in the other paragraphs, but is founded upon the contract of March 1, 1903, which is denominated contract No. 2. This contract embraces certain grade construction of appellant's road in Hamilton county, and it is averred that by its terms the cross complainant, as contractor, agreed to furnish all the materials, except bridges, and prepare the grade for the construction; that he was to receive 20 cents per cubic yard for all earth excavated between certain stations therein mentioned, and 32½ cents for the earth excavated between certain other stations therein named. It is charged that in case it became necessary to haul the earth or other material excavated more than 500 feet, then said contractor was to receive the additional sum of 1 cent per cubic yard for every 100 feet such material was hauled in excess of 500 feet, that he was to receive \$20 per acre for grubbing, and that for all tile he was to receive the prices therein named. It is shown that it was stipulated in this contract that the work was to be commenced in fifteen days from the date of notice of the chief engineer, and was to be completed on or before July 1, 1903, provided, that if there was any delay due to the failure of the traction company to procure necessary rights of way in time for the performance of the work, the period should be extended a reasonable time after such rights of way were procured. It is further alleged that such contractor commenced his work at the proper time, prosecuted the same vigorously, but, by reason of the numerous delays on the part of the traction company, he was unable to complete such work before January 1, 1904, at which time such work was completed and accepted by the company; that in the necessary completion thereof he was required to, and did, clear and grub a certain amount of land therein mentioned, and that he used certain quantities of tile of various sizes, and that he was compelled to perform certain extra amounts of work in excavating the pole lines for the traction company, which work was worth \$934. It is alleged that he excavated 57,959 cubic yards of material clas-

sified as earth, at the price of 32½ cents per cubic yard, and 61,626 cubic yards of earth at 20 cents per cubic yard. That the amount of overhaul necessary to be done was 311,904 cubic yards, which aggregated, under the contract, a price of \$3,119. That he performed certain other extra work at the Atlanta overhead station, amounting to 1,722 cubic yards at 20 cents per cubic yard, and that he performed other extra work known as "force account" to the amount of \$92.30. It is shown that he performed all of the conditions of the contract upon his part. The total value of the work done amounted to \$35,901.18, upon which he has been paid \$26,744.15, leaving a balance of \$9,157.03, due and unpaid. That the partial estimates made from time to time, as provided by the contract, were erroneous in this: That he was only allowed \$2,252, for the overhaul, estimated at 225,222 cubic yards. That the estimates made were further wrong, in that the engineer of the company estimated the earth excavated at 56,581 cubic yards at 31½ cents per cubic yard, and 47,783 cubic yards at 20 cents per cubic yard, instead of the true amount as hereinbefore alleged. It is charged, as in the other paragraphs, that the engineer was a stockholder and officer and employee of the traction company, and that all of the errors of which the cross complainant complains were the result of gross negligence, fraud, and abuse of discretion; that these estimates and classifications were made over the protest of such contractor, and are not binding upon him by reason of their fraudulent character as therein alleged. 'It is further shown that the filing of he cross complainant's intention to hold the statutory lien was duly filed and recorded as provided by law. The prayer is for judgment for \$10,000 and attorneys' fees and foreclosure of the lien.

Among the first points or propositions advanced by appellant's counsel for a reversal of the judgment is that § 12 of the mechanics' lien act of 1883 (Acts 1883, chap. 115, p. 143), as amended in 1889 (Acts 1889, chap. 123, p. 258; Burns's Anno. Stat. 1908, § 8305), so far as it attempts to create a lien against railroad property in favor of contractors who neither furnish material nor personally perform any labor, is, under article 4, § 19, of the state's Constitution, invalid, because contractors cannot be said to be embraced in the title of the original act of 1883, *supra*. What is known as the "mechanics' lien act of 1883," *supra*, is entitled, "An Act Concerning Liens of Mechanics, Laborers, and Materialmen." Section 12 of the above-entitled act, as originally enacted, declares

that "all persons who, by contract with any railroad corporation . . . shall perform labor or furnish material for any such corporation . . . in the way of grading, building embankments, or making excavations for the construction of any such railroad or railroads, or who shall build or repair bridges, etc., shall have a lien," etc. The latter section appears to have been twice amended, once in 1885 (Acts 1885, chap. 99, p. 236), and again in 1889 (Acts 1889, chap. 123, p. 258), but there has been no amendment to the title of the statute, and, whatever attempts the legislature may have made by subsequent amendments to extend or broaden the provisions of the act as it was originally enacted, all appear to have been made without any change or amendment of the original title. This section, as it appears in the amendatory act of 1889, which is § 8305, Burns's Anno. Stat. 1908, and upon which appellees in this case seek to base their right to a lien upon the railroad property in question, reads as follows: "All persons who shall perform work or labor in the way of grading, building embankments, making excavations for the track, building bridges, trestlework, works of masonry, fencing, or any other structure, or who shall perform work of any kind in the construction or repair of any railroad, or part thereof, in this state; and all persons who shall furnish any material for any such bridge, trestlework, work of masonry, fence, or other structure, or who shall furnish any material for use in the construction or repair of any railroad, or part thereof, in this state, whether such work or labor be performed or such material furnished in the pursuance of a contract with the railroad corporation building, repairing, or owning such railroad, or whether such work or labor be performed or material furnished in pursuance of a contract with any person . . . engaged as . . . contractor, subcontractor, . . . [etc.], may have a lien to the extent . . ."

The question, as raised and presented by counsel for appellant, is that the title of the mechanics' lien statute of 1883 is not broad enough, under the constitutional provision to which we have referred, to authorize thereunder legislation providing a lien in favor of "contractors," who do not personally perform the labor in the construction of a railroad, and that therefore the provisions of § 12, hereinbefore set out, must be confined or limited to persons who themselves actually perform such labor, and that the term "laborers," as employed in the title, cannot be held to extend to or embrace contractors who undertake the work of building or constructing

a railroad. This question, so far as we are able to discover, appears to be raised and presented for the first time in this appeal. Each of the contracts in this case executed by the railroad company and appellee Bick, reads in part as follows: "This agreement, made and concluded [here the date is stated] by and between J. N. Bick of the first party, hereinafter called 'contractor,' and the Indianapolis Northern Traction Company, of the second party, hereafter called 'company,' bear witness as follows: First. The contractor, in consideration of the prices hereinafter agreed to be paid to him by the company, hereby undertakes and agrees to do and perform, to the satisfaction and acceptance of the chief engineer of the company, all of the grubbing, clearing, grading, and to furnish all materials, and to do and supply all other things requisite and necessary to complete the roadbed, with the exception of the permanent bridges and masonry, and prepare the same ready for receiving the superstructure upon that portion of the railroad known and designated as section, etc. Such work shall be finished in the best and most workmanlike manner, and shall be constructed of the best materials of their several kinds, and all in conformity with the annexed specifications and conditions and proposals, which are hereby expressly made a part of this contract," etc. The contract for the overhead line construction of appellant's road, as entered into between it and Brennan & Nelson, is as follows: "This agreement made this 15th day of December, 1902, between the Indianapolis Northern Traction Company, hereinafter referred to as the 'company,' and Brennan & Nelson, hereinafter referred to as 'contractor,' witnesseth. The contractor does hereby covenant promise, and agree, for the consideration hereinafter named, to do all work, deliver all materials, for erecting, complete in place, the work described, all in accordance with the specifications and drawings referred to herein and hereunto attached, in a proper, thorough, and workmanlike manner, and under the direction and to the satisfaction of the company's engineer," etc. As shown by these contracts and the evidence in this case, appellees undertook to perform the construction of the parts of appellant's railroad as provided by the contracts, not merely as laborers, but wholly as contractors, the work of such construction being let to them by the railroad company under the aforesaid mentioned contracts; such work being performed by persons whom appellees hired or engaged as their employees to carry out their contracts.

An examination of the title in controver-

sy discloses that it advises or indicates that the object of the legislation proposed by the legislature is to deal only with liens pertaining to three classes of persons, *viz.*, "mechanics, laborers, and materialmen." The title is expressed or stated in explicit language, and it is quite evident that thereby it was the intention of the legislature to tie down or limit the proposed legislation thereunder to the liens of mechanics, laborers, and materialmen. It so explicitly expresses the whole purpose of the legislation as to bring it within the maxim that the expression of one thing excludes all others. Under the circumstances, therefore, it is not within the province of a court to extend the legislation under such a title so as to embrace liens in favor of persons who do not fairly come within the meaning or scope of the title in controversy. *Mewhert v. Price*, 11 Ind. 199; *Voss v. Waterloo Water Co.* 163 Ind. 60, 66 L.R.A. 95, 106 Am. St. Rep. 201, 71 N. E. 208, 2 A. & E. Ann. Cas. 978; *State ex rel. Western Constr. Co. v. Clinton County*, 186 Ind. 162, 198, 76 N. E. 986; *State v. Dorsey*, 167 Ind. 199, 78 N. E. 843. In considering the question as to whether appellees' right to the liens herein involved can be upheld under § 8305, *Burns's Anno. Stat. supra*, we must first determine whether the legislature, in enacting the mechanics' lien law of 1883, intended to extend its protection to contractors of the class to which appellees belong, or, in other words, to persons who, under their contracts, furnish the labor and services of others in performing or carrying out the work which they have contracted to do. The act herein in question, being remedial in its character, should, as to all persons who come within its provisions, be accorded a liberal construction. But, as it is in derogation of the common law, the liberal rule of construction does not apply in determining what persons come within the statute, but, in respect to this question, a court must indulge in a strict construction; for, as said in *Morris v. Louisville, N. A. & C. R. Co.* 123 Ind. 489, 24 N. E. 335: "Courts must construe and enforce the statute as a remedial one, but they cannot extend it to meet cases not within its scope, however meritorious they may be." See 2 *Jones, Liens*, 2d ed. § 1554; *Phillips, Mechanics' Liens*, 3d ed. §§ 18, 19; *Boisot, Mechanics' Liens*, § 34, 37; *Cincinnati R. & M. R. Co. v. Spera*, 36 Ind. App. 315, 319, 73 N. E. 293, and authorities there cited.

The next inquiry is, What is meant or intended by the term "laborer," as employed in the title of the act? While this term is found in the title, nevertheless its meaning must be tested and determined by

the same rule which would be applicable if it were contained in the body of the statute. It is a well-settled canon of construction in this state that words or terms employed in an act of the legislature will be interpreted or construed in their plain, popular, and usual meaning, unless such a construction will manifestly result to defeat the intent of the legislature. *Massey v. Dunlap*, 146 Ind. 350, 44 N. E. 641. It is evident, we think, that if we are guided by this well-recognized rule in the interpretation of the term "laborers," as used in the title, we will not, in so doing, defeat the legislative intent. It certainly may be asserted, as there is nothing appearing to the contrary, that the word "laborers" was used by the legislature in the common or popular meaning usually accorded to it by lexicographers as well as by the courts in their interpretation of such term contained in statutes of similar import as the one herein involved. The policy of the legislation enacted under the title in question was to protect a class of persons commonly known as "mechanics" and "laborers," who themselves, generally speaking, perform the work or labor which they have contracted to do; or, in other words, persons who, by the force of their circumstances, depend for their daily or present support upon the wages or compensation received by them for their labor, and to whom for that reason, among others, the legislature deemed it proper to award a lien to secure the payment of the wages or compensation earned by them. It is clear, we think, that by the term "laborers" in the title of this act, the legislature did not contemplate or intend to extend the legislation so as to include a class of persons known as "contractors," who usually perform or carry into effect the work which they have undertaken, not by their own labor, but by means of the services of employees, from whose labor they expect to, and generally do, make or secure a profit. In § 1630, 2 *Jones on Liens*, the author says: "The right conferred by a lien in favor of laborers is personal, and cannot be availed of by one who furnishes labor." In respect to the definition of the term "laborer," see *Century Dictionary*, under the caption of "laborer," and vol. 2, *Bouvier's Law Dictionary*, p. 99. That statutes conferring lien rights upon laborers cannot be held to apply to or include contractors, such as appellees in this case appear to be, is well sustained by the following cases: *Raynes v. Kokomo Ladder & Furniture Co.* 153 Ind. 315, 318, 54 N. E. 1061; *McElwaine v. Hosey*, 135 Ind. 481, 35 N. E. 272; *Anderson Driving Park Asso. v. Thompson*, 18 Ind. App. 458, 459, 48

N. E. 259; Little Rock, H. S. & T. R. Co. v. Spencer, 65 Ark. 183, 42 L.R.A. 334, 47 S. W. 196; Dano v. Mississippi, O. & R. River R. Co. 27 Ark. 564, 567; Martin v. Michigan & O. R. Co. 62 Mich. 458, 29 N. W. 40; Chicago & N. E. R. Co. v. Sturgis, 44 Mich. 538, 7 N. W. 213; Heebner v. Chave, 5 Pa. 117; Seiders's Appeal, 46 Pa. 57; Wentroth's Appeal, 82 Pa. 471; Pennsylvania & D. R. Co. v. Leuffer, 84 Pa. 168, 24 Am. Rep. 189; Mann v. Burt, 35 Kan. 10, 11, 10 Pac. 95; Adams v. Goodrich, 55 Ga. 233; State v. Mills, 55 Wis. 229, 233. 12 N. W. 359; Tod v. Kentucky Union R. Co. 18 L.R.A. 305, 3 C. C. A. 60, 6 U. S. App. 186, 52 Fed. 241; Rogers v. Dexter & P. R. Co. 85 Me. 372, 21 L.R.A. 528, 27 Atl. 257; Vane v. Newcombe, 132 U. S. 220, 33 L. ed. 310, 10 Sup. Ct. Rep. 60; Henderson v. Nott, 36 Neb. 154, 38 Am. St. Rep. 720, 54 N. W. 87; Aikin v. Wasson, 24 N. Y. 482; Wakefield v. Fargo, 90 N. Y. 213; Lang v. Simmons, 64 Wis. 525, 25 N. W. 650; Frick v. Norfolk & O. V. R. Co. 32 C. C. A. 31, 57 U. S. App. 286, 86 Fed. 725, 24 Cyc. Law & Proc. pp. 810-814, and cases cited in footnotes thereto.

In Aikin v. Wasson, supra, the court of appeals in New York held that a contract or for the construction of a part of a railroad was not a laborer or servant within the provisions of the statute making stockholders of a railroad corporation personally liable for the debts due or owing to any of its laborers or servants for services performed for such corporation. In Wakefield v. Fargo, supra, the court held that a person employed by a corporation at a yearly salary as a bookkeeper and general manager was not a laborer within the provisions of the same statute in New York. The view entertained by the court of appeals in this latter case is quoted with approval in Raynes v. Kokomo Ladder & Furniture Co. 153 Ind. 315, 54 N. E. 1061. The question there was whether appellant, who was the general manager of appellee company, was entitled to the lien secured by the provisions of §§ 7058, 7255, Burns's Anno. Stat. 1894. The court, in considering the provisions of those sections, said: "The persons to whom such liens and preferences are secured . . . are mechanics and laborers employed about any shops, etc., who perform manual and mechanical labor. A general manager is not included either in the letter or spirit of these enactments. In speaking of the kind of services which entitled the laborer to the benefit of a similar statute, it is said in Wakefield v. Fargo, supra, 'that he who performs them must be of a class whose members usually look to the reward of a day's labor or service for immediate or present support, 30 L.R.A. (N.S.)

from whom the company does not expect credit, and to whom its future ability to pay is of no consequence.' " Rogers v. Dexter & P. R. Co. supra, involved the construction of a statute which imposed a liability on the railroad companies to pay for the work of "laborers" employed in the building of railroads of such railroad companies. The court in that appeal held that the provisions of this statute did not apply to a subcontractor who personally performed labor along with other men employed by him in the construction of a railroad section which he had contracted to build. The court, in considering the application of the statute, among other things in its opinion, said: "In the language of the business world, a laborer is one who labors with his physical powers, in the service and under the direction of another, for fixed wages. This is the common meaning of the word, and hence its meaning in the statute. The plaintiff in this case performed his labor in his own business. He was responsible only for the performance of his contract. The means for such performance were of his own choice. He need not personally have performed physical labor at all. He could have employed all, as well as a part, of the necessary labor. What physical labor he did perform was not for wages, but to reduce the expenses and increase the hoped-for profits of his contract. He clearly was not a laborer within the common and statute meaning of the term." In Wentroth's Appeal, supra, the questions arose whether Frederick Snyder, who had performed a certain contract by hiring teams and drivers, but who did no hauling himself, was a laborer within the meaning of a statute which gave a preference to "miners, mechanics, laborers, or clerks for labor or services rendered by them." The court, in that appeal, held that, within the contemplation of the statute, laborers were those who performed, with their own hands, the contract they make with their employers. The court, in passing upon the question, said: "What class of persons was intended to be comprehended by the word 'laborer'? We think this question has been very accurately answered by this court in Seiders's Appeal, 46 Pa. 57. 'By laborers,' says Mr. Justice Woodward, in delivering the opinion of the court, 'we mean those who perform with their own hands the contract they make with the employer.'" The court further said: "It is clear that Frederick Snyder does not fall within this description. The act meant to favor those who earned their money by the sweat of their own brows, not those who were mere contractors to have the work done, and whose compensation was

the profit they would realize on the transaction."

Quotations in support of our conclusion might be made from many of the other authorities hereinbefore cited, but to do so is unnecessary, and would only serve to extend this opinion. It must follow, and we so hold, that the term "laborers," as used in the title of the act in question, cannot be interpreted or construed to apply to a class of persons denominated and known as "contractors," and was not so intended by the legislature. Consequently, the provisions of § 8305, Burns's Anno. Stat. supra, must be considered as applying only to, and including, mechanics, laborers, and materialmen, and do not embrace contractors. To construe it so as to include contractors would render it, to this extent, violative of § 19, art. 4, of the Constitution, for the reason that this class of persons is not within the scope of the act of which it forms a part. Counsel for appellees, however, insist that the liens of their clients can be upheld under the provisions of § 8295, Burns's Anno. Stat. 1908, which is § 1, as amended, of the original mechanics' lien act of 1883, supra. But, so far as this section can be said to have been enlarged by amendment in the attempt to make it apply to and include contractors, it is open and subject to the same constitutional objections. We conclude, for the reasons stated, that appellees are not entitled to the lien and attorneys' fees awarded in their favor by the lower court, and the decree or judgment, to this extent, is erroneous.

Under appellant's second proposition it is argued that, as this is a case of equitable jurisdiction, therefore it is made the duty of this court, by the provisions of the act of 1903 (Acts 1903, chap. 193, pp. 338, 340), to weigh the evidence upon which the case was determined by the trial court. This evidence is embraced in a bill of exceptions, and was given by witnesses who testified *ore tenus* before the trial court. There appears to be quite a conflict in the evidence upon many of the material points or facts in issue. In fact, it may be said that the testimony of appellant's own witnesses upon some material matters is not fully impressed with harmony, but, to an extent, at least, is conflicting. Appellant's counsel admit in their brief that "there was much conflict in the oral testimony introduced on the trial in the Brennan branch of the case, upon certain incidental questions of fact."

In *Parkison v. Thompson*, 164 Ind. 609, 73 N. E. 109, 3 A. & E. Ann. Cas. 677, we construed the statute of 1903, and therein held that, in a case in which questions of

fact depended for their support upon conflicting oral evidence, we will not, under such circumstances, undertake to reconcile the conflict, and decide upon which side lies the weight of the evidence. It was further affirmed in the latter case that, under the old practice in chancery, before the procedure in cases of law and equity was united by our Civil Code, no oral testimony was heard in equity or chancery cases at the trial, as the testimony in such cases was in the form of depositions taken before a master or some other duly authorized officer. By this procedure the trial court was altogether deprived of the opportunity of seeing the witnesses, and of observing their demeanor and bearing while testifying, and, under the circumstances, occupied no better position for determining the credibility of the witnesses and weighing their evidence than did the supreme court, to which the cause might be removed for review of the questions involved. The holding in *Parkison v. Thompson*, supra, has been followed and adhered to by this court in the following cases: *Hudelson v. Hudelson*, 164 Ind. 694, 74 N. E. 504; *Ray v. Baker*, 165 Ind. 74, 74 N. E. 619; *Seiberling & Co. v. Porter*, 165 Ind. 7, 74 N. E. 516; *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131*, 165 Ind. 421, 2 L.R.A.(N.S.) 788, 75 N. E. 877, 6 A. & E. Ann. Cas. 829; *Tinkle v. Wallace*, 167 Ind. 382, 79 N. E. 355. Under the above decisions, the rule that this court will not weigh oral testimony wherein there is a substantial conflict, and determine on which side of the question there is a preponderance, is firmly settled. In such cases, if there is competent evidence to sustain the judgment of the lower court upon all material points, it will not be disturbed upon the weight of the evidence.

The evidence given upon the issues joined between appellant and appellees *Brennan* and *Hogue* is quite voluminous, covering, as it does, many pages of the record. It will be noted that these parties in their complaint allege facts to establish that appellant company was in default in the performance of its part of the contract; that it delayed and hindered appellees in carrying out their part of the contract by its failure to have ready the necessary poles, material, and the grades of the railroad, and thereby enable them to commence and complete the overhead work, which they had contracted to do within the period provided in the contract, and upon these facts and others, as averred in their complaint, they based their right of action. The contract under which they were obligated required that all of the work

which they had contracted to perform should be completed by August 15, 1903. Certainly, when appellant company obligated these parties to do and finish the work within a fixed period, it was its duty to afford them a fair and reasonable opportunity to begin and complete the work; or, in other words, under the mutual contract entered into between it and them, it became its duty to furnish the required material, secure the right of way, and have the road grade in readiness, as required by the contract, so that appellees, in the exercise of reasonable diligence, might begin and finish the work within the prescribed period without being subjected to unreasonable cost or expenses on account of the default, delays and hindrance of appellant. Its default or failure in these respects would subject it to liability for whatever damages appellees might reasonably sustain on that account. If appellant violated or breached its contract, as alleged, by the defaults, delays, and hindrance charged against it, and thereby prevented appellees from beginning and completing the work which they had contracted to do, the law would hold it liable for the reasonable worth or value of the work which they performed, and also for the loss sustained, if any, on account of their being prevented or not allowed by appellant to complete the work which they had undertaken to perform. *French v. Cunningham*, 149 Ind. 632, 637, 49 N. E. 797, and authorities there cited; *Louisville, E. & St. L. R. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. 153; *Lewis v. Atlas Mut. L. Ins. Co.* 61 Mo. 534; *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497, 4 L.R.A. 202, 42 N. W. 356; *Mississippi River Logging Co. v. Robson*, 16 C. C. A. 400, 32 U. S. App. 520, 69 Fed. 773. An examination of the evidence most favorable to appellees discloses that it sufficiently sustains the averments of the complaint. It appears from the evidence that the delays and hindrance which appellees encountered in the progress of the work should be imputed to appellant's own default and negligence in the premises. Inasmuch as there is evidence in the case which fully supports the judgment of the court, we are not permitted to disturb it upon the question of its weight. Aside from the question of the mechanics' lien and attorneys' fees awarded to appellees, the judgment in other respects as to them should be affirmed.

We next turn to the consideration of the questions raised by appellant upon the evidence given in the branch of the case relating to appellee Jacob N. Bick. This evidence covers some 3,816 pages of record. Appellant's counsel insist that it is at least our duty, upon this branch of the 30 L.R.A. (N.S.)

case, to consider and weigh the evidence, for in doing so we will really determine questions of law; i. e., whether, under the classification clause of the specifications which were made a part of the working contract entered into by appellant and appellee, material which, as they claim, is admitted to have been plowed with a 10-inch grading plow with six horses, is loose rock or earth. They assert that the evidence shows that it was the theory of appellee Bick that, "if the plows working in any given material turn only 'one fourth of a furrow,' then the contractor was entitled to have three fourths of the material excavated classified as loose rock, and only one fourth as earth." They argue that under the contract the test of classification is the means employed in the excavation, and not the quantity excavated on a given day.

The evidence shows that the valley of the Wabash river, in Miami county, is inclosed with high banks, dividing the uplands from the lowlands. These banks at irregular intervals are cut by streams flowing from above into the river. Appellant's engineers, in locating the line of the railway in this part of the country, for several miles followed ravines, and located the line diagonally crosswise with these ravines, and thereby made it necessary, in the construction of the road, to make cuts through the hills and fills through the hollows. A long fill appears to have been rendered necessary from the bottom of the hill to the bank of the river opposite the city of Peru. The purpose of so locating the road apparently was to get a lower grade than otherwise could be secured. Appellee, as a contractor, did the grading of over 20 miles of the road. A portion of the work which he performed was between Kokomo and Peru, in Howard and Miami counties. The other portion of the grading was in Tipton and Hamilton counties. For the purpose of carrying forward the work, appellee organized a corps of men and teams, and entered upon the work in the spring of 1902. As the work progressed, he increased his force by adding thereto other employees and teams. At times it appears that he was delayed in the progress of his work by the failure of appellant company to provide the right of way. The right of way immediately north of Kokomo was not secured by appellant company until the beginning of the following winter, and appellee was then directed by the company to do his work immediately, in order that the track of the road might be laid. Appellee, it appears, was delayed by the failures of appellant until cold weather, which froze the ground so hard that it

could not be excavated by plowing. The surface of the earth north of Kokomo is black loam, and on account of its being frozen, it became necessary to break it up by blasting, and to use in removing it wagons instead of wheelers, and thereby appellee appears to have incurred extra expenses, on account of money expended by him for powder used in blasting the frozen earth, and the extra labor rendered necessary for this purpose. Under the working contract, he was to be paid only for excavations, and nothing for fills, and if the earth was hauled more than 500 feet away from the part where it was excavated, whether it was wasted or put into fills, overhaul was to be allowed.

It is said by appellee that at the trial there were four questions of fact in issue in regard to the work performed by him on the line north of Kokomo. First, the number of cubic yards excavated in constructing the grades; second, the price for excavating all material that did not come within the class covered by the price fixed at 20 cents per cubic yard; third, as to the amount of overhaul; fourth, extra work, material, and "force account." It is asserted that no question arose in respect to the classification of material excavated on that part of the line south of Kokomo, for the reason that such material was earth only. But there was on this part of the line a dispute as to the amount of extra work, "force account," and overhaul. In respect to these several points, each party introduced many witnesses, including expert accountants, all of whom testified *ore tenus*. It appears that on the line south of Peru there were six cuts. These were known as, first, Coles No. 1; second, Coles No. 2; third, Redmonds; fourth, Jones; fifth, Geves; sixth, Cassville. The work on this latter part of the road was commenced some time in February, 1903, and was completed the last of the following December. In the performance thereof, appellee employed some 1,200 men, together with 700 teams. All of these, however, were not engaged in work at the same time. Among other things, the contract provided that "all material excavated by the contractor under this contract shall be classified either as earth, loose rock or solid rock, and the chief engineer of the company shall determine how the excavated material shall be classified. In cases of dispute, his finding and decision in the premises shall be conclusive on both parties." One of the clauses in the specifications provides as follows: "There shall be no classification of material of any kind other than earth, loose or solid rock, as provided for in these 30 L.R.A. (N.S.)

specifications . . . But this clause of the specifications shall not be construed so as to prevent the application of a percentage system in classifying material, as provided in clause 2 hereof." We find nothing in the contract or the specifications which stipulates specifically what shall be classified as earth. Clause 2 of the specifications provides as follows: "Loose rock shall comprise: First, hard shale or soapstone lying in its original or stratified position, coarse boulders in gravel, cemented gravel, hardpan, or any other material requiring, in the judgment of the chief engineer of the company, the use of the pick and bar, or which cannot be plowed with a strong 10-inch grading plow, well handled, and driven by six good mules or horses. It is to be understood that the plowing test shall apply to all the materials named herein, and that only such material is entirely loose rock which, in the judgment of the chief engineer, it is impracticable to plow at all with a strong 10-inch grading plow, well handled, behind a good six mule or horse team. Any material in which a portion of a day's work in plowing can be done with a strong 10-inch grading plow, well handled, behind a good six mule or horse team, will be classified as a percentage of earth and a percentage of loose rock, the amount of such percentage to be finally determined by the chief engineer of the company."

The further contention of appellant's counsel is that the above provisions of clause 2 of the specifications are shown by the evidence not to have been properly construed or interpreted by the trial court: or, in other words, the contention is advanced that the interpretation or construction accorded to this clause by the company's chief engineer, in classifying the material excavated, was correct, while, on the other hand, the interpretation placed upon it by the trial court was wrong. They further insist that, under the contract, the court did not correctly classify the material excavated on that part of the work north of Kokomo. Paragraph 1 of appellee's cross complaint relies on the written contract of December 6, 1902, while the second paragraph is founded on a contract partly written, but in other respects oral. It is not claimed that any question of classification arose on the third paragraph. Whether the court rendered judgment for the work done north of Kokomo on the first or second paragraph, the record does not disclose. It is evident, under the condition of the record, that we are confronted with the difficulty of determining, first, upon what paragraph, or paragraphs, of the cross complaint, the

judgment rests; second, what particular construction the trial court placed upon the above provisions of the contract in respect to classification of material, for the reason that the court's finding is very general, there being nothing therein to appraise us in respect to the amount of material which the court found had been moved by appellee Bick; third, nothing as to price allowed him for moving materials; fourth, nothing in respect to the amount awarded for the extra work and "force account;" fifth, nor for the overhaul. Virtually all that is shown by the general finding or judgment is the total amount awarded in favor of appellee, which, outside of attorneys' fees, is \$57,969.07. The provisions of clause 2 of the specifications, stipulating of what loose rock shall consist, may be divided as follows: "Loose rock shall comprise: First, hard shale or soapstone lying in its original or stratified position. Second, coarse boulders in gravel. Third, cemented gravel. Fourth, hardpan. Fifth, or any other material requiring, in the judgment of the chief engineer of the company, the use of the pick and bar. Sixth, or which cannot be plowed with a strong 10-inch grading plow, well handled, and driven by six mules or horses. Seventh. It is to be understood that the plowing test shall apply to all material named herein. That only such material is entirely loose rock which, in the judgment of the chief engineer, is impracticable to plow at all with a strong 10-inch grading plow, well handled, behind a good six mule or horse team. Eighth. Any material in which a portion of a day's work in plowing can be done with a strong 10-inch grading plow, well handled, behind a good six mule or horse team, will be classified as a percentage of earth and a percentage of loose rock, the amount of such percentage to be finally determined by the chief engineer of the company."

S. H. Knight, the chief engineer of appellant's company, testified in its behalf at the trial. The following hypothetical question was propounded to him by appellee's counsel on cross-examination: "Assuming, Mr. Knight, that four or five cuts are to be made, varying in length from 300 to 600 or 700 feet, and varying in depth, say, from 15 to 27 or 28 feet, and that after the first 4 feet of the top soil is taken off, there is encountered a hard soil or clay, interspersed with rocks or boulders, so that, in attempting to plow it, every 5 to 10 feet, with a heavy 10-inch grading plow, drawn by from four to six heavy horses, the plow is turned out by some boulder, or becomes fast under the boulder, so that, when it is fast, there is great difficulty in

extracting the plow; that in plowing, or attempting to plow, the plow does not enter the ground more than 3 inches, and often less; that a furrow from 3 to 5 inches wide is turned up, two men riding on the whiffletree, sometimes one man in addition on the plow beam, sometimes one man holding the plow handle, and sometimes two, the dirt hauled off by wheelers, which are very often being tripped by boulders which are being developed by the plowing, heavy boulders, so large that they have to be blown out with dynamite and hauled off by chain, they being so large that a team cannot snake them, but they have to be rolled with a rolling hitch; three or four furrows have to be plowed before the wheeler can attempt to fill at all, then being compelled to go 100 feet, then get one third of a load, being compelled to go to the fill that way because they could not get enough dirt in front of the wheelers to shove the dirt back into the wheelers,—I wish you to state to the court, you being familiar with the specifications in the contract, and using that knowledge, I wish you to state to the court whether or not any portion of that soil or clay and boulders should be classified as loose rock under the specifications." The answer of the witness to this question was, "On these specifications, I would not." The following hypothetical question was also propounded to him: "Assuming that after the yellow clay is taken off, several feet of it, there was encountered a blue clay a little harder than the yellow, but with comparatively few boulders and stones, and that it was excavated in the same way I have detailed [meaning as detailed in the previous question], except it was not necessary to use dynamite, or pick out the boulders, what would you say as to whether or not any portion of that blue clay should be classified as loose rock under the specifications?" The answer of this witness was, "I would not." There is evidence in the record to establish the facts stated in these questions, and therein assumed to be true, and that material excavated, as therein stated, was classified by the engineer entirely as earth. Counsel for appellee claim, first, that his answers to the above questions clearly show that he placed a wrong legal construction upon the provisions of clause 2 of the specifications hereinbefore set out; second, that his answers to the questions disclose that, upon the subject of classifications, he was so prejudiced against appellee, and in favor of appellant, his employer, and of whose company he was a stockholder, that he was not a fit person to settle the question of classification.

We will hereinafter endeavor particularly to point out wherein, as we believe, the engineer, as shown by his answers to the previous questions, misinterpreted the provisions of the specifications in regard to what material should be classified as loose rock. It is true that there is a provision in the specification in question that the chief engineer of the company should determine how matter excavated should be classified, etc., and his decision, in case of dispute, was to be conclusive on both parties. This provision, however, contemplated, under all circumstances, the exercise of an honest judgment on the part of the engineer upon the matter involved. This court has held that stipulations or provisions of this character cannot operate to deprive the parties of the right to resort to the courts for a redress of wrong, or to a recovery of whatever may be due them. *Louisville, E. & St. L. R. Co. v. Donnegan*, 111 Ind. 179, 12 N. E. 153; *Kistler v. Indianapolis & St. L. R. Co.* 88 Ind. 460; *Carroll County v. O'Connor*, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; *Fulton County v. Gibson*, 168 Ind. 471, 63 N. E. 982; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453. The rule generally affirmed by the authorities is that the measurements, estimates, and classifications of material, in cases where the same is left to the judgment or decision of the engineer, are accepted as *prima facie* correct, and to that extent are binding upon the parties to the contract, in the absence of fraud or gross or obvious mistake on the part of such engineer, and the burden is upon the party who assails them to establish such fraud or mistake. *McCoy v. Able*, *supra*; 3 *Elliot, Railroads*, §§ 1058, 1059. As previously shown, appellee, under his cross-complaint, assailed the decisions or findings of the chief engineer upon the ground that he acted arbitrarily, and that his judgment was impressed with gross mistakes and fraud. Without regard to the controlling effect which, under any circumstances, might be accorded to the provision or stipulation in the contract concerning the decision of the chief engineer as to estimates, measures, etc., being conclusive in cases of dispute, the provision certainly cannot control in respect to the contract so as to preclude either party from controverting any construction or interpretation which the engineer may have placed upon it, for it is elementary that it is the province of courts to construe contracts. Consequently, as claimed by counsel for appellee, if the engineer misinterpreted or misconstrued the provisions of the contract in his classification of loose rock by applying the "plow test," either

to the first, second, third, or fourth clause of the stipulations, as hereinbefore set out, then, under the circumstances, appellee would be entitled in this action to have such errors of the engineer reviewed by the court and corrected. *Williams v. Chicago, S. F. & C. R. Co.* 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631; *Lewis v. Chicago S. F. & C. R. Co. (C.C.)* 49 Fed. 708; 30 Am. & Eng. Enc. Law, 2d ed. p. 1271.

Counsel for appellant contend that the stipulation in clause 7, *viz.*, "It is to be understood that the plowing test shall apply to all material herein named," etc., modifies or destroys the classification of material immediately preceding as specified under clauses 1st, 2d, 3d, and 4th; or, in other words, that notwithstanding the provision of the specification by which the contracting parties expressly declared and agreed that "hardpan, coarse boulders in gravel," etc., should be classified as loose rock, nevertheless it was meant and intended that such material was subject to the plowing test provided for by clause 6. The provisions of the specification must be construed together, and given a reasonable interpretation, and they should not be construed in such a manner as to lead to absurdity. By the 2d clause, the parties were dealing with the plowing test as provided by clause 6, next preceding. This test was to apply to all material coming within its meaning; that is to say, as therein provided, only such material was to be considered as entirely loose rock, which, in the judgment of the chief engineer, it was impracticable to plow at all with a strong 10-inch grading plow, well handled, etc., or in other words, impracticable to plow the material, in the judgment of the chief engineer, when the plow test was applied. It is manifest that the latter test was not intended to refer to or control the particular material specified as hardpan, etc., which the parties had already declared should comprise or constitute "loose rock." Under the circumstances, to hold to the contrary would be absurd. We may assume that the appellant and appellee, in entering into the contract, recognized that the materials specified or named in the 1st, 2d, 3d, and 4th clauses were well-known hard substances, quite difficult to excavate. Therefore they mutually declared that they should be classified as loose rock. Doubtless the parties believed that other hard material might be developed in excavating, and therefore, under the circumstances, the pick and bar test and the plowing test were provided for other hard earth or substance not specific-

ally falling within that mentioned and specified in the preceding clauses.

In *Lewis v. Chicago, S. F. & C. R. Co.* supra, the specification involved was as follows: "Loose rock shall comprise: First, shale or soapstone lying in its original or stratified position, coarse boulders in gravel, cemented gravel, hardpan, or any other material requiring the use of pick and bar, or which cannot be plowed with a strong 10-inch grading plow, well handled, behind a good six mule or horse team." It will be observed that this is virtually the same as the one with which we have to deal. It appears in that case that, as the engineers construed the specification, "shale, cemented gravel, hardpan," etc., were not classified as loose rock unless more than six horses or mules were required to plow such material. The court in that case, in determining whether the engineers had properly construed the specification, said: "After an attentive consideration of the question, the court concludes that the engineers put a wrong construction on the 2d clause of the specifications, in so far as they construed the 'plowing test' to be applicable to shale, soapstone, cemented gravel and hardpan, as well as to other hard earthy substances. The right interpretation of the clause is as follows: Shale, soapstone, cemented gravel, and hardpan were known substances, and were known to be hard to handle. Therefore it was declared that they should be classified as loose rock. And inasmuch as it was thought probable or possible that other hard earths might be encountered in the progress of the work, it was agreed that any other material requiring the use of pick and bar, or that could not be plowed 'with a strong 10-inch grading plow . . . behind a good six horse or mule team,' should likewise be classified as loose rock. This is the correct exposition, and truly expresses the thought in the mind of the draftsman. . . . By far the largest portion of all the material found in the various cuts, except the rock cuts, was broken up, I think, by the use of a team of not more than six horses. Probably that was the most practicable and economical method of working the cuts, as an eight-horse team is usually cumbersome. Nevertheless, if the engineers had classified every cubic yard of earth that was so broken up with six horses 'as earth excavation,' it would not have accorded with the spirit of the contract." . . . In *Williams v. Chicago, S. F. & C. R. Co.* supra, identically the same specification was involved as in the case last cited. In this latter case the plaintiffs claimed, and offered to show, that the engineer had con-

strued hardpan to be loose rock only "when it could not be plowed with a strong 10-inch plow, behind a good six horse or mule team." The plaintiffs further contended that, under this clause of the contract, the classification of hardpan as loose rock was fixed without any reference to the plowing test. The court sustained this contention, saying: "We think the plaintiffs are correct in their interpretation of this clause, and if the engineer did so misconstrue it, he exceeded the power vested in him by the contract, and there is no principle of law or equity that demands that plaintiffs should submit to a misconstruction of their contract which would result in a serious loss to them. The contract fixed certain classifications of material; others it left to the judgment of the engineer." The court further affirmed that plaintiffs were entitled to show, if they could, under their complaint, that the engineer misconstrued the contract in his classification of the loose-rock clause, and had not measured the work according to the contract; that an allegation of fraud was not necessary to entitle them to make such a showing.

The interpretation for which appellee contends of the term "loose rock," as used in the specification in question, is manifested by the statements of facts in the hypothetical question propounded to the chief engineer. Appellant's counsel, however, deny that appellee's contention in respect to the construction is correct within the meaning of the contract, but affirm that the one accorded to it by the chief engineer is right. The infirmity of the interpretation placed upon the specification or contract by appellant's engineer is that it accords neither with its letter nor spirit. We have heretofore, we believe, sufficiently shown that the engineer was wrong in the construction which he accorded to the specification as to how the material mentioned in the hypothetical question should be classified. In addition to this we may say that the provision "any other material . . . which cannot be plowed," etc., must be construed to mean such hard material or substance as cannot be plowed with reasonable facility. The term "plowed" was certainly used in its usual meaning, and must have been so understood by the parties. They did not mean or intend thereby the mere "rooting-up" of the material, or cutting a very shallow furrow, or such plowing as would require men to ride upon the whiffetree and upon the plow beam in order to keep the nose of the plow in the material which was attempted to be plowed. It is not tenable to argue that plowing, within the meaning of the test provided, was accomplished where, as

the evidence shows, the material attempted to be plowed was hardpan, or contained many large and coarse boulders and cemented gravel, and that thereby the plow would be frequently turned out of its shallow furrow, and would become fastened beneath the boulders, so that the men handling it would be required to resort to the use of the pick and bar to loosen or extricate it from the boulders; that it required the force of several men to hold the nose or point of the plow in the ground; and that the plow nose or point would be frequently broken by the hardness of the material which was encountered in the progress of the work. Certainly, under these circumstances, it could not in reason be said that such material, within the meaning and spirit of the contract, should be classified as ordinary earth, to be removed by the appellee at 20 cents per cubic yard. A converse view, however, is apparently entertained by appellant. There was no price fixed by the contract for excavating loose rock, and appellee was only entitled to the reasonable value of such work. The value of such work, as shown by the evidence, is far in excess of that provided in the contract for the removal of earth.

Appellee claimed that the only feasible, practicable, and cheapest method of loosening and breaking up much of the material which was encountered in the work in some of the several cuts was by means of a plow, and that only a small portion of it could be removed by the ordinary method employed for removing earth.

After showing the character of the material, the number and size of boulders, and the great labor and difficulty experienced in loosening, excavating, and removing the material in question, and the only practicable method by which it could be broken up, appellee was asked the following questions:

Q. Now, what other method did you adopt there, trying to excavate this earth, except the way you have already detailed?

A. Well, the boys tried to pick it, and tried to blow it out.

Q. How did you pick it?

A. Run a pick down as far as he could drive it, and bring it up; he would just jerk out what was on the pick.

Q. Could he bury the pick in to the handle?

A. It was too hard.

Q. Now, you spoke of blowing up with dynamite?

A. Powder. It would not take any effect on it, just blow out whatever hole they put it in.

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Q. Now, you have been a contractor a good many years. Tell the court what method of loosening this earth was there known or available other than to do it with a plow, as you did it.

A Under these conditions nothing more.

Appellee's testimony was supported by many other witnesses. Because he employed the plow as the most feasible and available method of loosening and breaking up the material in controversy certainly affords appellant no room for insisting that such material should be classified entirely as earth, to be paid for 20 cents per cubic yard, mainly for the reason that the excavation thereof was principally done with a plow as the most feasible, practicable, and the cheapest method, as the evidence fully establishes. What appellee did in this respect could not be said to be plowing, but merely, in common parlance, "rooting-out" the boulders, and breaking up the hard substances with a strong grading plow which was used.

Appellee examined many witnesses upon the trial of the cause, some of whom were expert civil engineers. The evidence given by the men employed in excavating and grading appellant's railroad shows that much of the material developed in some of the several cuts was hardpan, and that other parts thereof, to quite an extent, were intermingled with boulders, large and small. The material encountered in the attempt to plow was so hard that sometimes the plow points would only last two or three hours. One witness testified that the material was so hard that he could not drive a harrow tooth down through it; that in his attempt to do so the tooth was bent, although it did not strike any boulder or rock. Others testified that dynamite was employed to break up the material, without much success; that it was useless to try to remove it with a force of ten or twelve horses attached to the plow; that the more horses used in drawing the plow, the more difficult it was for the men to keep the plow in the ground; that all that could be done was simply "to root" along; that six, seven, and sometimes as many as eight horses were used, but on account of the hardness of the material and the many boulders encountered it was found impracticable to use this number of horses. Four horses were all that it was practicable to use or employ with any degree of success in breaking up the material.

It is not necessary that we give the evidence in detail upon the many points in dispute before the trial court, for to do so would, under the circumstances, serve no

useful purpose. Suffice to say that the evidence as we find it in the record is ample to sustain the allegations of appellee's cross complaint, and the finding and judgment of the lower court upon all material points. In fact, it may be said that had the court given full credit to the testimony of appellee, it would have been justified in awarding a recovery in his favor of a much larger amount than it found was due to him. As heretofore shown, the contention of appellant's counsel that the lower court erred, upon the ground that it did not adopt the construction of the contract for which they contend, even if true, cannot be sustained. It does not appear that during the progress of the work there was any substantial dispute on the part of appellant's engineer in regard to the estimates and classification of the material to which appellee was entitled. Instead of making estimates and classifications, which, as shown, appellee frequently requested should be done, the engineer merely promised to do so, but failed to carry out his promise. The controversy appears to have arisen after appellee had completed the work and turned it over to appellant company. It appears that he was anxious that estimates and classifications should be made by the company's engineer, in order that he might know what he was being allowed. His pay roll at the time was running high, some weeks to \$14,000. He testified that he asked Mr. Knight, the chief engineer, about making estimates and classifications of material excavated, saying to him that he thought the matter ought to be settled so far as the work had progressed, stating to the engineer that the estimates which had been made were "rather shy." The engineer, in reply to this, as shown by appellee's testimony said: "Mr. Bick, my monthly statements are, to a certain extent, guesses; they are approximates only. When you get through with your work, you will have every yard and every yard of overhaul and your proper classification, so don't worry about them. I am going to treat you right." Appellee also appealed to the assistant engineer, who told him that there was a mistake in the overhaul, and that he would make it right next month, and he also promised to see that a detailed statement of the estimates should be furnished to appellee, but this promise was not carried out. Appellee testified that he also had a conversation with Mr. Drum, the general manager, along in August or September, before the work was completed, and informed him that he was getting "pretty rough treatment" as to estimates. In the language of appellee, "I told him my judgment

was that I was not getting my yardage, and when was I to get my overhaul up to that time? They had practically allowed me nothing, only a trifle on classification. That I needed the money. That they ought to give it to me. That he ought not to hold it until the job was done. That I ought to receive it as we went along." The general manager said to him in reply to this: "Mr. Bick, these engineers are narrow. It is hard to get a good man. You will come out all right when you get through." This evidence stands undisputed, and at least tends to show, as insisted by appellee, that he was thereby induced to wait until his job was completed in the belief that he would be fairly dealt with and treated at the final settlement. It appears that appellant adopted the method of measurement denominated and known in mathematics as the "prismoidal formula," while the witnesses for appellee, who testified as to the number of yards of material excavated, adopted and used the method known as the "average end area." Expert engineers testified pro and con to the correctness of these two methods. Appellant argues that the court adopted the latter method, but in respect to this contention we are not apprised by the record which method of computation or measurement the court adopted. Therefore the question as to which of these two methods is the most correct is not before us for determination.

It follows from the conclusions which we have herein reached that the judgment below must be in part reversed and in part affirmed. It is therefore ordered that all that part thereof which adjudges and awards a statutory lien in favor of the respective appellees, and attorneys' fees thereon, and a foreclosure of such lien, be reversed, with instructions to the lower court, on motion of appellant, to modify the judgment or decree to that extent. In all other respects the judgment is affirmed.

Myers, J., did not participate.

A petition for rehearing having been filed, Jordan, J., on December 7, 1909, handed down the following additional opinion (—Ind. —, 90 N. E. 65):

Appellants in this appeal have separately petitioned for a rehearing upon the grounds: First, that each of them was entitled to a trial by jury in the lower court; second, that their right to a jury trial was not waived. Appellee Bick has also petitioned for a rehearing of this case, so far as may be necessary for the court to amend and modify its judgment, and thereby fully sustain and affirm the judgment and decree of the Howard circuit court. He

claims that, if he is not entitled to a lien as a contractor under the act of 1883 (Acts 1883, chap. 115, p. 140), this right thereto is saved and awarded to him by virtue of an act of March 10, 1873 (Acts 1873, chap. 78, p. 187), entitled, "An Act to Give Security to Persons Who Contract with Railroad Corporations to Perform Work and Labor in the Construction of Railroads," which act he claims has never been repealed, but is in full force and effect. Other attorneys, on behalf of parties interested in like cases, in upholding their right to a lien as contractors, in briefs filed herein, criticize the decision as not being supported by the authorities cited, etc. The arguments in the main advanced by appellants for a rehearing are: First, that the decision in this appeal denies to them the right of a trial of the cause by jury,—a right, as they properly claim, guaranteed under the state's Constitution; second, that there should be a reversal of the judgment in its entirety, and a new trial ordered, and the cause remanded to the lower court, in order that they may be afforded an opportunity to demand a trial by jury as a matter of right. It is further contended that, during the progress of the trial below, appellants were not in a situation to have properly demanded a trial by jury, for, inasmuch as this suit is to foreclose a statutory lien, it, under our decisions, was of equitable cognizance, and therefore triable by the court; that therefore, under the circumstances, a trial by jury could not be demanded as a matter of right, and to have requested the lower court to submit the cause to a jury would have been but a useless formality. They further argue: That they demurred to the complaint for insufficiency of facts, which demurrer was overruled, to which ruling they excepted; that they objected to the introduction in evidence of the notice in respect to the lien sought to be enforced by appellee; that by these affirmative acts on their part they raised the question of their right to a trial by jury; and that such right was by these acts clearly preserved. It is not claimed, however, that they demanded or made any request whatever in the lower court for a jury trial, and there is no ruling of the court in denying any such demand or request assigned in the motion as a reason for a new trial.

Appellants, in their contention that, by the demurrer to the complaint and objection to the introduction of the notice of the lien in evidence, they raised and preserved the right to a jury trial, are clearly mistaken in their view of the question. In fact, the only point presented by the

demurrer, and determined by the court in its ruling thereon, was that the complaint stated a cause of action. If the complaint, independently of appellee's right to the lien in controversy, sufficiently stated a cause of action to entitle him to a personal judgment, then the demurrer was properly overruled. Our cases generally affirm that, if a complaint is sufficient to entitle the plaintiff to any of the relief demanded, a demurrer thereto should be overruled. *Linder v. Smith*, 131 Ind. 147, 30 N. E. 1073; *Yorn v. Bracken*, 153 Ind. 492, 55 N. E. 257; *Chicago & S. E. R. Co. v. Woodard*, 159 Ind. 541, 65 N. E. 577; *Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 642, 83 N. E. 246. See also *Shepardson v. Gillette*, 133 Ind. 125, 31 N. E. 788; *United States Sav. Fund & Invest. Co. v. Harris*, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451.

Opposing counsel insist that appellants waived their right to a jury trial by submitting the cause to the court without requesting or demanding that they be awarded a jury, and in not interposing any objections to the submission of the cause to the court for trial. It is insisted that an entry of record in this case fully discloses that appellants consented to the submission of the cause to the court for trial, and that thereby a jury trial was expressly waived. This entry is as follows: "Come the parties by counsel, and this cause being at issue and called for trial, the same is now submitted to the court for trial, without the intervention of a jury." As preliminary, we may say that we might properly deny appellants' petition for a rehearing on the ground that they are not in a position to have a review of the question which they present at this stage of the case; but as their counsel assert that it is one which is before this court for the first time, and as they evince much earnestness in their argument, we have concluded to consider their points, and herein give our reasons to show that their contentions or arguments in support of the petition are untenable. The question then is: Did appellants, in the lower court, either expressly or impliedly waive their right to a trial by jury?

Section 20 of our Bill of Rights declares that "in all civil cases the right of trial by jury shall remain inviolate." That this right in all civil cases where it exists may be waived by a party entitled thereto is not disputed. Section 576, Burns's Anno. Stat. 1908, provides the manner by which parties in a civil action may expressly waive their right to a jury trial: First, by failing to appear at the trial; second, by a written consent, in person or by attorney, filed with the clerk; third, by the

oral consent in open court, entered on the record. That this right may also be impliedly waived by a party failing at the proper time to make a demand or request for trial by jury is a proposition well settled by repeated decisions of this court. *Madison & I. R. Co. v. Whiteneck*, 8 Ind. 217; *Burgess v. Matlock*, 12 Ind. 357; *Sprague v. Pritchard*, 108 Ind. 491, 9 N. E. 416; *Jarboe v. Severin*, 112 Ind. 572, 14 N. E. 490; *Sheets v. Bray*, 125 Ind. 33, 24 N. E. 357; *Blair v. Curry*, 150 Ind. 99, 46 N. E. 672, 49 N. E. 908; *Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529. In *Madison & I. R. Co. v. Whiteneck*, supra, this court said: "If a party voluntarily abstains from claiming the right of trial by jury in a given case, it may be judicially held that it is waived." In *Jarboe v. Severin*, supra, the court said: "Where a party does not ask for a trial by jury, nor object to a trial of the cause by the court, with a jury as advisory merely, it is too late to object on appeal to the mode of the trial." In *Sheets v. Bray*, supra, the court said: "Where the right to a trial by jury exists, and no request is made for the same, it will be considered as waived." In *Blair v. Curry*, supra, it is said: "A jury trial is waived by a failure to demand it at the time of the trial." In *Boonville Nat. Bank v. Blakey*, supra, this court, after considering the manner by which a jury may be waived, as provided by § 576, *Burns's Anno. Stat. 1908*, said: "While it does not admit of doubt that there may be an implied waiver of the right of a jury trial, yet such waiver will not be predicated upon a doubtful implication." Or, in other words, where the waiver is predicated upon implication, the intention of the party to waive his right to a jury should be clearly manifested. In *Goodwin v. Hedrick*, 24 Ind. 121, this court held that an agreement to refer a cause to a referee for hearing was totally inconsistent with a submission to a jury, and was therefore a waiver of a jury trial. See also *Taylor v. First Cong. Church*, 7 Ind. App. 388, 34 N. E. 655; *Whitestown Mill. Co. v. Zahn*, 9 Ind. App. 270, 36 N. E. 653.

In *Hauser v. Roth*, 37 Ind. 89, the appellant was present in court by his counsel when the cause was ordered to be referred to a master in chancery to find the facts and report his finding to the court. Appellant in that case was ordered by the court to furnish the master with a bill of particulars, and with this order he complied. He was also present in court by counsel when the master filed his report, which was ordered to be spread of record. The appellant, as it appears, in that appeal, interposed no objections to the reference of the

cause to a master, and made no objections to the court's order at any stage of the proceedings. After the filing of the master's report, containing the finding, appellant then demanded a trial by jury; but his demand was overruled, to which ruling he excepted. In reviewing the question, on appeal, as to whether he had waived his right to a trial by jury, under the facts in that case, this court, after quoting from the provisions of the Civil Code of 1852, which provided the mode by which a jury trial might be waived (being the same provisions now embraced in § 576, *Burns's Anno. Stat. 1908*, supra), held that the appellant, in not objecting to the order of the court in submitting the cause to a master in chancery for a finding, must be presumed to have given his oral consent in open court, which was entered of record, and that thereby he waived a jury trial within the spirit of the third mode provided by § 576, supra. The court, speaking by *Worden, J.*, said: "Here it will be seen that the parties were in court at the time the court made the order referring the cause to the master, and requiring the appellant to furnish him with a bill of the particulars of the items of account claimed in his answer. . . . The appellant, by his attorneys, was present when the order was made, and submitted, not only to the order of reference, but to the order requiring him to furnish the master with the specified bill of particulars, making no objection thereto whatever. He must be presumed, therefore, to have consented. If he had required a trial by jury (a mode entirely inconsistent with a reference of the cause to a master), he should then have objected to the reference." The decision in the *Hauser Case* upon the question involved is quite applicable to the one in the case now before us. Appellants, at the time this cause is shown to have been submitted to the court for trial without the intervention of a jury, were present on court by counsel, and, as nothing to the contrary appears, it must be presumed that the entry of record in respect to the submission of the cause to the court was predicated upon the oral consent of appellants and appellees, and thereby falls within the third mode prescribed by § 576, *Burns's Anno. Stat. 1908*, supra, and must be held or considered as an express waiver of a jury trial by appellants and appellees, and consequently appellants cannot be heard to say that they were in any manner denied the right by the court to a trial by jury. It is a well-settled rule, recognized by our decisions, that where a party is in court in person or by counsel, and an opportunity is afforded him at the

proper time to assert or reserve his legal right or rights, his failure or neglect to do so is deemed and considered as a waiver of such right or rights. *Zehnor v. Beard*, 8 Ind. 96; *Preston v. Sandford*, 21 Ind. 156, and authorities there cited; *Adams v. Whitley County*, 164 Ind. 108, 72 N. E. 1029, and authorities there cited.

There certainly is no merit in the argument advanced by appellants' counsel, that as this suit involved the foreclosure of a statutory lien, and therefore of equitable jurisdiction, or, in other words, triable by the court, and not as a matter of right by jury, consequently they were not in a position or situation to demand a jury, and to have interposed such a demand would have been an idle formality and of no avail. Appellants were bound to know what were their legal rights and to have properly asserted them. Their counsel in this appeal successfully raised the question that appellee was not, under the law, entitled to the lien which he sought to have enforced. We have no reason to presume that they were not impressed with the same view of the law when the cause was submitted to the court for trial. Under the circumstances, appellants' counsel are not warranted in their contention that to have demanded a jury in the case would have been of no avail. Conceding that the lower court possibly might have denied this demand, still this would not have rendered it unavailable to appellants, for had the record disclosed that a demand or request for a trial by jury had been made at the proper time, but was overruled by the court, and that such ruling was assigned as a reason in the motion for a new trial, then, upon reaching the conclusion, as we did, that, under the law, appellee had no right to the lien which he claimed, we would have considered no other question raised in the case; but, for the error of the court in refusing a jury trial, we would have ordered a reversal of the judgment as a whole, and have remanded the cause to the lower court for a new trial, with instructions to grant appellants' demand for a trial by jury, and for further proceedings.

The claim is advanced by appellants to the effect that, because the court, instead of a jury, was permitted to try and determine the cause, it was therefore tried upon the wrong theory, to their injury; hence, for this court to affirm as correct the action of the trial court in rendering a personal judgment, it must be made affirmatively to appear that substantial justice was done in the trial below. Or, in other words, even if remanded for a new trial, a jury will be compelled to reach the same conclusion as that arrived at by the trial court. This 30 L.R.A. (N.S.)

contention is certainly untenable and devoid of merit. If the contention be true in respect to the wrong theory arising out of the trial by the court, then, under the circumstances, it may be said that appellants aided and helped to bring about or create this wrong theory by their failure to demand a jury trial, and consenting to the submission of the cause to the court, thereby giving the lower court to understand that they entertained the view that, under the law, the case was not triable by jury as a matter of right. The parties undoubtedly, in the lower court, acted upon the assumption that the issues were triable by the court, without the intervention of a jury, and certainly neither party will be permitted to shift or depart from this theory upon appeal to this court. *Elliott*, App. Proc. § 490.

The decision in the appeal of *Shaw v. Kent*, 11 Ind. 80, so far as it can be said to hold that a trial by jury can only be waived by a party by some one of the modes prescribed by § 576, *Burns's Anno. Stat.* 1908, is inconsistent with the holding of this court in its many decisions to which we have referred, and upon this point *Shaw v. Kent*, *supra*, has been, at least impliedly, overruled, and no longer can be considered as an authority.

By reading the original opinion, it will be seen that we did not hold that § 12 of the act of 1883, as amended, was invalid; but the holding was that its provisions did not embrace or apply to contractors such as was appellee *Bick*, and that to construe it so as to make it apply to and include him would render it antagonistic to § 19 of article 4 of the Constitution, for the reason that contractors of his class or grade were not within the scope of the act as originally entitled. To the many authorities cited in our opinion, we may now add § 157 of *Phillips on Mechanics' Liens*, wherein the author says: "But when we study the legislative intention in the enactment of a law granting those who work chiefly through physical means certain privileges, it is possible to see that the term 'labor' is used in a restricted sense, and not in its broad and comprehensive meaning. The object of the lien laws, now almost universal, is not doubtful, on authority, at least. One purpose may have been to protect the laboring man—the man whose subsistence depends on the wages earned by his own manual labor—from the reckless improvidence of his employer, and to furnish him with ample security for his earnings, which ordinarily he could not successfully demand. If this was the intention of the legislature in the passage of the law in question, then it follows that it does not

apply to contractors employing men and teams to cut and haul timber, doing no manual labor themselves, and deriving their compensation from the profits realized. Most of the authorities that we have examined support this view of the law, except in cases where, from the wording of the statutes, a different intention clearly appeared."

In opposing the contention of appellee Bick, that he has the right to have and enforce a lien under the act of 1873, *supra*, counsel for appellants insist that his intention cannot be sustained: First, because that act was repealed by the act of 1883; second, that, if not repeated, nevertheless appellee Bick and his coappellees are not embraced within its provisions. We pass, without deciding, the question raised in respect to the repeal of this statute, and consider the second point advanced by appellants' counsel. The act of 1873, *supra*, is entitled, "An Act to Give Security to Persons Who Contract with Railroad Corporations to Perform Work and Labor in the Construction of Railroads." It will be observed that the persons mentioned in the title are those who, contract to perform work and labor. The 1st section of the act, under the provisions of which a lien is awarded, provides that "all persons who, by contract with any railroad corporation or company, shall perform work or labor for any such corporation or company in the way of grading, building embankments, or making excavations for the track of any railroad . . . shall have a lien upon such grading, embankment, or excavation. . . ." It is manifest, we think, that this section, so far as it professes to apply to or include persons entitled to its benefits is no broader than § 12 of the act of 1883, and cannot be said to create a right to a lien upon the property of appellant railroad company in favor of appellee. Neither the title nor the body of the act of 1873, *supra*, can be held to contemplate or apply to a contractor like appellee, or, in other words, a person to whom the work of construction of a railroad is let, and who, in carrying out his contract, performs no manual labor himself, but, as the authorities assert, employs men and teams in the performance of his contract, and "derives his compensation from the profits realized." By the plain language of the statute of 1873, the right to a lien is limited or confined to all persons who by contract (either express or implied) "perform work or labor," etc.

It follows that each of the petitions of appellants and the petition of appellee Bick for a rehearing should be overruled, which is, accordingly, ordered.

30 L.R.A. (N.S.)

MAINE SUPREME JUDICIAL COURT.

OCEOLAR ROBBINS

v.

LEWISTON, AUGUSTA, & WATERVILLE STREET RAILWAY.

(— Me. —, 77 Atl. 537.)

Master — incompetent servant — disobedience of orders.

1. A servant who repeatedly violates different rules of the master, and disobeys different express orders, is legally incompetent; and if the master continues to employ him with knowledge of such incompetence, he will be liable for injuries to other employees through such disobedience of orders.

Evidence — incompetency of servant — sufficiency.

2. Evidence of specific acts of negligence on the part of an employee, tending to show his incompetence, by which the master had actual knowledge, or, by the exercise of due care, should have had such knowledge, is admissible on the question of incompetence and knowledge, in an action to hold the master liable for injury to an employee through a negligent act of the one alleged to be incompetent.

Same — complaints of incompetency — admissibility.

3. Evidence of a conversation between a person injured while alighting from an electric car, and officers of the railway company, bearing upon the question of the negligence of the motorman, is admissible to show knowledge of his incompetence, in an action by a coemployee to hold the company liable for injuries due to his disobedience of orders.

(August 15, 1910.)

Note. — Disobedience of orders as incompetency within the rule as to master's duty to furnish competent fellow servants.

This note is confined to cases like *ROBBINS v. LEWISTON, A. & W. STREET R. CO.*, in which the sole evidence of incompetency is the fact that the alleged incompetent servant repeatedly disobeyed orders. In many cases the servant's disobedience to orders is shown, but only as one of the several elements making up the incompetency alleged. Cases of that character are not of importance on this question, because it is impossible to tell what weight was given to each of the factors of the alleged incompetency.

And this note is confined to cases involving the disobedience of servants to the express rules or orders of the master, and does not include cases which merely involve the reckless or negligent failure of a servant to perform the ordinary duties required of him.

There are but few cases on this question, but this is not surprising, in view of the

EXCEPTIONS by defendant to rulings of Supreme Judicial Court for Kennebec County, made during the trial of an action brought to recover damages for personal injuries for which defendant was alleged to be responsible, which resulted in a verdict for plaintiff, and motion by defendant for a new trial. Overruled.

The facts are stated in the opinion.

Messrs. Heath & Andrews, for defendant:

Evidence of past single acts of negligence, even if communicated to the defendant, was not admissible.

Hatt v. Nay, 144 Mass. 186, 10 N. E. 807; Robinson v. Fitchburg & W. R. Co. 7 Gray, 92; Maguire v. Middlesex R. Co. 115 Mass. 239; Kennedy v. Spring, 160 Mass. 203, 35 N. E. 779; Connors v. Morton, 160 Mass. 333, 35 N. E. 860; Miller v. Curtis, 158 Mass. 127, 35 Am. St. Rep. 469, 32 N. E. 1039; Frazier v. Pennsylvania R. Co. 38 Pa.

104, 80 Am. Dec. 467; Baulec v. New York & H. R. Co. 59 N. Y. 356, 17 Am. Rep. 325; Hiltz v. Chicago & G. T. R. Co. 55 Mich. 437, 21 N. W. 878; Gore v. Curtis, 81 Me. 403, 10 Am. St. Rep. 265, 17 Atl. 314; 1 Greenl. Ev. §§ 461-469; Elliott v. Boyles, 31 Pa. 67; Olsen v. Andrews, 168 Mass. 261, 47 N. E. 90; Cooney v. Commonwealth Ave. Street R. Co. 196 Mass. 11, 81 N. E. 905; Southern P. Co. v. Hetzer, 1 L.R.A. (N.S.) 288, 68 C. C. A. 26, 135 Fed. 272; Cosgrove v. Pitman, 103 Cal. 268, 37 Pac. 232; Norfolk & W. R. Co. v. Hoover, 79 Md. 253, 25 L.R.A. 710, 47 Am. St. Rep. 392, 29 Atl. 995.

Mr. Benedict F. Maher for plaintiff.

Spear, J., delivered the opinion of the court:

This case comes up on motion and exceptions. The case is stated in the defendant's brief as follows:

fact that a servant who repeatedly disobeys orders is generally incompetent in other matters, so that the disobedience is only one of several factors going to make up the incompetency.

The reported cases generally recognize that repeated disobedience to orders alone constitutes incompetency within the rule requiring a master to use reasonable care to furnish competent fellow servants.

Ordinarily, the word "incompetency" is used to indicate merely a lack of experience, or of mental or physical unfitness; in other words, to indicate that the servant is either inexperienced or is unfit for the work because he is mentally or physically deficient. But it cannot be questioned that, under the rule requiring the master to use reasonable care to furnish his servant competent fellow servants, it has a much broader meaning.

One of the clearest definitions of a competent man, as distinguished from an incompetent one, is given in *Coppins v. New York C. & H. R. R. Co.* 122 N. Y. 557, 10 Am. St. Rep. 523, 25 N. E. 915, where the court says: "A competent man is a reliable man; one who may be relied upon to execute the rules of the master, unless prevented by causes beyond his own control. Hence, incompetency exists not alone in physical or mental attributes, but in the disposition with which a servant performs his duties. If he habitually neglects these duties, he becomes unreliable, and although he may be physically and mentally able to do well all that is required of him, his disposition toward his work and toward the general safety of the work of his employer and to his fellow servants makes him an incompetent man."

So, in *Maitland v. Gilbert Paper Co.* 97 Wis. 476, 65 Am. St. Rep. 137, 72 N. W. 1124, the court said: "A person may be competent to do the particular acts required of a fireman, yet be so careless in respect to obeying the rules that prohibit

him from interfering with appliances not connected with his work as to render him an exceedingly dangerous and incompetent person to be associated with. . . . So here, though it may be true that Welk had sufficient capacity to do the acts required of him as a fireman, yet, if he had not sufficient capacity to understand and obey rules which required him not to disturb parts of the machinery with which he had nothing to do, and which he was prohibited from touching, a violation of which rules was liable to imperil the personal safety of his fellow servants, he was incompetent."

And in *Coppins v. New York C. & H. R. R. Co.* supra, where the servant was charged with repeatedly violating rules in respect to the closing and locking of switches, the court said: "No distinction exists in principle between permitting the use of defective machinery and permitting employees to habitually disregard the safeguards that have been provided to insure the safe running and operation of trains."

And in *Cameron v. New York C. & H. R. R. Co.* 77 Hun, 519, 28 N. Y. Supp. 898, following the *Coppins* Case, it was held that a servant who habitually violated the rules requiring any employee who opened a switch to remain at it until it was closed or until he was relieved was incompetent. On appeal (145 N. Y. 400, 40 N. E. 1), however, it was held that knowledge on the part of the master of such repeated violation of the rules could not be inferred from the mere fact that such disobedience had continued for four months.

So, in *Southern P. Co. v. Huntsman*, 55 C. C. A. 366, 118 Fed. 412, it was held proper to admit evidence tending to show that the servant of whom complaint was made, either through a defect of memory or other cause, was liable to overlook his orders and take dangerous risks, and that the defendant company, in the exercise of ordinary care, ought to have been aware of the fact.

On July 20, 1907, the plaintiff was a motorman on defendant's trolley car, then running from Winthrop to Augusta, on a road which is operated by the block signal system. The track between the substation at East Winthrop and Island Park is governed by a block with lights at each end. Plaintiff, when about to leave the substation, found a white light in front of him, indicating, according to the system, that there was no car in the block coming toward him from Island Park. He was justified in going ahead into the block as he did. The due care of the plaintiff throughout is admitted.

Two cars had left Augusta, running opposite to plaintiff, one, the regular car, bound for Winthrop, the other, a special car with orders to run only to Island Park, and to there cross plaintiff. The special had no right to go beyond Island Park. It

was to follow the regular from Augusta to Island Park. The regular carried a sign, "Car following," to indicate to all crossing cars that they should wait for the special. Plaintiff's car and the regular from Augusta should have crossed at Island Park, if both had been on time. On arriving at Island Park, plaintiff's car not being there, the regular properly proceeded on towards the substation, as the light at Island Park was white, indicating that plaintiff had not arrived at the substation. When the regular so entered the block, it threw the light at the substation red, indicating to plaintiff that he must wait for the regular before entering the block. The regular, on crossing plaintiff at the substation, took off the sign, "Car following," as they knew the orders were for the special to remain at Island Park. When the regular passed plaintiff at the substation, he was justified

The habitual disregard for upwards of a year, by locomotive engineers, of a rule of their employer forbidding engines to remain on the main track while awaiting orders, is *prima facie* evidence of their incompetence, and the railroad's failure to ascertain such incompetence is *prima facie* evidence of its own negligence in retaining the habitually disobedient engineers in its service. *Whittaker v. Delaware & H. Canal Co.* 126 N. Y. 544, 27 N. E. 1042.

Frequently and continuously running his engine over crossings without signaling his approach, as he should have done, is evidence of incompetency in a locomotive engineer, and when it has long been habitual, is constructive notice to the railroad company that he is incompetent. *Wall v. Delaware, L. & W. R. Co.* 54 Hun, 454, 7 N. Y. Supp. 709, affirmed in 125 N. Y. 727, 26 N. E. 757.

In *Senior v. Ward*, 28 L. J. Q. B. N. S. 139, it was held that it was most culpable negligence on the part of the defendant to keep in his employment a banksman who habitually disregarded a rule requiring a test of the rope and tackle by which a cage was let down in a mine, and whom he knew to be habitually disregarding the rule.

In *Huntingdon & B. T. M. R. & Coal Co. v. Decker*, 82 Pa. 119, and in *Branch v. International & G. N. R. Co.* (Tex. Civ. App.) 40 S. W. 208, it was apparently conceded that repeated disobedience to orders amounts to incompetency, but the cases turn on other points.

A few cases may be cited as showing that the courts do not consider the mere lack of the mental and physical ability to do the work, the only form of incompetency.

Thus, in *Stoll v. Daly Min. Co.* 19 Utah, 271, 57 Pac. 295, the court said: "It must be conceded that a servant who frequently makes mistakes in his work, and is habitually careless, and fails to properly attend to the duties of the service in which he is employed, to such an extent that the 30 L.R.A. (N.S.)

risks and hazards of the employment are greatly increased thereby, is not a competent man for the work."

So, also, in *Consolidated Coal Co. v. Seniger*, 79 Ill. App. 456, affirmed in 179 Ill. 370, 53 N. E. 733, the court said: "If, instead of being watchful, he becomes inattentive, and habitually neglects his duty, he becomes unreliable; and although possessing the mental and physical ability to do well the work assigned him, his disposition toward the general safety of his fellow servants renders him an incompetent man."

And in *Beers v. Isaac Prouty Co.* 200 Mass. 19, 20 L.R.A. (N.S.) 39, 125 Am. St. Rep. 374, 85 N. E. 864, it was held that a foreigner who could not understand the language of his superior was incompetent, where the operation of the machine required two men in the frequent stopping, cleaning, and starting of it, in the accomplishment of which directions to him from the superior were necessary.

As to liability of master, as affected by inability of fellow servant to understand English, see note to *Beers v. Isaac Prouty & Co.* 20 L.R.A. (N.S.) 39.

Upon the general question of the liability of the master for injuries caused to one servant by the incompetency of a fellow servant, see note to *Norfolk & W. R. Co. v. Hoover*, 25 L.R.A. 710.

As to evidence of specific instances to prove character of servant in action against the master, see note to *McQuiggan v. Ladd*, 14 L.R.A. (N.S.) 689, at pages 756 et seq.

Upon the question, May breach of duty to employ or retain none but competent servants be inferred from the fact of their incompetence, see note to *Still v. San Francisco & N. W. R. Co.* 20 L.R.A. (N.S.) 322.

Upon the question, May incompetence of minor to perform duties of a particular employment be inferred from his minority, see note to *Wilkinson v. Kanawha & H. Coal & Coke Co.* 20 L.R.A. (N.S.) 331.

W. M. G.

in believing there was and would be no car in the block. The regular, as it left the block, turned the light white, a mechanical order to plaintiff to proceed to Island Park.

The special, without orders and against orders, left Island Park shortly after the regular, and, unseen by the regular, continued to follow it to the substation. This had no effect upon the substation light, which could be changed from red to white only by the action of the forward car, the regular. If the following car violates orders, and enters a block behind a regular, the protection of the crossing car is in the "Car following" sign.

As a result, the car of plaintiff and the special collided in the block, severely injuring plaintiff. That Taylor, the motorman, and Sanborn, the conductor in charge of the special, were both guilty of negligence in so entering the block, was admitted. The damages were assessed at \$7,500. The defendant does not contend that the law court would be justified in finding the damages to be unreasonably excessive.

From this statement it will be seen that the plaintiff's action rests upon the claim that the defendant was negligent in the selection and retention of its servants Taylor and Sanborn, especially Taylor, the motorman, when it knew, or, by the exercise of due care, should have known, his incompetency. The negligent act complained of was the running into the block without orders and against orders, in violation of the rule.

The fate of the motion depends upon the result of the exceptions. If the exceptions prevail, the evidence in support of the verdict disappears. If the exceptions fail, the verdict is well founded. In other words, the evidence, if admissible, amply sustains both the charge of unfitness of the servant, and such notice thereof to the defendant that it knew, or, by due care ought to have known, of his incompetency.

But it is contended that the negligent acts of the servant, which, by the verdict, we must assume to be proven, were not of such a character as to fairly warrant the conclusion of incompetency. We think differently. Time after time he ran his car, in violation of rules and orders, and against the protest even of the conductor, round curves at an excessive rate of speed. So persistently and recklessly did he do this that one conductor, after repeated reports of these wilful acts of misconduct to the superintendent of the defendant company, resigned his position rather than continue the hazard of further employment with this young man acting as motorman. He violated the controller handle rule, which forbids a motorman to leave the car with-

out taking his controller handle with him. He ordered the substation to shut down the power, clearly exceeding his authority. He refused to exchange passengers, as ordered, thereby disobeying the direct order of the superintendent. He refused to obey the conductor's signal bells.

These varied acts of insubordination seem to us more potent in their tendency to establish character for wilful disobedience than the repetition for an equal number of times of the same act, involving the precise element of character. The conduct of this servant, as manifested by these various acts, fully brings him within the rule of legal incompetency. In the legal sense, incompetency or unfitness is not predicated solely upon a want of ability and comprehension. It may be found side by side with even eminent skill respecting the particular thing to be done, and yet that skill so often and persistently exercised in violation of rules, orders, and regulations as to establish a character for such reckless acts as to render a person in every way mentally competent, legally incompetent. Such is the theory of the decisions.

In Consolidated Coal Co. v. Seniger, 179 Ill. 370, 53 N. E. 733, the court says: "One is incompetent who is wanting in the requisite qualifications for the business intrusted to him [He] . . . was incompetent, . . . if he was wanting in the qualifications required for the performance of the service, whether arising out of a lack of knowledge or capacity, or through imprudence, indolence, or habitual carelessness." In Maitland v. Gilbert Paper Co. 97 Wis. 476, 65 Am. St. Rep. 137, 72 I. W. 1129, the court says: "A competent man is a reliable man. Incompetency exists not alone in physical or mental attributes, but in the disposition with which a person performs his duties; and though he may be physically and mentally able to do all that is required of him, his disposition toward his work and toward his employer and toward fellow servants may make him an incompetent man." And it has been said in the recent case of Hamann v. Milwaukee Bridge Co. 127 Wis. 550, 105 N. W. 1084, 7 A. & E. Ann. Cas. 458: "Incompetence, in the law of negligence, means want of ability suitable to the task, either as regards natural qualities or experience, or deficiency of disposition to use one's abilities and experience properly." See, also Young v. Milwaukee Gaslight Co. 133 Wis. 9, 113 N. W. 59; Still v. San Francisco & N. W. R. Co. 154 Cal. 559, 20 L.R.A. (N.S.) 322, 129 Am. St. Rep. 177, 98 Pac. 672; Beers v. Isaac Prouty Co. 200 Mass. 19, 20 L.R.A. (N.S.) 39, 128 Am. St. Rep.

374, 85 N. E. 864; Baird v. New York C. & H. R. R. Co. 172 N. Y. 637, 65 N. E. 1113.

Therefore, if the evidence of these specific acts of the servant was admissible to prove both incompetency and knowledge, then, the defendant being amply charged with knowledge, the jury were authorized to find the servant incompetent, and to declare it negligence in longer retaining this young man in its employ as a motorman.

This brings us to the question raised by the exceptions: Is the evidence of specific acts of prior negligence admissible to prove (1) incompetency, (2) knowledge to the master? All the exceptions but one, which will be discussed later, present the same question of law, and may be considered together.

The defendant does not question the assertion that the great weight of authority is in favor of the admission of such testimony, and cites only Massachusetts and Pennsylvania in opposition. On the other hand, it appears from the plaintiff's brief that twenty-nine of the thirty-one states that have passed upon this question have decided in the affirmative. The precise question has never been raised in this state. We are therefore free to adopt that rule which seems best calculated, upon the principles of reason and authority, to attain the best results. Upon a careful examination of the authorities, it is the opinion of the court that the rule admitting specific acts of prior negligence tending to prove the incompetency of a servant when the master has actual knowledge of such acts, or, by the exercise of due care, should have had such knowledge, is the safer and better rule to establish. In arriving at this conclusion, we have carefully reviewed and considered the reasons advanced by the courts for the directly opposite views by them declared.

The Massachusetts and Pennsylvania courts base their decision upon the doctrine of surprise and multiplicity of issues. See *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807; *Frazier v. Pennsylvania R. Co.* 38 Pa. 104, 80 Am. Dec. 467. While many strong reasons may be adduced in favor of this doctrine, it has yet been found so impracticable in its application to concrete cases that even the later Massachusetts cases have felt compelled to modify it. See *Cox v. Central Vermont R. Co.* 170 Mass. 129, 49 N. E. 97; *Ledwidge v. Hathaway*, 170 Mass. 348, 49 N. E. 656; *Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90; *Peaslee v. Fitchburg R. Co.* 152 Mass. 155, 25 N. E. 71.

It should be observed, however, that the court stood squarely upon the original doctrine in *Cooney v. Commonwealth Ave.* 30 L.R.A. (N.S.)

Street R. Co. 196 Mass. 11, 81 N. E. 905, and that the rule of exclusion is the law of Massachusetts to-day.

The opposite rule seems to be based upon the ground of natural admissibility. In *Thayer's Preliminary Treatise on Law of Evidence*, p. 530, is found the following:

"In like manner, in the whole of the secondary and adjective part of the law there should be little opportunity to go back upon the rulings of the trial judge. There should be an abuse, in order to justify a review of them by an appellate court. In order to make this practicable, the rules of evidence should be simplified, and should take on the general character of principles, to guide the sound judgment of the judge, rather than minute rules to bind it. The two leading principles should be brought into conspicuous relief: (1) That nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."

From this it may be stated as a general principle that whatever to the ordinary reasoning mind is logically probative of a fact in issue is prima facie admissible, and should not be excluded unless its admission is in conflict with some principle of law, or in violation of some rule of policy. Past acts of negligence on the part of a servant in the performance of his duties have a direct and natural tendency to prove unfitness and incompetency, are prima facie admissible, and their admission is not in conflict with any rule or policy of law, as the cases clearly show. In the *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 Ind. 294, 10 Am. Rep. 111, it was held:

"In an action by a servant against the master, to recover damages for injuries occasioned by the negligence of a coservant, held, that evidence of particular acts of carelessness and negligence on the part of the coservant was admissible to show that the master had retained said coservant in his service after he knew, or ought to have known, that said servant was careless and negligent."

A review of this opinion will disclose that the case was carefully considered, and the opposite doctrine fully condemned. *Baulec v. New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325, involves the precise point in issue. After specifically rejecting the Massachusetts and Pennsylvania doctrine, and fully approving the rule enunciated in 38 Ind., the court proceeds to give the following sound and cogent reasons for its opinion:

"When, as here, the general fitness and capacity of a servant is involved, the prior

acts and conduct of such servant on specific occasions may be given in evidence with proof that the principal had knowledge of such acts. The cases in which evidence of other acts of misconduct or neglect of servants or employees whose acts and omissions of duty . . . have been held incompetent have been those in which it has been sought to prove a culpable neglect of duty on a particular occasion by showing similar acts of negligence on other occasions. . . . When character, as distinguished from reputation, is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation or want of adaptation to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts that individuals acquire a general reputation, and by which their characters are known and described, and the actual qualities, the true characteristics of individuals, those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility, are learned and known. A principal would be without excuse should he employ for a responsible position, on the proper performance of the duties of which the lives of others might depend, one known to him as having the reputation of being an intemperate, imprudent, indolent, or careless man. He would be held liable to the fellow servants of the employee for any injury resulting from the deficiencies and defects imputed to the individual by public opinion and general report. Still more should he be chargeable if he had knowledge of specific acts showing that he possessed characteristics incompatible with the duties assigned him, and which might expose his fellow servants and others to peril and harm."

In *Smith v. Chicago, P. & St. L. R. Co.* 236 Ill. 369, 86 N. E. 150, will be found this significant language: "The mere happening of an accident would not ordinarily raise a presumption of incompetency, . . . but the conduct of a person on a single occasion may be entirely sufficient to demonstrate his unfitness, and, after such an occurrence, to charge the employer with a failure of duty in keeping him in the service."

The same rule is found in various states, as shown by the following cases: *Stanton Coal Co. v. Bub*, 218 Ill. 125, 75 N. E. 770; *Evansville & T. H. R. Co. v. Guyton*, 115 Ind. 450, 7 Am. St. Rep. 458, 17 N. E. 101; *Pfuld v. F. J. Romer Sons*, 107 30 L.R.A.(N.S.)

Minn. 353, 120 N. W. 303, 304; *Hilts v. Chicago & G. T. R. Co.* 55 Mich. 437, 21 N. W. 881; *Tucker v. Missouri & K. Teleph. Co.* 132 Mo. App. 418, 112 S. W. 8; *Galveston, H. & S. A. R. Co. v. Davis*, 4 Tex. Civ. App. 468, 23 S. W. 305; *First Nat. Bank v. Chandler*, 144 Ala. 286, 113 Am. St. Rep. 39, 39 So. 828; *Louisville & N. R. Co. v. Wyatt*, 29 Ky. L. Rep. 437, 93 S. W. 604; *Stoll v. Daly Min. Co.* 19 Utah, 271, 57 Pac. 295; *Green v. Western American Co.* 30 Wash. 87, 70 Pac. 320.

We feel clear that, upon both reason and authority, the exception to the class of evidence above discussed should be overruled.

The exception to the admission of acts of prior negligence to prove the knowledge of the master has been coupled with the exception to the admission of such evidence to prove incompetency, inasmuch as, if the latter was determined to be competent evidence, the former, *a fortiori*, must be admissible. This conclusion is fully supported by the cases already cited upon the main proposition, and need not be further discussed. This exception should also be overruled.

The third and only other exception to be considered relates to the admission of the testimony of Maud Smith of a conversation which she heard related at one time by her husband to the superintendent of the road, as to an accident, and injuries received by him while alighting from a car upon which Merton Taylor was acting as motorman, and repeated at another time to one of the directors of the defendant company. This exception refers generally to the testimony of the witness to be found in the case inclosed in brackets. As no brackets appear to inclose any part of the evidence, we are able to consider only the pages referred to in the defendant's brief. But these pages do not disclose that any exceptions were taken. Therefore we are unable to examine this exception further than to say that the evidence seems to be entirely competent upon the question of notice to the defendant.

It is conceded that the plaintiff, when injured, was in the discharge of his duties and in the exercise of due care. The evidence discloses that he was injured by the negligence of the defendant's servant, that the servant was in fact incompetent, and that his incompetency was known to the defendant when the plaintiff was injured and prior thereto, and yet he was retained in its employ.

Motion and exceptions overruled.

SOUTH CAROLINA SUPREME COURT.

**ROXANA V. WALKER, Resp.,
v.
SELVA ALVERSON et al., Appts.**

(— S. C. —, 68 S. E. 966.)

Levy — vested remainder.

1. A vested remainder is subject to execution during the continuance of the preceding estate.

Will — remainder — vesting of estate.

2. An estate created by a devise to one or his heirs after the death of a life tenant, with a provision that, in the event that he shall de cease before the life tenant, leaving no heirs, then the estate shall go to another, vests in the first taker, subject to be divested in case he predeceases the life tenant, without leaving heirs.

(Gary, A. J., dissents.)

(September 20, 1910.)

Note. — Expectant and contingent interests in real property as subject of attachment or levy on execution.

The earlier cases on this question are collected in a note to *Young v. Young*, 23 L.R.A. 642.

The cases in this note are confined exclusively to the interest of an heir in the lands of his ancestors, reversioners, remainders, executory devise, inchoate rights of dower, and curtesy initiate.

As shown in the earlier note, the general rule is that lands, tenements, and hereditaments which may be taken and sold on execution include all possible titles to lands, contingent or otherwise, where there is a real interest, but where it is uncertain to whom the estate will go, or where it is limited to take effect upon an uncertain event, it is a mere contingency, not subject to levy and sale.

In *Byerly v. Sherman*, 126 Iowa, 447, 102 N. W. 157, it was held that an unassigned distributive share of an heir of a deceased person, in an undivided interest in land, may be levied on and sold under execution.

Under a statute providing that land to which the defendant has a legal title in fee for life or for a term, whether in possession, reversion, or remainder, may be sold under execution, and making estates of every kind held in trust subject to the debts of the person for whose benefit they are so held, just as they would be if those persons owned a like interest in the property itself, it was held in *Smith v. Smith*, 115 Ky. 329, 73 S. W. 1023, that the interest of a devisee is subject to attachment for his debts, notwithstanding the provision of the will, restricting alienation by him until he arrives at a certain age.

But in *Brightman v. Morgan*, 111 Iowa, 30 L.R.A. (N.S.)

A PPEAL by defendants from a judgment of the Common Pleas Circuit Court for Spartanburg County in plaintiff's favor in an action brought to recover possession of certain real property to which she alleged title under the will of Mary Ann Johnson, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Nichols & Nichols and William M. Jones for appellants.

Messrs. Johnson & Nash, for respondent:

A contingent remainder is not subject to execution, levy, and sale by the sheriff.

11 Am. & Eng. Enc. Law, p. 631; 17 Cyc. Law & Proc. p. 952; *Roundtree v. Roundtree*, 26 S. C. 470, 2 S. E. 474; *Allston v. Bank of the State*, 2 Hill, Eq. 235.

This is a contingent remainder.

Charleston & W. C. R. Co. v. Reynolds, 69 S. C. 503, 48 S. E. 476; *Thomas v. Poole*, 19 S. C. 323; *Boykin v. Springs*, 66 S. C. 370, 44 S. E. 934; *Faber v. Police*, 10 S. C.

481, 82 N. W. 954, it was held that the unadmeasured distributive share of the husband in his deceased wife's real estate was not subject to levy under an execution against him. It was suggested, however, that the execution plaintiff might have a remedy in equity to subject the husband's unassigned interest.

In *Beaver v. Ross*, 140 Iowa, 154, 20 L.R.A. (N.S.) 65, 118 N. W. 287, 17 A. & E. Ann. Cas. 640, it was held that a devise of land to testator's wife for life, with directions to sell it at her death, and out of the proceeds pay a certain amount to a certain person, and divide the remainder among testator's children, effects a conversion of the property as of the time of the testator's death; and judgments against one of the children, before sale is actually effected, will not create a lien on his interest in the property as the testator's heir.

A creditor of a devisee, who attaches real property devised before the distribution of the estate, is not required to present his claim to the probate court, but the property continues subject to the lien of attachment. *Martinovich v. Marsicano*, 150 Cal. 597, 119 Am. St. Rep. 254, 89 Pac. 333.

Vested remainders.

As shown in the earlier note, it is generally held that a vested remainder may be taken in execution, and sold by virtue thereof, under a judgment against the remainderman. To the same effect are *Ernst v. Northern Bank*, 20 Ky. L. Rep. 1334, 49 S. W. 333; *Roach v. Dance*, 26 Ky. L. Rep. 157, 80 S. W. 1097; *Armiger v. Reitz*, 91 Md. 334, 46 Atl. 990; *Stern v. Lee*, 115 N. C. 426, 26 L.R.A. 814, 20 S. E. 736.

And the undivided interests of remaindermen in a vested remainder are subject to levy and sale on execution for their re-

387; *Darnell v. Barton*, 75 Ga. 377; *Starnes v. Hill*, 112 N. C. 1, 22 L.R.A. 598, 16 S. E. 1011; *Bailey v. Sanger*, 108 Ind. 264, 9 N. E. 159; *Rivers v. Frapp*, 4 Rich. Eq. 277; *Boykin v. Boykin*, 21 S. C. 530; *Hopkins, Real Prop.* p. 291; 2 Washb. Real Prop. 5th ed. 629; 20 Am. & Eng. Enc. Law, p. 882; *McCreary v. Coggeshall*, 74 S. C. 47, 7 L.R.A.(N.S.) 433, 53 S. E. 978, 7 A. & E. Ann. Cas. 693.

It is not the uncertainty of the estate in the future, but the uncertainty of the right to such enjoyment, which marks the difference between a contingent and a vested remainder.

Faber v. Police, supra; *Farr v. Gilreath*, 23 S. C. 512; *Moseley v. Hankinson*, 22 S. C. 328; *Robinson v. Ostendorff*, 38 S. C.

74, 16 S. E. 371; *Mangum v. Piester*, 16 S. C. 316; *Smith v. Winn*, 38 S. C. 197, 17 S. E. 717.

"Survivorship" is the contingency upon which a contingent remainder may depend.

Leroy v. Charleston, 20 S. C. 72; *Dehon v. Redfern*, Dud. Eq. 118; *Faber v. Police*, 10 S. C. 385; *Roundtree v. Roundtree*; *Robinson v. Ostendorff*; and *Smith v. Winn*, —supra; *People's Loan & Exch. Bank v. Garlington*, 54 S. C. 421, 71 Am. St. Rep. 800, 32 S. E. 513; *Woodley v. Calhoun*, 69 S. C. 288, 48 S. E. 272.

The last provision in a will governs and controls foregoing provisions.

Fraser v. Boone, 1 Hill, Eq. 360, 27 Am. Dec. 422; *Seabrook v. Seabrook*, McMull. Eq. 201.

spective debts. *Deadman v. Yantis*, 230 Ill. 243, 120 Am. St. Rep. 291, 82 N. E. 592.

So, a judgment debtor's undivided interest in property devised to another for life, with power of disposition, and remainder over to the debtor and others, is subject to levy and sale on execution for his debts. *Pedigo v. Botts*, 28 Ky. L. Rep. 196, 89 S. W. 164.

In *Williams v. Lobban*, 206 Mo. 399, 104 S. W. 58, the interest of one of the children under a will devising land to testator's wife, and directing that at her death it should be sold and the proceeds divided among testator's eight children, was held subject to seizure in an attachment suit, and to sale under execution during the widow's life. It was contended that the direction to sell at the widow's death, and to divide the proceeds among the children, converted the land into personalty at the time of the testator's death, and it could not, for that reason, be seized as realty, but it was held that the will vested the land in the devisees, subject to the widow's life estate, and whether the estate of each devisee be considered real estate or personalty, it could be sold, either by the devisee voluntarily, or by judgment and execution against him.

An equitable vested remainder created by a trust deed is subject to sale on execution against the remainderman. *Dunkerson v. Goldberg*, 89 C. C. A. 120, 162 Fed. 120.

A remainderman's interest, encumbered with a homestead, may be levied upon and sold, subject to the homestead right. *Brokaw v. Ogle*, 170 Ill. 115, 48 N. E. 394.

Contingent remainders.

Contingent remainders are not, in general, subject to seizure during the continuance of the precedent estate, and it has been specifically so held:

—as to the interest of remaindermen under a devise of real estate limiting the remainder to such persons of a class as may be alive at the death of the life tenant, notwithstanding the general provisions of the 20 L.R.A.(N.S.)

statute that the words "real estate," "real property," and "lands," include lands, tenements, and hereditaments, and all rights thereto and interests therein, since such remaindermen have no interest, legal or equitable, in the land devised until the termination of the life estate. *Nichols v. Guthrie*, 109 Tenn. 535, 73 S. W. 107;

—as to the interest of children of the testator in land devised to the widow for life, for the education of minor children, with direction for sale at death of the widow, and division of proceeds among all the children, notwithstanding the general provision of a statute that any land to which the debtor has a legal title, whether in possession, reversion, or remainder, shall be subject to sale under execution. *Mudd v. Durham*, 17 Ky. L. Rep. 1202, 33 S. W. 1116;

—as to the interest which a son acquired under his father's will, directing that the widow take charge of all the testator's property, and receive all the proceeds arising therefrom during her life, and directing that, at her death, the executor should take charge of the property, and dispose of it and divide the proceeds among testator's children in a given way. *Harris v. Kittle*, 119 Ga. 29, 45 S. E. 729;

—as to the interest in remainder which a son acquired under his father's will, giving the property to the widow for life, and after her death to be divided equally between his two sons, and providing that if either sons should die before the decease of the widow, leaving lawful issue, such issue should inherit in the place of the parent so deceased. *Smith v. Gilbert*, 71 Conn. 149, 71 Am. St. Rep. 163, 41 Atl. 284.

In *Taylor v. Taylor*, 118 Iowa, 407, 92 N. W. 71, it was held that the statute making judgments liens upon real estate owned by defendants, and defining real estate as including lands, tenements, hereditaments, and all rights thereto and interests therein, contemplates a present, tangible right to their interest in the land, so that where the uncertainty of a contingent remainder involves solely the question of who shall take the real estate, it is not, before vest-

Hydrick, J., delivered the opinion of the court:

Mary Ann Johnson disposed of her property, real and personal, by her will, as follows:

"Item 2. I give, bequeath, and devise all of my property . . . unto my beloved husband, Thomas P. Johnson, for his sole use and control, during his natural life.

"Item 3. After the decease of my husband, it is my will and desire that my cousin, Roxana Sowell, or her heirs, shall come into possession of all my property, both personal and real, forever.

"Item 4. In the event, if my cousin, Roxana Sowell, shall decease before my husband, Thomas P. Johnson, leaving no heir or heirs, I will and desire that the heirs

of my brother, S. James Ellis, or their heirs, shall inherit all of my estate, after the death of my husband, Thomas P. Johnson."

During the life of Thomas P. Johnson, the interest of Roxana Sowell (now Walker) in the real estate was sold under execution against her. The defendant is in possession, claiming under the purchaser at that sale. After the death of the life tenant, Roxana brought this action to recover the possession of the land. If the limitation to her was a contingent remainder, the purchaser at the sheriff's sale took nothing, and she is entitled to recover. But, if her interest was a vested remainder, it was conveyed by the sheriff's deed, and the defendant is entitled to retain the possession.

ing, the subject of levy and sale under execution.

But under a statute providing that an expectant estate is descendible, devisable, and alienable in the same manner as an estate in possession, it was held in *Cohalan v. Parker*, 138 App. Div. 849, 123 N. Y. Supp. 343, that a testamentary remainder interest, whether vested or contingent, is subject to sale to satisfy a judgment against the devisee, and whatever interest the devisee has will pass to the purchaser at the sale.

And in *Wood v. Watson*, 20 R. I. 223, 37 Atl. 1030, it was held that a judgment debtor's contingent interest in real property was liable to attachment under a statute providing that such interest in real estate may be disposed of by legal conveyance or will, the general rule being that the attachment creditor acquires the same rights over the thing attached as his debtor had, so far as to enable him to satisfy his judgment therefrom.

Moreover, it was held that the statute authorizing a judgment creditor to attach real estate, or the right, title, and interest of any defendant therein, was broad enough to include a contingent interest in the real estate. *Ibid.*

In *Higgins v. Downs*, 101 App. Div. 119, 91 N. Y. Supp. 937, it was held that a devise by a testatrix to her son, the residue of her property to be held in trust by her executors, and managed by them for her son's benefit until he should arrive at the age of fifty years, when said trust should continue, in the discretion of the executors, with provision that the son might dispose of the property by will if he should die while the trust was in force, but if he should die intestate, the property to go to the heirs at law of the testatrix,—created two future expectant estates, to take effect in the alternative; namely, the remainder in the son, limited by the precedent estate in the executors and contingent upon his arriving at the age of fifty years, and the exercise by the executors at that time of their discretion to terminate the trust; and second, the remainder in the testatrix's heirs

at law, limited upon the same precedent estate in the executors, and contingent upon the failure of the estate to vest in the son, and also upon his failure to exercise the power of disposal by will during the term of the trust; and that the expectant estate in the remainder created in the testatrix's son was a descendible, devisable, and alienable estate, to which the lien of a judgment recovered against him would attach upon execution.

Dower.

As shown in the earlier note, the rule is well settled that, unless otherwise regulated by statute, a mere right of dower, before an assignment thereof, is only a chose in action, and not such an interest or estate in real property as can be levied upon and sold under execution. And to the same effect are the following later cases: *Baer v. Ballingall*, 37 Or. 416, 61 Pac. 852; *Falkner v. Thurmond* (Miss.) 23 So. 584; *Petefish v. Buck*, 56 Ill. App. 149.

Nor can an unassigned dower be reached by a creditors' bill, in the absence of any provision thereof by statute. *Harper v. Clayton*, 84 Md. 346, 35 L.R.A. 211, 57 Am. St. Rep. 407, 35 Atl. 1083.

In *Young v. Thrasher*, 61 Mo. App. 413, it was held that a statute permitting a widow to transfer her unassigned dower could not subject such dower to sale under execution, "as many reasons exist," said the court, referring to *Waller v. Mardus*, 29 Mo. 25, "why a voluntary alienation should be permissible and an involuntary alienation be prohibited."

In *Canadian Bank v. Rolston*, 4 Ont. L. Rep. 106, it was held that the right of dower in an equity of redemption, before assignment, is not subject to sale under execution; that the widow, before assignment of dower, though entitled to redeem a mortgage to which her dower is subject, is not possessed of an estate in the land, and is not therefore an "assign" of her husband, nor a "person having the equity of redemption," within the meaning of a statute subjecting the interest of such persons to sale under execution.

Allston v. Bank of the State, 2 Hill, Eq. 235; Roundtree v. Roundtree, 26 S. C. 450, 2 S. E. 474.

The sole question, therefore, is: Was the limitation to Roxana a contingent or a vested remainder? The master and circuit court held that it was contingent, and gave judgment for plaintiff. The law favors the vesting of estates at the earliest time pos-

sible; and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested. 4 Kent, Com. 195. "Whenever there is a doubt as to the quantity of the estate devised, or whether it is vested, the rule is to presume that the testator intended to give an absolute rather than a qualified estate, and a vested rather than contingent inter-

But in *Latourette v. Latourette*, 52 App. Div. 192, 65 N. Y. Supp. 8, it was held that the dower right of a widow in the lands of her deceased husband is liable to be taken by attachment to satisfy the claims of her creditors before its admeasurement, under a statute providing that any interest in real property, whether vested or not vested, which is capable of being aliened by the defendant, shall be liable to attachment.

And in *Gildehaus v. Fidelity Bldg. & Sav. Co.* 24 Ohio C. C. 110, it was held that the dower interest of the judgment debtor may be subjected to the payment of his debts, notwithstanding such interest has not been assigned, under a statute providing that any interest in any claim or chose in action, due or to become due, shall be subject to the payment of the judgment.

In *Peebles v. Bunting*, 103 Iowa, 489, 73 N. W. 882, it was held that judgments obtained against a widow attach immediately to her interest in her husband's real estate, which may be levied upon and sold, where she does not elect to take her homestead right in her husband's lands, as provided by statute, in lieu of dower.

In *Trowbridge v. Cunningham*, 63 Kan. 847, 66 Pac. 1015, where, under the statute, the surviving wife inherits one half of the real estate of her husband; it was held that her undivided share may be levied on and sold for the payment of her indebtedness.

So, when dower is assigned, it becomes a life estate, and may then be sold upon execution against the doweress. *Petefish v. Buck*, supra.

And the unassigned right of dower in lands is such an interest as may be reached by a judgment creditor by the aid of a court of equity. *Petefish v. Buck* and *Baer v. Ballingall*, supra.

Curtesy initiate.

The contingent curtesy of a husband in his wife's lands is not, during the life of the wife, subject to attachment or sale under execution, in the satisfaction of his debts. *Ball v. Woolfolk*, 175 Mo. 278, 75 S. W. 410.

Under a statute providing that the separate property of the wife shall not be liable for the debts of her husband, his estate by the curtesy in her property is not liable to be sold to pay a debt of his, created after the passage of the statute. *Hitz v. National Metropolitan Bank*, 111 U. S. 722, 28 L. ed. 577, 4 Sup. Ct. Rep. 613. In that 30 L.R.A. (N.S.)

case it was argued that the property exempted from the husband's debts by the statute was the wife's property, and that the life estate of the husband was not her property; but it was held that the statute was intended to exempt all property which came to the wife by any other mode than by the husband from liability to seizure for his debts, without regard to the nature of the interest which the husband may have in it, or the time when it accrued; and that, in regard to the husband's debts created after the passage of the law, no principle of law or morals was violated by the enactment. To the same effect is *Mattoon v. McGrew*, 112 U. S. 713, 28 L. ed. 824, 5 Sup. Ct. Rep. 369.

In *Campbell v. McBee*, 92 Va. 68, 22 S. E. 807, it was held that, under the married women's property act, the husband has no interest in the wife's separate real estate during her lifetime, but that the husband is entitled to curtesy when the wife dies intestate, and a judgment against the husband will attach to his estate by the curtesy, but in subordination to a deed of trust made by the husband and wife during the coverture, to secure a loan made to the wife, since by her conveyance, so far as the land was necessary to pay the debt secured, the husband had no curtesy in it.

In *Hampton v. Cook*, 64 Ark. 353, 62 Am. St. Rep. 194, 42 S. W. 535, it was held that the husband's right to curtesy in the wife's land is superior to the claims of her judgment creditors, although, during her life, they might have had the land sold under execution, and thereby might have extinguished the estate by curtesy. The court said that the estate vested in the husband by virtue of his marital rights, in the lifetime of his wife, independently of her debts, and consequently did not vest in him at her death, subject to her debts, if any.

Reversionary interests.

In *Rusk v. Hill*, 121 Ga. 379, 49 S. E. 261, it was held that the reversionary interest in lands which have been assigned as dower is subject to levy and sale at the instance of the creditors of the husband's estate.

And in *Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13, it was held that, upon the death of the owner of the reversionary interest in land, before the expiration of the particular estate, his heirs took his interest, subject to the payment of his debts, which interest could be sold on execution.

A. L. R.

est; and even where the words import a contingency, but do not create a condition precedent, they give a vested interest to the devisee, subject, however, to be divested if the contingency should not happen." *Smith v. Hilliard*, 3 Strobb. Eq. 223, 224. In considering the difference between vested and contingent remainders, Mr. Fearné calls attention to the confusion which sometimes arises from the failure to observe the distinction between the uncertainty which makes a remainder contingent, and the uncertainty of its ever taking effect in possession,—“a distinction,” he says, “not always attended to, but absolutely requisite to complete an accurate notion of what is in law considered as a contingent estate; for, wherever there is a particular estate, the determination of which does not depend on any uncertain event, and a remainder is thereon absolutely limited to a person *in esse* and ascertained, in that case, notwithstanding the nature and duration of the estate limited in remainder may be such as that it may not endure beyond the particular estate, and may therefore never take effect or vest in possession, yet it is not a contingent, but a vested remainder. As if a lease be to A for life, remainder to B for life or in tail,—here, notwithstanding B may possibly die, or die without issue, in the lifetime of A, and consequently never come into possession, yet is his remainder vested in interest, and by no means comprised in the legal notion of a contingent estate. It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that every remainder for life or in tail is and must be liable, as the remainderman may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.” 1 Fearné, *Contingent Remainders*, p. 215. Again, at page 216, he says: “Wherever the preceding estate is limited, so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may by any means determine before the expiration of the estate limited in remainder, such remainder is vested.” Chancellor Kent thus expresses the difference: “It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment, which marks the difference between a vested and contingent interest.” 4 Kent, Com. 198. Mr. Washburn says: 30 L.R.A. (N.S.)

“A vested remainder is one the owner of which has the present capacity of taking the seisin in case the particular estate were to determine. But no degree of uncertainty as to the remainderman’s ever enjoying his remainder will render it contingent, provided he has by the limitation a present absolute right to enjoy the estate the instant the prior estate should determine.” 2 Washb. Real Prop. § 1541. In *Faber v. Police*, 10 S. C. 376–387, this court pointed out the distinction between vested and contingent remainders as follows: “The most marked distinction between the two kinds of remainders is that, in the one case, the right to the estate is fixed and certain, though the right to the possession is deferred to some future period; while, in the other, the right to the estate as well as the right to the possession of such estate is not only deferred to a future period, but is dependent on the happening of some future contingency.”

With these rules and distinctions before us, let us examine the will to ascertain the intention of the testatrix, for to that we must give effect, unless it conflicts with some rule of law. After the death of her husband (a certain event), she gives the property to Roxana (a person *in esse*, and ascertained), or her heirs. If she had said no more, there would be no difficulty. But, after having given her property unqualifiedly to Roxana, she says, in the next clause: “In the event, if my cousin, Roxana, shall decease before my husband, I will and desire that the heirs of my brother, S. James Ellis, or their heirs, shall inherit all of my estate, after the death of my husband.” The previous devise to Roxana manifests the intention that she should take in preference to the Ellis heirs. But the context shows that, after testatrix had given Roxana the estate, it occurred to her that she might die before the life tenant, without leaving heirs, and, to provide for that contingency, she made the devise over. It is contended that the contingency expressed in the limitation over cut down the absolute interest previously given to Roxana, and made it contingent upon her surviving the life tenant. That depends upon whether the contingency expressed in the devise over is so incorporated into the substance of the gift to Roxana as to make her right to the estate depend upon her surviving the life tenant; or whether the testatrix, having in mind the uncertainty of her actual enjoyment of the estate, intended merely to provide for that contingency. We think the two clauses of the will, taken together, show the latter to have been her intention. If there had been no limitation over, precisely the same uncertainty

as to Roxana's actual enjoyment of the estate would have existed. It is more consistent, therefore, with the intention expressed in the third clause of the will, to give the estate to Roxana, to hold that the fourth clause creates only a condition subsequent, upon the happening of which the estate already vested will be divested. When a gift is made in one clause of a will in clear and unequivocal terms, the quantity or quality of the estate given should not be cut down or qualified by words of doubtful import, found in a subsequent clause. To have that effect, the subsequent words should be at least as clear in expressing that intention as the words in which the interest is given. While a contingent remainder is one limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event, it does not follow that every remainder which is subject to a contingency or a condition is therefore a contingent remainder. The condition may be precedent or it may be subsequent. If the former, the remainder is contingent; if the latter, it is vested, though it may be divested by the happening of the condition.

There is a class of cases which closely resemble, in the rules of construction applicable, the case under consideration, in which vested remainders are limited in terms which seem to import contingency; but the contingent expressions are construed to denote merely the time when the estate is to take effect in actual possession; as, for example, when an estate is limited to one, "if," or "when," or "as soon as" he attains a certain age, with a limitation over, in case he dies under the age specified, or dies under that age without issue, etc. There the words of apparent contingency are held not to create a condition precedent to the right of enjoyment, or to denote the time when the interest shall vest, but merely the time when enjoyment in possession shall commence, or when an estate already vested shall be divested.

The case of *Rivers v. Fripp*, 4 Rich. Eq. 278, is an illustration of the rule. In that case the devise was to testator's wife for life, and, after her death, to his son for life; "and from and immediately after the death of my wife and son, unto the issue of my said son living at the time of his death, who shall live to attain the full age of twenty-one years, or who, dying before that time, shall leave issue to live until the time at which the parent or parents, if alive, would have reached the age of twenty-one years," and, in default of such issue, then over. Held to give a vested, but defeasible, interest, with immediate right to the rents and profits, to a child of the

son who survived both the wife and son, although such child died under twenty-one years of age, leaving no issue which lived until the time at which the parent, if alive, would have been twenty-one years of age. *Seabrook v. Gregg*, 2 S. C. 68, is another case construing the limitations of a will which, if not identical, are not materially different from those contained in the will construed in *Rivers v. Fripp*. In both these cases the English cases which established the rule of construction are reviewed at some length. The doctrine of these cases has never been questioned, and they are in accord with the current decisions. English and American, upon the point decided. In *Rivers v. Fripp*, at page 278, the court said: "The authorities concur that this inquiry must be determined by the sense in which the testator intended the devisee's interest in the property to depend upon his attaining the specified age. Thus, a devise to a person if he shall live to attain a particular age, standing alone, would be contingent; yet, if it be followed by a limitation over in case he die under such age, the devise over is considered as explanatory of the sense in which the term is used, to wit, that at that age the estate should become absolute and indefeasible. The interest in question, therefore, is construed to vest *instantly*. 1 Jarman, Wills, 738." So here, the devise over is explanatory of the sense in which the testatrix intended the devise to Roxana to depend upon her surviving the life tenant; to wit, that at that time (the death of the life tenant) the estate should become absolute and indefeasible.

In *Haynsworth v. Haynsworth*, 12 Rich. Eq. 114, donor conveyed real and personal property to the use of his granddaughter M., wife of H., for life, and, after her death, to the use of H. for life, and, after his death, to the use of the children born and hereafter to be born of the said M., and their heirs; but, should the said M. and the said H. both die without leaving children living at the time of their decease, born of the said M., then over. M. afterwards died, leaving H. and one child surviving her, and the child then died, leaving H. surviving him. Held, that the child took a vested transmissible interest, which became indefeasible at the death of M. leaving him surviving her, and consequently that the limitation over could not take effect. In the circuit decree, which was affirmed upon that point, Chancellor Carroll uses the following language: "If the words employed be in other respects sufficient to pass a present interest, the mere circumstance of its being limited over a contingency does not in itself prevent the inter-

est from vesting. *Rutledge v. Rutledge*, *Dud. Eq.* 205; *Skey v. Barnes*, 3 *Meriv.* 340, 25 *Eng. Rul. Cas.* 593. On the contrary, there is high authority for the proposition that it has precisely the opposite effect." A limitation over in case of the prior devisee dying under certain circumstances, or before attaining a certain age, or in case of his dying before the life tenant, etc., is an argument in favor of the prior devisee's taking an immediately vested interest; for, as said by *Tindal*, Ch. J., in *Phipps v. Ackers*, 9 *Clarke & F.* 583, the limitation over "sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which, of course, gives him the immediate interest, subject only to the chance of its being devested on a future contingency." It shows, therefore, that the prior devisee is the preferable object of the testator's bounty, from which a presumption arises of an intention that the estate should invest in him, subject to the divesting contingency. *Smith v. Hilliard*, 3 *Strobb. Eq.* 223, 224. See also *Rutledge v. Rutledge*, *supra*; *Kersh v. Yongue*, 7 *Rich. Eq.* 100; *Boykin v. Boykin*, 21 *S. C.* 529; *Brown v. McCall*, 44 *S. C.* 503, 22 *S. E.* 823; and *Woodley v. Calhoun*, 69 *S. C.* 290, 48 *S. E.* 272.

There is another class of cases which are analogous to the one we are now considering, in which *Mr. Fearn* says [p. 247]: "The contingency upon which an estate is limited has been considered as a condition subsequent instead of precedent, so that the estate becomes vested immediately, subject to be defeated by the condition when it happens, in the room of not taking effect till such condition happens." He gives the case of *Stocker v. Edwards*, 2 *Shower*, 398, as an instance. In that case there was a surrender of copyholds to the use of the surrenderor for life, and afterwards to the use of his youngest son, and the heirs of his body, if he attained the age of eighteen, and, if he died before eighteen, without issue male, then to the right heirs of A. It was held to be a condition subsequent with respect to the youngest son, and therefore the remainder vested immediately, subject to be defeated by the condition of his dying without issue male before he attained the age of eighteen. The doctrine of *Stocker v. Edwards* upon this point was recognized in *Bromfield v. Crowder*, 1 *Bos. & P. N. R.* 313, where testator devised all his estate to D. and R. for their lives successively, and after the death of the survivor, to B., if he lived to attain the age of twenty-one, 30 *L.R.A. (N.S.)*

but not otherwise, and, in case he died before attaining that age, over. Both D. and R. died while B. was under twenty-one. Held, that B. took a vested estate in fee simple, defeasible on his dying under the age of twenty-one. In *Phipps v. Ackers*, *supra*, the earlier English cases were reviewed and the doctrine established by them reaffirmed.

There is still another class of cases to which this case belongs, in which the same rule of construction is applied, and that is where the contingency is the devisee's surviving the life tenant. In *Williamson v. Field*, 2 *Sandf. Ch.* 533, it is said: "When the person to whom a remainder after a life estate is limited is ascertained, and the event upon which it is to take effect is certain to happen, it is a vested remainder, although by its terms it may be entirely defeated by the death of such person before the termination of the particular estate." In *Blanchard v. Blanchard*, 1 *Allen*, 223, there was a devise to the wife for life, and, after her death, to five children by name, with a proviso that, if any of the children named should die before the wife, the property should be equally divided amongst the survivors, except those so dying should leave issue, and, in that case, to the issue. Held, that the portion of the will preceding the proviso was a devise to the wife for life, remainder, at her death, to the children named; and, there being in that portion of the will no such words of contingency as "if they shall be living at her death," or "to such of them as shall be living at her death," or other words apt and proper to create a condition precedent, and thereby make the remainders contingent, the remainders were vested, subject to be divested by the happening of the condition. In *Mercantile Bank v. Ballard*, 83 *Ky.* 481, 4 *Am. St. Rep.* 160, the devise was to the use of B for life, after her death, to be conveyed to her children and their descendants in the same proportion as if it had descended from her; but, if she left no child, nor descendant of a child, to the use of C. Held, that the children of B living at the death of testator took a vested fee simple, subject to be divested by their dying before B. The court said: "A devise to A for life, remainder to B, but, if B is dead at the termination of the life estate, then to C, passes to B a vested estate, and a contingent interest to C." In *Avery v. Everett*, 110 *N. Y.* 317, 1 *L.R.A.* 264, 6 *Am. St. Rep.* 368, 18 *N. E.* 148, a devise to the testator's wife for life, remainder to his son, C. H., and, in case C. H. should die without children, then, after the wife's

death and the son's death, to A. S., a nephew, was held to give C. H. a vested fee at testator's death, subject to be defeated by his death without children. In *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. 558, a devise to the testator's wife for life, with full power of sale, remainder to five children named, to be divided equally amongst them, in case of the death of any of them, without issue, either before testator, or before receiving the portions given them, the share of such to be equally divided amongst the survivors. Held, each of the children took a vested remainder, subject to be devested by the exercise of the power of sale or by death, without issue, before the life tenant. In *Finch v. Lane*, L. R. 10 Eq. 501, the devise was to testator's wife for life, remainder, as to part, to his brother for life, and after the death of the wife, subject to the brother's interest in the part, to M. in fee, if she should be living at the death of the wife, but, if she should die before the wife, without leaving issue, then over. M. died before the widow, but left issue. Held, that M. took a vested remainder. That case seems to be directly in point, and as near on all fours with this case as well can be. It was decided on the authority of *Phipps v. Ackers*.

Both the master and the circuit judge seems to have based their conclusion in part, at least, upon the application of a test laid down in *Faber v. Police*, 10 S. C. 388, for determining whether a remainder is vested or contingent, to wit: "To inquire whether the person claiming such remainder, being *sui juris*, could, by uniting with the owner of the particular estate, convey a fee-simple title. If he could, such a remainder must be regarded as vested; otherwise, it is contingent." Whatever may be said of the applicability and reliability of that test in ordinary cases, it is obvious that it fails when applied to the case of a remainder which is vested subject to a devastating contingency, and also to the case of a vested remainder to a class some of whom are not in esse. That there are such vested remainders all the authorities are agreed.

The cases above cited fully illustrate the principles upon which this case must be decided. Our conclusion is that Roxana took a vested interest, subject to be devested by her death before the life tenant, leaving no heir or heirs. Her interest, therefore, passed under the sheriff's deed, and she cannot recover.

Judgment reversed.

Gary, A. J., dissents.
30 L.R.A. (N.S.)

MICHIGAN SUPREME COURT.

FRED SCHOENFELD, Plff. in Err.,

v.

BENJAMIN W. BOURNE et al.

(159 Mich. 139, 123 N. W. 537.)

Process — publication — name — *idem sonans*.

A published notice to "Dunton" is not sufficient to support an attachment against property of Denton, although a codefendant was correctly named, if no personal service was secured on either.

(December 10, 1909.)

Note. — Applicability of doctrine of idem sonans to substituted or constructive service of process.

Since the method of obtaining jurisdiction over one's person or property in an action commenced by substituted or constructive service of process is exceptional, and in derogation of any common-law method of procedure, some courts take the position that no presumptions, in order to make good the service, should be indulged that are not strictly and clearly warranted by the law sanctioning such practice, and that if the service of such process is made under the wrong name, the service will not be validated by a resort to the doctrine of *idem sonans*. This is the view taken in *SCHOENFELD v. BOURNE*. Likewise, in *Steinman v. Jessee*, 108 Va. 567, 62 S. E. 275, wherein it appeared that the appellant was made a party to a bill in a certain suit, but was proceeded against only by order of publication, the notice of which, as published, gave his name as "A. J. Stainmau," and nowhere in the publication was his correct name of "Steinman" given, the court said: "In order to bind appellant by those decrees, the proceeding against him by publication must have been strictly in compliance with the statute authorizing notice to a party to a pending suit by publication. Such a notice is constructive only, and the order of publication, as well as the statute authorizing it on prescribed conditions, is to be strictly construed; otherwise a party's rights cannot be taken from him without a day in court. Unquestionably the doctrine of *idem sonans* may be invoked to cure immaterial variations in the spelling of a name, but the authorities agree that the combination of letters and syllables must produce the same sound as the true name. To apply the doctrine to this case, where, in the caption to the order of publication, the name is spelled 'Stainmau,' which is the notice, while in that part of the publication regarded as the warning, the name is spelled 'Stinman,' and hold that appellant should have understood that 'Steinman' was meant, would be not only to carry the doctrine beyond any authority cited, or that we have been able to find, but beyond sound reasoning. That the initials of the Chris-

ERROR to the Circuit Court for Gratiot County to review an order setting aside a judgment in plaintiff's favor, and quashing a writ of attachment. Affirmed.

The facts are stated in the opinion.

Messrs. Hollis C. Johnson, O. G. Tuttle, and John T. Mathews for plaintiff in error.

Messrs. Stone & Watson, for defendants in error:

Attachment is a harsh and extraordinary remedy, unknown to the common law, and the statutory provisions upon which the right depends must be strictly construed, and cannot be extended beyond their terms.

Jaffray v. Jennings, 101 Mich. 517, 25 L.R.A. 645, 60 N. W. 52; Estlow v. Hanna, 75 Mich. 219, 42 N. W. 812; Buckley v.

Lowry, 2 Mich. 418; Steers v. Vanderberg, 67 Mich. 530, 35 N. W. 110; Woolkins v. Haid, 49 Mich. 299, 13 N. W. 598; Cochran v. Johnson, 95 Mich. 67, 54 N. W. 707; Granger v. Superior Ct. Judge, 44 Mich. 384, 6 N. W. 848.

The error in the spelling of the name in the notice of publication rendered the service fatally defective.

Lee v. Clary, 38 Mich. 223; Reading v. Waterman, 46 Mich. 107, 8 N. W. 691; Zlotocizski v. Smith, 117 Mich. 202, 75 N. W. 470; D'Autremont v. Anderson Iron Co. (D'Autremont v. Gaylord) 104 Minn. 165, 17 L.R.A.(N.S.) 236, 124 Am. St. Rep. 615, 116 N. W. 357, 15 A. & E. Ann. Cas. 114; Hubner v. Reickhoff, 103 Iowa, 368, 64 Am. St. Rep. 191, 72 N. W. 540; Fan-

tian name of the party for whom the notice is intended are correctly printed is of no importance, except as a matter of secondary consideration, since the attention of one reading the notice, perchance it might be, would not be attracted by the initials of the Christian name, but by the surname, far less commonly in use in the great majority of cases than the initials of a Christian name."

In Hubner v. Reickhoff, 103 Iowa, 368, 64 Am. St. Rep. 191, 72 N. W. 540, cited in *SCHOENFELD v. BOURNE*, it was held that the doctrine of *idem sonans* did not apply where service of process was made by publication, in an action of divorce against a nonresident. The court said: "Where a service is by publication, which is made conclusive because of a presumption that it comes to the notice of the person, can the court assume, as a matter of law, that the name 'Keesel' would or should be understood as 'Keisel'? Can it be said to be a rule of law that one of the latter name, on seeing the former name in a notice, must or should understand it to mean him? Let it be conceded that, if he were in court, the identity of the person as the one intended might be shown; but can it be assumed as a legal conclusion that 'Keesel' should be understood as 'Keisel'? It is hardly to be doubted that, while 'Reed' could be held to apply to 'Read' or 'Reade,' with the person in court, and an issue of identity made, a court would not assume, in a publication service, that it meant, or should be understood to mean, either of the others. The danger of such a holding is apparent, because of the fact that all three words are names of persons, pronounced alike, but of different orthography. Under some conditions, either name might be held to apply to either of the persons, but not in a case where a name, not his own, is published in a notice, to which he has not responded."

In *McRee v. Brown*, 45 Tex. 506, where an effort was made to sustain a judgment by default against "Robert McRee," on citation by publication to "Robert McKee," Moore, Associate Justice, observed: "If there is a mere immaterial discrepancy in

the manner of writing or spelling the name of the defendant in the citation and the judgment, the doctrine of *idem sonans* may be invoked to sustain the judgment, because, in such case, it is manifest to the court that the party against whom the judgment is rendered is in fact the same person upon whom the citation was served. And when personal service is had on the proper party, though he has failed to appear, there may be more reason in holding him bound, notwithstanding an error in the citation, than when notice is given merely by publication. In support of a judgment against a non-resident on constructive service, evidently the court should indulge in no presumption not strictly and clearly warranted by the record. Certainly, the names McKee and McRee, neither to the eye nor ear, convey the idea that they refer or apply to the same person. There may be some sort of euphony in their pronunciation; but there is no more similarity of sound between them than there is between 'Doe' and 'Roe;' and from reading them it would not be supposed that the same person was referred to more readily than would we come to a like conclusion from reading the names of these celebrated legal entities."

In *New Orleans v. Cordeviollé*, 10 La. Ann. 727, it was observed: "No reasonable pronunciation can make the word published 'Cordoviatti' sound like Cordeviollé. The name advertised is not the name of the defendant. It is hardly necessary to observe that a case of this kind differs somewhat from a suit commenced by citation, where the personal service of the citation would demonstrate who was intended to be made defendant."

In *Buchanan v. Roy*, 2 Ohio St. 251, the court said it was by no means clear that a notice by publication to Sarah Ray, without further description or means of identification, could be held to be a notice to Sarah Roy, under the doctrine of *idem sonans*, but no opinion was expressed, because it was not deemed necessary to decide the point.

In *Thornily v. Prentice*, 121 Iowa, 89, 100 Am. St. Rep. 317, 96 N. W. 728, where it

ning v. Krapf, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293; Thornily v. Prentice, 121 Iowa, 89, 100 Am. St. Rep. 317, 96 N. W. 728; 16 Am. & Eng. Enc. Law, p. 122.

Moore, J., delivered the opinion of the court:

The plaintiff is a resident of Ohio. The defendants reside in the Republic of Mexico. Plaintiff proceeded against the defendants in the circuit court for the county of Gratiot, by attachment, by reason of the nonresidence of the defendants. The writ issued July 10, 1908. Plaintiff attempted to publish a notice of attachment, but in the published notice named the defendants as "B. W. Bourne and William H. Dunton." On October 15, 1908, an affidavit of publication was filed, made by one of the publishers of the Gratiot Journal, stating therein that the notice annexed thereto had been published in said paper at least once in each week, for six weeks, and that the first publication thereof was on the 27th day of August, 1908. This affidavit was subscribed and sworn to on October 9, 1908. On November 6, 1908, the plaintiff filed his declaration, and on the following day entered the default of the defendants. On Novem-

appeared that a judgment was obtained against William M. Thornily, on a substituted service "on W. M. Thornily by leaving a copy of notice with Paul Thornily, over fifteen years of age, his son," when the defendant's real name was Willis H. Thornily, the court held that the names were not *idem sonans*, and that the judgment was void. It was said: "A judgment rendered upon such service will bind no one not properly named in the record. This does not mean that the name must be correctly spelled, but it must be so nearly correct as to come within the rule of *idem sonans*; that is, if the name, as spelled or written in the record, when pronounced according to commonly accepted methods, conveys to the ear a sound practically identical with the sound of the correct name, as commonly pronounced, the designation is sufficient, and no advantage can be taken of the clerical error. . . . Where, however, the record of a judgment entered upon a notice of this kind presents not a mere discrepancy or variation in the spelling of a defendant's name, but the use of a name other and different than that borne by the person against whom such judgment is sought to be enforced, the rule of *idem sonans* is not applicable, and the adjudication is of no validity against such person. . . . Where the rights of a person are to be concluded by a notice which is merely constructive, not actual, it is right and just that the party who wishes to avail himself of its benefits be held to follow the forms provided by statute."

In other cases it has been held that the doctrine of *idem sonans* does apply to 30 L.R.A. (N.S.)

ber 12, 1908, plaintiff took a judgment against the defendants for \$6,070.66, and costs. On January 4, 1909, defendants entered a motion to set aside the judgment and quash the writ. On March 4, 1909, the court entered an order granting defendants' motion. The case is brought here by writ of error.

The contentions of defendants are: (1) That, because of the failure of the plaintiff to publish the notice of attachment, as required by statute, the court never acquired jurisdiction in the case. (2) That, because of the plaintiff's failure to file proof of publication of the notice of attachment, as required by statute, the court, in any event, did not acquire jurisdiction to render judgment in the case. Both of these contentions are opposed by the plaintiff, and while he concedes that, because of lack of personal service of process, it would be the duty of the court to set aside the judgment, and permit the defendants to come in and defend, yet it is his contention that his proceedings and judgment are regular, and the court has only discretionary power to set aside the judgment. In our view of the case, the only question necessary to be considered is whether the publication of notice

cases involving the question of the substituted or constructive service of process under the wrong name.

Thus, in Puckett v. Hetzer, 82 Kan. 726, 109 Pac. 285, it was said: "The notice only need be considered. If the proper party were duly served, other mistakes are inconsequential. Where service by publication is undertaken, the notice must state the name of the party to be served; and the question is whether the name 'Joseph Renner,' appearing in a printed notice of that character, looks enough like, and when pronounced sounds enough like, 'Joseph Renner' to stand for the same person. Perfect orthography is not required. Perfect identity of sound is not required. Grant that there is some orthoëpical standard in existence, pronunciation modeled after it will vary in different localities, with different individuals in the same locality, and with the same person at different times; and practical similarity is all that can be insisted upon. . . . Besides what has been said in reference to sound, the appearance of the printed words 'Joseph Renner' was enough like that of 'Joseph Renner' to put a fairly prudent person on guard against a clerical or typographical error. Much mail has been opened without hesitation when the divergence from correct orthography was much greater."

In Rowe v. Palmer, 29 Kan. 337, it was held that a judgment in an action against "Joseph Shaffer," to quiet the title to a certain piece of land, where the service of process was by publication, was valid against "Joseph Shafer," the correct name of the owner of the land. Horton, Ch. J.,

was fatally defective because defendant William H. Denton was called therein William H. Dunton.

The claim of plaintiff as to this feature of the case is stated by counsel as follows: "It seems to me clearly the name of 'Dunton' is *idem sonans* to 'Denton,' or perhaps, more properly speaking, the names of 'Bourne and Dunton' are *idem sonans* to 'Bourne and Denton.' Especially is this so where they are brought into court at the suit of Fred Schoenfeld, and declared against as joint defendants under a written contract relation. It will be interesting in this connection to examine some of the cases in Michigan upon the question of *idem sonans*. The name of Kinney and Kenney are held *idem sonans*. Kinney v. Harrett, 46 Mich. 87, 8 N. W. 708. Also Dixon and Dickson. Reading v. Waterman, 46 Mich. 107, 8 N. W. 691. Also Brearley and Brailey. People v. Gosch, 82 Mich. 31, 46 N. W. 101. Also Rutty and Ruthe. Ruthe v. Green Bay & M. R. Co. 37 Wis. 344; Van Benschoten v. Fales, 126 Mich. 176, 85 N. W. 476." An examination of these cases will show that they are clearly distinguishable from the one before us. Only one of them, the last one, was an at-

tachment case. There an alias writ was taken out, and the names of the defendants were therein correctly given, and a personal service of the writ was had upon one of the defendants. In the case at bar there was no personal service.

In Granger v. Superior Ct. Judge, 44 Mich. 384, 6 N. W. 848, Justice Campbell, speaking for the court, said: "Where cases and proceedings are not according to the usual course, and are special in their character, they are held void on slighter grounds than regular suits, because the courts have not the same power over their records to correct them. So where there has been no personal service within the jurisdiction, the doctrine prevails that proceedings not conforming to the statutes are void; but this is on the ground that there has been no service whatever, and the party, therefore, has not been notified in any proper way of anything. The purpose of the statutory methods is to furnish means from which notice may possibly or probably be obtained; but, as a court acting outside of its jurisdiction is not recognized as entitled to obedience, the special statutory methods stand entirely on their own regularity, and, if not regular, cannot be said to have been

said: "Within the doctrine of *idem sonans*, the variance between Shaffer and Shafer is not sufficient to render the judgment . . . a nullity."

In Stein v. Hanson, 99 Minn. 387, 109 N. W. 821, it appeared that the original notice of the expiration of the time for redemption of land from a tax sale was directed to "Hans E. Hanson," while the notice as published was directed to "Hans E. Hansen." It was held that this was a mere irregularity, and that "the rule of *idem sonans* deprives the contention of merit."

In Lane v. Innes, 43 Minn. 143, 45 N. W. 4, it was held that a published summons which named the defendant as "Berlah M. Plimpton," whereas her true name was "Beulah M. Plimpton," was not such a material change as to be misleading, citing the note in 13 Am. Dec. 233, on the doctrine of *idem sonans*. Gilfillan, Ch. J., dissents for the following reason: "I think in statutory proceedings to obtain substituted service,—service by notice given through a newspaper,—inserting the name 'Berlah' instead of the true name 'Beulah,' no matter how it occurred, by mistake or otherwise, would vitiate the service. One name is not *idem sonans* with the other."

The doctrine of *idem sonans* has been applied in a great number and variety of cases where the service of process was by substitution on publication under the wrong name, and the service was upheld or invalidated without any discussion as to the applicability or nonapplicability of the doctrine to such exceptional cases. No attempt

has been made to exhaust these cases, but among them are the following: Grober v. Clements, 71 Ark. 568, 100 Am. St. Rep. 91, 76 S. W. 555; Seaver v. Fitzgerald, 23 Cal. 93; McCash v. Penrod, 131 Iowa, 631, 109 N. W. 180; Harrell v. Neef, 80 Kan. 348, 102 Pac. 838; Entrekim v. Chambers, 11 Kan. 377; Jenne v. Jenne, 7 Mass. 94; Graton v. Holliday-Klotz Land & Lumber Co. 189 Mo. 322, 87 S. W. 37; Simonson v. Dolan, 114 Mo. 176, 21 S. W. 510; Trover v. Wood, 96 Mo. 478, 9 Am. St. Rep. 367, 10 S. W. 42; Chamberlain v. Blodgett, 96 Mo. 482, 10 S. W. 44; Whelen v. Weaver, 93 Mo. 430, 6 S. W. 220; Burge v. Burge, 94 Mo. App. 15, 67 S. W. 703; Kuhn v. Kilmer, 16 Neb. 699, 21 N. W. 443; Ellis v. State, 3 Tex. Civ. App. 173, 21 S. W. 66, 24 S. W. 660; Kelly v. Kuhnhausen, 51 Wash. 193, 130 Am. St. Rep. 1095, 98 Pac. 603, distinguishing Chamberlain v. Blodgett, 96 Mo. 482, 10 S. W. 44; Bigelow v. Chatterton, 2 C. C. A. 402, 10 U. S. App. 267, 51 Fed. 614.

As to the use of a nickname in the publication of process, see note to Ohlman v. Clarkson Sawmill Co. 28 L.R.A. (N.S.) 432.

As to the use of initials instead of Christian name in publication of process, see the note to Butler v. Smith, 28 L.R.A. (N.S.) 436.

As to the effect of a summons or notice to a person by wrong initial, see the note to Illinois C. R. Co. v. Hasenwinkle, 15 L.R.A. (N.S.) 129.

As to the omission of Christian name in publication of process, see note to Whitney v. Masemore, 11 L.R.A. (N.S.) 676.

E. M. S.

conducted under the statutes. The distinction is obvious, and is not imaginary."

In *Steere v. Vanderberg*, 67 Mich. 530, 35 N. W. 110, Justice Champlin, speaking for the court, said: "It is a settled rule of law that all exceptional methods of obtaining jurisdiction over persons not found within the state must be confined to the cases and exercised in the way precisely indicated by the statute; and it may also be regarded as settled law that a failure to comply with the statutory requirements where the jurisdiction conferred is special, and no personal service is obtained, renders the judgments null and void. *Thompson v. Thomas*, 11 Mich. 274; *King v. Harrington*, 14 Mich. 532; *Millar v. Babcock*, 29 Mich. 526; *Johnson v. Delbridge*, 35 Mich. 436; *Woolkins v. Haid*, 49 Mich. 299, 13 N. W. 598; *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657."

In *Jaffray v. Jennings*, 101 Mich. 515, 25 L.R.A. 645, 60 N. W. 52, Justice Hooker, speaking for the court, said: "We start with the proposition that attachment is a harsh and extraordinary remedy, unknown to the common law; and the statutory provisions upon which the right depends, being in derogation of the common law, must be strictly construed, and cannot be extended beyond their terms. See cases cited in 1 *Jacob & C. Dig.* p. 96, § 1; *Estlow v. Hanna*, 75 Mich. 219, 224, 42 N. W. 812."

In the opinion in the case of *Fanning v. Krapf*, 61 Iowa, 417, 14 N. W. 727, 16 N. W. 293, is found the following language: "In considering the question, we must not be misled by the singularity of the name. If a notice to A. B. Smith would not be sufficient if published as to B. A. Smith, then we think that the notice in this case is not sufficient. The question before us concerns the title to real estate, and it would not be possible to base any safe rule upon the distinction between names that are peculiar and those that are not peculiar. Notice by publication, even where there is no misnomer, does not afford a very strong natural presumption that the fact of the pendency of the action will be brought to the defendant's actual knowledge. Notice by this mode is allowable only out of necessity. It must often happen that great injustice is done and great hardship suffered. We are not disposed to open the door any wider than necessity requires. Whoever undertakes to give notice by publication, and misnames the defendant, is without excuse. It requires very little care to publish the defendant's name correctly. We are evidently justified in holding the plaintiff who gives notice by publication to a considerable degree of strictness. If we were to adopt the rule contended for by the ap- 30 L.R.A. (N.S.)

pellee, that not only can the Christian names be entirely omitted, but the initial letters of the Christian names transposed, this might become the favorite mode of giving notice by publication. It appears to us that we should open the door to mischief of which no one could see the end."

In *Hubner v. Reickhoff*, 103 Iowa, 368, 64 Am. St. Rep. 191, 72 N. W. 540, it was held that where service in an action for divorce against a nonresident is by publication, and defendant makes default, the court cannot assume that the name "Keesel" in the notice should be understood as "Keisel," the name of the defendant, on the principle of *idem sonans*, and the decree was held void. See also *Estlow v. Hanna*, 75 Mich. 219, 42 N. W. 812, and *Cochrane v. Johnson*, 95 Mich. 67, 54 N. W. 707.

Applying the principles stated in these cases, we think it clear that in an attachment case against Benjamin W. Bourne and William H. Denton, nonresidents, where no one is personally served with process, the court does not get jurisdiction because of the publication of a notice describing the defendants as Benjamin W. Bourne and William H. Dunton.

Judgment is affirmed.

Grant, Montgomery, Ostrander, and McAlvay, JJ., concur.

NEW YORK COURT OF APPEALS.

FRANK W. MOLLOY, Appt.,

v.

CITY OF NEW ROCHELLE, Resp't.

(198 N. Y. 402, 92 N. E. 94.)

Municipal contracts — letting in violation of statute — remedy of bidder.

1. A statutory requirement that contracts for the performance of municipal work shall be let to the lowest bidder does not

Note. — Remedy of lowest bidder for refusal of authorities to award contract to him.

It is assumed in this note that the bidder who is seeking to enforce his rights is the lowest bidder, or the lowest responsible or best bidder, so that, under the law, it is the duty of the proper public officials to award him the contract; and the question to be treated here is whether, assuming that he is entitled to the contract and its benefits, he has any remedy, and, if so, what remedy, if the officials refuse to accept his bid, or, having accepted it, refuse to enter into a formal contract with him, or otherwise seek to deprive him of the benefit of his bid. What constitutes a bidder the lowest bidder is not discussed.

give such bidder a right of action against a municipality for his lost profits in case the contract is, contrary to the statute, awarded to a higher bidder.

Same — bid as effecting contract.

2. The making of the lowest bid for the performance of municipal work, in response to an advertisement, does not effect a contract with the municipality, a breach of which will give the bidder a right of action, although the statute requires the contract to be let to the lowest bidder, where the advertisement reserves the right to reject any or all bids.

(May 10, 1910.)

A PPEAL by plaintiff from a judgment entered upon an order of the Appellate Division of the Supreme Court, Second De-

Hence, the right of the officers to exercise a discretion as to who is the lowest bidder is not treated. So, too, cases are omitted where the deciding point was the right to reject any and all bids, and to abandon the work or readvertise. As to right of lowest bidder on a public contract, see note to *Anderson v. St. Louis Public Schools*, 26 L.R.A. 707. As to sufficiency of specifications where public contract is required to be awarded to lowest bidder, see note to *Hannan v. Board of Education*, post, 214.

If a duty is imposed for the benefit of one person or class of persons, and another's advantage from its discharge is merely incidental, and not a part of the design of the statute, no such right is created in favor of the latter as forms the subject of an action at law or of a suit in equity. As sustaining this general proposition, see, *inter alia*, *Colorado Paving Co. v. Murphy*, 37 L.R.A. 630, 23 C. C. A. 631, 49 U. S. App. 17, 78 Fed. 28, appeal dismissed for want of jurisdiction in 166 U. S. 719, 41 L. ed. 1188, 17 Sup. Ct. Rep. 987; *Talbot Paving Co. v. Detroit*, 109 Mich. 657, 63 Ann. St. Rep. 604, 67 N. W. 979,—which are all cases relating to rights of lowest bidder.

The usual provision in municipal charters, that contracts for public work shall be awarded to the lowest or lowest reliable and responsible bidder, was not enacted to furnish employment for contractors, or to benefit a bidder for such work, but with the design to benefit and protect the property holders and taxpayers of the municipalities. *Colorado Paving Co. v. Murphy*, supra; *Vincent v. Ellis*, 116 Iowa, 609, 88 N. W. 836; *Talbot Paving Co. v. Detroit*, supra; *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557; *Carmichael v. McCourt*, 27 Ohio C. C. 775; *Com. ex rel. Snyder v. Mitchell*, 82 Pa. 343; and other cases.

This principle, therefore, has been held to be fatal to the right of the lowest bidder to any relief, either in law or equity, for failure of the authorities to award him the contract, or to prevent the contract being awarded to another. It goes not to defeat any particular cause of action, but to de-

partment, overruling exceptions by plaintiff which were ordered by a Trial Term, Part 2, for Westchester County, to be heard by the Appellate Division in the first instance, and dismissing the complaint in an action brought to recover damages for alleged wrongful failure to award plaintiff a contract for certain public work. Affirmed.

Statement by Chase, J.:

The defendant's charter provides: "Whenever any expenditures to be made or incurred by the common council or city board or any city officer in behalf of the city, for work to be done, or materials or supplies to be furnished, . . . shall exceed \$200, the city clerk shall advertise for and re-

feat the right to any relief. *Colorado Paving Co. v. Murphy*, supra.

Injunction.

Hence, although taxpayers and property holders, whose rights of property may be injuriously affected by the fraudulent or arbitrary violation of this and similar provisions of city charters, may maintain a suit to enjoin such action by public officers whose duty it is to comply with them, yet the lowest reliable and responsible bidder for a contract for public work has no such vested or absolute right to a compliance with such provisions of the statutes as will enable him to maintain an injunction against their violation by public officials, because these provisions were not enacted for his benefit. *Colorado Paving Co. v. Murphy* and *Carmichael v. McCourt*, supra; *Adams v. Ives*, 63 N. Y. 650.

But it has been held that where the officials are vested with the right to reject all bids or accept the lowest, the court, at the suit of the lowest bidder, may enjoin the officials from entering into a contract with a higher bidder, but will not, by mandamus, compel them to award the contract to the lowest bidder. *Akron v. France*, 24 Ohio C. C. 63.

One claiming to be the lowest bidder for cleaning certain streets cannot, when his bid is rejected and the contract awarded to another, have a temporary injunction against the officials, forbidding them from proceeding under such contract, continued in force until litigation regarding the rights of such bidder is finally determined, since such injunction could be of little value to such bidder, and might seriously affect the public health. *McCafferty v. Glazier*, 10 How. Pr. 475.

The lowest bidder for laying a street car track, whose only competitor was an existing street railway company, cannot, when the council rejects both bids, and allows the street railway company to exercise a right given in their franchise to build the track as an extension of their existing tracks, have such construction of the tracks

ceive proposals therefor, in such manner as the common council, or as the board or officer charged with making such contract, shall prescribe, and the contract therefor shall be let to the lowest responsible bidder, who shall execute a bond to said city, with one or more sureties, being freeholders, for the faithful performance of the contract." Laws 1899, chap. 128, § 33. The city clerk, in pursuance of said statute and resolutions of the common council of the defendant, published a notice as follows: "Sealed proposals will be received by the city clerk at his office . . . for the regulating and grading of . . . in the city of New Rochelle, upon plans and specifications prepared by the city engineer, which may be procured upon application at his office in

the city hall building. . . . A certified check to the amount of \$1,000 must accompany each bid. . . . The common council reserves the right to reject any and all bids. . . ." In pursuance of such notice, six bids were filed in accordance with said advertisement. The bids were in items which required a computation to determine the aggregate amount of each bid. Accompanying the plaintiff's bid was a certified check for \$1,000, and a written statement by a responsible surety company that in case the contract was awarded to the plaintiff, such surety company would become bound as such surety and guarantor for the faithful performance of the contract, and execute a bond therefor, as required by the statute. The plaintiff was a responsible

enjoined. *Johnson v. West Side Street R. Co.* 9 Ohio Dec. Reprint, 71.

In *Campbell v. Philadelphia*, 10 W. N. C. 221, it was held that the lowest bidder, whose bid had been accepted, was entitled to an injunction forbidding the officials from inserting in the formal contract a provision not contained in the advertisements, whereby payment of part of his compensation would be delayed. Here the acceptance of his bid was treated as making a contract, the terms of which would be gathered from the advertisement and bid, and which the officials could not change, and the case is distinguished from one where the officials had refused to accept the lowest bid.

Injunction will not lie at the suit of the lowest bidder, who claims to have a valid contract with the municipality, to prevent the municipality from entering into a contract with another, since, if his claim is correct, he has an adequate remedy at law. *Riker v. Oakland Circuit Judge*, 138 Mich. 181, 101 N. W. 229.

A taxpayer having a substantial interest in the controversy as such is not debarred from bringing an action to enjoin the awarding of a contract to one not the lowest bidder, by the fact that he was himself the lowest bidder, and has thus also an ulterior motive. *Times Pub. Co. v. Everett*, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695; *Mazet v. Pittsburgh*, 137 Pa. 548, 20 Atl. 693; *Times Printing Co. v. Seattle*, 25 Wash. 149, 64 Pac. 940; *Hannan v. Board of Education (Okla.)* post, 214, 107 Pac. 646.

Mandamus.

Principally on the ground that such statutes were not enacted for the benefit of the lowest bidder, it has been held that mandamus will not lie at the suit of the lowest bidder, to compel the public officials to enter into a contract with him. *Vincent v. Ellis*, supra; *People ex rel. Belden v. Contracting Board*, 27 N. Y. 378; *People ex rel. Ryan v. Aldridge*, 83 Hun, 279, 31 N. Y. Supp. 920 (where bid was accepted, but no formal contract made); *Com. ex rel. Snyder v. Mitchell*, supra; *American Pav. Co.* 30 L.R.A. (N.S.)

v. Wagner, 139 Pa. 623, 21 Atl. 160 (where, however, the official reserved and exercised the right to refuse to grant the contract to anyone); *Com. ex rel. Hackett v. Philadelphia*, 13 W. N. C. 61; *State ex rel. Phelan v. Board of Education*, 24 Wis. 683 (will not lie as matter of right).

But a contrary ruling has been made in many cases, usually without much, if any, discussion of the reason. *State ex rel. Whedon v. York County*, 13 Neb. 57, 12 N. W. 817 (in which mandamus was issued, it being assumed without argument that relator was entitled thereto if he was shown to be the lowest bidder); *State ex rel. Woodruff-Dunlap Printing Co. v. Cornell*, 52 Neb. 25, 71 N. W. 961; *People ex rel. Putnam v. Buffalo County*, 4 Neb. 150 (*dictum*); *Marsh v. State*, 2 Neb. (Unof.) 372, 96 N. W. 520; *People ex rel. Vickerman v. Contracting Board*, 46 Barb. 254; *People ex rel. Mathews v. Buffalo*, 5 Misc. 36, 25 N. Y. Supp. 50; *Boren v. Darke County*, 21 Ohio St. 311; *Beaver v. Institution for Blind*, 19 Ohio St. 97; *State v. Marion County*, 39 Ohio St. 188.

Mandamus will not be granted in favor of the best bidder, to compel the execution of a contract with him by the municipal authorities, after one has been in fact let to another. *State ex rel. Prince v. Police Jury*, 108 La. 311, 32 So. 363 (whether it would lie before, not decided); *Talbot Paving Co. v. Detroit*, 91 Mich. 262, 51 N. W. 933; *People ex rel. Belden v. Contracting Board*, supra; *Weed v. Beach*, 56 How. Pr. 470; *People ex rel. Gibb v. Board of Education*, 5 N. Y. Supp. 392; *Re Hilton Bridge Constr. Co.* 13 App. Div. 24, 43 N. Y. Supp. 99 (where successful bidder was not made a party); *Capital Printing Co. v. Hoey*, 124 N. C. 767, 33 S. E. 160; *State ex rel. Nevina v. Printing Comrs.* 18 Ohio St. 386; *Deckman v. Oak Harbor*, 10 Ohio C. C. 409 (in which 90 per cent of the work had been done by another, to whom the contract had been awarded); *Detroit Free Press v. State Auditors*, 47 Mich. 145, 10 N. W. 171.

The reason sometimes given is that the result of ordering a second contract for the same work would be to subject the state to

bidder. After the opening of the bids, the common council referred all the bids to the street and sidewalk committee and the city engineer to tabulate and report at an adjourned meeting, and the meeting then adjourned to a day specified. On the adjourned day, the committee to which the bids were referred reported, by which report it appeared that the aggregate amount of the plaintiff's bid was \$61,626.30, and that he was the lowest bidder. Without discussion or further consideration, a resolution was then offered and passed, as follows: "Resolved, that the bid of F. W. Molloy (plaintiff) be rejected." Thereupon a further resolution was adopted, as follows: "On motion . . . the contract for the improvement of North avenue, Hor-

ton avenue, and Brook street is awarded to Ensignor Brothers, at the sum of \$64,204.40." The plaintiff thereupon filed a protest against the action of the common council, and subsequently brought this action.

At the trial term, the plaintiff, in addition to showing the facts as stated, offered evidence to show that his profits on the contract would have been \$16,889.40, and rested. The court thereupon dismissed the complaint, and ordered that the exceptions taken during the trial be heard in the first instance at the appellate division, and that entry of judgment upon the verdict aforesaid be suspended in the meantime until the hearing and decision by said appellate division of said exceptions. The appellate

the payment of double compensation. *People ex rel. Belden v. Contracting Board*, supra.

Of course, jurisdictions which hold that mandamus will not issue at all at the suit of the lowest bidder, to compel the award of the contract to him, would, *a fortiori*, make the same ruling when the contract was awarded to another.

But the contrary ruling has been made. *Marsh v. State and Boren v. Darke County*, supra (in which some work had been done by the successful but higher bidder).

And mandamus was allowed in favor of the lowest bidder for an entire work, although the public officials had, contrary to law, divided up the work, and attempted to award portions of it to others. *State ex rel. Woodruff-Dunlap Printing Co. v. Cornell*, supra.

The highest bidder at a tax sale may enforce his bid by compelling the treasurer to issue a certificate of sale for the land purchased. *Richardson County v. Miles*, 7 Neb. 123 (*dictum*).

An official whose duty is limited to passing on the sufficiency of bonds of bidders, who refuses to pass on the sufficiency of the bond of the lowest bidder, on account of certain untenable objections to the legality of the work itself, may, at the suit of such lowest bidder, be compelled by mandamus to make a decision; but as his duty calls for an exercise of judgment, the court will not control his discretion by indicating what his decision shall be. *People ex rel. McKown v. Green*, 50 How. Pr. 503.

In *People ex rel. Mathews v. Buffalo*, supra, where the board of aldermen wrongfully rejected a bid because of the insufficiency of the bond, when no bond was required by law, a mandamus was issued, requiring the board to consider the relator's bid as valid and regular, and that they determine whether or not the relator is responsible, and the lowest bidder, free from deception, fraud, or collusion, and if they find in the affirmative, to award the contract to the relator.

It was held in *People ex rel. Holler v. Board of Contract*, 2 How. Pr. N. S. 423, 30 L.R.A. (N.S.)

that when a city council by resolution lets a contract for paving a street to the lowest bidder, the latter has a right to have the proper contract written out, in accordance with his bid, so accepted, and mandamus will issue to compel its execution.

It was also held in *People ex rel. John Single Paper Co. v. Edgcomb*, 112 App. Div. 604, 98 N. Y. Supp. 965 (two judges dissenting), that where the advertisement for bids for printing contains the illegal requirement that only union labor be employed on the work, and the lowest bid is accepted, the board whose duty it is to pass on the sufficiency of the bond, which refuses to approve it on the sole ground that it does not contain the illegal requirement, may be compelled by mandamus to accept the bond. The above two cases were doubtless decided on the theory that the acceptance of the bid completed the contract.

One who was the highest bidder for the privilege of leasing public lands, who refused to accept the lease when offered at the amount of his bid, cannot compel the board of public lands to accept a lower bid made by him at a subsequent competition, though he was then the highest bidder, since he did not act in good faith. *State ex rel. Reed v. Scott*, 18 Neb. 597, 26 N. W. 386.

As to right of lowest bidder to mandamus after acceptance of his bid, see also *infra*, under title "Damages."

Action for damages—in general.

The lowest bidder, whose bid has been rejected in favor of another, has no right of action at law to recover against the municipality profits which he might have made had his bid been accepted. *Talbot Paving Co. v. Detroit*, 109 Mich. 657, 63 Am. St. Rep. 604, 67 N. W. 979; *Smith v. New York*, 10 N. Y. 504.

Nor has he a right of action for damages against the official personally, when the latter, in good faith, refuses to award him the contract. *American Pav. Co. v. Wagner*, 139 Pa. 623, 21 Atl. 160.

And it has even been held that he has no right of action for damages against the

division overruled the exceptions, and judgment was entered, dismissing the complaint.

Messrs. L. Laflin Kellogg and Alfred C. Patté, with Messrs. Kellogg & Rose, for appellant:

The plaintiff being concededly the lowest responsible bidder, the arbitrary rejection of his bid, and the acceptance of a higher bid by the common council, was absolutely unauthorized and illegal.

People ex rel. Coughlin v. Gleason, 121 N. Y. 631, 25 N. E. 4.

The mandatory provisions of the charter entitled the plaintiff, as the lowest responsible bidder, to the contract, as a matter of law; and a refusal by the city to enter into a written contract with him therefor was a breach entitling him to damages.

People ex rel. Lunney v. Campbell, 72 N. Y. 496; Lynch v. New York, 2 App. Div. 213, 37 N. Y. Supp. 798; Pennell v. New York, 17 App. Div. 455, 45 N. Y. Supp. 229; Beckwith v. New York, 121 App. Div. 462, 106 N. Y. Supp. 175; Walsh v. New York, 113 N. Y. 142, 20 N. E. 825; Argenti v. San Francisco, 16 Cal. 255; Ft. Madison v. Moore, 109 Iowa, 476, 80 N. W. 527; Safety Insulated Wire & Cable Co. v. Baltimore, 13 C. C. A. 375, 25 U. S. App. 166,

officials who refused to declare him to be the lowest bidder, and to award the contract to him, even though it be granted that he was in fact the lowest bidder, and entitled to the contract, and though this was known to the officials, and though they acted maliciously in refusing to declare him to be the lowest bidder, since their determination is judicial in its nature. East River Gaslight Co. v. Donnelly, 93 N. Y. 557.

—where bid has been accepted.

But if his bid has been accepted, and he has a clear legal right to have a contract executed, he may sue for damages, but cannot have mandamus to compel the execution of the contract, as his remedy at law is sufficient. Safety Insulated Wire & Cable Co. v. Baltimore, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140; People ex rel. Lunney v. Campbell, 72 N. Y. 496; People ex rel. Heckley v. Croton Aqueduct Board, 49 Barb. 259; People ex rel. Downey v. Thompson, 99 N. Y. 641, 1 N. E. 542; People ex rel. Gibb v. Board of Education, supra; People ex rel. Ryan v. Aldridge, 83 Hun, 279, 31 N. Y. Supp. 920 (semble); Lynch v. New York, 2 App. Div. 213, 37 N. Y. Supp. 798; Pennell v. New York, 17 App. Div. 455, 45 N. Y. Supp. 229; Beckwith v. New York, 121 App. Div. 462, 106 N. Y. Supp. 175.

These cases seem to proceed on the theory that the acceptance of the bid cre-

66 Fed. 140; Turner v. Fremont, 159 Fed. 221.

Mr. Michael J. Tierney, for respondent:

There was no contractual relation between the plaintiff and defendant, and the complaint was properly dismissed.

Walsh v. New York, 113 N. Y. 142, 20 N. E. 825; People ex rel. Francis v. Troy, 78 N. Y. 33, 34 Am. Rep. 500; Erving v. New York, 131 N. Y. 133, 29 N. E. 1101; Gleason v. Peerless Mfg. Co. 1 App. Div. 257, 37 N. Y. Supp. 267; East River Gaslight Co. v. Donnelly, 93 N. Y. 557; Com. ex rel. Snyder v. Mitchell, 82 Pa. 343; Findley v. Pittsburgh, 82 Pa. 351; Douglass v. Com. 108 Pa. 559.

Although the common council did not give due consideration to the plaintiff's bid, he would not be entitled to recover any damages for the rejection of his bid and the failure to award him the contract.

Dill. Mun. Corp. 4th ed. § 470; Smith v. New York, 10 N. Y. 504; Smith, Modern Law of Mun. Corp. § 746-i; Strong v. Campbell, 11 Barb. 138; Colorado Paving Co. v. Murphy, 37 L.R.A. 634, 23 C. C. A. 631, 49 U. S. App. 17, 78 Fed. 28; Com. ex rel. Snyder v. Mitchell and Findley v. Pittsburgh, supra; East River Gaslight Co. v. Donnelly, 93 N. Y. 561.

ated a contract enforceable at law, rendering mandamus unnecessary.

When a bid has been duly accepted by the proper officials of a municipality, it becomes a contract, and cannot be thereafter revoked by the municipality, and a refusal on its part to carry it out will subject it to an action for damages. Safety Insulated Wire & Cable Co. v. Baltimore, supra.

Right to appeal.

In some states, by statute, an appeal lies from the action of the county board or other body having power to let contracts to the lowest bidder. Under such a statute, it has been held that the court, on appeal from the action of the board in awarding a contract to one not the lowest bidder, may order the contract to be awarded to the lowest bidder. Baum v. Sweeney, 5 Wash. 712, 32 Pac. 778; State ex rel. De Rackin v. Allen, 8 Wash. 168, 35 Pac. 609.

When an appeal lies, resort cannot be had to mandamus, as the right of appeal is an adequate remedy. State ex rel. De Rackin v. Allen, supra.

Certiorari.

In Townsend v. Copeland, 56 Cal. 612, it was held that the action of a board of supervisors of a county in rejecting a bid for county printing is not judicial in its nature, and hence cannot be reviewed by certiorari, at the instance of the lowest bid-

Chase, J., delivered the opinion of the court:

Provisions similar to the one in the defendant's charter, from which we have quoted, are common in municipal charters everywhere. Such provisions are intended to prevent favoritism. They result from an effort to prevent official action being influenced by improper motives. The same effort to prevent improper official action finds expression in village law (Consol. Laws, chap. 64), § 332, general city law (Consol. Laws, chap. 21), § 3, and in many municipal charters, where it is provided that an officer therein shall not be directly or indirectly interested in a contract which he, or a board of which he is a member, is authorized to make on behalf of the municipality. Municipal officers acting in behalf of the municipality should not have a personal interest in determining who shall be awarded a contract, or be affected in any way in their official action towards a favorite among the bidders. Such contracts should be made with the lowest responsible bidder therefor, because there is less opportunity in contracts so let for improper special agreements to the disadvantage of the corporation, and such contracts are, in consequence thereof, and because of the competition, more economical for the municipi-

pality. The meaning and purpose of provisions in municipal charters requiring that contracts shall be made with the lowest responsible bidders therefor have been repeatedly defined and stated by the courts.

In *Brady v. New York*, 20 N. Y. 312, 316, the court, referring to a similar provision in the charter of the city of New York, says: "It was based upon motives of public economy, and originated, perhaps, in some degree of distrust of the officers to whom the duty of making contracts for the public service was committed. If executed according to its intention, it will preclude favoritism and jobbing, and such was its obvious purpose. It does not require any argument to show that a contract made in violation of its requirements is null and void." In *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 634, 25 N. E. 4, the court, referring to a similar provision in the charter of Long Island City, says: "This provision was inserted in the charter undoubtedly to prevent favoritism, corruption, extravagance, and improvidence in the procurement of work and supplies for the city, and should be so administered and construed as fairly and reasonably to accomplish this purpose."

Such a statutory provision, enacted as a protection to the corporation, cannot be

der. The court said: "The board, in determining to whom the contract should be awarded, was absolutely obliged to award the contract to the lowest bidder, or it had a right to exercise its discretion in the matter. If it was obliged to give the contract to the lowest bidder, it follows that there was nothing in the power which was judicial in its nature, but it was purely ministerial. If, on the other hand, the board possessed a discretionary power in the premises, the most that can be said against its action is that it was erroneous, and not an act in excess of its jurisdiction. In neither case is certiorari the proper remedy."

It was similarly held in *People ex rel. Dean v. Contra Costa County*, 122 Cal. 421, 55 Pac. 131, that the action of a board of supervisors in granting a franchise in pursuance of an act requiring it to grant all franchises to the highest bidder is legislative, and not judicial, and hence that certiorari will not lie at the suit of one claiming to be the highest bidder, to annul the action of the board in granting the franchise to another.

So, in *Hammer v. Smith*, 11 Ariz. 420, 94 Pac. 1121, it was held that though a statute requires "the contract (for public printing) to be let to the best responsible bidder," one claiming to be the best bidder cannot have the action of a board of supervisors in awarding the contract to another reviewed by certiorari, which, by statute, 30 L.R.A. (N.S.)

"shall be granted in all cases where the inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer," since the function exercised by the board is not a judicial one. The court said: "In the case before us there is no issue, although there is demanded the exercise of both judgment and discretion in determining who is the best responsible bidder. There is no issue, because there is but one party in interest,—the public. As against one another, the bidders present an issue, but this issue is merely incidental. Its adjudication is not the ultimate. No bidder has a right to the contract. None has a right or privilege of any sort to be conserved by the board. To be a party to a judicial determination, one must present, as against his adversary, a right or privilege to be maintained or denied. The discretion and judgment exercised in this matter are those of an agent, seeking the best interest of his principal in letting a contract. They are executive discretion and judgment, not judicial."

But there are cases in which certiorari has been successfully resorted to by the lowest bidder to set aside the action of a public board in awarding the contract to another. *State, Connolly, Prosecutor, v. Hudson County*, 57 N. J. L. 286, 30 Atl. 548; *Faist v. Hoboken*, 72 N. J. L. 361, 60 Atl. 1120; *Jacobson v. Board of Education* (N. J. L.) 64 Atl. 609. R. A. E.

used to make a disobedience of its provisions by the municipal officers a double source of punishment to the municipality. If the plaintiff is right in his contention, then a disobedience of the provisions of the statute will make the municipality pay the difference between the lowest bid and the bid for which the contract is made, and also the profit that the lowest responsible bidder would have made if the statute had not been violated. But such is not the purpose of the charter provision. In *Strong v. Campbell*, 11 Barb. 135, 138, the court says: "Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action." In *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557, 561, the court, referring to a similar statute, says: "The statute merely provides a scheme for the prudent administration of the affairs of the city, and has imposed a duty upon the defendants to carry it out. This duty appears, from the plaintiff's showing, to have been violated. But the duty is a public duty to the city or people at large, not to the plaintiff or for the benefit of individuals, or the promotion of any private interest, nor has the statute given to the plaintiff or any person an action for its violation." The court used the language quoted in an action brought by the plaintiff against the defendants, who composed the common council of Long Island City, to recover against them individually the damages which he claimed to have incurred by reason of their failure to obey the statute. Such language, however, is applicable to this action, in which the plaintiff seeks to make the municipality respond in damages for the failure of its officers to obey a statute enacted for the express purpose of protecting the municipality in its property rights. The statute was not enacted for the benefit of the plaintiff, and he cannot recover by reason of its provisions. *Talbot Paving Co. v. Detroit*, 109 Mich. 657, 63 Am. St. Rep. 604, 67 N. W. 979.

Although the plaintiff asserts rights under the statute, he also claims to be entitled to recover on contract. No contractual relation can arise merely from a bid, unless, by the terms of the statute and the advertisement, a bid in pursuance thereof is, as a matter of law, an acceptance of an offer, wholly apart from any action on 30 L.R.A. (N.S.)

the part of the municipality or any of its officers. Such, plainly, is not the plaintiff's case. The statute and the advertisement in this case call for proposals. The common council reserved the right to reject any and all bids. Under a statute requiring that all contracts shall be awarded to the lowest bidder, the body awarding the contract, acting in good faith, may refuse to so award the contract if they deem it for the best interest of the city to do so, and may reject all of the bids and readvertise. *Walsh v. New York*, 113 N. Y. 142, 20 N. E. 825.

This court in *Erving v. New York*, 131 N. Y. 133, 138, 29 N. E. 1101, 1103, says: "The awarding of the contract on the part of the officer to one of several bidders requires the exercise on his part of judgment and discretion, and the award itself should be manifested by some formal official act on his part, and ordinarily reduced to writing, and made a part of the records in his department. In no other way can the rights of the parties be preserved, at least, prior to the actual execution of the contract. The mere arithmetical operation of ascertaining which bid is the lowest does not constitute an award. The duty of the commissioner to examine the proposals and award the contract is judicial in its nature and character . . . and the award is the result of a judicial act." The plaintiff's bid in this case was never accepted. It was expressly rejected by the common council. The plaintiff, therefore, does not sustain a contractual relation with the defendant, and cannot sustain this action as upon contract. The authorities mentioned by the plaintiff are all distinguishable from this case. They are each based upon an accepted bid.

In *Lynch v. New York*, 2 App. Div. 213, 37 N. Y. Supp. 798, plaintiff sought to recover damages in consequence of the defendant's refusal to execute a contract whereby the plaintiff was to perform certain work in the construction of a sewer in the city of New York. The plaintiff presented a bid for the work, pursuant to an advertisement, and he was thereafter duly notified that his bid was the lowest, and that the contract had been awarded to him. The notice to the plaintiff was given in accordance with the action and determination of the commissioner of street improvements, to whom the bids were delivered. Six days thereafter, the commissioner notified the plaintiff that his bid was rejected on account of an irregularity therein. The defendant then refused to execute the formal contract with the plaintiff, and this action was brought. It was held that the proposal by the plaintiff and the acceptance thereof by the commissioner consti-

tuted a contract, binding upon both, and that it was then too late to reject all bids, and that the plaintiff was entitled to judgment for his damages. In *People ex rel. Lunney v. Campbell*, 72 N. Y. 496, 498, the relator sought by mandamus to compel the defendant, as commissioner of public works of the city of New York, to enter into a contract with him for certain grading, etc. It appeared that the relator was the lowest bidder for the contract, and that his bid had been accepted and the contract awarded to him. The special term denied the application for a mandamus, and the order was affirmed by the general term of the supreme court, and also by this court. This court says: "There appears to be no question that if the proceedings were all regular and conducted according to law, as is asserted, and the relator has in all respects conformed to the provisions of the city charter, that he has a right of action against the city for all damages which he has sustained by reason of the refusal of the commissioner to execute and carry out the contract. No rule is better settled by the decision of the courts than that in such a case mandamus will not lie." In *Pennell v. New York*, 17 App. Div. 455, 45 N. Y. Supp. 229, the plaintiffs were the lowest bidders for certain work in the city of New York. The bid was sent by the commissioner of public works to the comptroller, for his approval of the sureties on the contract. A change in the sureties was made by mutual consent, and the plaintiffs were informed orally by the commissioner of public works that he would execute a contract for the work in question. Subsequently, the commissioner refused to execute the contract. It was held that the bidder was entitled to recover the damages sustained by him by reason of such refusal.

In *People ex rel. Ryan v. Aldridge*, 83 Hun, 279, 31 N. Y. Supp. 920, the common council of Rochester advertised for proposals for a survey of a portion of the territory of the city, and directed that the mayor execute a contract for the work to the lowest competent surveyor bidding therefor. The bid of the relator was accepted, and the work was awarded to him by resolution. Shortly thereafter, the common council voted to reconsider its previous action, and indefinitely postponed further action thereon. This proceeding was brought to compel the execution of the contract with the relator. Held that, if a municipality has contracted with a party to do certain work, and afterwards refuses to have it done, the

municipality does not thereby relieve itself from the obligation of the contract, but the remedy of the contractor is confined to his action for damages resulting from its breach.

It is urged that, unless bidders are given some rights under the statutes mentioned, it will result in the statutes being wholly disregarded. The provisions of such statutes are always rigidly enforced by the courts when their enforcement is sought by one for whose benefit they are enacted. Actions upon contracts let in violation of such statutes are not sustained. *Dickinson v. Poughkeepsie*, 75 N. Y. 65; *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144; *City Improv. Co. v. Broderick*, 125 Cal. 139, 57 Pac. 776; *La France Fire Engine Co. v. Syracuse*, 33 Misc. 516, 68 N. Y. Supp. 894; *Walton v. New York*, 26 App. Div. 76, 49 N. Y. Supp. 615; *Smith*, Modern Law of Mun. Corp. § 746. The petitions of contractors who have taken contracts in violation of such statutes, to compel municipal officers to pay, in pursuance of such contracts, are denied. *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4. Assessments involving expenditures in violation of such statutes are set aside upon the petition of taxpayers. *Re Emigrant Industrial Sav. Bank*, 75 N. Y. 388, *People ex rel. Weiss v. Buffalo* (Sup.) 84 N. Y. Supp. 434; *Re Merriam*, 84 N. Y. 596.

An action may be maintained by a taxpayer to prevent any illegal official act by an officer, agent, commissioner, or other person, acting on behalf of a municipal corporation. General Municipal Law (Consol. Laws, chap. 24), § 51; Code Civ. Proc. § 1925. A taxpayer otherwise qualified to maintain an action under the statutes to prevent illegal official acts and a waste of public funds is not otherwise disqualified because specially and peculiarly interested in the event. *Gage v. New York*, 110 App. Div. 403, 97 N. Y. Supp. 157; *Times Pub. Co. v. Everett*, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695.

Counsel for the appellant, in his oral argument, requested that we should discuss in this opinion the question of the power of the courts in any case to direct by mandamus the officer or board charged with the duty of entering into municipal contracts as to which of several bidders therefor should be awarded the contract. That question is not presented on this appeal for our determination. It should be left for discussion and determination in a case where the question is directly and necessarily involved, unaffected by this decision, except

so far as it is controlled by what we have actually and necessarily decided herein.

The plaintiff cannot sustain this action, and the judgment should be affirmed, with costs.

Cullen, Ch. J., and Haight, Werner, Willard Bartlett, and Hiscock, JJ., concur.

Vann, J., concurring:

I concur in the result upon two grounds: (1) The plaintiff had no right to recover damages from the defendant for breach of contract, because there was no contract, as is clearly shown by Judge Chase, in his opinion. (2) The remedy of the plaintiff was by mandamus to compel the execution of a contract in accordance with the statute. He was the lowest responsible bidder. He tendered adequate security, and the statute commanded the common council, unless they rejected all bids, to award the contract to him. *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631, 25 N. E. 4. The rejection of his bid, and the acceptance of one higher by several thousand dollars, was arbitrary and illegal. It was presumptively corrupt, for favoritism is one form of corruption. For such a violation of law by those who represent the city, there should be a remedy against the city, and, as it cannot be by way of damages for breach of contract, it should be by mandamus. Otherwise competition may be stifled through the want of inducement to bid for public work.

The opinion in *People ex rel. Lunney v. Campbell*, 72 N. Y. 496, in so far as it declares that there is no remedy by mandamus in such cases, was *obiter*, and should be disregarded. At least, if the court is of the opinion that mandamus will not lie, a suggestion should be made to the legislature, for the public as well as the lowest bidder need protection. In many cases the public can be adequately protected only through the lowest bidder. According to the law, as apparently left by the decision about to be made, the city is helpless, because it is in the hands of the wrongdoers, and, if the lowest bidder has no remedy, there is no one impelled by duty or self-interest to prevent the violation of an important provision, common to nearly all municipal charters, designed to protect the public, but now practically useless.

30 L.R.A. (N.S.)

OHIO SUPREME COURT.

JAMES F. GOODLOVE, Plff. in Err.,

v.

STATE OF OHIO.

(82 Ohio St. 365, 92 N. E. 491.)

Indictment — descriptive matter — surplusage.

1. An allegation in an indictment, descriptive of that which is essential to the charge therein made, is a material allegation, and cannot be rejected as surplusage.

Homicide — identity of deceased — evidence — sufficiency.

2. Where an indictment charges the accused with having assaulted and killed one "Percy Stuckey, alias Frank McCormick," evidence that the defendant assaulted and killed a person commonly known as Frank McCormick will not sustain a verdict of guilty against the defendant, unless it also be shown that the Frank McCormick assaulted and killed and Percy Stuckey were one and the same person.

(June 28, 1910.)

Headnotes by the COURT.

Note. — Necessity of proving that person bore both real name and the alias by which the indictment purports to describe him.

No other case has been found in which the exact question presented in *GOODLOVE v. STATE* has been raised.

In *Evans v. State*, 62 Ala. 6, it was held unnecessary to prove that the defendant, designated under an alias, was known and called by both names, but that where he was identified by one of them, and it was shown that he was known in the community by that name, that was all that was necessary.

In *Falkner v. State*, 151 Ala. 77, 44 So. 409, where an indictment for murder alleged the killing of "Asaria Simmons, alias Dummy," the court said that proof of the alias "Dummy" met all the requirements; but this was apparently in reply to a contention that the indictment required proof that the deceased was known as "Asaria Dummy" or "Dummy Simmons;" and it does not appear whether or not it was proven that the true name of the deceased was "Asaria Simmons."

Under the rule that the indictment must be drawn with sufficient certainty fully to apprise the accused of the crime with which he is charged, it is generally held that this is sufficiently done in an indict-

ERROR to the Circuit Court for Wyandot County to review a judgment affirming a judgment of the Court of Common Pleas, convicting defendant of manslaughter. Reversed.

The facts are stated in the opinion.

Messrs. Sheets & West and Meck & Stalter, for plaintiff in error:

The name of the assaulted person, being a necessary allegation, must be proved as laid, and any variance therein will be fatal.

2 Bishop, Crim. Proc. § 65; 1 Elliott, Ev. § 200; 4 Elliott, Ev. § 2714; Price v. State, 19 Ohio, 423; 1 Bishop, Crim. Proc. § 683, note 6; 1 Archbold, Crim. Pr. & Pl. 8th ed. 241; Moore v. State, 12 Ohio St. 387; Wharton, Crim. Ev. § 64; State v. Gaffery, 12 La. Ann. 265; R. v. Deeley, 1 Moody, C. C. 303; Hensley v. Com. 1 Bush, 11, 89 Am. Dec. 604; State v. Taylor, 15 Kan. 420; Lewis v. State, 90 Ga. 95, 15 S. E. 697; King v. State, 44 Ind. 285; People v. Hughes, 41 Cal. 234; Owens v. State (Tex. Crim. Rep.) 20 S. W. 558; Mead v. State, 26 Ohio St. 505; Humbard v. State, 21 Tex. App. 200, 17 S. W. 126.

Messrs. H. H. Newell and D. C. Parker, for the State:

The name "Percy Stuckey" was surplusage, not vital to the case.

Com. v. Hunt, 4 Pick. 252; Com. v. Randall, 4 Gray, 36; State v. Craighead, 32 Mo. 561.

An indictment for homicide which states the name by which deceased was known among acquaintances is sufficient, even though it be not the true name.

Walter v. People, 32 N. Y. 147; Rye v. State, 8 Tex. App. 163; Com. v. Desmar-teau, 16 Gray, 1; Pyke v. State, 47 Fla.

93, 36 So. 577; People v. Woods, 65 Cal. 121, 3 Pac. 466.

No prejudice could accrue to the accused for any change or omission of one or more of the names given in the indictment as those of the deceased, or even of the accused, if the identity of the deceased or accused was established by the proof.

People v. Lake, 110 N. Y. 63, 6 Am. St. Rep. 344, 17 N. E. 146; Moore v. State, 47 Tex. Crim. Rep. 410, 83 S. W. 1117; Kennedy v. People, 39 N. Y. 245.

Crew, J., delivered the opinion of the court:

At the October term, 1908, of the court of common pleas of Wyandot county, the grand jury of said county found and presented against James F. Goodlove, the plaintiff in error herein, a certain indictment of which the following is a copy.

The State of Ohio } ss:
Wyandot County }

In the court of common pleas, Wyandot count, Ohio, of the term of October, in the year of our Lord one thousand nine hundred and eight. The jurors of the grand jury of the county of Wyandot and state of Ohio, then and there duly impaneled, sworn, and charged to inquire of and present all offenses whatever committed within the limits of said county, on their said oaths, in the name and by the authority of the state of Ohio, do find and present that James F. Goodlove, late of said county, on the 6th day of August, in the year of our Lord one thousand nine hundred and eight, at the county of Wyand-

ment for murder when the evidence shows that the deceased was known to the accused by the name alleged.

An illustration of the application of this test is furnished by People v. Lake, 110 N. Y. 61, 6 Am. St. Rep. 344, 17 N. E. 146. An indictment for incest gave the name of the daughter as Georgiana Towne, commonly known as Georgiana Lake; but the proofs showed that she was named Georgiana Jeanette Lake, and generally spoken of as Nettie Lake. It was nevertheless held that the indictment was sufficient to sustain a conviction, she being present at the trial and identified by the witnesses.

If the name "Percy Stuckey," in GOODLOVE v. STATE, had been altogether omitted, and the indictment had referred to the deceased merely by his assumed name, "Frank McCormick," the indictment would undoubtedly have been good, for the accused could not have been prejudiced.

In Walter v. People, 32 N. Y. 147, it was held that an indictment for homicide which states the name by which the deceased was 30 L.R.A. (N.S.)

known among his acquaintances is sufficient, even though it is not his true name.

And in Rye v. State, 8 Tex. App. 163, it was held that the requirement that an indictment must allege the name of the injured party is to apprise the accused of the accusation against him, and is sufficiently complied with in an indictment for murder, where the evidence shows that he was known to the accused by the name charged.

In Thomas v. State, 49 Fla. 123, 38 So. 516, it was held that where the evidence shows that the person killed was known by the name alleged in the indictment, a conviction will not be set aside because there was evidence that he was also known and called by another name.

So, also, in the following cases, it was held that the person murdered may be described in the indictment by the name by which he was commonly called, though differing from his name by baptism: Com. v. Desmar-teau, 16 Gray, 1; Pyke v. State, 47 Fla. 93, 36 So. 577; People v. Woods, 65 Cal. 121, 3 Pac. 466.

A. L. R.

dot aforesaid, in and upon one Percy Stuckey, alias Frank McCormick, then and there being, did unlawfully, purposely, and of deliberate and premeditated malice make an assault, in a menacing manner, with intent him, the said Frank McCormick, unlawfully, purposely, and of deliberate and premeditated malice to kill and murder; and that the said James F. Goodlove, a certain pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said James F. Goodlove, then and there in his right hand had and held, then and there, unlawfully, purposely, and of deliberate and premeditated malice, did discharge and shoot off to, against, and upon the said Frank McCormick, with the intent aforesaid, and that the said James F. Goodlove, with the leaden bullets aforesaid, out of the pistol aforesaid, by force of the gunpowder aforesaid, by the said James F. Goodlove then and there discharged and shot off as aforesaid, him, the said Frank McCormick, in and upon the upper right side of the back of him, the said Frank McCormick, then and there unlawfully, purposely, and of deliberate and premeditated malice did strike, penetrate, and wound, with the intent aforesaid, so as aforesaid discharged, and shot out of the pistol aforesaid, by the said James F. Goodlove, in and upon the upper right side of the back of him, the said Frank McCormick, one mortal wound of the depth of 4 inches and of the breadth of half an inch, of which mortal wound he, the said Frank McCormick, then and there died: and so the jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said James F. Goodlove him, the said Frank McCormick, in the manner and by the names aforesaid, unlawfully, purposely, and of deliberate and premeditated malice, did kill and murder, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Ohio.

H. H. Newell,
Prosecuting Attorney.

Wyandot county, Ohio.

The defendant, James F. Goodlove, being duly arraigned upon this indictment pleaded thereto not guilty. Thereafter and during said October term, 1908, the defendant was put upon trial upon said indictment, and by the verdict of the jury was convicted of the crime of manslaughter. A motion for a new trial was made and overruled, and thereupon the defendant was sentenced by the court to imprisonment in the Ohio penitentiary at hard labor for a period of fifteen years. This judgment of the court of common

pleas was affirmed by the circuit court. To obtain a reversal of the judgments below, James F. Goodlove now prosecutes error in this court. While the petition of plaintiff in error in this case contains numerous assignments of errors alleged to have occurred on the trial of this cause in the court of common pleas, the only one of these assignments material to be noticed or considered in this opinion is the alleged error of the trial court in overruling the motion of defendant, made at the close of all the evidence, to direct the jury to return a verdict of not guilty; for if this claim of error be resolved in favor of the accused, as upon this record we are of opinion it must be, it is necessarily fatal, and the other errors assigned become wholly immaterial. That in every indictment for injury to the person the law imperatively requires that the name of the injured party shall, if known, be stated, is too well settled to admit of controversy, and it follows therefrom as a logical and necessary sequence that the name of the person injured, if known, being indispensable matter of allegation, is essential matter of proof, and, when stated, must be proved as laid, unless such proof is excused by statute. The indictment in the present case charged the accused, James F. Goodlove, with having assaulted and killed one "Percy Stuckey, alias Frank McCormick." Hence, under the charge so made, the name of the party assaulted becomes and is essential matter of description and identification, and to warrant conviction upon such charge it was incumbent upon the prosecution to establish by the evidence, beyond a reasonable doubt, that the person assaulted and killed was in fact Percy Stuckey. This indictment does not charge, nor was it intended thereby to charge, that James F. Goodlove assaulted and killed both Percy Stuckey and Frank McCormick, but the charge is that he assaulted and killed one Percy Stuckey, called or otherwise known as Frank McCormick. The names therein mentioned were intended to be, and are, but different designations or descriptions of the same person, namely, Percy Stuckey, and, the rule being well settled that no allegation in an indictment descriptive of that which is essential to the charge can be disregarded or rejected, the crime thus charged in this indictment is not made out or established by proof only that the accused assaulted and killed one Frank McCormick, there being no evidence whatever to show that said Frank McCormick and Percy Stuckey were one and the same person. In the case now before us not only is there a total absence of evidence that Percy Stuckey

and Frank McCormick were one and the same person, but there is not in this case, from beginning to end, a scintilla of evidence even tending to show, or that would suggest, that any such person as Percy Stuckey ever had an existence. There was therefore in this case a total failure of proof as to an essential allegation and material part of the offense charged in the indictment, and such defect not being one of mere variance that is excused or rendered harmless by the curative provisions of § 7216, Rev. Stat., it was and is necessarily fatal, and the motion to direct a verdict in this case should have been sustained. The conclusion reached by us finds abundant support in the reasoning of the authorities cited in the briefs of counsel.

Judgments of the Circuit Court and of the Court of Common Pleas reversed, and plaintiff in error discharged.

Summers, Ch. J., and Davis, Shauck, and Price, JJ., concur.

OKLAHOMA SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appt.,

v.

STATE OF OKLAHOMA et al.

(— Okla. —, 107 Pac. 929.)

Carrier — free storage — interstate commerce.

1. That part of order No. 167, rule 10, of the state corporation commission, which provides that ten days' free storage shall be allowed on less than car-load shipments, when destined to consignees who live at interior points 5 miles or more from the railroad station, in so far as it applies to interstate commerce, is void, for the reason that it is in conflict with and is superseded by §§ 1 and 2 of an act entitled, "An Act to Amend an Act Entitled, 'An Act to Regulate Commerce'" (act June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1909, p. 1149), and for the further reason that it interferes with and imposes upon interstate commerce an unreasonable burden.

Pleading — amendment — verification — error.

2. An amendment to an affidavit charging a railway company with having violated a certain order of the state corporation commission, so as to make the amended affidavit charge the violation of an order other than that charged in the original affidavit, must be certified; and an order of the corporation commission, directing

that the original affidavit shall be amended, and thereupon, over the objection of defendant, proceeds with the trial upon the theory that it has been amended, where such amendment was never made, verified, and filed, is reversible error.

(March 8, 1910.)

Note. — Power of state as to demurrage charges by carrier on interstate shipments.

Few cases have considered the question here annotated.

In *St. Louis, I. M. & S. R. Co. v. Edwards* (Ark.) 127 S. W. 713, an action was brought to recover a penalty for a failure to give notice of the arrival of goods, as provided by a statute which also provided for demurrage charges against consignees for a failure to remove freight. The act was held to be a reasonable regulation in aid of commerce, and therefore valid as to interstate shipments, provided Congress or the Interstate Commerce Commission had not made regulations covering the same matters. The court here said: "We understand the rule established by the various decisions of the Supreme Court of the United States to be that, where Congress or the Commission created for that purpose has prescribed regulations upon a particular subject relating to interstate commerce, the same are exclusive in their operation, and the states no longer have power to make regulations on that subject; but that until Congress or the Commission has acted upon a particular matter of regulation, a state may enforce its regulations which do not directly burden interstate commerce. There being no regulation, as we have seen, either by Congress or by the Interstate Commerce Commission, on the particular subject now under consideration,—that is, of reciprocal demurrage,—the test as to the validity of the state regulation is whether it is a direct burden upon, or is in aid of, commerce." The court then proceeds to examine into the question of whether the statute before it, requiring the giving of notice, is a burden upon commerce, and concludes that it is rather in aid thereof than in the nature of a burden, and holds the act valid.

In *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.* 110 Minn. 25, — L.R.A.(N.S.) —, 124 N. W. 819, which was an action brought against the carrier, to recover the penalty prescribed for its failure to furnish cars, a so-called reciprocal demurrage statute, providing that "the period during which the movement of freight or furnishing cars is suspended on account of strikes, public calamities, accident, or any cause not within the power of the railroad company to prevent, or during which the loading or unloading of freight by shipper or consignee is delayed by reason of inclement weather which would make loading or unloading impracticable, or any cause not in the power of said shipper or

APPEAL by defendant from an order of the State Corporation Commission punishing defendant for contempt for violation of certain orders of the Corporation Commission. Reversed.

Statement by Hayes, J.:

On the 17th day of April, 1909, appellee filed his affidavit with the state corporation commission, in which he charges appellant with having violated two certain orders of said corporation commission, and asked that it be summoned to appear and show cause why it should not be fined for contempt. He avers in his affidavit that appellant, in violation of order No. 167, rule 10, of the corporation commission, on April 7, 1909, at its Cordell station, demanded storage of appellee on less than a car-load shipment, which, on April 7, 1909, had arrived at Cordell over appellant's railway, and which had been shipped to appellee as consignee; and that appellant, although appellee offered to pay the regular freight charges on the shipment, refused to deliver the same to him, unless he would pay, in addition to the regular freight charges, storage on the goods from forty-eight hours after their arrival until the date on which delivery was demanded. He complained, further, that appellant, in violation of rule 4 of the same order, failed to promptly notify him of the arrival of said freight. By a second count in his petition, he charges appellant with having violated order No. 168, rule 3, of the corporation commission, in that on March 3, 1909, it refused to accept from him, at its freight house or platform, freight for shipment in less than car-load lots, and required him to load the same into a car almost in-

accessibly located. During the trial on the petition, appellee was permitted, over objections of appellant, to amend his petition, so as to charge that appellant had refused, on March 20, 1909, in violation of order No. 10, § 2, of the corporation commission, to receive from him at its depot or platform a box of trees for shipment. The commission found that appellant had violated order No. 167 by refusing on April 7, 1909, to deliver the freight without payment to it of storage charges thereon, demanded by its agent, and that it had, on March 20, 1909, violated its order No. 10, § 2, as charged in the amended petition, and thereupon made an order fining appellant for contempt in the sum of \$100 on each count. It is to reverse this order that this proceeding is prosecuted.

Mr. R. A. Gleinschmidt, for appellant.
Mr. George A. Henshaw, for the State.

Hayes, J., delivered the opinion of the court:

Order No. 167, rule 10, of the state corporation commission, with the violation of which appellant is charged and has been convicted by the corporation commission, reads as follows:

"(a) Storage will be charged on all less than car-load freight held in or on railroad warehouses or platforms over forty-eight hours from the first 7 A. M. after notice of arrival, not including Sundays and legal holidays, at the rate of five (5) cents per ton for each twenty-four hours or fraction thereof.

"(b) Double these charges shall be assessed on freight of an explosive character.

consignee to prevent, shall be added to the free time allowed in this act, and counted as additional free time," was held to affect interstate commerce only remotely, and was upheld as a valid exercise of the police power.

In *Darlington Lumber Co. v. Missouri P. R. Co.* 216 Mo. 658, 116 S. W. 530, a state statute regulating demurrage charges was before the court, but the question of whether it violated the commerce clause of the Federal Constitution was reserved, since the pleadings did not present the question. The court, however, remarked: "That the state has a right within certain limits to regulate demurrage charges is not seriously disputed, nor could it be."

In *Ann Arbor R. Co. v. Michigan R. Commission* (Mich.) 127 N. W. 746, where one section of an act regulating the powers of the railroad commission provided that it should apply to the transportation of property "between points within the state, and to the receiving, switching, delivering, storing, and handling of such property, and 30 L.R.A. (N.S.)

all charges connected therewith," and another section gave the commission power to promulgate demurrage rules, it was held that the power to regulate demurrage was expressly limited to cases where the property in question had been transported "between points within this state," so that it was unnecessary to pass upon the power of the legislature to grant authority to regulate demurrage charges as to goods which were the subject of interstate commerce.

It has been held that the provisions of the interstate commerce act regulating the "delivering, storage, or handling" of freight, and requiring the rates to be reasonable, are broad enough to include demurrage. *Michie v. New York, N. H. & H. R. Co.* 151 Fed. 694.

For a note as to the validity of penalties for failure to furnish freight cars, and involving the power of the states to pass such acts, see *Patterson v. Missouri P. Coal Co.* 15 L.R.A. (N.S.) 733.

J. T. W.

"(c) The minimum charge for any one shipment shall be 10 cents.

"(d) Ten days' free time will be allowed on less than car-load shipments when destined to consignees who live at interior points 5 miles or more from the railroad station.

"(e) Freight on cars placed on delivery track, and subsequently unloaded in railroad warehouses or platforms, is subject to demurrage rules while on delivery track, and storage rules thereafter."

The shipment of freight involved in this case was a consignment of fruit trees of less than car-load lot, which originated in Shenandoah, Iowa, and was consigned to appellee at Cordell, in this state. That such shipment involves interstate commerce is too evident to require citations of authorities. Appellee resides more than 5 miles from the town of Cordell. When he demanded delivery of the shipment to him, more than forty-eight hours had elapsed since the arrival of the shipment, and notice thereof had been mailed to appellee by appellant's agent, and appellant's agent at Cordell refused to deliver the shipment, without payment of storage charges for the excess time the freight had remained in the depot after the lapse of forty-eight hours after its arrival. Appellee refused to pay the storage charges, and appellant refused to deliver the freight. Counsel for the railway company attacks the order of the commission upon the ground that order No. 167, rule 10, is void. The alleged invalidity of said order is urged by counsel in his brief upon three grounds: First, that it is in violation of a certain act of the territorial legislature extended in force in the state by the enabling act and the Constitution; second, that it is in violation of the act of Congress regulating interstate commerce, approved June 29, 1906, commonly known as the Hepburn act (act June 29, 1906, chap. 3591, 34 Stat. at L. 584, U. S. Comp. Stat. Supp. 1909, p. 1149); third, that said order is a burden upon and interferes with interstate commerce, in violation of the Constitution of the United States.

The first paragraph of § 18, art. 9, of the Constitution, confers upon the corporation commission power and authority and charges it with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in the state, in all matters relating to the performance of their public duties and their charges therefor. But the third paragraph of the section puts a limitation upon the power and authority granted in general terms by the first paragraph of the section, in the following language: 30 L.R.A. (N.S.)

"The authority of the commission (subject to review on appeal, as hereinafter provided) to prescribe rates, charges, and classifications of traffic for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations, or requirements for corporations or other persons shall be subject to the superior authority of the legislature to legislate thereon by general laws. . . ." Bunn's Constitution of Oklahoma, p. 60. This provision of the Constitution divides the subject-matters over which the corporation commission is given jurisdiction into two classes. The first class includes those matters over which its authority is paramount, to be exercised, however, under regulations prescribed by the Constitution or by law. The second class includes those matters over which its authority is inferior to the power of the legislature to legislate thereon by general laws. It is contended by appellant that the promulgation by the commission of order No. 167, rule 10, was the exercise of an authority belonging to the second class; that such order is and can be effective only to the extent that it is not in conflict with any general act of the legislature on the same subject-matter.

We think the contention that the making and promulgation of said order is by virtue of authority within the second class above described cannot be sustained. The matters over which the commission is given paramount authority are to prescribe all rates, charges, and classifications of transportation and transmission companies. Said order No. 167, rule 10, undertakes to fix the charges that transportation companies may make and collect for storage services rendered incidentally to the transportation and delivery of freight; and, in so far as it attempts to prescribe the charges that shall be made for such services, it clearly falls within the first class, and its actions thereon, when made in conformity to the regulations prescribed by law, are paramount. The territorial legislature, on the 15th day of March, 1905, passed an act entitled, "An Act to Regulate Demurrage and Storage Charges, and to Prevent Delays in Furnishing Cars and in the Transportation and Delivery by Railroad Freight Other Than Live Stock and Perishable Freight." Sess. Laws 1905, p. 143. Sections 7 and 8 of said act, in so far as said order No. 167, rule 10, of the commission, is involved in this cause, covers the same subject-matter as said order. By § 7, the act prescribes what notice of the arrival of freight shall be given by a common carrier to the consignee, and the manner

and time of the service of such notice. Section 8 provides that all package freight unloaded by railroad companies in their depots or warehouses, and all freight which, in order to release cars, is unloaded in the yard space of a railroad company, and not removed therefrom by the owner within forty-eight hours, computing from 7 o'clock A. M. of the day following legal notice of arrival, may be subject to the charge of storage for each day it remains in custody of the railroad company, and prescribes the rates of such storage charge. The validity of these provisions of that act, at the time of its enactment, although, under the terms of the act, they apply both to intrastate and interstate shipments, has not been questioned by either party; and assuming, without deciding, that said act was valid and in force in the territory of Oklahoma at the time of the admission of the state, and was extended in force by reason of § 2 of the schedule to the Constitution and of § 21 of the enabling act (act June 16, 1906, chap. 3335, 34 Stat. at L. 277), the same in all events became inoperative when the state corporation commission, in the exercise of the authority vested in it by the Constitution, promulgated rules and orders upon the subject of storage charges covering the subject-matter of said act, which are in conflict with said act. Whatever may be the power of the legislature to prescribe rules and regulations concerning the matters set forth in the first part of that portion of § 18, art. 9, quoted supra, in the absence of any action thereon by the corporation commission, when the corporation commission exercised its authority, its acts and orders, in so far as they are valid, superseded all rules and regulations by statute theretofore existing and covering the same subject-matter.

Section 35, art. 9, of the Constitution, provides that after the second Monday in January, 1909, the legislature may by law, from time to time, alter, amend, revise, or repeal sections from 18 to 34 inclusive, of said article, or any of them, or any amendment thereof. By reason of this provision, it is within the power of the legislature to enact, at any time after the second Monday in January, 1909, a law changing the powers of the corporation commission, as defined by § 18, supra; and the authority of said commission that, before the second Monday in January, 1909, was paramount to the authority of the legislature to legislate upon any subject within the authority of the legislature, is since that date subject to the superior authority of the legislature to legislate upon any subject of which the commission is given jurisdiction; but § 35

can have no operation in this case, because the general law, to wit, the act of the territorial legislature of March 15, 1905, was enacted and extended as a general law of the state (if it was extended) prior to the time the legislature is authorized by said § 35 to alter, amend, or repeal those sections of the Constitution which confer upon the corporation commission its powers, and define the character of such powers. The time at which said act became a law of the state, the power of the commission over the subject-matter of the act was supreme.

Order No. 167, rule 10, is made to apply both to intrastate and interstate shipments. This proceeding grows out of an effort of the commission to enforce the order as to an interstate shipment. The next inquiry, therefore, that arises under appellant's contentions, is: Is said order incompatible with any act of the Congress of the United States upon the same subject-matter, enacted by virtue of the power delegated to Congress by § 8, art. 1, of the Federal Constitution, to regulate commerce with foreign nations and among the several states and with the Indian tribes? In *Covington & C. Bridge Co. v. Kentucky*, 164 U. S. 204, 38 L. ed. 982, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087, the court discussing the power of the states over the subject of commerce, said: "The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes: First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the state cannot interfere at all."

The grant to Congress of the power to regulate interstate commerce does not, in the absence of congressional legislation upon the subject, imply a prohibition on the states to exercise the same power in enacting local laws designed to secure the performance by an interstate carrier of the duties imposed upon it by the common law, and to secure the safety and comfort of passengers. *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 966. The cases in which it has been held that a state may, in the absence of congressional inhibition, enact laws and regulations on matters local in their nature, which tend to enforce the proper performance by interstate carriers of duties arising in the state, and which do not impede, but aid and facilitate, intercourse and traffic, although such laws or regulations may incidentally affect interstate commerce, are numerous, and the doctrine is too well settled to admit of doubt. *Smith v. Alabama*, 124 U. S. 465,

31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Chicago & N. W. R. Co. v. Fuller, 17 Wall. 560, 21 L. ed. 710; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Chicago, M. & S. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; Richmond & A. R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 336; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Asbell v. Kansas, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485, 14 A. & E. Ann. Cas. 1101; Missouri P. R. Co. v. Larabee Flour Mills Co. 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214. But when any such laws, passed by the state in the exercise of its police power, come in conflict with an act of Congress upon the same subject-matter, or the power granted to Congress over any such matter has been exercised by that body by the enactment of legislation upon the precise subject-matter covered by the act of the state legislature, the law of the state must yield, and is superseded by the Federal act. Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802. In the case last cited, the statute of Texas made it unlawful for any railroad company in that state to charge and collect, or to endeavor to charge and collect, from any consignee, a greater sum for transporting freight than was specified in the bill of lading. One of defendant's agents refused to deliver to plaintiff a consignment of furniture unless plaintiff paid the freight charges in accordance with the rates named in the printed tariff sheet posted in the office of the company, as required by the act of Congress known as the interstate commerce act (act Feb. 4, 1887, chap. 104, 24 Stat. at L. 379), as amended by act March 2, 1889, chap. 382, 25 Stat. at L. 855, U. S. Comp. Stat. 1901, p. 3154, then in force, which amount was in excess of the charges specified in the bill of lading. Speaking of the result that must follow a conflict between the national act relating to interstate commerce and the act of the state relative thereto, the court said: "Clearly, the state and the national acts relate to the same subject-matter and prescribe different rules. By the state act, the bill of lading is made controlling as to the rate collectable, and a failure to comply with that requirement exposes the delinquent

carrier to its penalties, while the national statute ignores the bill of lading, and makes the published tariff rate binding, and subjects the offender, both carrier and agent, to severe penalties. The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. . . . It is no answer to say that in this case the defendant might have complied with both the state and the national statute. . . . The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes, operating upon the same subject-matter, prescribe different rules. In such case one must yield, and that one is the state law."

Section 1 of the Hepburn act (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1909, p. 1149), defines the word "railroad" as follows: "The term *railroad*, as used in this act, shall include all bridges and ferries used or operated in connection with any railroad; . . . and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all *freight depots*, yards, and grounds used or necessary in the transportation or delivery of any of said property. . . . The term *transportation* is defined by the same section to "include cars and other vehicles, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership, or of any contract, expressed or implied, for the use thereof, and all services in connection with the *receipt*, *delivery*, elevation, and transfer in transit, ventilation, refrigeration, or icing, *storage* and handling of property transported. . . ." (Italics are ours.) It is provided by the same section that it shall be the duty of every carrier subject to the provisions of this act to provide and furnish "transportation upon reasonable request therefor, and at just and reasonable rates."

Section 2 of the act requires every common carrier subject to the provisions of the act to file with the Interstate Commerce Commission, and print and keep open to public inspection, schedules allowing all rates, fares, and charges of transportation between different points on its own route and points on the route of any other carrier, and provides that "the schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing

charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." All changes in the rates, fares, and charges filed and published by the common carrier, as required by the act, except those made after thirty days' notice to the Commission and to the public, are prohibited, and the same section prohibits any carrier, except as otherwise provided by the act, to engage or participate in the transportation of passengers or property as defined in the act, unless the rates, fares, and charges upon which the same are transported by the carrier have been filed and published as required by the act; and a carrier is further prohibited from extending to any shipper or person any privilege or facility in the transportation of passengers or property, except such as are specified in the tariffs filed and published by it. It must be borne in mind that "transportation," as defined by the act, includes storage and all services rendered by the carrier in connection with the delivery of property transported. A violation of the act is made a misdemeanor, and subjects the offending corporation to a fine of not less than \$1,000, nor more than \$20,000, for each offense.

Section 4 authorizes and empowers the Interstate Commerce Commission to hear complaints made against any carrier, charging it with violation of any of the provisions of the act, and to determine whether any regulation or practice whatsoever of such carrier, affecting the rights of complainant, is unjust or unreasonable, unjust or unduly preferential, prejudicial or otherwise in violation of any of the provisions of the act, and determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to thereafter be made, and to prescribe what regulation or practice in respect to such transportation is just, fair, and reasonable to be followed thereafter. Rebating and giving advantages and preferences to shippers is prohibited.

A complaint against a carrier for violation of the act may be made by any person, firm, corporation, association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization, or railroad commissioner or railroad commission of any state or territory. Act February 4, 1887, chap. 104, § 13, 24 Stat. at L. 383, U. S. Comp. Stat. 1901, p. 3164.

It appears to us that it was the purpose of Congress to assume jurisdiction over the 30 L.R.A. (N.S.)

entire subject-matter relative to interstate shipments from the time of the origin of such shipment down to the point where the shipment is entirely at an end and its character as a transaction of interstate commerce ceases. That such was the purpose of Congress is evidenced by the language of the act, and it is further emphasized when the conditions and the circumstances out of which that act originated and the evils it was intended to remedy are recalled. A system of rebating and discrimination by interstate carriers in favor of some shippers and localities, and against other shippers and localities, had become so prevalent, unjust, and disastrous in its effects that it became necessary for Congress to exercise directly, and through the agency of the Interstate Commerce Commission, its power over interstate commerce to an extent that had not theretofore been deemed necessary. But if Congress may not control the storage of interstate shipments and charges therefor, occurring before delivery of the shipment, and require the establishment of uniform rates as to shippers and localities under similar circumstances and conditions, there is left to the carrier a ready means of defeating the object of the law; or where the state law does not prohibit, or where, under a more liberal law in one state than in another, an interstate carrier could give to its patrons, or some of them, storage facilities and rates which it refuses to others in the same state or in another state; or where no state legislation existed upon the subject, carriers could fix a low charge or no charge at all for storage in one state, and a high rate in another state, upon the same class of freight and under similar circumstances; and if all states legislated upon the subject, it is hardly probable that there would be uniformity in the legislation, and by the law of one state a shipper would be required to pay a much lower rate, and probably have a longer free time for delivery, than a shipper in an adjoining state, under a law which would require a higher rate and a shorter free time for delivery of any consignment. Under such conditions, discrimination between shippers and localities could be as effectively accomplished in many instances as if the carrier were permitted to rebate on the charges for services rendered in the transit of the shipment.

The contention of appellee, that storage of freight after its arrival at the point of destination, awaiting the delivery of the shipment to the consignee, and charges therefor, are not part of an interstate commerce transaction, cannot be sustained. An interstate shipment does not come to an end until a delivery of the consignment

to the consignee. *State v. Eighteen Casks of Beer* (Okla.) 25 L.R.A. (N.S.) 492, 104 Pac. 1093. And the mere placing of an interstate shipment in the carrier's depot or freight house to await delivery to the consignee does not terminate the interstate transaction, and subject the property to the police power of the state. *Heyman v. Southern R. Co.* 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130.

The evidence fails to disclose whether appellant has ever filed with the Interstate Commerce Commission a schedule of charges for storage, or a statement of its practice or regulations relative to storage of freight after its arrival at point of destination, and before delivery to the consignee. An agent of appellant testified that the charges demanded on the freight in this controversy were made under the direction of a circular received by the agent of the company at Cordell; but the record does not disclose whether this circular, attempting to fix the rate of charge on storage, had ever been filed with the Interstate Commerce Commission, or was in conformity with any order of that Commission.

In *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214, the mill company made application to the courts of Kansas for a mandamus to compel the railway company to transfer for its shipments of grain and flour in car-load lots, consigned from or to other states, from the tracks of the Atchison, Topeka, & Santa Fé Railway Company, over the transfer track of that company and a portion of the main track of the defendant, and a spur track to the mill and elevator of plaintiff. The railway company rendered similar services to all other shippers at the same station, but had refused to render this service to the mill company, because of disagreement between them over a demurrage charge on certain shipments of freight. The practice of the railway company of rendering such service to the other shippers, and of refusing it to the mill company, was a discrimination against it, in violation of its common-law duties. From a judgment of the supreme court of Kansas affirming the decree of the trial court awarding the writ, proceedings in error were taken to the Supreme Court of the United States, where the railway company questioned the jurisdiction of the Kansas courts upon the ground that the services which the mill company sought to require them to render were incidental to and directly affected interstate commerce, and that jurisdiction thereof had been conferred upon the Interstate Commerce Commission. The court, in an opinion by Mr. 30 L.R.A. (N.S.)

Justice Brewer, held that while jurisdiction had been conferred upon the Interstate Commerce Commission by act of Congress to hear complaints involving a practice of an interstate carrier, whereby the carrier discriminates against a shipper, and to make orders correcting the same, a mere delegation of such power to the Commission did not disturb the authority of the state to compel the carrier to discharge its common-law duties, and so render its service to shippers as not to discriminate between them, where it appeared that the Commission had not acted upon the matter directly involved. Mr. Justice Brewer, speaking for the majority of the court, said: "But the fact that Congress has intrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the state in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not disturb the authority of the state."

But we think that the facts in the case at bar, and those parts of the interstate commerce act and acts amendatory thereof to be applied, distinguish the case at bar from that case. We understand the effect of the decision in *Missouri P. R. Co. v. Larabee Flour Mills Co.* to be that, where a railway company renders a service to some shippers which it refuses to others, the remedy provided by the Federal act is only cumulative, and does not prevent a complaining party from resorting to the state courts to compel the carrier to discharge his common-law duties to him by process of that court, where the Interstate Commerce Commission has not acted upon the subject. But, as to what services a carrier shall render in connection with an interstate commerce shipment, and what charges it shall make therefor, the Federal statute not only makes it the duty of a carrier to file with the Commission a schedule of its storage charges and all services to be rendered by the carrier in connection with the shipment and delivery of same, and prohibits it to charge any other rates than those specified in the tariff filed with the Commission, but also prohibits it from engaging or participating in transporting any property until it does file such rates and charges as required by the act; and if a carrier violates the act by making charges without having filed its schedule of rates, as required by the act, or charges rates in excess of those fixed by its tariff filed, it may be punished therefor,

and a tribunal is provided in which complaint may be made of such violation of the act, and a procedure prescribed, and a remedy provided. If a state may, after the Hepburn act became effective, regulate by statutes, or by order of some commission vested with administrative or legislative power, the service that a carrier shall render in connection with an interstate shipment, and the delivery thereof, and fix the charges for such services, then we have the Federal act prohibiting a carrier from making any charge until the same has been fixed by the filing of its tariff with the Commission, and from rendering any other free service in connection with the delivery of the property than that named in the tariff; and at the same time may have a regulation by state authority, authorizing and requiring it to do the very thing the Federal act directs, that all charges made shall be just and reasonable, and, for an unjust and unreasonable charge, a remedy is provided.

We have been able to find no case from the Supreme Court of the United States, whose decision upon the question here involved would be controlling, that is decisive of this case; but *State ex rel. Railroad Commission v. Adams Exp. Co.* 171 Ind. 138, 19 L.R.A.(N.S.) 93, 85 N. E. 337, 966, if not directly in point, strongly supports the conclusion we reach. That was a proceeding to compel an express company by mandamus to deliver, in cities having a population of 2,500 or more, express free to the places of business and residences of the consignees, as required by a certain act of the legislature of the state of Indiana, approved March 6, 1901 (Laws 1901, chap. 62). It was held that the state statute had been superseded by the Hepburn act, and that the writ of mandamus should be denied.

We also think that the reason urged against the validity of the order of the corporation commission under appellant's third contention is sound. A state, in the exercise of its police power, may, by act of its legislature or by rule of some administrative agency upon whom the power has been conferred to make reasonable regulations, regulate by reasonable rule the place, manner, and time of delivery of merchandise moving in the channels of interstate commerce; but it must not make such regulations as will burden or interfere with interstate commerce. *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 142, 26 Sup. Ct. Rep. 722; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365. See also *Central R. Co. v. Murphey*, 196 U. S. 194, 49 L. ed. 30 L.R.A.(N.S.)

444, 25 Sup. Ct. Rep. 218, 2 A. & E Ann. Cas. 514; and *Southern R. Co. v. Com.* 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70. In *Central R. Co. v. Murphey*, supra, it is held that imposition by state statute upon the initial or connecting carrier of interstate commerce of the duty of tracing a shipment of freight and informing the shipper where and how the same was lost, damaged, or destroyed, when applied to interstate commerce, was void as in violation of the commerce clause of the Federal Constitution. In *Houston & T. C. R. Co. v. Mayes*, a statute of the state of Texas, requiring that when a shipper of freight shall make requisition for a number of cars to be furnished at any point indicated within a certain number of days from the receipt of the application, and shall deposit one fourth of the freight with the agent of the company, the company, failing to furnish the cars, shall forfeit \$25 per day for each car to be furnished, providing, however, that the law should not apply in case of strikes or other public calamities,—was held an infringement upon the power of Congress to regulate interstate commerce, and declared void. In *McNeill v. Southern R. Co.* supra, it was held that an order of the state corporation commission requiring railway companies to deliver cars from another state to the consignee on a private siding beyond its own right of way was a burden on interstate commerce and void.

In the case at bar, the order of the corporation commission requires the railway company, in every case where the consignee lives 5 or more miles from the station of the railway, to give to the consignee ten days' free storage of his shipment, irrespective of any and all contingencies, conditions, or circumstances. In the absence of congressional legislation upon the subject, a state may, in the exercise of its police power, require that a consignee shall have a reasonable time after the arrival of an interstate shipment to receive and take the same from the premises of the carrier, without extra charge than that made for the service of transporting the shipment, and might prescribe and require of the carrier to give notice of the arrival of any shipment; but the rule in question undertakes to do more than this. Although the consignee be present when the consignment arrives, or although, not present, he has immediate notice of its arrival, and no cause exists to prevent his receiving same immediately, and removing it from the charge of the carrier, the order directs and compels the carrier to become his warehouseman for a period of ten days, free of charge. It gives to the consignee who has notice of the arrival of his freight, and an opportunity

to remove it, the same privilege and free service that it gives to him who has not or may not have such notice; the only condition being that the consignee lives 5 miles or more distant from the station. It is true, in this case, that the consignee went to receive his freight immediately upon receipt of notice; but the constitutional validity of a law is to be tested, not by what has been done under it, but what may be done. *Southern R. Co. v. Com.* supra; *Stuart v. Palmer*, 74 N. Y. 191, 30 Am. Rep. 289. The common law imposes no duty upon the common carrier to render services as warehouseman other than such as are necessarily incidental to the transportation of the property. The order of the corporation commission, requiring that free storage of ten days be given on all shipments to consignees living 5 or 10 miles distant from the carrier's depot, although the consignees, have notice of the arrival of the freight and opportunity to remove it, requires the carrier to give its property to such shippers for said period of time to be used as a warehouse. It thereby imposes an additional and unreasonable burden upon the carrier, and is, as to interstate shipments, void. Whether or not the order is not void, both as to interstate commerce and as to intrastate commerce, in that it requires certain free service to be given, in cases not necessarily incidental to the performance of its duties as a common carrier, and thereby takes property without due process of law, need not be determined here, for the application of the order to an intrastate shipment is not involved in this proceeding.

For reversal of the decree of the commission adjudging appellant guilty of contempt upon the second count of the affidavit or petition of appellee, appellant urges that the commission erred in permitting appellee, during the progress of the trial, to amend, or to have considered amended, his affidavit so as to allege a violation of order No. 10, instead of order No. 168, as originally alleged in the affidavit. During the progress of the trial, it was made to appear that order No. 168, with violation of which appellant was charged in the second count of the affidavit, was not in force and effect, either at the time the alleged offense was committed, or at the time of the trial. The commission, on its own motion, ruled that the affidavit could be and should be amended so as to show a violation of order No. 10, instead of order No. 168. These two orders are in most respects the same; there being, however, in some respects a difference in their provisions. The trial proceeded upon the theory that the amendment had been made, but no amendment in fact was made,

nor a new affidavit filed. The action of the commission was error.

On May 29, 1908, the legislature enacted a statute providing for the punishment of any corporation, person, or firm for contempt for the violation of any order or requirement of the corporation commission. *Sess. Laws 1907-08*, p. 228. Section 1 of the act makes any corporation, person, or firm that violates an order of the commission subject to a fine of not exceeding \$500, and each continuance of the violation a separate offense. Section 2 of the act prescribes the procedure for contempt proceedings. It is provided that such proceedings may be instituted by any citizen of the state or other parties affected by the order of the commission, by filing an affidavit with the corporation commission, setting forth the acts of omission or failure to comply with such order or requirement.

Since the adjudication provided by the statute in these proceedings is wholly punitive, a proceeding thereunder must be deemed quasi criminal, if not criminal, and, in the prosecution of such proceeding, the procedure prescribed by the statute should be strictly pursued. 4 *Enc. Pl. & Pr.* pp. 767, 770, and authorities there cited. Before any proceeding for contempt may be begun, an affidavit setting forth the fact prescribed by the statute must be presented to and filed with the commission, and an amendment to such affidavit must likewise be verified, and to permit the same to be amended by interlineation, without the amendment being sworn to, is error. *State ex rel. Thompson v. Lavery*, 31 Or. 77, 49 Pac. 852; *State v. Kaiser*, 20 Or. 50, 8 L.R.A. 584, 23 Pac. 964. See also *Back v. State*, 75 Neb. 603, 106 N. W. 787.

Since, for the foregoing reason, this portion of the order of the commission must be reversed, it is unnecessary to decide whether, if the amendment of the affidavit had been made by the filing of a new affidavit of appellee, the proceeding would have had to have been treated as a new proceeding, and whether it would not have been error for the commission to have continued with the trial over the objections of defendant, that it had not had an opportunity to prepare its defense to the new charge. Appellant also urges that order No. 10 is void, for the reason that it attempts to regulate interstate commerce. Section 2 of order No. 10 provides: "Freight to be transported in less than car-load lots shall be delivered to and received by each initial carrier at its freight houses, platforms, or sheds, as may be customary, properly marked, and immediately after such delivery, and upon demand made to the office agent of the carrier or other agent in charge of

each station, junction, or intersection, together with proper tender of freight charges, if demanded in advance, and proper notification of the name of the consignee and destination, a proper bill of lading thereof shall be delivered to the shipper, and the carrier's control over and responsibility for such freight shall commence." But neither the affidavit filed in this case nor the evidence discloses whether the consignment of freight which appellee is alleged to have tendered to appellant's agent, the acceptance of which was refused by the agent, was an interstate or intrastate shipment, and we therefore do not pass upon this contention.

The order of the Commission is reversed, and the cause remanded.

Dunn, Ch. J., and Kane and Turner, JJ., concur. Williams, J., not participating.

OKLAHOMA SUPREME COURT.

KENNER WHITTAKER ALLISON, Sr.,
Appt.,
v.
ANNA BRYAN.

(Two Cases.)

(— Okla. —, 109 Pac. 934.)

Pleading — dismissal — docketing case — prejudice.

1. In the absence of a showing of prejudice, a petition filed in the office of the clerk of the district court, the object and purpose of the action being to secure the right of visitation on the part of a parent deprived of the custody of a child, will not be dismissed because entitled in, and by the clerk given, the same docket number as a former case between the same parties, which had been finally closed in that court.

District court — child — parent's right of visitation — jurisdiction.

2. The district court is a court of general jurisdiction, in which jurisdiction of actions both legal and equitable is vested, and, in the exercise of its equity power, it has jurisdiction to entertain, hear, and determine the question of the right of visitation on the part of a parent denied the custody of a child.

Pleading — failure to reply — effect.

3. Where a defendant voluntarily goes to trial without a reply being filed to the answer, when he is not bound to do so, he is thereby held to have waived it, and is regarded as consenting to go to the proof of the answer, as if it were denied.

Appeal — briefs — points — waiver.

4. It is essential that all points upon

which counsel rely for a reversal of a cause be made in the brief, and properly made; if not so made, they are waived. It is not enough to assert in general terms that a ruling of the trial court is wrong; a fair effort must be made to prove that it is wrong, or the point will not be considered as having been made.

Illegitimate child — adoption — consent of mother.

5. Under § 4900, Comp. Laws (Okla.) 1909, the mother of an illegitimate, unmarried minor child is entitled to its custody, services, and earnings, and under § 4919, id., such child cannot be adopted without her consent, if she be living and has not forfeited her rights therein, and an adoption sought to be made without her consent is not valid as to her, notwithstanding the consent of the father of the child, who, acting under § 4931, id., had previously received the child into his home, and in a lawful manner effected its legitimation.

Same — adoption by father — right of mother to visit — contempt of court.

6. The mother of an illegitimate, unmarried minor child which has been legitimated by its father under the provisions of § 4931 of the Compiled Laws of Oklahoma 1099, does not by reason of such legitimation, where same will not conflict with the best interests of the child, forfeit the right to visit the child or to have it visit her,

Note. — Validity of adoption without consent of natural parents.

As to the right of parties to adoption proceedings, or their privies, to attack a decree of adoption, see Phillips v. Chase, post, 159, and note thereto.

Necessity of consent or notice to parents — in general.

The status of adoption was unknown at the common law, and hence is governed entirely by statute; since it involves a change of status primarily affecting rights of the natural parents, the child, and the adopting parents, it is generally necessary that the consent of these parties to the adoption be obtained; but as it is a duty of the state of the child's domicile to act as *parens patriæ*, to the extent, at least, of finding a home and protector for every child within its borders, it is sufficient that the state consent to the adoption of the child, or authorize by legislative enactment the adoption of a child within its borders, under prescribed conditions. While ordinarily the consent of the natural parents to the adoption of their child is necessary in order to deprive them of their parental rights, these rights are not absolute in their nature, and it is lawful for the state to provide for the forfeiture of such rights, and for the adoption of a child, without notice to, or consent of, the parents, where, in accordance with such statutory provision, they have forfeited their parental rights.

In Stearns v. Allen, 183 Mass. 404, 97

and failure and neglect, without sufficient cause, on the part of the father, to observe a valid order of a court enforcing such right, is punishable as a contempt, and in such a case it is no defense that his wife objected or refused to consent to his obedience to the same.

(May 31, 1910.)

CONSOLIDATED appeals from judgments of the District Court for Cleveland County in plaintiff's favor in actions brought to compel the adopting father of an illegitimate child to permit its natural mother to visit it, and to punish him for contempt of court for his alleged failure to comply with a court order directing him to allow the mother to visit such child. **Affirmed.**

The facts are stated in the opinion.

Am. St. Rep. 441, 67 N. E. 349, in considering the general question as to the rights of natural parents in proceedings for the adoption of their child, the court said: "Adoption involves a change of status. So far as the adopting parents are concerned, the change cannot be made without their consent. So far as an infant child is concerned, the state, as his protector, may make the change for him. The natural parents of the child should be considered and their natural rights should be carefully guarded, but their rights are subject to regulation by the state, and if these come into conflict with the paramount interests of the child, it is in the power of the state by legislation to separate children from their parents when their interests and the welfare of the community require it."

—where child has been abandoned.

It is frequently provided by statute that the consent of natural parents need not be obtained or notice given them of proceedings to adopt a child whom they have abandoned, or who has been taken from them by some judicial proceeding on the ground of improper guardianship, or other similar ground. In such cases the existence of the fact authorizing the adoption is jurisdictional, and the court has jurisdiction of the proceeding on the finding by it of the existence of this fact, whether based upon proper evidence or not; and the judgment or order of adoption entered therein is conclusive, at least as to the parties to the proceedings, and those claiming through or under them. *Re Camp*, 131 Cal. 470, 82 Am. St. Rep. 371, 63 Pac. 736; *Re McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80, 74 Pac. 1039; *Leonard v. Honisfager*, 43 Ind. App. 607, 88 N. E. 91; *Egoff v. Madison County*, 170 Ind. 238, 84 N. E. 151; *Dupre's Succession*, 116 La. 1091, 41 So. 324; *Re Edds*, 137 Mass. 346; *Tiffany v. Wright*, 79 Neb. 10, 112 N. W. 311; *Re Larson*, 31 Hun, 539; *Von Beck v. Thomsen*, 44 App. Div. 373, 60 30 L.R.A. (N.S.)

Messrs. Milton Brown and Flynn, Ames, & Chambers for appellant.

Messrs. J. B. Dudley and Giddings & Giddings, for appellee:

Mrs. Allison was not a necessary party to either action.

Krug v. Davis, 87 Ind. 590; *Re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407; *Keith v. Ault*, 144 Ind. 626, 43 N. E. 924; *Barnes v. Allen*, 25 Ind. 222; *Lawson v. Scott*, 1 Yerg. 92.

Dunn, Ch. J., delivered the opinion of the court:

Appellant has appealed to this court two cases in which judgments have been rendered against him in the district court of Cleveland county; as they are closely associated, they have been consolidated, and will be considered together. The primary

N. Y. Supp. 1094, affirmed without opinion in 167 N. Y. 601, 60 N. E. 1121; *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; *Nugent v. Powell*, 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23.

The fact that parents were not served with notice of proceedings to adopt their child does not render an order of adoption entered in such proceeding invalid as to the parties thereto and their privies, although the proceeding might be successfully attacked by the parents for that reason. *Coleman v. Coleman*, 81 Ark. 7, 98 S. W. 733; *Woodward's Appeal*, 81 Conn. 152, 70 Atl. 453; *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Beatty v. Davenport*, 45 Wash. 555, 122 Am. St. Rep. 937, 88 Pac. 1109, 13 A. & E. Ann. Cas. 585.

In *Woodward's Appeal*, the court reasoned that even though the parents of the adopted child had the right to contest the validity of the adoption decree in so far as it deprived them of their legal parental rights, because no notice of the proceeding was given them, it did not follow that a decree giving to the infant statutory capacity of inheritance from a stranger, where rendered in pursuance of jurisdiction conferred by statute, and in the manner prescribed thereby, must be held void for that reason.

Furgeson v. Jones, 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842, asserts a contrary rule. It is there said that if the parents are living, their consent to the adoption of their child must be obtained, and is a prerequisite to jurisdiction; that "without such consent, jurisdiction does not attach, and the court is without authority to act and make a decree of adoption, and if it undertakes to do so its decree will be a nullity; not voidable, but void; and may be collaterally assailed in any action." This language was used in holding that the validity of adoption proceedings could be successfully questioned on the ground of

facts out of which they grow are set forth and considered in the case of *Allison v. Bryan*, 21 Okla. 557, 18 L.R.A.(N.S.) 931, 97 Pac. 282, 17 A. & E. Ann. Cas. 408, an opinion of this court delivered June 25, 1908, and they will not be reviewed here further than is necessary to state the subsequent acts out of which the controversies in these cases arose.

Under the judgment rendered in the opinion mentioned, exclusive custody of the child involved (a boy of tender years) was taken by Kenner Whittaker Allison, Sr. No provision or arrangement was entered into between him and the child's mother to permit her to visit it, and on August 10, 1909, she filed, as plaintiff, her petition in the district court of Cleveland county.

failure to give notice to the parents by parties to the proceeding, or their privies, for the purpose of depriving the child of his right to inherit from his adopted parents.

Where a statute authorizes the depriving of parents of their child where they are unfit to have his custody or control, and a proceeding under such statute is had after due notice to the parent, and the child is taken from their custody and transferred to that of a board, in proceedings thereafter taken to adopt such child, notice thereof to the parents, or their consent thereto, is not necessary. *Egoff v. Madison County*, supra.

As to a natural parent who did not consent to the adoption of his child, and who received no notice, actual or constructive, of the proceedings to adopt, the order of adoption is not conclusive, and he may dispute the existence of the fact upon which depended the jurisdiction of the court to entertain the proceeding and render the judgment of adoption. *Willis v. Bell*, 86 Ark. 473, 111 S. W. 808; *Miller v. Higgins* (Cal. App.) 111 Pac. 403; *Sullivan v. People*, supra; *Lee v. Back*, 30 Ind. 148; *Re Carter*, 77 Kan. 765, 93 Pac. 584; *People ex rel. Cornelius v. Callan*, 124 N. Y. Supp. 1074; *Re Olson*, 3 Ohio N. P. 304; *Booth v. Van Allen*, 7 Phila. 401; *Re Sleep*, 6 Pa. Dist. R. 256; *Beatty v. Davenport*, supra; *State ex rel. Le Brook v. Wheeler*, 43 Wash. 183, 86 Pac. 394; *Schiltz v. Roenitz*, 86 Wis. 31, 21 L.R.A. 483, 39 Am. St. Rep. 873, 56 N. W. 194.

Thus, in *Sullivan v. People*, the court said: "A parent has the right to the custody of his child as against all the world, unless he has forfeited his right, or the welfare of the child demands that he should be deprived of it. To divest him of his rights without notice and an opportunity to be heard is not only contrary to every principle of natural justice, but is prohibited by the Constitution. The court cannot be clothed with authority to decree that a parent has deserted his child and forfeited his natural rights without notice to him. . . . Whether the statute requires notice to a parent within the state who is charged 30 L.R.A.(N.S.)

the home of appellant, in which she charged him, as defendant, with having had the sole custody of the child since the 1st day of October, 1908, and that she had never had it in her possession since that time, nor had she been permitted to see it or exercise any rights of a mother over it for a period of eleven months. That she had applied to the defendant for permission to see her said child, which was being gradually estranged from her, and that, owing to its tender years, she would soon pass from its memory and become unto it as a stranger. That she had a deep affection for her offspring, and a longing for permission to see and commune with it, but that, unless the court made an order requiring defendant to produce the child,

with having deserted his child, or not, there can be no valid adjudication depriving him of his parental rights without notice. The decree of adoption was void as against him, and does not entitle respondent to the custody of the child."

This doctrine was applied in *Schiltz v. Roenitz*, supra, and an order of adoption based upon a finding of abandonment was held not to be conclusive evidence that the natural parent had abandoned the child, or had been lawfully deprived of his services, in an action by him to recover of the adoptive parents for such loss of services and for alienating the affections of his child, the natural parent alleging fraud and bad faith on the part of the adoptive parent in making the charge of abandonment and thereby procuring the order of adoption. As to the effect upon the rights of the natural parent of an order of adoption entered under such circumstances, the court said: "The contention that the county court could, without notice to the plaintiff, or opportunity to him to defend against the charge of abandonment, grant an order depriving the plaintiff of his most sacred natural rights in respect to his child, so jealously guarded and protected by the laws, offends against all our ideas respecting the administration of justice, and is opposed to the principles which lie at the foundation of all judicial systems not essentially despotic in their character and methods of procedure. It is provided by the 14th Amendment to the Constitution of the United States, that 'no state shall . . . deprive any person of life, liberty, or property without due process of law.' Due process of law, as applied to judicial proceedings, includes a charge before some judicial tribunal, and notice to the party in some form, either actual or constructive, and an opportunity to appear and produce evidence in his defense and be heard by himself or counsel. To proceed to adjudicate in the absence of notice to the party 'would be contrary to the first principles of the social compact, and of the right of administration of justice.'"

The rule thus broadly stated in *Schiltz v. Roenitz* is apparently modified in *Parsons*

and to permit her to visit and enjoy its society, defendant would continue to refuse it. She then prayed the court to make an order requiring defendant to produce the child, and to make an order for such temporary custody as might be just and proper. This petition was by the clerk of the district court given the same number as that of the former case, above referred to, which likewise arose in that court. Defendant filed a motion to strike the petition from the files for the reason that the former case had been finally concluded by the judgment of this court; and for the further reason that plaintiff was in contempt by having unlawfully kidnapped and removed from the jurisdiction of both courts the child in question, after the rendi-

tion of judgment by the supreme court, and had taken no steps whatever to exonerate herself from the contempt involved. This motion was by the court overruled.

Thereafter, and on September 21, 1909, an answer was filed in which the defendant admitted that plaintiff was the mother of the child, and set up that he had the exclusive custody, under the judgment and decree of that court, based on the facts and judgment directed and handed down by the supreme court; that the plaintiff was in contempt of both courts, of which she had not purged herself, and that the best interests of the child required the exclusive custody and control of the defendant over it, and required that it be not disturbed, and that the court had no jurisdiction to

v. Parsons, supra, wherein the court said that the fact of abandonment judicially determined was essential to the jurisdiction of the court in a proceeding to adopt a child without notice to the natural parents, and without their consent, where based upon a statute authorizing the adoption of an abandoned child without notice to, or consent of, his parents. And it was further said that it was not essential to jurisdiction that the fact of abandonment should be determined on proper evidence, or in accordance with the truth, because mere error in that regard did not affect the jurisdiction, since, if jurisdiction be obtained to determine the fact, its determination wrong, or on insufficient or improper evidence, was immaterial on the question of the legal right to proceed judicially to the next step, the court adding: "A judicial determination may be contrary to conclusive evidence or legal evidence, or without any evidence, yet cannot be impeached for want of jurisdiction." Referring to Schiltz v. Roenitz, the court said that the conclusion reached therein to the effect that, in the absence of notice to the parents, an order of adoption was not conclusive evidence under this statute of the fact of abandonment, although based upon a finding by the court of that fact, was but affirming what was clearly held inferentially in that case, that the order was nevertheless valid as to the child, obviously meaning the court had jurisdiction that far, which, of course, included jurisdiction of the petitioner who commenced the proceeding.

These cases were both referred to in *Re McCormick*, 108 Wis. 234, 81 Am. St. Rep. 890, 84 N. W. 148, the *Schiltz Case* on the point that an order of adoption under this statute, based upon the abandonment of a child by its parents, was clearly a nullity as against them, where no notice was given them, and no finding of abandonment was made by the court. *Parsons v. Parsons* was referred to and cited to the point that want of notice to the parents, however, did not take away the jurisdiction of a county court to determine whether the parents had in fact abandoned the child.

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In *Nugent v. Powell*, adoption proceedings were sustained so far as concerned the right of the adopted child to inherit from his adoptive parents, although the father had no notice of the proceeding, and did not consent to the adoption; it was, however, conceded that, notwithstanding these proceedings, the father might, at any time since they took place, have brought an action for the recovery of possession or custody of the child, in which case the proceedings would constitute no bar to such action, or be conclusive upon him of the fact of abandonment.

Where a mother has done nothing which will operate as a relinquishment or abandonment of the child, and the adoptive parents know of her residence at the time of the adoption proceedings in a juvenile court, and she is not notified thereof, the proceedings are void for want of jurisdiction. *Re Carter*, 77 Kan. 765, 93 Pac. 584; *Willis v. Bell*, 86 Ark. 473, 111 S. W. 808; *People ex rel. Cornelius v. Callan*, supra.

And where fraud is practised upon the court, and an order of adoption is procured by falsely representing that the child proposed to be adopted has been abandoned by his parent or parents, upon whom no notice is served, and hence no opportunity given to refute the charge, the proceeding will be reopened at the instance of such parent, or a hearing had upon habeas corpus. *Lee v. Back*; *Re Carter*; *Booth v. Van Allen*; *Beatty v. Davenport*; and *Miller v. Higgins*,—supra.

Where a father is not a party to a proceeding that resulted in an order for the adoption of his child, and hence has not had his day in court, and is deprived of his right to object to the adoption because of false statements as to his alleged abandonment of the child, the order of adoption cannot be urged as an effective objection to awarding the custody of the child to the father on habeas corpus, when it appears that such custody will be for the best interest of the child. *People ex rel. Cornelius v. Callan*, supra.

And in *Re Carter*, the mother was held entitled to maintain habeas corpus proceed-

grant the relief prayed for. A trial was had on this petition and answer without a reply, and the court, after hearing the evidence, and considering the same, rendered judgment requiring defendant to produce the said child on the first and third Sundays in each and every month thereafter, at the town of Norman, Cleveland county, and deliver the child to its mother for a period of from 9 o'clock A. M. until 3:30 P. M. on each of said Sundays, in order that the said mother might have the privilege of seeing the child alone and in the absence of any other person. It was further provided that said mother should not remove the said child from the town, and in no wise attempt to prejudice the child against its father or his wife. From this

judgment, proceedings in error have been duly prosecuted to this court.

After the judgment in the foregoing case had been entered, and during the time it was in force, defendant ignored the same, and on the 5th day of October, 1909, plaintiff filed her affidavit in the district court of Cleveland county, in which she recited the judgment, and that, at the appointed time and on the day set, she was present for the purpose of enjoying the society of her child under the order made, but that the defendant, in violation and in contempt of the order of the court, failed and refused to produce said child, or cause the same to be produced at Norman, but willfully kept said child away from said town of Norman, and from defendant. Where-

ings to obtain the custody of her child, where she had been adopted in proceedings of which the mother had no notice, the jurisdiction of the court being based upon the false allegation that the mother had abandoned the child.

So, in *Beatty v. Davenport*, the mother was held entitled to maintain habeas corpus proceedings to recover her children from adoptive parents, where the order of adoption was made in proceedings of which no notice, constructive or otherwise, was given her, the proceedings being based upon the consent of the father, and the false allegation that the mother had abandoned the children. The court said that the decree of adoption was binding only upon the parties before the court, and their privies, and was not binding upon the mother, because she was neither a party nor a privy thereto; hence it had no jurisdiction to determine her rights.

A stranger to the adoption proceeding may collaterally attack the judgment of adoption as invalid because notice thereof was not given the natural parents, and they did not appear therein or consent thereto. Thus, in *Taber v. Douglass*, 101 Me. 363, 64 Atl. 653, where written consent to the adoption was given by the father of the child adopted, and the consent of the mother was not given, although she was living at the time, and no notice of the proceeding was given to her, the proceeding was held to be invalid and subject to attack on this ground by a stranger to the proceeding, as a defense to an action by the adoptive parents to recover damages for enticing the child to leave their home and service.

— — — what amounts to abandonment.

Although statutory proceedings permitting the adoption of abandoned children without the consent of their parents are to be found in most of the states, and have frequently been before the court, the attempt has seldom been made to define the term "abandon," as used therein.

In *Winans v. Luppig*, 47 N. J. Eq. 302, 20 Atl. 969, it was said that the statutory 30 L.R.A. (N.S.)

notion of abandonment did not necessarily imply that the parents had deserted their child, or even ceased to feel any concern in his interests, but it might fairly import any conduct on their part which evidenced an established purpose to forego the parental duties and relinquish the parental claims to the child.

Wood v. Wood (N. J.) 77 Atl. 91, holds that to bring a case within the statute authorizing the adoption of abandoned children without the consent of their natural parents, there need be no actual abandonment, but it is sufficient if there has been such a course of conduct on the part of both the father and mother as to indicate that there was a settled intention to forego parental rights, and to leave the child permanently in the care of others. Applying this doctrine, a mother of a family of children whose father was dead was held to have abandoned one of the children by permitting her to continue to live for a period of some years, with her aunts, after the death of the father, the aunts supporting and educating the child. The fact that the mother thus permitted the child to remain with her aunts was held to authorize the court to permit the adoption of the child by the aunts, against both the consent of the mother and of the child, the court taking the view that the child was influenced by the mother to object to the adoption.

Compare with *Booth v. Van Allen*, 7 Phila. 401, which holds that abandonment is to renounce and forsake entirely,—to leave with a view never to return; hence, a parent cannot be said to have abandoned her child where she has made careful provision for securing it a home and a care taker.

In *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147, Marshall, J., speaking for the court, said: "The term 'abandon' obviously means no more than neglect or refusal to perform the natural and legal obligations of care and support which parents owe to their children."

And in *Nugent v. Powell*, abandonment was said to be simply the evidentiary fact

upon the court made an order requiring defendant to appear on the 8th day of November, 1909, at the courthouse in Norman, and show cause why he should not be punished for contempt for a violation of said order. The defendant, for his answer, set up that the court had no jurisdiction to make the order dated September 21, 1909, for the several reasons set forth therein. Second, he denied that he had wilfully violated the previous order of the court, because of the fact that circumstances under which he had been situated since it had been rendered made it practically impossible to comply therewith. Thereafter a change of judge was asked for and allowed, and on a hearing the court entered judgment against defendant, assessing

a fine in the sum of \$1 and the costs of said proceeding.

It is first contended that the court was without jurisdiction to entertain this action for the reason that the petition filed was by the clerk given the same number as the old case, which had been finally closed. In the case of *Holt v. Holt*, 23 Okla. 639, 102 Pac. 187, the converse of this proposition was presented; the contention in that case being that the petition should have been filed in the original action, but that the clerk, although it was entitled as in the original case, had given it a separate number, and filed it as an original case. This court held that this fact would not deplete the court of jurisdiction to try the same, although the statute was susceptible

which proved the ultimate fact of relinquishment. In other words, "the relinquishment of one's rights is the fact and result of one's abandonment of those rights."

—nonresidence of parent.

The nonresidence of a parent does not render it unnecessary to give him actual or constructive notice of proceedings to adopt his child without his consent, and an order of adoption entered in a proceeding without notice to him, or without securing his consent thereto, is invalid. *Furgeson v. Jones*, 17 Or. 204, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac. 842.

And a nonresident parent not served with actual or constructive notice of proceedings to adopt his child may maintain habeas corpus proceedings against the adoptive parent, claiming under an order of adoption entered in such proceeding. *People ex rel. Cornelius v. Callan*, 124 N. Y. Supp. 1074; *Beatty v. Davenport*, 45 Wash. 555, 122 Am. St. Rep. 937, 88 Pac. 1109, 13 A. & E. Ann. Cas. 585; *Re Carter*, 77 Kan. 765, 93 Pac. 584.

Notice by publication to a nonresident father of proceedings to adopt his child constitutes sufficient notice, where the adoptive parents of the child and the child's mother are within the jurisdiction of the court wherein the proceeding is had. *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441, 67 N. E. 349. To the same effect where the parents are unknown is *Omaha Water Co. v. Schamel*, 78 C. C. A. 68, 147 Fed. 502.

—where parents are divorced or living apart.

The fact that parents are divorced or not living together is no ground for denying to either of them the right to notice of proceedings to adopt their child, and the consent of the parent having the custody of the child is not sufficient to sustain the proceeding as against the parent not consenting thereto, who has no notice thereof. *Willis v. Bell*, 86 Ark. 473, 111 S. W. 908; *Miller v. Higgins* (Cal. App.) 111 Pac. 403.

In *Willis v. Bell*, the parents have been dissolved.

and the mother given the custody of an infant child. Thereafter she removed to another state, and consented to the adoption of the child by a relative. The father did not consent thereto, and had no notice of the proceeding. Subsequently to the adoption proceedings, he commenced proceedings in chancery to obtain the custody of the child, and attacked the validity of the adoption proceeding because his consent thereto had not been obtained, and no notice of the proceeding had been given him. In holding the adoption proceeding to be invalid as to the father, for these reasons, it was said that the jurisdiction of the court depended upon the express consent of the parents of the child, unless their residence was shown to be unknown, and it was added that it was not intended that the legal status of a child could be changed by the consent of only one of two living parents, and hence the order was not binding upon the nonconsenting parent.

In *Miller v. Higgins*, the fact that the parents had been divorced, and the child given into the custody of the mother, who consented to his adoption, was held not to render it unnecessary to obtain the consent of the father, and hence, as to him, the proceeding was invalid, his consent not having been obtained, and no notice of the proceeding given him.

Compare with *Younger v. Younger*, 106 Cal. 377, 39 Pac. 779, which holds that the adoption of a child, where based upon the consent of the mother, having the custody of the child, under an order of the court granting her a divorce from the father, was an absolute bar to proceedings by the father in the divorce case, for an order giving to him the custody of the child a portion of the time, the adoption proceeding being based upon a statute authorizing the adoption of the child with the consent of the parent having his custody under an order of a court divorcing the parents. The force of this decision is somewhat weakened by the later decision of that court, already noticed (*Miller v. Higgins*, supra), wherein the two cases are distinguished on the ground that, in the former case, the di-

to the construction contended for, as there was no prejudice shown to have occurred to the adverse party, and in our judgment the same rule is entirely applicable in the case at bar. We cannot see that, had the petition been entitled differently, and filed as an original action, that the issue presented would have been different, nor can we see that the trial or the rights of the parties were in any way affected by the fact that it was filed or sought to be filed in the old case, which had been finally terminated. There being no prejudice, there was no error.

The next question which is presented is

voice decree gave the custody of the child absolutely to the mother, who consented to the adoption, while in the latter case, the custody of the child was given to the mother, subject to the further order of the court.

At least, as affecting the child's rights of inheritance, a divorce of the parents may, by a statutory provision to that effect, render unnecessary the giving of notice to the parent who, by the decree of divorce, is deprived of the custody of the child, and who does not thereafter contribute to its support, where the proceeding is based on the consent of the parent awarded the custody of the child, and who supports it. *Re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407.

A divorce granted the mother of a child on the ground of desertion by the father, together with his absence and failure to aid in the support of the child or mother, makes a sufficient case of desertion of both to sustain proceedings to adopt the child, although based merely upon the consent of the mother, and without notice to the father. *Baker v. Strahorn*, 33 Ill. App. 59.

It has been held that the consent of the mother of a child to his adoption is necessary only when she is living with her husband, or has the custody and control of the child; and hence, notice to her of the adoption of the child is not necessary when she is living separate and apart from the father, who has the charge and control of the child. *James v. James*, 35 Wash. 655, 77 Pac. 1082. Although this doctrine was asserted in general terms in the foregoing case, it gives doubtful support to the validity of adoption proceedings not based upon the consent of the parents, and without notice to them, as it was enunciated in a case where one of the adoptive parents, a party to the proceeding, was seeking to invalidate an order of adoption on the ground that the mother of the child had not been served with notice of the proceeding, and had not consented to the adoption.

Necessity of parent's consent to adoption of illegitimate child.

The mother of an illegitimate child has all the parental rights of other parents, and hence is entitled to notice of proceedings to 30 L.R.A. (N.S.)

that the court, independent of this fact, is without jurisdiction to entertain the case and grant the relief demanded. The action which was here brought, as is noted, was for the purpose of requiring the defendant, who had effected the legitimation of this child (*Allison v. Bryan*, supra), to permit its natural mother to visit and have access to it. The district court is a court of general jurisdiction in which jurisdiction of actions both legal and equitable is vested, and in the exercise of its equity powers it would have jurisdiction to entertain, hear, and determine the questions presented in this case. It is held in the case of *Rossell*

adopt her child. *Purinton v. Jamrock*, 195 Mass. 187, 18 L.R.A. (N.S.) 927, 80 N. E. 803; *Re Sleep*, 6 Pa. Dist. R. 256; *Booth v. Van Allen*, 7 Phila. 401; and to the same effect, see *ALLISON v. BRYAN*.

The fact that the mother is a minor when she gives her consent to the adoption of her illegitimate child will not invalidate an adoption proceeding based thereon. *Re Bush*, 47 Kan. 264, 27 Pac. 1003.

The consent of the mother to the adoption of her illegitimate child is sufficient without obtaining the consent of the father, his consent not being necessary. *Gibson's Appeal*, 154 Mass. 378, 28 N. E. 296.

The consent of the father is not sufficient, although he has legitimized the child. *ALLISON v. BRYAN*.

As with legitimate children, the mother of an illegitimate child may forfeit her parental rights to the child by abandonment or other sufficient reason, and the child may be adopted without notice to her. Thus, where the custody of an illegitimate child was taken from the mother after due notice to her, on the ground of her misconduct, neglect, crime, drunkenness, and other vices, and she acquiesced in such proceeding for a considerable period of time, permitting the child to be supported as a pauper, she was not entitled to notice of the proceeding to adopt him. *Purinton v. Jamrock*, supra.

So, where a mother abandons her illegitimate child, proceedings to adopt him may be sustained, and the child transferred to his adoptive parents, although the mother appears in the proceeding, and objects to the adoption. *Richards v. Matteson*, 8 S. D. 77, 65 N. W. 428; *Winans v. Luppig*, 47 N. J. Eq. 302, 20 Atl. 969.

But a mother cannot be said to have abandoned her illegitimate child, where she has made careful provision for it and secured for it a home and a care taker,—one who has agreed to stand in the relation of a parent to the child, and perform for him the duties of a mother,—the mother reserving the right to reclaim the child under certain circumstances; and hence, adoption proceedings without the consent of the mother, and based upon the claim that she had abandoned her child, will be set aside at her instance. *Booth v. Van Allen*, supra.

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v. Rossell, 64 N. J. Eq. 21, 53 Atl. 821, that "under proceedings invoking the general power of the chancellor over the affairs of infants and their custody during minority, . . . the chancellor may, by decree or order, award the custody of an infant child of parents living in a state of separation without being divorced, to one of them, and incidentally provide for the access of the other parent to the child, under proper restrictions."

The supreme court of Arkansas, in the case of *State v. Grisby*, 38 Ark. 406, says: "The jurisdiction of a court of chancery extends to the care of the person of an infant so far as necessary for his protection and education; and whenever it appears that a father is guilty of gross ill-treatment or cruelty towards his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, or that he professes atheistical or irreligious principles, or that his domestic relations are such as to tend to the corruption and contamination of his children, or that he otherwise acts injuriously to their morals or interest, in every such case a court of chancery will interfere and deprive him of their custody, and appoint them a suitable guardian to take care of them and superintend their education; and this jurisdiction is not taken away by the like power conferred by statute on the probate court." To the same effect, see *Bowles v. Dixon*, 32 Ark. 92; *Re Lundergan*, 30 N. Y. S. R. 382, 8 N. Y. Supp. 924; *Com. ex rel. Strickland v. Strickland*, 27 Pa. Super. Ct. 309; *State, Baird, Prosecutor, v. Baird*, 21 N. J. Eq. 384.

Nor is it true, as contended, that the failure to reply to the answer in the case admitted the allegations thereof, and thereby concluded the plaintiff as to the jurisdiction of the court. The case went to trial and was tried in all respects as if a reply had been filed, and the rule is that where a defendant voluntarily goes to trial without a reply, when he is not bound to do so, he is thereby held to have waived it, and is regarded as consenting to go to the proof of the answer, as if it were denied. *Holt v. Holt*, supra.

The defense set up in the motion and answer, that plaintiff could not be heard in this action because of her alleged contempt, is waived by counsel by not insisting thereon and urging it in their brief. It is not claimed that any proceedings have been taken against her, or judgment had therefor, nor is there any argument or citation contained in the brief, insisting thereon, and the same, if possessing any merit, is considered waived; the rule in 30 L.R.A. (N.S.)

such cases being stated by Judge Elliott, in his work on Appellate Procedure (§§ 444, 445), as follows: "It is essential that all points be made in the brief, and properly made; if not so made, they are waived. . . . It is not enough to assert in general terms that a ruling of the trial court is wrong; a fair effort must be made to prove that it is wrong, or the point will not be considered as having been made. Counsel cannot make a point in an appellate tribunal by a naked general assertion, for such an assertion will not be heeded. . . . But, in order to secure so much as notice of the point stated, they must support it by a fair effort, adducing arguments, and, if they can, citing authorities. A bare designation of a ruling as erroneous, without discussion, is not sufficient to entitle counsel to successfully insist that he has made a point."

We now come to the consideration of the merits of the case. To defeat the claim of right in the plaintiff to be permitted to have the right of visitation, and to be permitted at reasonable intervals to enjoy the society and to see and be with her child, aside from contending that it was against the best interests of the child, defendant relies upon an alleged adoption which it is contended took place on the 8th day of December, 1905, in the probate court of Cleveland county, wherein the defendant and his wife joined in a decree of adoption, thereby making the said child, in addition to being legitimated, the child of himself and wife by adoption. And it is argued that by reason of the fact that the defendant had legitimated the child, it was no longer illegitimate, and that being its legitimate father by virtue thereof, he had the power and the right to give consent to its adoption by himself and wife. This claim, in our judgment, cannot be sustained. At common law, so long, as the mother of an illegitimate child was living, she was entitled to its custody as against all the world. *Inhabitants of Peter-sham v. Dana*, 12 Mass. 429; *Young v. State*, 53 Ind. 536; *Robalina v. Armstrong*, 15 Barb. 247; *People v. Mitchell*, 44 Barb. 245. The infant was said to be the child of no one, and its putative father had no common-law right so long as the mother was living; his right attached only after her death, whereupon he became entitled as against the world to the care and custody of the child. *Pote's Appeal*, 106 Pa. 574, 51 Am. Rep. 540; *Aycock v. Hampton*, 84 Miss. 204, 65 L.R.A. 689, 105 Am. St. Rep. 424, 36 So. 245.

The common-law principles annunciated in the foregoing authorities find expression in our statute, § 4900, Compiled Laws of

Oklahoma, 1909, as follows: "The mother of an illegitimate unmarried minor is entitled to its custody, services, and earnings." This is a statutory recognition of the right of the mother in an illegitimate child, as it existed at common law, and which cannot be denied her, except by force of some statute or by a court acting in the interest of the infant. Section 4919, Okla. Comp. Laws, 1909, provides: "A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery or of cruelty, and for either cause divorced, or adjudged to be an habitual drunkard, or who has been judiciously deprived of the custody of the child, on account of cruelty or neglect."

The mother of this child was living at the date of the alleged adoption, and it is not claimed that she gave her consent to the adoption mentioned, nor that she had ever been adjudged guilty of adultery or any of the other grounds contained in the statute. But, as is seen, it is contended, by the circuitous route mentioned and the fact that the legitimation of the child could be accomplished without the consent of the mother, that the child could then be adopted by securing the consent of the legitimating parent, and in this way validate an adoption which could not otherwise be effected.

By adoption, a child in law ceases to be the child of its natural parents; they cease to have any legal rights therein; and it no longer owes to them any duty. So declares the statute, § 4930, Okla. Comp. Laws 1909, which is as follows: "The natural parents of a child so adopted shall be deprived by the decree of all legal rights as respects the child, and the child shall be decreed from all obligations of maintenance and obedience as respects such parents."

The statute of legitimation, § 4931, Okla. Comp. Laws 1909, contains no such terms, but provides that the father of an illegitimate child, by acknowledging it as his own, etc., and treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed legitimate from the time of its birth. The word "adopts" is used in the sense of "legitimizes," and the child is legitimated rather than adopted. *Allison v. Bryan*, 21 Okla. 557, 18 L.R.A. (N.S.) 931, 97 Pac. 282, 17 A. & E. Ann. Cas. 468; *Blythe v. Ayres*, 96 Cal. 532, 19 L.R.A. 40, 31 Pac. 915. The effect of such legitimation on the child is noted in a discussion contained in the case of *Pratt v. Pratt*, 5 Mo. App. 30 L.R.A. (N.S.)

539: "A legitimate child has, from the moment of its birth until the day of its legal majority, a common-law right to a support from the father. It is entitled to bear his name, even though never acquired by common reputation. If designated in a grant or devise as the child of a named person, who is known as its father, the identification is established and the acquisition made secure. It may inherit, not merely from the father, but from remoter ancestors and from collateral kindred. It may also be inherited from, in an ascending, descending, or collateral direction. These and other incidents are the legal insignia of legitimate birth. Bastardy has none of them. The illegitimate son is *filius nullius*. He has no claim to a support from his father, unless by statutory provision. He cannot take his father's name, or any name, except such as may be appropriated through common reputation. He can acquire nothing from a grant or devise in which he is only designated by a reference to his putative father. He cannot inherit, either from his father, or from any remoter ancestor, or from a collateral kinsman. He cannot be inherited from, except by his own descendants. All these several adjuncts or incidents, in either classification, make up the status or condition which is called legitimacy, or bastardy, as the case may be."

Adoption as we see, cannot be legally made where the parents of a legitimate, or the mother of an illegitimate, child are living, except through and by their consent; and while doubtless all parental rights are yielded in the case of adoption, we have found no foundation for the claim that all rights on the part of the mother of an illegitimate child, consistent with its best interests, are lost in the mere exercise by the father of his right of legitimation. The interests of the child are of first and controlling importance; some mothers of illegitimate children, considering solely their best interests, might be willing to waive all rights of every kind and character which they possessed therein in order to have them adopted and thereby enabled to enjoy the privilege of legitimate persons. Others, seemingly forgetful or indifferent to the best interests of the child, or even taking a different view, might refuse an opportunity of this character, the result of which would be to the child's detriment; and it was to provide for cases of this character that the law, in its great interests in the child's welfare, empowered the father to exercise the rights given under the legitimating statute.

But no case has been called to our attention, and a most diligent search has

failed to reveal one, which has gone to the extent of holding that the father, after having, against the mother's wishes and will, legitimated the child, could then further ignore the mother's affection and interest in it, and again act against her consent, and effect an adoption, with all its legal consequences. It is true that, acting under the statute, the father has completely legitimated the child; it now enjoys all of the rights and privileges of a legitimate child, as mentioned in the case of *Pratt v. Pratt*, supra, and "the father of a legitimate, unmarried minor child is entitled to its custody, services, and earnings" (Okla. Comp. Laws 1909, § 4899), and the reciprocal rights and duties between the father and the child are the same as those existing between legitimate parents and their legitimate children; still, as to its mother, when her rights are involved, it is an illegitimate child, and the law is that an illegitimate minor child cannot be adopted without the mother's consent, and that which cannot be done directly cannot be done indirectly. Except for the legitimating statute, no one could have disturbed this woman's complete right of custody in and to her child, and in our judgment it would be a strained and unnatural construction of this statute and the rights of the parties under it to yield to the contention of counsel for defendant, for "the law should never receive such a construction as would tend to dry up the sources of natural affection." *Barela v. Roberts*, 34 Tex. 554. If the mother desires to give her consent to adoption, she, of course, may do so; but she cannot be lawfully stripped of her inherent right to say no.

In conjunction with the foregoing we notice the claim of counsel that the father made, executed, and had recorded, a deed of adoption in Kansas City, Missouri, in June, 1903. This, it is contended, was done with the consent of plaintiff, and the claim is made she thereby yielded the right she now asserts. We do not so construe this instrument; that deed was effectual merely to constitute of the infant an heir of his father, and to vest in him a right to look to him for support. This is the specific limitation contained in the deed. It contains the proviso: "With all the right as heir or devisee, and with the same rights as if he had been born to me in lawful wedlock, and with all the privilege and obligation existing between parent and child, according to the provision of an act of the general assembly of the state of Missouri, the same being chapter 90 of the Revised Statutes of Missouri, 1899, and as construed by the decision of the supreme court of Missouri in the case of *Fosburgh v.* 30 L.R.A. (N.S.)

Rogers, 114 Mo. 122, 19 L.R.A. 201, 21 S. W. 82, which act and decision expresses the intention of the parties and by which they will be governed."

An inspection of the case referred to verifies the limitation we here place on the instrument, as it related solely to the child's right of inheritance. The particular section of the statute under which this deed was executed received a construction at the hands of the supreme court of Missouri in the case of *Re Clements*, 78 Mo. 352, and of its effect in reference to the rights of the natural parents, the court said: "The statute in question, it must be confessed, is quite imperfect and very unskillfully drawn, but, when carefully considered, we think it will be found to contain enough to effectuate its general purpose. The 1st section (§ 599 [Rev. Stat. 1879]) is complete and perfect in itself, and authorizes any person to adopt the child of another so as to make him his heir, without the consent of the parents or other person. *Reinders v. Koppelman*, 68 Mo. loc. cit. 499, 30 Am. Rep. 802. This the legislature, having undoubted power to enact a statute of descents, may lawfully authorize to be done. This section, it will be perceived, does not undertake to create or establish the relation of parent and child between the adopter and the adopted, further than to give the child adopted a right of inheritance to the same extent as if he or she were the child of the adopter. The privilege thereby conferred may be of no pecuniary or other benefit to the recipient, until the death of the adopter. But the 3d section (§ 601) goes further, and gives the child adopted a right during the life of the adopter to have and receive from him or her, support, maintenance, and proper and humane treatment. The devolution of these parental duties upon the adoptive father necessarily implies that he is to have the custody and control of the child adopted. But as the legislature has no power to authorize one person, whether acting from motives of charity, benevolence, or caprice, to transfer to himself, at his own election, the custody and control of the children of another, it is declared in the last clause of this section that 'this provision,' meaning the whole of the 3d section, wherein the rights, express or implied, hereinbefore mentioned, are conferred, 'shall not extend to other parties, but is wholly confined to parties executing the deed of adoption.' That is to say, parties who do not join in the deed of adoption shall not be affected by anything contained in the 3d section; or, to state the matter differently, the natural relations of parent and child, and the rights and duties spring;

ing therefrom, are not to be disturbed without the consent of the natural parent." The mother was not a party to the deed and even had she consented to its execution, it deprived her of no right she now asserts.

We do not dissent from the law of the cases of Hope's Petition, 19 R. I. 486, 34 Atl. 994, and Ousset v. Euvrard (N. J. Eq.) 52 Atl. 1110, relied on by defendant. Each of these cases states the conceded proposition that the custody of the child, either legitimate or illegitimate, where a controversy arises in reference thereto, is granted wherever its best interests and welfare direct. This is virtually all that was passed on in the Hope Case. In the Ousset v. Euvrard Case, the mother of certain illegitimate children, by an instrument in writing, transferred all of her interest and custody in and to them to their father, who, with the consent of his wife, had taken them into his household. He was wealthy and the children had a good home. The mother sought to set aside this instrument and take the children, remove them from the state to a tenement in New York city, where she and her husband lived, both of whom were engaged in gainful occupations for a daily livelihood. The court found specifically that the mother was unfit and the prospective home unsuited for the children, and for this and other reasons refused to set aside the instrument. For sufficient reasons and facts which are made apparent in the case, the mother was denied the custody of the children and also the right to visit them at the home of their father and his wife. The issues presented in that case and in this were likewise in other ways dissimilar; so much so that it can scarcely be considered an authority to a further extent than presenting a recognition of the conceded doctrine that the best interest of the child is the controlling element in all of these cases.

We have made an exhaustive examination of the authorities wherein the question of the right of parents to visit children whose custody had been taken from one or the other or both, and from them, without detailing the facts of each, we cull the following declarations of the rule laid down by the courts on this subject.

"The privilege of visiting accorded to the mother is a plain dictate of humanity, in the absence of any reason to suppose that the privilege would be abused to the injury of the boy. There was none in this case. The charges of immorality against the mother were not sustained. She is shown to be an industrious, hard-working woman, and a good woman, by all the wit-
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nesses, except the defendant. But had it been otherwise, the permission to visit would not be necessarily erroneous. The courts should regard the maternal instinct in the veriest trull that walks the streets, taking proper care that it do not lead to the corruption of the offspring. It is the strongest and holiest sentiment of humanity; the freest from selfishness or impurity; and often the last hope of redemption for fallen natures." *Haley v. Haley*, 44 Ark. 429.

"Under our statutes, the father is given the right to the custody of his minor children, yet this right is not an absolute legal right, beyond the control of the courts. The cardinal principle in such matters is to regard the benefit of the infant paramount to the claims of either parent. While the courts will not lightly interfere with what may be termed the 'natural rights' of parents, yet the primary object of all courts, at least in America, is to secure the welfare of the child, and not the special claims of one or the other parent. Under the facts of this case, we cannot see that the trial court at all abused its judicial discretion in giving the custody of this infant to its mother, subject to the conditions, however, that she should not remove it from the city, and that the father should have the right to visit it at seasonable hours three times a week, and to take it to his home or for a walk or drive for five hours every Sunday. Of course, all such orders are merely provisional and temporary, and may be changed at any time when conditions change." *State ex rel. Flint v. Flint*, 63 Minn. 187, 65 N. W. 272.

"The future welfare and happiness of the child is entitled to the highest regard, if not to paramount consideration. Her worldly prospects in life are mainly dependent upon her father, and it is not to be disguised that there is great danger from the existing state of things that his natural love and regard for her may by degrees become weakened, and be followed by alienation and estrangement. The daughter is now of a suitable age to be placed at a boarding school, under the especial charge of some lady of character; and while I cannot assent to any plan which will deprive her mother of her care, or of her society, so far as is compatible with her position in a school, yet I am persuaded that a scheme may be framed upon that position, which will enable her father to visit her with more freedom, and with more advantage to her cherishing due respect and affection for him, than can be afforded in her present situation." *Ahrenfeldt v. Ahrenfeldt*, 4 Sandf. Ch. 493.

"As a matter of strict law, it cannot be denied that in this state, as at common law, the general rule is that the claim of the father to the persons of his infant children is paramount to those of the mother. This rule is so entirely axiomatic that it would be idle to cite authorities in its support. But this rule has only a subordinate application whenever a court of equity is called upon to exercise its authority in that branch of its capacity just referred to. On such an occasion it is not the dry, technical right of the father, but the welfare of the child, which will form the substantial basis of judgment. The legal right of the father will not be passed by, except when, in the opinion of the court, the well-being of the child requires such supersedure. . . . Provision should be made in the decree for the reasonable access of the parents, respectively, to the children, and a privilege should likewise be reserved that either party, in case of any material change of circumstances, should be permitted to come into court for further directions or assistance." *State, Baird, Prosecutor, v. Baird*, 21 N. J. Eq. 384.

"The general rule is that the father is entitled to the custody of his child; but the chancellor will look to the happiness and comfort of the child, and will confide his custody to the parent whose time and attention can be best devoted to its care and welfare. See *Irwin v. Irwin*, 96 Ky. 318, 28 S. W. 664, 30 S. W. 417, and *McBride v. McBride*, 1 Bush, 15. We are of opinion that the court did not err in awarding the custody of the child to its mother, it being of tender years and in delicate health; but the court erred in not providing in the order that the appellee, the father, should be permitted at reasonable times and places to visit and enjoy its society." *Barlow v. Barlow*, 28 Ky. L. Rep. 664, 90 S. W. 216.

"The enforcement of the prima facie right of Mrs. Smith to the custody of her minor children is resisted upon the ground of her unfitness, arising from excessive use of intoxicating drinks. The existence of this deplorable habit at one period of her life is admitted in the traverse by the petitioner of the return of the respondent; but she also asserts that she has reformed this habit and that for months before filing this petition she had abstained from the use of liquor; and that she conquered this appetite upon her promise of the respondent that, upon effecting this reformation, her children would be given her. . . . Mrs. Smith must not, however, be denied access to her children. At reasonable times she must be permitted to visit them, and to have them to herself on such occasions, if

she desires it. It is right that her offspring should be taught to love their mother, and it depends upon herself whether the legal right to which I have referred shall at a future day be granted to her." *Com. ex rel. Smith v. Smith*, 1 Brewst. (Pa.) 547.

"Our decision is that, for the present, at least, the child be allowed to remain with the mother. We wish to add, however a single monitory remark. The mother should remember that this decision is not necessarily definitive, and that while the custody of the child is confided to her, the father's right has not been forfeited. It will be her duty to respect his right and allow him every proper opportunity to cultivate the affection of the child. Especially will it be her duty to refrain from any attempt to alienate the child from the father, or to instill into her mind any thought or feeling which a daughter ought not to cherish for her father. A failure to observe this monition may be good ground for another application on the part of the petitioner for the custody of his child." *McKim v. McKim*, 12 R. I. 462, 34 Am. Rep. 694.

And finally, this court, in its former opinion, after holding that the father, by virtue of his acts under the legitimating statute, was entitled, as against the mother or the world, to the possession of the child, in consonance with the holding of all the courts, declared: "We would not have it understood, however, that, in thus declaring the law, we hold he should not see his mother, be with her, or be permitted to enjoy her society, nor she his. Not at all. Under the judgment rendered in this cause in the lower court, provision was made for the father to visit the child, and the successful respondents should not be deaf to those common promptings of humanity which dictate that the child and the mother be granted the utmost possible latitude for social communion consistent with the new duties placed upon all. In case of sickness or accident the mother should be promptly notified, and, if she desires, permitted to attend, care for, and nurse. The treatment to be accorded the child is that usually accorded legitimate children. Such children are frequently permitted to go from home to visit their friends and kindred, and friends and kindred are frequently permitted to visit them, and this is the treatment that the father, in this instance and in this case, should accord to this child, and which should now establish its relationship toward its mother." [21 Okla. 573.]

From the foregoing it will be seen that under practically every and all conditions

the parent, in some instances the father and in others the mother, while losing the right of custody of their children, have in every instance received at the hands of the court recognition of their right of visitation. It is true the foregoing cases, other than the opinion of this court, present those only in which the question arose between parents of legitimate children, but the underlying reason for the rule was in each instance that the one accorded the right was a parent, and that it was in accord with humanity and right living and the best interests of the child that it should not forget and be estranged. The father of this child has, perforce of the law in this state, been enabled to take from this mother, against her will, this child, and to take to himself its care and custody. We have no doubt of his sincere affection for it, nor do we question that he and his wife desire to retain it in their home, nor do we doubt that, when the best interests of the child are taken into consideration, the force and effect of this law and their action under it will result in effecting the best interests of the child. While granting the foregoing, there is no law, either written or unwritten, which denies to its mother, where it will not conflict with the interest of the child, the right of visitation accorded by the courts to all other parents.

Mrs. Allison is not a necessary party in either of these cases. The child by the act of the father was not made her heir. *Barnes v. Allen*, 25 Ind. 222; *Keith v. Ault*, 144 Ind. 626, 43 N. E. 924. Nor did it enter her household as her child. The statute under which it was legitimated would have been rendered in very many instances nugatory and its effectiveness largely curtailed, if, acting under it, the child to be legitimated were to take as an heir of the wife of its father, as but few if any wives could be found who would consent to receive into their homes such children, when to do so would make them heirs equally with their own children, and in practically all of such cases the wife would refuse to permit its entrance in the family. The legitimation of the child under this statute was accomplished by the father, and the wife's sole connection with the transaction was the giving of her consent to its reception into the family, where it might be treated as if it were legitimate. It has been represented to us that Mr. and Mrs. Allison are without other children; that she is possessed of considerable means, and has by will made it her heir; also that she entertains toward it a deep and sincere affection,—all of which is highly praiseworthy, tending to the child's welfare and

happiness, and further justifying its father in his commendable course resulting in its legitimation. The defense tendered by Mr. Allison in the contempt proceeding is that Mrs. Allison refused to permit him to comply with the order of the court; this cannot be allowed him, as his wife has no legal right to the custody and control of the child. If the best interests of the child require it, or the father contumaciously bids defiance to its orders, there is full authority in the court to take it from their household and place it with the mother or elsewhere, and if the mother's deportment is such that, by permitting her to visit with the child, it would be detrimental to its best interests, then this privilege may be denied her, so that the relationship of both parties to this controversy toward this child depends upon their conduct.

We desire just here to drop this word of admonition to both parties. This child is entitled to the affection of both its father and its mother, and they likewise are entitled to the affection of the child; and it is the positive, affirmative duty of each, abiding constantly with them, to say nothing to cause it to think ill of the other, nor should they permit others in its presence to harshly criticize the absent one.

There is no evidence in this record to justify us in finding that detriment would come to the child by permitting its mother to see it for the brief period granted in the order of the court, twice each month. If a change of situation occurs, justifying a change in any of its terms, the power still remains with the court, on application, to modify it in any particular; but neither party has a right to violate it. The happiness which has come to Mr. and Mrs. Allison in the companionship of this little child ought to cause them to reflect most seriously upon the situation in which their privilege places its unfortunate mother, and this thought should cause them to turn a tender side to the one who has lost all, and more than that which they have gained, and they should ungrudgingly grant and permit her the small measure of happiness which she can secure by the brief opportunities afforded by this order to see her offspring. The status of this child has once more had the careful, painstaking consideration of this court, and in affirming the judgments now before us, it is with the hope that it will put a finality to the controversy.

The judgment of the trial court in both cases is accordingly affirmed.

Turner, Williams, Kane, and Hayes,
JJ., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

LEONARD H. PHILLIPS et al.
v.

HORACE CHASE, Appt.

(203 Mass. 556, 89 N. E. 1049.)

Evidence — sufficiency — undue influence.

1. A finding of undue influence in securing an adoption by a woman of the son of her husband by a former wife is supported by evidence that the husband, being her physician and she an invalid, married her after she had secured a divorce from a former husband, about which she was peculiarly sensitive, and within a few months threatened to leave her unless she would

adopt his son, which under the circumstances she could not bear, and that she subsequently said many times that she was forced to adopt the son against her will.

Adoption — fraud — setting aside decree.

2. One who so dominates the will of his wife as to force her against her will to bring a petition in court for the adoption of his son by a former wife commits a gross fraud upon the wife, and such fraud upon the court that the decree of adoption will be set aside in a proper case.

Appeal — objections — sufficiency — probate decree.

3. An objection that a decree of adoption entered by a probate court cannot be set aside on the facts entitles one appealing from a subsequent decree attempting to set it aside, to raise the question wheth-

Note. — Right of parties to adoption proceeding, or their privies, to attack decree of adoption.

As to the validity of adoption without notice to the natural parents, see Allison v. Bryan, ante, 146, and note thereto.

The rule is well settled that neither the parties to adoption proceedings, nor their heirs, privies, or personal representatives, are entitled collaterally to attack a judgment of adoption, for failure to comply with the statutory requirements in the adoption proceedings, after the order of adoption has been recognized and treated as valid by the parties thereto. *Coleman v. Coleman*, 81 Ark. 7, 98 S. W. 733; *Woodward's Appeal*, 81 Conn. 152, 70 Atl. 453; *Sullivan v. People*, 224 Ill. 468, 79 N. E. 695; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Nugent v. Powell*, 4 Wyo. 173, 20 L.R.A. 199, 62 Am. St. Rep. 17, 33 Pac. 23; *Nelson v. Nelson*, 127 Ill. App. 422; *Re McKeag*, 141 Cal. 403, 99 Am. St. Rep. 80, 74 Pac. 1039; *Cubitt v. Cubitt*, 74 Kan. 353, 86 Pac. 475; *Mullany's Adoption*, 25 Pa. Co. Ct. 561; *Brown's Adoption*, 25 Pa. Super. Ct. 259; *Wolf's Appeal*, 10 Sadler (Pa.) 139, 22 W. N. C. 93, 13 Atl. 760; *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147.

As said in *Parsons v. Parsons*, supra: "Proceedings to avoid the judgment of adoption are clearly of an equitable nature, and after the lapse of many years, during which time the status of the subject of adoption has been recognized as legally fixed by the judgment of the county court by all parties to the proceedings, one of those parties on whose motion the judgment was rendered is in no position to appeal to the equity powers of the court to declare it void. The plainest principles of estoppel apply to the situation. Appellant petitioned for the judgment. It was entered on her motion. The person most interested, the child, was a ward of the court, and its status for life was entirely and irrevocably changed by the result of the proceedings, if they were valid. Their validity was recognized by the appellant till she be-

came pecuniarily interested in changing her position. Clearly she cannot be aided by a court of equity to do that to the injury of the person she was instrumental in locating in her family as her adopted son."

And in *Re McKeag*, the court remarked: "There is nothing that can be said against the policy of adoption laws; there is everything that can be said in their favor. Under them, innocent, parentless, and abandoned children are withdrawn from the charity of public institutions, and provided with comfortable homes and affectionate foster parents. Unfortunate children whose parents, through overwhelming adversity, or the infirmities of their nature, are unable to care and provide for them, are placed in cheerful homes under the care and control of adoptive parents, willing and able to provide for their protection and comfort. Under the beneficent provision of these statutes, such children are accorded advantages and opportunities for better moral, intellectual, and material advancement; a measure of happiness is secured to the adoptive parents and the child adopted, under the reciprocal influences of filial and parental affection, and, inasmuch as the development of the child into a valuable member of society and an upright citizen depends upon healthy, moral home influences and parental solicitude, to that all-important extent, then, under these laws, are the best interests of society and the state conserved. Recognizing these good results, courts are more and more inclined to an abandonment of the old rule of strict construction, and to place a fair and reasonable construction upon proceedings under the statute, with a view of sustaining the assumed relationship, particularly against a collateral attack by strangers to the proceedings, whose only interest is to defeat the relations which the adoptive parents always recognized and never questioned, so that they may succeed to an estate from which, by the very fact of adoption, the adoptive parents intended they should be excluded in favor of the adopted child."

But see *Furgeson v. Jones*, 17 Or. 205, 3 L.R.A. 620, 11 Am. St. Rep. 808, 20 Pac.

er or not petitioner is entitled on all the facts to any relief, and to raise objections not specified as objections to the decree, where under such an appeal the case is heard *de novo* in the appellate court.

Fraudulent decree — setting aside — fraudulent beneficiary — innocent party.

4. A man who by fraud induces his wife to adopt his son by a former wife, thinking that if the son gets her property the father will benefit thereby, cannot, after the son's death, assert title to the property as his heir against the next of kin of the wife, on the theory that the decree of adoption cannot be set aside because the son was not a party to the fraud.

Decree — death of parties — setting aside.

5. A decree secured by fraud, whereby a

842, wherein it is asserted that adoption proceedings invalid for a failure to obtain the consent of the father, or to serve him with notice, actual or constructive, of the proceeding, may be successfully attacked on that ground by any person who may be interested in or affected by such decree.

An order of adoption will be revoked by mutual consent of the parties, where, upon investigation by the court, such a course is found to be for the best interests of the child. *Re Gatkowski*, 12 Pa. Co. Ct. 191.

Where the right of inheritance depends upon the recording of the decree of adoption, and it is not recorded, the adopted child cannot claim to inherit the property of his adoptive mother as against her legal heirs. *James v. James*, 35 Wash. 650, 77 Pac. 1080.

There is nothing in the nature of a decree of adoption to take away the power of the court wherein the proceeding was held to revoke and annul the decree on the ground that it was procured by fraud practised upon the court, at least where practised by a party to the proceeding, when the other party thereto is seeking relief therefrom because of such fraud. *Tucker v. Fisk*, 154 Mass. 674, 28 N. E. 1051, approved in *Fiske v. Pratt*, 157 Mass. 83, 31 N. E. 715; *McKay v. Kean*, 167 Mass. 524, 46 N. E. 120; *PHILLIPS v. CHASE*.

Applying this doctrine in *Tucker v. Fisk*, the heirs and legal representatives of an adoptive parent, after her death, were permitted to attack the validity of an order of adoption on the ground that such parent, at the time of the adoption proceeding, was of unsound mind, and the adoption was procured by undue influence exercised upon her by the person adopted; these facts being concealed from the court in order to obtain the decree of adoption.

It is, however, not sufficient that fraud be practised upon the party to the adoption proceeding, but, in order to render the decree of adoption open to attack on the ground of fraud, it must further appear that a fraud was practised upon the court in pro-

curating the decree; hence it is not error for the probate court to refuse to frame an issue of fact for the jury on the question whether fraud was practised upon a party to the adoption proceeding, it being a question properly for that court to determine whether a fraud was practised upon it. *Fiske v. Pratt* and *McKay v. Kean*, supra.

Appeal — probate decree — sufficiency of objections.

6. The question of ratification of a decree of adoption procured by fraud, or of laches and the statute of limitations, cannot be raised on appeal from a subsequent decree of the probate court setting aside the former one, where no objections to the decree on those grounds were filed on appeal, although upon such an appeal the case is heard *de novo* in the appellate court.

(November 23, 1909.)

The mere silence of an infant in proceedings to adopt him by a person of unsound mind does not constitute a fraud upon the court which will entitle the heirs of the adoptive parent, after the parent's death, to have the order of adoption set aside, since the infant has no part in the proceedings, the whole matter resting with the court, whose duty it is to make such an investigation as it deems proper. *Brown v. Brown*, 101 Ind. 340.

That the grandfather of a child practised a fraud upon the mother by inducing in her mind the belief that her child was dead, and thereby obtained her consent to the adoption by third parties of a child claimed to be hers, but the parentage of which was in doubt, is not sufficient to entitle the mother to have the order of adoption set aside, where the adoptive parents acted in good faith in the proceeding, and relied upon letters of the mother indicating her consent to the adoption without reference to whether the child adopted was actually her child. *Barclay v. People*, 132 Ill. App. 338.

That the father practised a fraud upon the adoptive parents by representing the mother to be dead, and thereby induced such parents to adopt the child, which they would not have done had they known the mother was living, is not a ground for setting aside the decree of adoption at the instance of the adoptive parents. *James v. James*, 35 Wash. 655, 77 Pac. 1082.

The consent of a mother to the adoption of her child, under the mistaken belief that she has not long to live, is no ground for thereafter setting aside the order of adoption. *Nelson v. Nelson*, 127 Ill. App. 422.

A. G. S.

A PPEAL by defendant from a decree the Supreme Judicial Court for Essex County affirming a decree of the Probate Court revoking a former decree of that court by which Mrs. Jeannie P. Chase adopted De Forest Woodruff Chase. Affirmed.

The facts are stated in the opinion.

Mr. Frederic D. McKenney, with Messrs. Robert M. Morse, Joseph H. Soliday, and Richard Y. Fitz Gerald, for appellant:

A wrongful appeal to motives not absolutely dominating was the utmost undue influence that the evidence could be held to have proved, and that is not sufficient to warrant setting aside a status.

Silsbee v. Webber, 171 Mass. 378, 50 N. E. 555; Re Brigham, 176 Mass. 227, 57 N. E. 328; Fairbanks v. Snow, 145 Mass. 153, 1 Am. St. Rep. 446, 13 N. E. 596.

There was no such undue influence as would at any time have warranted annulling the decree.

Cooper v. Crane [1891] P. 369; Field's Marriage Annuling Bill, 2 H. L. Cas. 48; Lacoate v. Guidroz, 47 La. Ann. 295, 16 So. 836; Parsons v. Parsons, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; Leavitt v. Leavitt, 13 Mich. 456; Collamore v. Learned, 171 Mass. 99, 50 N. E. 518; Sherman v. Sherman, 47 N. Y. S. R. 404, 20 N. Y. Supp. 414; Brown v. Brown, 101 Ind. 340; Stevenson v. Stevenson, 7 Phila. 386.

In general, duress must overpower the mind, not merely influence the choice.

Morse v. Woodworth, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525; Wilcox v. Howland, 23 Pick. 167; Emmons v. Scudder, 115 Mass. 367; Cunningham v. Boston, 15 Gray, 468; Chase v. Phillips, 153 Mass. 17, 26 N. E. 136.

The frauds on the court for which courts of equity will interfere to set aside judgments must be acts by which the successful party has prevented his adversary from presenting the merits of the case, or by which the jurisdiction of the court has been imposed upon.

United States v. Flint, 4 Sawy. 42, Fed. Cas. No. 15,121; Keyes v. Brackett, 187 Mass. 306, 72 N. E. 986, 3 A. & E. Ann. Cas. 81; Sankey's Case, 4 Pa. Co. Ct. 624; Wolf's Appeal, 10 Sadler (Pa.) 139, 22 W. N. C. 93, 13 Atl. 760; Parsons v. Parsons, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; Hubbard v. Hubbard, 19 Colo. 13, 34 Pac. 170; Orth v. Orth, 69 Mich. 158, 37 N. W. 67; Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.

The undue influence, if any, was that of a person not a party to the status of adoption, and was not known to Woodruff

Chase, and is, therefore, no ground for annulling the adoption.

Sherman v. Sherman, *supra*; Holbrook v. Holbrook, 114 Mass. 569; Root v. Bancroft, 8 Gray, 619.

Where the so-called duress consists only of threats, a contract is voidable only, not void.

Fairbanks v. Snow, 145 Mass. 154, 1 Am. St. Rep. 446, 13 N. E. 596; Foss v. Hildreth, 10 Allen, 80; Vinton v. King, 4 Allen, 565; Lewis v. Bannister, 16 Gray, 500; Fisher v. Shattuck, 17 Pick. 252; Worcester v. Eaton, 13 Mass. 375, 7 Am. Dec. 155.

The undue influence, if any, in inducing the status, was not a wrong to the rights of these petitioners, either as Mrs. Chase's prospective heirs and next of kin, or as remaindermen under the trust, and therefore they had not during Mrs. Chase's lifetime, and *a fortiori* have not, a *locus standi* to ask that the decree be annulled.

Payne's Appeal, 65 Conn. 397, 33 L.R.A. 418, 48 Am. St. Rep. 215, 32 Atl. 948; Cooper v. Cooper, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892; Ogden v. McHugh, 167 Mass. 279, 57 Am. St. Rep. 456, 45 N. E. 731; Graham v. Stanton, 177 Mass. 321, 58 N. E. 1023; Johnston v. Johnston, 53 L. J. Ch. N. S. 1014, 52 L. T. N. S. 76; Faremouth v. Watson, 1 Phillim. Eccl. Rep. 355; Wells v. Cottam, 10 L. T. N. S. 138; Tyler v. Aspinwall, 73 Conn. 493, 54 L.R.A. 758, 47 Atl. 755; Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Ruger v. Heckel, 21 Hun, 489, affirmed in 85 N. Y. 483; Henry v. Henry, 4 Dem. 253; Brink v. Brink, 8 Kulp, 367; Stanhope v. Stanhope, L. R. 11 Prob. Div. 103; A. v. B. L. R. 1 Prob. & Div. 559.

The decree of adoption cannot be annulled after the death of either of the parties to the status.

Bell v. Bell, 181 U. S. 175, 176, 45 L. ed. 804, 805, 21 Sup. Ct. Rep. 551; Brownword v. Edwards, 2 Ves. Sr. 242; Stanhope v. Stanhope, *supra*; Thomson v. Thomson, 65 L. J. Prob. N. S. 65, 80; Rawson v. Rawson, 156 Mass. 578, 31 N. E. 653; Re Brigham, 176 Mass. 223, 57 N. E. 328; Nolan v. Dwyer, 40 Wash. 459, 1 L.R.A. (N.S.) 551, 111 Am. St. Rep. 819, 82 Pac. 746, 5 A. & E. Ann. Cas. 890; Owens v. Sims, 3 Coldw. 544; Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064; Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831; Fornshill v. Murray, 1 Bland, Ch. 479, 18 Am. Dec. 344; Pingree v. Goodrich, 41 Vt. 47; Rice v. Rice, 184 Mass. 488, 69 N. E. 319; Combs v. Combs, 17 Abb. N. C. 265; Griffin v. Banks, 24 How. Pr. 213; Parker's Appeal, 44 Pa. 309; Perry v. Meddowcroft, 10 Beav. 134; Meddowcroft v. Huguenin, 4 Moore, P. C. C.

386; *Harrison v. Southampton*, 22 L. J. Ch. N. S. 722; *Hinks v. Harris*, 4 Mod. 182; *Kenn's Case*, 7 Coke, 141; *Sherwood v. Ray*, 1 Moore P. C. C. 353; *Richardson v. Stowe*, 102 Mo. 33, 14 S. W. 810; *Henry v. Henry*, supra; *Re Morrisson*, 52 Hun, 102, 5 N. Y. Supp. 90, affirmed in 117 N. Y. 638, 22 N. E. 1130; *Tyler v. Aspinwall*, supra; *Baugh v. Baugh*, 37 Mich. 59, 26 Am. Rep. 495; *Brink v. Brink and A. v. B.* supra; *Tompert v. Tomppert*, 13 Bush, 326, 26 Am. Rep. 197; *Stevenson v. Gray*, 17 B. Mon. 193; *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; *Gray v. Gardner*, 81 Me. 554, 18 Atl. 286; *Brown v. Brown*, 101 Ind. 340; *Sankey's Case*, 4 Pa. Co. Ct. 624; *Wolf's Appeal*, 10 Sadler (Pa.) 139, 22 W. N. C. 93, 13 Atl. 760; *Van Matre v. Sankey*, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628.

Messrs. Moorfield Storey and Ezra R. Thayer, for the appellees:

The decree of adoption was procured by a fraud on the court.

Phillips v. Chase, 201 Mass. 446, 131 Am. St. Rep. 406, 87 N. E. 755; *Tucker v. Fisk*, 154 Mass. 574, 28 N. E. 1051; *Brown v. Grove*, 116 Ind. 85, 9 Am. St. Rep. 823, 18 N. E. 387; *Brooke v. Mostyn*, 2 De G. J. & S. 373; *Carew v. Johnson*, 2 Sch. & Lef. 280; *Patch v. Ward*, L. R. 3 Ch. 207; *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Bandon v. Becher*, 3 Clark & F. 479.

The court has power to set aside the decree of adoption.

Crocker v. Crocker, 108 Mass. 403, 84 N. E. 476; *Edson v. Edson*, 108 Mass. 599, 11 Am. Rep. 393; *Holmes v. Holmes*, 63 Me. 420; *Allen v. Maclellan*, 12 Pa. 328, 51 Am. Dec. 608; *Anderson v. Anderson*, 74 Hun, 56, 26 N. Y. Supp. 492, affirmed in 147 N. Y. 719, 42 N. E. 721; *Marks v. Crume*, 16 Ky. L. Rep. 707, 29 S. W. 436.

Even if Woodruff Chase's ignorance of the fraud would have been a defense in his lifetime, the defendant, being now the only person beneficially interested in sustaining the adoption, cannot take advantage of it after his son's death.

Bovey v. Smith, 1 Vern. 60; *Kennedy v. Daly*, 1 Sch. & Lef. 379; *Bailey v. Bailey*, 61 Me. 361; *Clark v. McNeal*, 114 N. Y. 287, 11 Am. St. Rep. 638, 21 N. E. 405; *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Riggs v. Palmer*, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188.

Mrs. Chase's death does not take away the power of the court.

Tucker v. Fisk, 154 Mass. 577, 28 N. E. 1051; *Fiske v. Pratt*, 157 Mass. 83, 31 N. E. 716; *McKay v. Kean*, 167 Mass. 524, 46 N. E. 120; *Edson v. Edson*, 108 Mass. 30 L.R.A. (N.S.)

596, 11 Am. Rep. 393; *Wood v. Wood*, 136 Iowa, 128, 12 L.R.A. (N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492; *Lawrence v. Nelson*, 113 Iowa, 277, 57 L.R.A. 583, 85 N. W. 84; *Brown v. Grove*, 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387; *Fidelity Ins. Co's Appeal*, 93 Pa. 242; *Boyd's Appeal*, 38 Pa. 241; *Smith v. Smith*, 3 Phila. 489; *Johnson v. Coleman*, 23 Wis. 453, 99 Am. Dec. 193; *Rodgers v. Nichols*, 15 Okla. 570, 83 Pac. 923; *Fritz v. Fritz*, 9 Ohio S. & C. P. Dec. 275; *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341; *Daniels v. Benedict*, 50 Fed. 347; 2 Bishop, Marr. & Div. § 1554; *Rice v. Rice*, 184 Mass. 488, 69 N. E. 310; *Bell v. Bell*, 181 U. S. 175, 41 L. ed. 804, 21 Sup. Ct. Rep. 551; *Thomas v. Thomas*, 57 Md. 504; *Downer v. Howard*, 44 Wis. 82; *Danforth v. Danforth*, 111 Ill. 236; *Orchardson v. Cofield*, 171 Ill. 14, 40 L.R.A. 256, 63 Am. St. Rep. 211, 49 N. E. 197; *Barth v. Barth*, 102 Ky. 56, 80 Am. St. Rep. 335, 42 S. W. 1116; *Stanhope v. Stanhope*, L. R. 11 Prob. Div. 103.

The fact that Woodruff Chase has also died (after accepting service of the petition and testifying in the suit) is immaterial. *Rawson v. Rawson*, 156 Mass. 580, 31 N. E. 653.

There was no ratification of the adoption by Mrs. Chase.

Phillips v. Chase, 201 Mass. 446, 131 Am. St. Rep. 406, 87 N. E. 755; *Bartley v. Boston & N. Street R. Co.* 198 Mass. 163, 83 N. E. 1093; *Flagg v. Phillips*, 201 Mass. 216, 87 N. E. 598; *Gowland v. DeFaria*, 17 Ves. Jr. 20; *Bell v. Campbell*, 123 Mo. 1, 45 Am. St. Rep. 505, 25 S. W. 359; *Connar v. Leech*, 84 Md. 571, 36 Atl. 591.

Loring, J., delivered the opinion of the court:

On April 23, 1889, the judge of the probate court for the county of Essex made a decree, after hearing, by which De Forest Woodruff Chase, son of her husband by a former wife, became the adopted son of Mrs. Chase. Mrs. Chase died on September 13, 1905. A month later (on October 14, 1905) a petition was filed by those who, but for the adoption, would have been her next of kin, to set aside the decree of adoption. On October 20, 1905, De Forest Woodruff Chase voluntarily accepted service. He gave his deposition on November 10, in the presence of the judge of probate who entered the original decree of adoption, and died on December 19, 1905. The same judge, after hearing, found that the petition for adoption and the decree entered thereon "were procured by the undue influence of her husband, the said Horace Chase, and were a fraud upon said court," and entered a decree revoking the decree of

adoption. This was on February 19, 1906. On March 8, 1906, Horace Chase took two appeals from this decree, one as sole heir of Woodruff, adopted son, and interested in the estate of Mrs. Chase, and the other as administrator of the estate of Woodruff, adopted son and interested in Mrs. Chase's estate.

The appellant filed five objections to the decree of the probate court.

On his motion the following issues were tried by a jury: "(1) Did Jeannie P. Chase of her own free will adopt De Forest Woodruff Chase on April 23, 1889? (2) Was she unduly influenced in the making of said adoption by Horace Chase or any other person?"

On the first issue the jury answered "No," and on the second, "Yes."

After these issues had been tried the appeal came on for hearing before the chief justice of this court on the other issues involved in it. The appellant introduced in evidence the evidence taken before the jury. No other evidence was offered by either party. The chief justice, on the answers made by the jury and on the evidence introduced before him, found for the appellees, and entered a decree affirming the decree of the probate court revoking the decree of adoption. The case is before us on an appeal from that decree.

1. The first question raised is that covered by the fifth objection filed by the appellant, to wit: "The procuring of said adoption did not constitute a fraud upon said court."

We are of opinion that the answers given by the jury on the two issues tried by them settle that question in the affirmative.

The second of the two issues settled by the verdict of the jury in the case at bar is not in the usual form. But we are of opinion that the verdict must be taken to be tantamount to a finding on an issue in the usual form, and to mean that the adoption was procured by the undue influence of Horace Chase or some other person; and we are further of opinion that we ought to construe it in the light of the evidence on which (as appears from the evidence at the later hearing) it was founded. So construed, it must be taken to be a finding that the adoption was procured by the undue influence of Horace Chase. There is nothing in that evidence showing undue influence by any other person.

Undue influence in procuring another to adopt his child means the same thing as undue influence in procuring another to make a will, for example, in favor of his child. It is established that that means that the person exercising the influence so

far dominated the will of the other person as to substitute his will for that of the other person, with the result that the action brought about by the undue influence is not in reality the act of the person whose act it is in form, but the act of the person exercising the undue influence. *Shailer v. Bumstead*, 99 Mass. 112; *Woodbury v. Woodbury*, 141 Mass. 329, 55 Am. Rep. 479, 5 N. E. 275.

The appellant has argued that the finding of the jury in the case at bar should not be taken to be a finding of undue influence in that sense of the term. But the record does not disclose what the instructions were under which the jury made their finding on this issue. The instructions given to the jury should have been those stated above, and, in the absence of the charge actually given, must be taken to have been so.

The appellant now seeks to raise the further point that the evidence did not warrant a finding that there was undue influence on the part of Dr. Chase, if that is what undue influence means.

It is not clear that this argument does not come too late. The proper time for raising that question was at the trial of the issue, by asking for a ruling that the evidence did not warrant a finding that the adoption was procured by undue influence, or by an exception to the instructions under which the jury were allowed to find that it was. No such question was then raised. See *Phillips v. Chase*, 201 Mass. 444, 131 Am. St. Rep. 406, 87 N. E. 755. But all the evidence before the jury is before us, and (without intimating that the appellant has a right to raise the question now) we prefer to put our decision on the ground that the evidence did warrant the finding, giving to it the meaning that we have held must be given to it.

The principal argument of the appellant on this point is that "Mrs. Chase stated to her brother that the doctor gave her a week to decide whether she should adopt his son, or have him leave her (Evidence of Leonard Phillips, p. 152); and on Mrs. Chase's fear of a possible scandal arising out of the separation, the whole claim of the petitioner is based. But this was merely an appeal to motives, and an appeal to motives does not constitute duress." "Duress must overpower the mind, not merely influence the choice."

Undue influence must overpower the mind, and in our opinion the evidence in the case at bar warranted a finding that Mrs. Chase's mind had been overpowered by her husband. What is true of duress is true of undue influence, namely, it is of

no consequence how the domination over the mind was acquired; it is enough that it was acquired. *Silabee v. Webber*, 171 Mass. 378, 50 N. E. 555. If the evidence in the case at bar had shown nothing more than the presentation by one person to another of a choice between two courses of action, the jury would not have been warranted in finding that the adoption was procured by undue influence. But the evidence in the case at bar was not merely that. The marriage between Dr. Chase and Mrs. Chase took place on January 26, 1889, and the adoption on April 23 of the same year. Dr. Chase made the acquaintance of the woman who afterwards became his wife in 1884 or 1885. She was then Mrs. Culliton, and came to him as a patient. By his own account she was then in a very pitiful condition, a physical wreck, anemic and unable to walk more than a short distance without fatigue, or to read without her eyes paining her. There was another trouble which need not be mentioned. He did much to relieve her, and in six months she had greatly improved. She remained under his care as a physician continuously thereafter, and in his own words: "There never was a day, as I lived with her, that I didn't have a suggestion to make for her physical benefit." She obtained a decree of divorce nisi from her first husband in December, 1887, and this was made absolute in June, 1888. It turned out that Culliton had married her from mercenary motives only, and in another way the marriage and the reason for her leaving her husband made her peculiarly sensitive about it. It was also in evidence that Mrs. Chase, as she afterward became, looked upon it as a scandal so humiliating to her that she could not endure a similar one. The jury were warranted in finding that this was so, that Dr. Chase knew it, and, to force her to adopt his son, told her within three months after the marriage that if she did not do so he would desert her. There was no pretense that the adoption was made by reason of any affection which she then bore to Woodruff. Their acquaintance up to that time was casual only. Woodruff testified that he was asked to come to Swampscott and that he did so; that he was then asked to go to Salem with Dr. and Mrs. Chase, and while on the train to Salem he learned for the first time that the reason why he had been summoned to Swampscott, and was going to Salem, was to be adopted by Mrs. Chase. He was asked if he had any objections. "I told her, 'No;' that if I could be of any service I should be glad. She said that, owing to certain conditions in her mother's will and cer-

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tain conditions that the trust fund had been left in, she wanted to have it so that she could leave her money as she wished to, and she found that she could not do so without adopting some lawful heir; that she wished that her money should go to my father and to me." And Dr. Chase himself testified that the reason Mrs. Chase gave for the adoption was to protect him: "If my son had it, I presume my son would be kind enough, if I needed it, to share with me." In addition there was evidence that Mrs. Chase frequently spoke in later years of the adoption "bitterly," that she said that she had been forced to do it against her will, and when her husband left for a time at a later date, she tried to kill herself, and finally asked him to come back on his own terms. This case therefore could be found not to be a case where one at arm's length gives another a choice of action. Dr. Chase stood in the twofold confidential relation of physician and husband; Mrs. Chase, though better, was not well; and the jury were warranted in finding that, to his knowledge, she was not willing to submit to a second scandal arising out of marriage, and that she at many times said that she was forced against her will to adopt Woodruff as her son. The evidence was conflicting, and the jury could have taken a different view of the case. But the evidence authorized a finding that the adoption was procured by undue influence, and that view of it was taken by the jury.

We are of opinion that if one so dominates his wife's will as to force her against her will to bring a petition in court for the adoption by her of his son by a former wife, he commits a gross fraud upon his wife, and such a fraud upon the court that the decree of adoption should be set aside in a proper case. For that proposition no authorities are necessary.

2. The next contention of the appellant is that on the facts found by the jury, and on any facts which could have been found on the evidence before the chief justice, the decree of adoption cannot be set aside. This contention is based on the fact that the fraud was not committed by Woodruff Chase, the other party to the petition for adoption, that the wrong done was a wrong done to Mrs. Chase, not to her next of kin, that the status created by the adoption cannot, or at any rate will not, be changed after the death of both parties to it, and that Dr. Chase, in defending the petition for revocation, is defending in the right of his son, and consequently that the petition must be disposed of as it would be disposed of if Woodruff Chase were alive and defending the petition.

The appellees have argued that these objections, not having been specified by the appellant as objections to the decree, are not now open to him.

Where an appeal is taken to the supreme judicial court from a decree of the probate court, the case involved in that decree is heard *de novo* in the appellate court. Ordinarily no answer is filed in the probate court by the respondent. In cases where the appeal is taken by him, the objections to the decree appealed from serve the same purpose as an answer; and in all cases the purpose of Rev. Laws, chap. 162, § 10, is to give notice to the other party of the issues which the appellant intends to raise. Objections to an appeal required by Rev. Laws, chap. 162, § 10, are not like assignments of errors under the eleventh rule of the United States circuit court of appeals (79 C. C. A. xxvii. 150 Fed. xxvii.), which requires the appellant, with his petition for a writ of error or appeal, to file "an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged." For that reason *Oswego Twp. v. Travelers' Ins. Co.* 17 C. C. A. 77, 36 U. S. App. 13, 70 Fed. 225, and the other cases in circuit courts of appeal of the United States cited by the defendant, are not applicable here; and the other cases cited by the appellant seem to be decisions under similar requirements. The rule of construction to be applied in case of objections to an act appealed from under Rev. Laws, chap. 162, § 10, was laid down in *Codwise v. Livermore*, 194 Mass. 445, 80 N. E. 609.

An objection by a respondent that the decree appealed from is against the law gives the appellee notice that at least the appellant contends that the facts do not entitle the petitioner to any relief, and we are of opinion that the first objection in the case at bar entitles the appellant to raise the question which would be open under a general demurrer, to wit, is the petitioner entitled on all the facts to any relief?

The issues involved in this case were greatly simplified by the death of Woodruff Chase. On the evidence it hardly could have been found as a fact that he was a party or even privy to the fraud committed upon Mrs. Chase by his father. Had he lived, he could have invoked with great force (as his father has attempted to do in the case at bar) the doctrine of *Fairbanks v. Snow*, 145 Mass. 153, 1 Am. St. Rep. 446, 13 N. E. 596. The doctrine of *Fairbanks v. Snow* is that where one party to a contract is forced to enter into it through duress exercised upon him by a stranger to it, no ground for its avoidance is made

out as against the other party to the contract who was not privy to the duress.

Dr. Chase was required by Rev. Laws, chap. 154, § 1, to join with his wife in the petition for the adoption of his son by a former wife, and he in fact did join with her in that petition. Dr. Chase and his wife were the parties on one side of the petition and Woodruff Chase was the party on the other side of the petition. The undue influence was exercised by one petitioner on the other petitioner, not by one party to the petition on the other party to it.

The rule of *Fairbanks v. Snow* does not apply in all cases where a fraud has been committed on a court. There are cases where a court will set aside a decree or judgment made by it, because of a fraud practised upon it by a stranger, that is to say, a person who is not a party to the cause in question, and who is not acting with the privity or consent of one of the parties to it. The bribery of one of the jury which rendered the verdict on which a decree or judgment is founded is doubtless an example. Such a case was before this court in *Crocker v. Crocker*, 198 Mass. 401, 84 N. E. 476.

But we do not find it necessary to consider these questions in deciding the case at bar. On the death of Woodruff Chase without leaving a will, his father became entitled to all his property. There is no evidence that he left any creditors. It follows that his father alone became entitled thereto. It was established by the answers given by the jury on the issues tried by them that the adoption of his son, Woodruff, was procured by a gross fraud practised by Dr. Chase upon his wife and upon the court.

The law will not allow a man to profit by his own wrongdoing. Adopting and adapting the words of Mr. Justice Field in *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 600, 29 L. ed. 997, 1000, 6 Sup. Ct. Rep. 877, 881, "it would be a reproach to the jurisprudence of the country" if the law did allow that.

It is settled that the English common law is not open to that reproach. It has been twice laid down in Great Britain, once by Lord King in *Bovey v. Smith*, 1 Vern. 60, and once by Lord Redesdale in *Kennedy v. Daly*, 1 Sch. & Lef. 355, 379, that one who obtains property by a breach of trust, and afterwards buys it from a bona fide purchaser for value, does not get a good title to it, although everyone else in the world buying under those circumstances would get the title of the bona fide purchaser for value. And that has been decided in New York (*Clark v. McNeal*, 114 N. Y. 287, 11 Am. St. Rep. 638, 21 N. E. 405), and in

Maine (*Bailey v. Bailey*, 61 Me. 361). The same principle was applied in *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 29 L. ed. 997, 6 Sup. Ct. Rep. 877, where the holder of a valid policy on the life of another murdered him to secure immediate payment (see also *Burt v. Union Cent. L. Ins. Co.* 187 U. S. 362, 365, 47 L. ed. 216, 218, 23 Sup. Ct. Rep. 139, 140, where the court says that "the maturity of which [the policy] was accelerated by his execution for crime"), and in *Riggs v. Palmer*, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188, where the beneficiary under an existing will of his grandfather murdered him to prevent a revocation of the will, and to secure the share of his property thereby given to him. It is true that in *Mutual L. Ins. Co. v. Armstrong* and in *Riggs v. Palmer* the murders were committed for the direct purpose of securing money in the one case and property in the other, and that could not be found to be the case here. It could not be found that the respondent in the case at bar procured the adoption of his son by Mrs. Chase because he expected to outlive them both. But that element did not exist in the cases where it has been laid down or held that one who has possessed himself of property through a breach of trust cannot set up the title of a bona fide purchaser for value, which he has subsequently acquired.

It is not necessary in the case at bar to go so far as the court went in those cases, for it is plain that the appellant here procured the adoption in order to secure his wife's property for his son, thinking that if his son got the property he would benefit thereby. That is enough to bring the case within this doctrine, if it is not enough that the adoption was procured through his fraud, and the property has now come to him.

Where the fraud committed by a defendant entitles him without disentitling the plaintiff, the proper remedy is a bill in equity to prevent him from taking or from retaining property to which he is entitled by or under the decree procured by his fraud. That was the remedy employed in *Riggs v. Palmer*, supra, where (as we have said) the legatee murdered the testator to prevent a revocation of the will, and to secure immediately the legacy thereby given to him.

But the peculiarity of the case at bar and of the case before the court in *Tucker v. Fisk*, 154 Mass. 574, 28 N. E. 1051, is and was that the decree which entitled the respondent disentitled the petitioners. See *McKay v. Kean*, 167 Mass. 524, 46 N. E. 120. If the adoption of Woodruff as Mrs.

Chase's son is not set aside, the petitioners are not entitled to her property as her next of kin. Under those circumstances no relief can be given unless the decree of adoption is set aside. If a decree of adoption is ever to be set aside to prevent a person taking or keeping property obtained through his own fraud, it can be properly done when (as in the case at bar) the adoption was originally made not for the personal relations thereby created, but for its effect upon property, where both parties to it are dead, and where the only person entitled to property by force of it is the person who committed the fraud.

Under the facts existing when the decree of revocation in this case was made, the petition for revocation here in question could be treated as a petition founded on the principle that a wrongdoer will not be allowed to profit by his own fraud, that the only way of preventing the fraud was to revoke the decree of adoption, and that there were no reasons then existing why that should not be done.

For cases where it was decided or laid down that a decree of adoption or divorce will be revoked to prevent such a fraud (or, as it is usually put, where property interests are involved), even after the death of one or both the parties to it, see *Tucker v. Fisk*, supra; *Fiske v. Pratt*, 157 Mass. 83, 31 N. E. 715; *McKay v. Kean*, supra; *Collamore v. Learned*, 171 Mass. 99, 50 N. E. 518; *Lawrence v. Nelson*, 113 Iowa, 277, 57 L.R.A. 583, 85 N. W. 84; *Wood v. Wood*, 136 Iowa, 128, 12 L.R.A. (N.S.) 891, 125 Am. St. Rep. 223, 113 N. W. 492; *Boyd's Appeal*, 38 Pa. 241; *Fidelity Ins. Co's Appeal*, 93 Pa. 242; *Brown v. Grove*, 116 Ind. 84, 9 Am. St. Rep. 823, 18 N. E. 387; *Johnson v. Coleman*, 23 Wis. 453, 99 Am. Dec. 103; *Bomsta v. Johnson*, 38 Minn. 230, 36 N. W. 341; *Daniels v. Benedict* (C. C.) 50 Fed. 347; *Rodgers v. Nichols*, 15 Okla. 579, 83 Pac. 923.

3. The appellant's next contention is that the adoption was ratified by Mrs. Chase, who lived for more than fourteen years after the date of the decree.

But no objection to the decree of the probate court on that ground was filed by the appellant. In trying the questions remaining to be tried by the court after it was established by the jury that the adoption was procured by the undue influence of the appellant, the appellees had a right to proceed on the footing that under the objections filed by the appellant no issue of fact of that kind was to be raised. And proceeding on that footing, there was no occasion for them to put in evidence bearing on that issue. The record in this case affords ground for the belief that, under

the rule laid down in *Phillips v. Chase*, 201 Mass. 444, 131 Am. St. Rep. 406, 87 N. E. 755, there were two witnesses who could have testified in support of the appellees' case on that issue, but whose testimony was not put in evidence. The underlying question of fact to be decided in the case at bar was whether credit should or should not be given to the color which Dr. Chase gave in his testimony to the incidents of his life with Mrs. Chase. If credit was not given to his testimony, it is not likely that he could have hoped to succeed in persuading the court that his wife, who died a suicide, ever succeeded in escaping from the domination which the jury found he had over her at the time of the adoption. We speak of this because it is apparent that the appellant has not lost anything by his failure to file an objection on this ground.

4. The defenses of laches and of the statute of limitations are not open to the appellant. No objection to the decree of the probate court on those grounds was filed. But when the true ground on which the relief is given in this class of cases is considered, it is apparent that there is nothing in these contentions of the appellant. The same is true of the constitutional point raised by him.

Decree affirmed.

Writ of error dismissed by United States Supreme Court, March 21, 1910, 216 U. S. 616, 54 L. ed. 639, 30 Sup. Ct. Rep. 577.

VIRGINIA SUPREME COURT OF APPEALS.

VIRGINIA BAKING COMPANY, Appt.,
v.
SOUTHERN BISCUIT WORKS.

(— Va. —, 68 S. E. 261.)

Trademark — ordinary words — origin and manufacture.

1. The words "Crown" and "Jamestown" may, when applied in combination with other words to a manufactured article, indicate origin and manufacture, and, as so combined, be the subject of a valid trademark.

Same — different application — validity.

2. One who has applied the words "Crown" and "Jamestown" to crackers and small cakes, respectively, cannot complain that they are respectively applied by another manufacturer to ginger snaps and larger cakes of an entirely different class.

(March 10, 1910.)

30 L.R.A.(N.S.)

APPEAL by defendant from a decree of the Chancery Court of Richmond in complainant's favor in a suit to enjoin the alleged infringement of certain trademarks, and for an accounting for profits and damages alleged to have accrued from such infringement. Reversed.

The facts are stated in the opinion.

Messrs. Meredith & Cocke, for appellant:

One is not required to so distinguish his articles that careless and indifferent buyers will know by whom they are made or sold. His competitor has no better right to the monopoly of the trade of the negligent and indifferent than he has.

Allen B. Wrisley Co. v. Iowa Soap Co. 59 C. C. A. 56, 122 Fed. 796; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; *Amoskeag Mfg. Co. v.*

Note. — Use of tradename or trademark on articles other than those to which it is applied by the owner.

But few cases have considered this specific question; in those that have, it is generally recognized that the use of a trademark or tradename upon articles of a certain class does not preclude the right of others to use the same trademark or tradename upon articles of an entirely different class; that is, of such a different class that the general public would not connect the person originally coining or using the trademark or tradename with the manufacture or production of the class of articles to which it is applied by the other person. To illustrate: A manufacturer of stoves could not claim that his trademark was infringed by the use thereof by another to designate cement products manufactured by him. While the foregoing proposition is well settled, the dividing line between the use of the same trademark or tradename on articles, although not resembling each other, yet of the same general character, is more obscure. In general, the owner of a trademark or tradename will be protected therein as against the use thereof by others upon articles which, in their general characteristics, construction, or use are so closely allied with the products to which the owner applies the same as to render it probable, or at least possible, that the general public may be deceived thereby as to the manufacturer or producer of the article.

As said by the court in *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. 297, the criterion is not the certainty of success in misleading the public, but its probability or even possibility.

On the same subject, Lord Herschell remarked that the proposed use of the same words by another manufacturer, although on a different article, would be calculated to deceive, and added: "But I do not think it is necessary to go so far as this. I think it is enough to say that I am not satisfied that there would be no reasonable danger

Trainer, 101 U. S. 51, 25 L. ed. 993; Corbin v. Gould, 133 U. S. 308, 313, 33 L. ed. 611, 613, 10 Sup. Ct. Rep. 312; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537-551, 34 L. ed. 997-1005, 11 Sup. Ct. Rep. 396; Brown Chemical Co. v. Meyer, 139 U. S. 540-544, 35 L. ed. 247-249, 11 Sup. Ct. Rep. 625; Stachelberg v. Ponce, 128 U. S. 686, 32 L. ed. 569, 9 Sup. Ct. Rep. 200; Deering Harvester Co. v. Whitman & B. Mfg. Co. 33 C. C. A. 558, 62 U. S. App. 689, 91 Fed. 376; Amoskeag Mfg. Co. v. Spear, 2 Sandf. 599; International Trust Co. v. International Loan & T. Co. 153 Mass. 271, 10 L.R.A. 758, 26 N. E. 693; White v. Trowbridge, 216 Pa. 11, 64 Atl. 865; New Haven Patent Rolling Spring Bed Co. v. Farren, 51 Conn. 324; Coats v.

Merrick Thread Co. 149 U. S. 562, 37 L. ed. 847, 13 Sup. Ct. Rep. 966; Saunders v. Sun Life Assur. Co. [1894] 1 Ch. 543; Burgess v. Burgess, 3 De G. M. & G. 896, 25 Eng. Rul. Cas. 186; French Republic v. Saratoga Vichy Spring Co. 191 U. S. 427-440, 48 L. ed. 247-253, 24 Sup. Ct. Rep. 145; Powell v. Birmingham Vinegar Brewery Co. [1896] 2 Ch. 68; Edwards v. Dennis, L. R. 30 Ch. Div. 471.

To acquire an exclusive right, the trademark must, either by itself or by association, point distinctly to the origin or ownership of the article to which it is applied, for unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived.

of the public being so deceived." *Eno v. Dunn*, L. R. 15 App. Cas. 261.

And in determining whether the article to which a trademark is subsequently applied by another is of the same class, so as to be within this rule, the court, as said in *Bass, Ratcliff & Gretton v. Feigenspan*, 96 Fed. 206, will not be astute to recognize in favor of an infringer fine distinctions between different articles of merchandise of the same general nature, and will resolve against the wrongdoer any fair doubt whether the public may or may not be deceived through the use of the same mark or symbol by another.

The fact that the manufacturer or producer of an article which, in its general characteristics, construction, or purpose resembles that of another, applies to it the trademark or tradename of the latter, is generally considered strong if not convincing proof that the purpose was to mislead the public, and derive an undue advantage therefrom, to the injury of the owner of the tradename. As reasoned by the court in *Carroll v. Ertheiler*, 1 Fed. 688: "The dominating characteristic of the plaintiff's trademark is the name 'Lone Jack.' His tobacco has come to be known and described by this name throughout the country to such an extent that the accompanying device has ceased to be important, if it ever was so,—doubtless rarely observed and slightly remembered. At home and abroad, to the trade and the public, it is familiarly known as 'Lone Jack,' and is thus designated as the plaintiff's manufacture by purchasers and sellers. The defendant's application of this name to his smoking tobacco is an adoption and use of the essential part of the plaintiff's trademark. Surrounding it with a different device signifies nothing to the public, who attach no importance to the device of the plaintiff. The defendant's name upon the cigarettes, if recognized (and it would not be without close inspection), would not inform the public that the tobacco is not of the plaintiff's manufacture. That the defendant's act is calculated to mislead can hardly be doubted; that it has mislead, the plaintiff 30 L.R.A. (N.S.)

tiff's affidavits we think show; and the inference that the defendant supposed it would mislead, and intended it should, cannot well be avoided. Why otherwise did he adopt this particular name? He knew it to be the recognized designation of the plaintiff's tobacco, which had become popular with consumers and the trade. Did he not expect the public to be influenced thereby and his business increased? An affirmative answer cannot well be avoided. If he did not, however, the injunction will do him no harm, for he has not yet had time to establish a reputation of his own under this name."

In denying the right to use the words "Omega Oil" as a trademark for medicated soap, where those words were already in use by another as a trademark for a liniment, in *Omega Oil Co. v. Weschler*, 35 Misc. 441, 71 N. Y. Supp. 983, the court said: "The adoption of the words 'Omega Oil' by defendants was calculated to deceive the public into the belief that plaintiff's article was being put up for sale in another form; or, at least, into the belief that soap was placed on the market by plaintiff or by its consent. The adoption of green as the color of the soap, and the green wrapper and box, by defendants tended to further such deception, green being the distinctive color of plaintiff's liniment and of the labels on its bottle. Defendant's object in choosing the name and color of its soap is manifest, and, so far as I can see, for but a single purpose . . . 'that purpose a species of competition in trade which courts of equity hold to be unfair.'"

And in *American Tobacco Co. v. Polacsek*, 170 Fed. 117, on the same point the court remarked: "The logic of the situation may be briefly stated. Either the defendant is endeavoring to profit by the reputation of McAlpine's tobacco, or he is not. If it be true that he is making this attempt, he should be stopped *in limine*. If, on the other hand, he is only selling his goods on their merits, he does not need the same trademark as the complainant."

Applying the foregoing principles, it was held in *Carroll v. Ertheiler*, *supra*, that it

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; Elgin Nat. Watch Co. v. Illinois Watch Case Co. 179 U. S. 665-674, 45 L. ed. 365-379, 21 Sup. Ct. Rep. 270; 28 Am. & Eng. Enc. Law, pp. 395, 396; Columbia Mill Co. v. Alcorn; Amoskeag Mfg. Co. v. Trainer; and Stachelberg v. Ponce,—supra; Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co. 128 U. S. 598, 32 L. ed. 535, 9 Sup. Ct. Rep. 166; Corbin v. Gould, supra; Lawrence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Brown Chemical Co. v. Meyer and Allen B. Wrisley Co. v. Iowa Soap Co. supra; French Republic v. Saratoga Vichy Spring Co. 191 U. S. 427-439, 48 L. ed. 247-253, 24 Sup. Ct. Rep. 145; Deering Harvester Co. v.

Whitman & B. Mfg. Co. and Amoskeag Mfg. Co. v. Spear, supra; Coats v. Merrick Thread Co. 149 U. S. 562-573, 37 L. ed. 847-852, 13 Sup. Ct. Rep. 966; Powell v. Birmingham Vinegar Brewery Co. and Edwards v. Dennis, supra.

The right of one person to a certain trademark for a certain kind of baked stuff does not cover other kinds, so as to prevent its use by other persons for other kinds.

Smith v. Reynolds, 13 Blatchf. 458, Fed. Cas. No. 13,099; Amoskeag Mfg. Co. v. Garner, 54 How. Pr. 302; Royal Baking Powder Co. v. Sherrell, 93 N. Y. 331, 45 Am. Rep. 229; Caswell v. Davis, 58 N. Y. 233, 17 Am. Rep. 233; French Republic v. Saratoga Vichy Co. 191 U. S. 427, 48 L. ed. 247, 24 Sup. Ct. Rep. 145; Dela-

constituted an infringement for a manufacturer of cigarettes to use as a trademark the same word symbol as that owned and used by a manufacturer of smoking and chewing tobacco.

The same conclusion was reached under substantially a similar state of facts in *American Tobacco Co. v. Polacsek*, supra. In approving and following the doctrine of the *Carroll Case*, the court reasoned: "A trademark is a guaranty that the goods to which it is attached are made by its owner. If the owner has a high character for honesty, good workmanship, and fair dealing, his mark stands for all of these qualities. Those who have been accustomed to his goods see his mark and buy, knowing that they will not be defrauded. Whether a manufacturer confines himself to smoking tobacco, chewing tobacco, or cigarettes, he is still in the tobacco business, just as one is in the clothing business, whether he makes coats, waistcoats, or trousers; just as one is in the whisky business whether he makes rye or Bourbon. A consumer who believes in *McAlpin's* tobacco, seeing '*Virgin Leaf*' cigarettes on the market will naturally think that they are the product of the *McAlpin* factory, precisely as if '*D. H. McAlpin & Company*' had been printed on the package."

And in *Amoskeag Mfg. Co. v. Garner*, supra, the use of the word "*Amoskeag*" as a trademark or tradename for cotton goods, but not calico prints, was held to preclude its use as a trademark by a manufacturer of calico prints. Protection was given the complainant not only on the theory that the use of the trademark to designate calico prints would amount to a deception, or, at least, might amount to a deception of the public as to the manufacturer of the prints, but also upon the theory that such use would be prejudicial to the reputation of the owner of the trademark, since it was applied only upon articles produced by it of superior quality and excellence, while the use complained of was upon calico prints of an inferior grade and quality.

A manufacturer of muslin, using as a trademark the word "*Wamsutta*," may re-

strain the use thereof as a trademark by a manufacturer of shirts. *Wamsutta Mills v. Allen*, 12 Phila. 535.

A manufacturer of knit goods, although confining his operations to knit underwear, acquires a right in the tradename "*Northwestern Knitting Company*," to designate its manufacturer, which precludes the use thereof by another manufacturer of knit goods, although he applies it only to sweaters, which the original owner of the tradename and trademark does not manufacture. *Northwestern Knitting Co. v. Garon* (Minn.) 128 N. W. 288.

And in *Church & D. Co. v. Russ*, 99 Fed. 276, a manufacturer of soda was held entitled to restrain the use of its trademark by a manufacturer of baking powder. The court reasoned that the public would readily suppose that the baking powder bearing complainant's trademark was either manufactured by it, or by someone having its authority and consent, and that it vouched for the superior and high character of the goods bearing such trademark, and added: "Goods are in the same class whenever the use of a given trademark or symbol on both would enable an unscrupulous dealer readily to palm off on the unsuspecting purchaser the goods of the infringer as the goods made by the owner of the trademark, or with his authority and consent."

To the same effect, under a very similar state of facts, is *Layton Pure Food Co. v. Church & D. Co.* — L.R.A.(N.S.) —, 182 Fed. 35, which cites with approval the foregoing case.

The use by a manufacturer of liniment of the words "*Omega Oil*" as a trademark therefor precludes the manufacturer of a medicated soap from using the same words as a trademark therefor, since liniment and soap are not of such a different character as will permit the use upon the latter of the name created and made valuable as a trademark for the former. Liniment may have a much broader application than a soap, but it also possesses to a certain extent the qualities of a soap, and is used for many of the same purposes. *Omega Oil Co. v. Weschler*, 35 Misc. 441, 71 N. Y. Supp.

ware & H. Canal Co. v. Clark, 13 Wall. 311, 322, 20 L. ed. 581, 583; Edwards v. Dennis, L. R. 30 Ch. Div. 454; Singer Mfg. Co. v. Loog, L. R. 8 App. Cas. 42.

Mr. A. W. Patterson, for appellee:

A trademark is a mercantile sign manual of the owner, showing the origin of his goods, and is employed to designate the same or like articles of production.

Delaware & H. Canal Co. v. Clark, 13 Wall. 311, 20 L. ed. 581; 28 Am. & Eng. Enc. Law, p. 389; Anglo-Swiss Condensed Milk Co. v. Metcalf, L. R. 31 Ch. Div. 454; Carroll v. Ertheiler, 1 Fed. 688; White v. Miller, 50 Fed. 277; Church & D. Co. v. Russ, 99 Fed. 276; Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. 72 N. J. Eq. 555, 65 Atl. 870; Enoch Morgan's Sons Co. v. Ward, 12 L.R.A.(N.S.) 729, 81 C. C. A. 616, 152 Fed. 690; Hier v. Abrahams, 82 N. Y. 519, 37 Am. Rep. 589; Collins Co. v. Oliver, Ames & Sons Corp. 20 Blatchf. 542, 18 Fed. 561; Wamsutta Mills v. Fox, 49 Fed. 141; Bass, Ratcliff & Gretton v. Feigen-span, 96 Fed. 206; Amoskeag Mfg. Co. v. Garner, 54 How. Pr. 297; Godillot v. American Grocery Co. 71 Fed. 873; White v. Miller, 50 Fed. 277; Re Wright, 148 Off. Gaz. 834; Re Dunn's Trade Mark, 7 R. P. C. 311; Australian Wine Importers Trade Mark, 6 R. P. C. 311; Re Turney & Sons Trade Mark, 11 R. P. C. 37; Eastman Photographic Materials Co. v. John Griffith's Cycle Corp. 15 R. P. C. 105; Dunlop Pneu-

matic Tyre Co. v. Dunlop Lubricant Co. 18 R. P. C. 12; Swift v. Groff, 114 Fed. 605; Edison Storage Battery Co. v. Edison Automobile Co. 67 N. J. Eq. 44, 58 Atl. 861; Gannert v. Rupert, 62 C. C. A. 594, 127 Fed. 962; Walter Baker & Co. v. Delapenha, 160 Fed. 750.

Similarity such as will deceive the critical, well-posted buyer is not the degree of likeness necessary to this action.

Nims, Unfair Business Competition, p. 74; Wirtz v. Eagle Bottling Co. 50 N. J. Eq. 164, 24 Atl. 658; N. K. Fairbank Co. v. R. W. Bell Mfg. Co. 23 C. C. A. 554, 45 U. S. App. 190, 77 Fed. 869; Kosterling v. Seattle Brewing & Malting Co. 54 C. C. A. 76, 116 Fed. 620; Stuart v. F. G. Stewart Co. 33 C. C. A. 480, 63 U. S. App. 561, 91 Fed. 243; Leidersdorf v. Flint, 50 Wis. 401, 7 N. W. 252; Ewing v. Johnston, L. R. 13 Ch. Div. 434, L. R. 7 App. Cas. 219.

"Grade symbols" are entitled to the ample protection against infringement.

American Solid Leather Button Co. v. Anthony, 15 R. I. 338, 2 Am. St. Rep. 898, 5 Atl. 626; Ransome v. Bentall, 3 L. J. Ch. N. S. 161; Gillott v. Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553; Lawrence Mfg. Co. v. Lowell Hosiery Mills, 129 Mass. 325, 37 Am. Rep. 302; Shaw Stocking Co. v. Mack, 21 Blatchf. 1, 12 Fed. 707; Bayer v. Baird, 15 R. P. C. 615; American Tin Plate Co. v. Licking Roller Mill Co. 158 Fed. 690; Millington v. Fox, 3 Myl. & C. 338; Law-

983, affirmed in 68 App. Div. 638, 74 N. Y. Supp. 1140.

In Collins Co. v. Oliver Ames & Sons Corp. 20 Blatchf. 542, 18 Fed. 561, a manufacturer of edged tools, to which it applied the trademark "Collins & Company" was held entitled to restrain the use by another of this term as a trademark for shovels, although not engaged in the manufacture of shovels itself. Protection was given in this case on the theory of protecting the public against deception, and also because such use was prejudicial to the owner of the trademark, since it was applied by it only upon edged tools of a superior quality, while the application complained of was to shovels of an inferior grade and quality.

Fruit salt and baking powder are not of so essentially different a character that the one could not be supposed to enter into the composition of the other, although one is an aperient medicine, and the other a powder for baking. Hence, the use of the trademark "fruit salt" to designate an aperient medicine precludes its use by another to designate a baking powder, since such use would tend to induce the public to believe that the fruit salt powder was an ingredient of the baking powder, or employed in its preparation, or that the manufacturer of the fruit salt powder was connected with the manufacture of the baking powder. Eno v. Dunn, L. R. 15 App. Cas. 252, 30 L.R.A.(N.S.)

But a trademark for dry white oxide of zinc is not infringed by its use to designate a paint composed of white oxide of zinc, ground in oil, since the two articles are of an entirely different class. La Société Anonyme des Mines v. Baxter, 14 Blatchf. 261, Fed. Cas. No. 8,099.

A substance named "celluloid," which word is used as a trademark therefor, is not infringed by the use by another of the word "Celluloid" as a trademark for starch. Celluloid Mfg. Co. v. Read, 47 Fed. 712.

In George v. Smith, 52 Fed. 830, the court said that the use of the word "Epicure" as a trademark for canned fruit would not prevent its use by another as a trademark for canned salmon. In further illustration of the distinction between classes of articles which would justify the use of the same trademark by different manufacturers, it was said that beer and nails did not belong to the same class of merchandise simply because both were sold in kegs.

An iron manufacturer who uses a lion's head as a trademark cannot prevent a linen manufacturer from using a lion's head as a trademark for his goods. Ainsworth v. Walmesley, 35 L. J. Ch. N. S. 352. And see to the same effect, the remarks of the court in Hall v. Barrows, 4 De G. J. & S. 150.

In the foregoing cases, the question con-

rence Mfg. Co. v. Tennessee Mfg. Co. 138 U. S. 537, 34 L. ed. 997, 11 Sup. Ct. Rep. 396.

Whittle, J., delivered the opinion of the court:.

This suit in equity was brought by the appellee, the Southern Biscuit Works, to enjoin the appellant, the Virginia Baking Company, from the alleged infringement of certain trademarks, the property of the plaintiff, and also to compel an accounting by the defendant for profits and damages charged to have accrued from such infringement.

The litigants are rival corporations located in the city of Richmond, and engaged in the manufacture of biscuit products, such as cakes, crackers, snaps, jumbles, and like goods. The gravamen of the bill is that the defendant has been guilty, not of unfair business competition, but that it has infringed upon the rights of the plaintiff in and to the use of two words, namely, "Crown" and "Jamestown." These words, it is claimed, had been adopted and appropriated by the plaintiff as common-law trademarks, and continuously applied "to distinguish and identify its biscuits in certain styles and varieties," and that it has the exclusive right to use them "for the purpose of distinguishing and identifying its said biscuit products." The bill admits that the plaintiff has hitherto only used its

"Crown" trademark in connection with soda crackers, and the "Jamestown" brand with small cakes, known as "drops;" but the insistence is that the plaintiff's right to the employment of these words is exclusive, and that the defendant may not lawfully use either of them on any kind of cracker or cake whatsoever.

The answer controverts the proposition that the words "Crown" and "Jamestown" were adopted for the purpose of indicating "origin, manufacture, or ownership" of the goods to which they were applied, or for general use, but insists that they were placed upon certain specific articles to denote "class, grade, style, or quality," and therefore could not be upheld as technically trademarks. It concedes the use by it of the word "Crown" in connection with cakes known as "ginger snaps," and "Jamestown" with cakes called "jumbles," but denies that the trade has been deceived, or that any purchaser, either wholesale or retail, could have been misled by such use of these words.

Confining our consideration to the precise issue presented by the pleadings, we are of opinion that the fair result of the evidence shows that the respective businesses of these litigants are conducted under distinct and wholly dissimilar corporate names and general trademarks, the plaintiff doing business as the Southern Biscuit Works, under a trademark consisting of a sheaf of wheat printed on a label in red, white, black, and

considered was the right to be protected in a trademark or tradename against its use by another as a trademark for an article of a sufficiently similar class to make it probable or possible that the public might be misled into believing that the owner of the trademark or tradename was connected with the production or sale of the article to which it was subsequently sought to apply the mark or name. The question was considered in these cases with reference to rules peculiar to trademarks and tradenames. In this connection it is of interest to note that relief has sometimes been given the owner of a tradename by restraining its use by another, although as a trademark for an article of an entirely different class than that with reference to which the tradename is used. In such cases, the person using the tradename for a trademark has made such use of it as would make it possible or probable that the public would be deceived into believing the owner of the tradename was connected with, or authorized the manufacture and sale of, the article to which the trademark was applied. The view was apparently taken that the owner of the tradename owed a duty to the public to prevent such use, otherwise he might be estopped to dispute his responsibility for and connection with the production and sale of the article to which the tradename was applied as a trademark. 30 L.R.A. (N.S.)

This danger of injury to the owner of the tradename was regarded as sufficient to authorize him to invoke the aid of equity to restrain such use by another. *Routh v. Webster*, 10 Beav. 561; *Walter v. Ashton*, [1902] 2 Ch. 282. This doctrine was applied in the latter case, and the manufacturer of bicycles was restrained from using as a trademark for his bicycles the word "Times" in such a way as to lead the public to believe that such bicycles were manufactured by, or sold under the authority and superintendence of, the Times Publishing Company, publishers of a paper called "The Times," it appearing that there was a reasonable probability of such company being exposed to litigation, and possibly, or even probably, being made responsible by reason of such use.

And in *Kinsley v. Jacoby*, 28 Abb. N. C. 451, 20 N. Y. Supp. 46, the proprietors of a hotel known as the Holland House were held entitled to restrain the use of such name by another as a trademark for cigars, where the purpose of the use was to represent to the public that the manufacturer of the cigars was in some way connected with the hotel. The ground upon which relief was given in this case is not entirely clear, as the question is not elaborated in the opinion, which, however, cites as authority cases applying rules peculiar to trademarks and tradenames. A. G. S.

light blue; that in addition to this, as subsidiary word symbols, the plaintiff has acquired the exclusive right to use the word "Crown" in connection with its soda cracker style of goods, and "Jamestown" with a certain kind of cake known as "drops;" that the defendant is operating under the corporate name of the Virginia Baking Company, and using a trademark consisting of the obverse of the great seal of the commonwealth of Virginia on a red, white, and blue label. It likewise employs the word "Crown" as a grade symbol in connection with a small variety of cakes known as "ginger snaps," and the word "Jamestown" with cakes called "jumbles." A "jumble" is four or five times as large, and is essentially a different cake from a "drop," having a hole in the center as large as the "drop" itself. These several kinds of cakes are recognized in the trade as distinctive classes of goods. The words "Crown" and "Jamestown" are mere fanciful words, and, standing alone, do not indicate "origin and manufacture;" nevertheless, in association with other words, they have that effect, and entitle the plaintiff to claim a trademark for the combination. *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51, 25 L. ed. 993; *Corbin v. Gould*, 133 U. S. 308, 33 L. ed. 611, 10 Sup. Ct. Rep. 312.

Conceding, then, the right of the plaintiff to the exclusive use of these words in the connection in which they occur and to the extent to which they have been appropriated and applied, as against the defendant, the right is coextensive only with such use. If there be any foundation for the claim that it was the intention of the plaintiff to apply these trademarks to other products, it was an undisclosed purpose, resting exclusively in the mind of the plaintiff, and could not affect the rights of the defendant, who cannot be expected to anticipate that the plaintiff might in the future conclude to manufacture and place on the market a "Crown" ginger snap, or a "Jamestown" jumble. The record affords no proof of misrepresentation or unfair dealing on the part of the defendant, and the direct testimony adduced to show that the public has been misled by the alleged infringement of the plaintiff's trademarks in the particulars complained of is extremely meager and inconclusive. Indeed, we think it is apparent that none save the careless and inattentive could reasonably have been misled by the acts complained of.

The doctrine in controversies of this sort is stated in *International Trust Co. v. In-30 L.R.A. (N.S.)*

ternational Loan & T. Co. 153 Mass. 271, 278, 10 L.R.A. 758, 26 N. E. 693, 695, as follows: "It is not sufficient that some person might possibly be misled; but the similarity must be such that 'any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other.'"

In *White v. Trowbridge*, 216 Pa. 11, 64 Atl. 862, the court held: "The defendant will not be enjoined from using certain trademarks or labels, where they are not so similar to the ones used by plaintiff, in appearance or in the connection of the words, as to deceive a person of ordinary intelligence, using ordinary care."

In *Allen B. Wrisley Co. v. Iowa Soap Co.* 59 C. C. A. 54, 122 Fed. 796, the court said: "But he is not required to so distinguish his articles that careless and indifferent buyers will know by whom they are made or sold. His competitor has no better right to the monopoly of the trade of the negligent and indifferent than he has."

The rule is stated with equal emphasis by the Supreme Court of the United States in *Coats v. Merrick Thread Co.* 149 U. S. 562, 572, 573, 37 L. ed. 847, 852, 853, 13 Sup. Ct. Rep. 966, 970. Mr. Justice Brown, in delivering the unanimous opinion of the court in that case, observes: "There is, no doubt, a general resemblance between the heads of all spools containing a black and gold label, which might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this."

. . . In short, they could do little more than place their own name conspicuously upon the label, to rearrange the number by placing it in the border instead of the center of the label, and to omit loops of the plaintiffs' periphery, and substitute their own star between the numerals. Having done this, we think they are relieved from further responsibility."

These decisions sufficiently illustrate the controlling principle in the present case, and, as applied to the evidence, are conclusive against the pretensions of the appellee.

The decree of the Chancery Court must therefore be reversed, the injunction dissolved, and the bill dismissed.

Buchanan, J., absent.

Petition for rehearing denied June 9, 1910.

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON, Respt.,
v.

ADOLF DACKE, Appt.

(— Wash. —, 109 Pac. 1050.)

Criminal law — estoppel to defend.

One who has had sexual relations with a child prior to the passage of a statute making it a crime carnally to know a child of her age of previous chaste character is not precluded from relying on her previous unchastity to avoid punishment for acts committed after the passage of the statute, on the theory that he cannot take advantage of his previous wrongdoing to avoid the application of the statute.

(June 30, 1910.)

APPEAL by defendant from a judgment of the Superior Court for Kittitas County convicting him of statutory rape. Reversed.

The facts are stated in the opinion.

Messrs. Pruyn, Streff, & Hoefler, for appellant:

Chaste character means that prosecutrix

Note. — May defendant charged with sexual offense against female of previous chaste character impeach her character for chastity by reason of his own intercourse with her prior to the acts charged.

Although many cases may be found not within the scope of this note, passing upon the question of the competency and relevancy of evidence of specific acts of unchastity on the part of the prosecutrix with the defendant prior to the date of the seduction or rape for which he may be indicted, the point determined in *STATE v. DACKE*, whether the defendant, charged under a statute with carnally knowing a female child between the ages of fifteen and eighteen years and "of previously chaste character," is estopped from showing that she is not "of previously chaste character," and thus not within the protection of the statute, by reason of his own intercourse with her at some date prior to that charged in the indictment, and when she is chaste as to everyone except himself, appears to have been passed upon in but one other case.

In *Bailey v. State*, 57 Neb. 706, 73 Am. St. Rep. 540, 78 N. W. 284, 11 Am. Crim. Rep. 660, the facts of which are sufficiently set out in *STATE v. DACKE*, Ragan, C., in delivering the opinion, said: "It is said by counsel for the state that to allow the prisoner to urge as a defense here the intercourse which took place between himself and the prosecutrix in the state of Iowa would be permitting the accused to take advantage of his own wrong. This is simply saying that the accused is estopped from asserting the truth of his unlawful conduct in another jurisdiction, because that 30 L.R.A. (N.S.)

shall possess actual personal virtue; and a single act of illicit connection may be shown on behalf of the defendant.

People v. Clark, 33 Mich. 117, 1 Am. Crim. Rep. 660.

The chastity of the female must be shown affirmatively by the state.

Corn. v. Whittaker, 131 Mass. 224; *West v. State*, 1 Wis. 209; *People v. Roderigas*, 49 Cal. 9; 1 Greenl. Ev. § 35; *Bishop, Crim. Law*, § 639; *State v. Eckler*, 106 Mo. 585, 27 Am. St. Rep. 372, 17 S. W. 814; *State v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *State v. Hill*, 91 Mo. 425, 4 S. W. 121; *State v. Wenz*, 41 Minn. 196, 42 N. W. 933; *State v. Timmens*, 4 Minn. 325, Gil. 241; *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *State v. Zabriskie*, 43 N. J. L. 369; *State v. Lockerby*, 50 Minn. 363, 36 Am. St. Rep. 658, 52 N. W. 958, 9 Am. Crim. Rep. 617.

The presumption in favor of the chastity of the prosecutrix is overcome by the presumption of the innocence of the defendant, and the burden rests upon the state to prove the averment in the indictment.

conduct would establish his innocence of the crime with which he is charged with having committed in this state. But the state, in criminal prosecutions, may not invoke against the prisoner the doctrine of estoppel. . . . To sustain a criminal conviction, it is not enough for the state to show that the prisoner indicted has violated the spirit of the statute, but the evidence must show beyond a reasonable doubt that he has offended against the very letter of the law. . . . Here the prisoner is charged with having had in this state sexual intercourse, with her consent, with a girl sixteen years of age, she being prior thereto chaste. At the time the intercourse occurred in this state, the female was not chaste. Prior to the prisoner's intercourse with her in Iowa, so far as this record shows, she was chaste, and in Iowa—for we must presume the laws of that state to be the same as ours—he robbed her of her virginity, and committed the crime for which he is convicted here."

There is *dicta* in this case, approved in *Blair v. State*, 72 Neb. 501, 101 N. W. 17, to the effect that a defendant cannot plead his own defilement of a girl within the statute of limitations as a defense to a later defilement. It was said: "Had the first defilement of the girl by the prisoner occurred in Nebraska instead of Iowa on the date it did, and which was prior to the one charged in the indictment, then the first defilement would be no defense to the prisoner on an indictment for the second, since both would have been within the statute of limitations, and each intercourse a part of the crime charged in the indictment."

E. M. S.

Oliver v. Com. 101 Pa. 215, 47 Am. Rep. 704; People v. Squires, 49 Mich. 487, 13 N. W. 828; State v. Moore, 78 Iowa, 494, 43 N. W. 274; People v. Krusick, 93 Cal. 74, 28 Pac. 794; People v. Clark, 33 Mich. 117, 1 Am. Crim. Rep. 660.

Messrs. E. K. Brown and O. O. Felkner, for the State:

In rape and seduction cases brought under statutes requiring previous chastity of the prosecutrix, the previous chastity of the prosecutrix will be presumed until evidence to the contrary appears, and the burden of proving unchastity is upon the defendant, if he would avail himself of that defense.

Bishop, Statutory Crimes, 3d ed. §§ 648, 649; People v. Brewer, 27 Mich. 134; People v. Clark, 33 Mich. 112, 1 Am. Crim. Rep. 660; Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708; State v. Higdon, 32 Iowa, 262; State v. Bowman, 45 Iowa, 418; State v. Wells, 48 Iowa, 671; State v. Moore, 78 Iowa, 494, 43 N. W. 273; State v. McClintic, 73 Iowa, 663, 35 N. W. 696; State v. Hemm, 82 Iowa, 609, 48 N. W. 971; State v. Brown, 86 Iowa, 121, 53 N. W. 92; State v. Thornton, 108 Mo. 640, 18 S. W. 841; State v. Kelley, 191 Mo. 680, 90 S. W. 834; McTyler v. State, 91 Ga. 254, 18 S. E. 140; Barker v. Com. 90 Va. 820, 20 S. E. 776, 9 Am. Crim. Rep. 614; Mills v. Com. 93 Va. 815, 22 S. E. 863; Ferguson v. State, 71 Miss. 805, 42 Am. St. Rep. 492, 15 So. 66; Smith v. State, 118 Ala. 117, 24 So. 55; Woodard v. State, 5 Ga. App. 447, 63 S. E. 573; Com. v. Allen, 135 Pa. 483, 19 Atl. 957; Leedom v. State, 81 Neb. 585, 116 N. W. 496.

The *corpus delicti*, the age of the prosecutrix, the fact that she is unmarried, and her previous chastity, may always be proved by her own uncorroborated testimony.

Kenyon v. People, 26 N. Y. 203, 84 Am. Dec. 177; People v. Orr, 92 Hun, 199, 36 N. Y. Supp. 398; People v. Kearney, 110 N. Y. 188, 17 N. E. 736; Leedom v. State, supra; State v. Hetland, 141 Iowa, 524, 119 N. W. 961.

Morris, J., delivered the opinion of the court:

Appellant was convicted of the crime of rape, and appeals from the judgment entered.

A number of errors are assigned, but we will refer to only one, which in our opinion is decisive of the appeal. The Criminal Code of 1909 amended the law relating to rape, among other changes making it a crime to carnally know a female child between the ages of fifteen and eighteen 30 L.R.A. (N.S.)

years and of previous chaste character. Rem. & Bal. Code, § 2436. Appellant was informed against under this new section, the charge being laid in Kittitas county, and the time as June 30, 1909. The state's evidence discloses that prosecutrix, who was then seventeen years old, and the appellant, first became acquainted in Snohomish county, some time in October, 1908; that in the following November they began having sexual relations, with the full consent of prosecutrix; and that these relations were indulged in whenever opportunity afforded, until the following March, when prosecutrix with her family moved to Kittitas county. In May appellant went to Kittitas county and renewed his acquaintance with prosecutrix, and they again assumed their sexual relations, until July 8th, when appellant was arrested and charged with an offense occurring on June 30th. At the close of the state's case, the prosecutrix having testified to these facts concerning her relations with appellant, his counsel moved for a directed verdict of acquittal, which being denied, he excepted, and now alleges error in the court so ruling.

In construing the statute involved in this information, every requirement must be given effect as constituting an essential element in the offense created. The requirement that the female against whom the offense is committed shall be of "previously chaste character" was unknown to the common law, nor was it an ingredient of any statute of this state defining rape, until the act of 1909. When, therefore, that act went into effect on the 8th day of June, 1909, it brought within its protecting terms a theretofore—so far as this crime is concerned—unknown requirement, that of previous chastity. The carnal knowledge of a female child between the ages of fifteen and eighteen years with her consent, under the old law, constituted rape; but under this act of 1909, under which this information lies, such carnal knowledge is not a crime unless the female child be of "previously chaste character." The act includes within its terms one female child and one male, and since the male person cannot commit the offense described in the statute except upon the female child described in the statute, it follows that, as to the male person charged with the crime, the female child must be "of previously chaste character," not alone as to some other man, nor only as to all other men, but to the particular man named in the information. The female child named in this information having testified to voluntary sexual relations with appellant many times prior to June 30th,

she was not on that day within the protection of the statute, in that she was not "of previously chaste character." The term "of previously chaste character" means the same in law as in morals. It describes a condition of sexual purity. It means a female who has never submitted herself to the sexual embrace of man, and who still retains her virginal chastity. It is defined as "chaste in fact when seduced," in *Hussey v. State*, 86 Ala. 34, 5 So. 484; as "actual personal virtue," in *State v. Patterson*, 88 Mo. 88, 57 Am. Rep. 374; *Lyons v. State*, 52 Ind. 426, 1 Am. Crim. Rep. 28; *Kenyon v. People*, 26 N. Y. 203, 84 Am. Dec. 177. "A chaste female is one that has never had sexual intercourse, who yet retains her virginity. A virtuous female is one who has not had sexual intercourse unlawfully, out of wedlock, knowingly and voluntarily." *Marshall v. Territory*, 2 Okla. Crim. Rep. 136, 101 Pac. 139. Whatever may be the language which one may choose to define a female of previously chaste character, it certainly cannot be contended that one who, moved by lewd desire and libidinous impulse, submits herself to the carnal embrace of a man from November to July whenever the time and the place are opportune, is a female of such a character on the 30th day of June.

It is argued by the state that, as to the appellant, the prosecutrix is exempt from this requirement of the law; that, being the author of her undoing, he cannot take advantage of his own wrong and hide himself under the cloak of this statutory requirement, as a shield for his protection. Such an argument is purely a sentimental one, and, although it may be abhorrent to the moral sense to permit a man to protect himself with the shield of his own wrong, we are dealing with a legal question, and not one of sentiment nor morals; and, in order to find a man guilty of such an offense as the one named in this information, we must first find a female who can in all its essentials measure up to the requirement of the law charged to be violated. The test of virtue in a woman is a personal and physical test, and when, by reason of her voluntary sin, she has lost her virginal purity, it matters not who contributed to that loss; she is no longer chaste. It is not a sound argument to say that the prosecutrix in this case was immune from rape as to all other men, but not from appellant. The statute makes no such distinction; neither can we. As is said in *Shirwin v. People*, 69 Ill. 55, 1 Am. Crim. Rep. 650: "The right of the accused to defend must be as broad as that of the prosecution to criminate."

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Such we believe to be the reasoning of the law. Its authority will be found in similar cases to which we will now refer.

In *People v. Clark*, 33 Mich. 112, 1 Am. Crim. Rep. 660, the defendant was charged with seduction on July 28th. The complaining witness testified that the first offense was committed on that day. She then gave evidence of similar offenses committed in the month of August, one of which latter offenses was elected by the prosecution to go to the jury. The court held a conviction upon the latter act could not be sustained, and said: "The object of this statute was not to punish illicit cohabitation. Its object was to punish the seducer." The court then holds there could be no seduction in August, even though made under a promise of marriage, when the evidence showed prior acts. The complaining witness having already fallen in July, there was in August no virtue to seduce. So, in *People v. Squires*, 49 Mich. 487, 13 N. W. 828, defendant was charged with seduction in September. The proof showed the first act of intercourse between the parties long prior to that. Held, complaining witness was unchaste in September, and could not then be seduced. In *Bailey v. State*, 57 Neb. 706, 73 Am. St. Rep. 540, 78 N. W. 284, 11 Am. Crim. Rep. 660, the defendant was convicted of rape under a statute very similar to ours. The act charged was on June 13th. The evidence disclosed that the first act of intercourse between defendant and prosecutrix took place in Iowa, the previous March. The court held that the conviction could not be sustained, as the prosecuting witness was not previously chaste in June, and said: "The fact that she was first deprived of her virginity by the prisoner does not strengthen the state's case. . . . To sustain a conviction under it, the evidence must show beyond a reasonable doubt, among other things, that the female with whom the sexual intercourse was had was, prior to that intercourse, sexually pure,—chaste as Diana." The court then takes up the argument here made that defendant could not take advantage of his own wrong, and holds that the state in criminal prosecutions cannot invoke the doctrine of estoppel against a defendant; that it is not enough to show a violation of the spirit of the statute; but that its very letter must be offended against. In *State v. Patterson*, supra, the court says: "Evidence of prior specific acts of unchastity with the defendant himself is now universally received, as well in cases of seduction as in cases of rape. What for? To show that in the latter class of cases there was less likelihood of

absence of consent; and that in the former, in consequence of a prior act of the defendant, there was no chastity left to seduce. Can it be material by whom the prior act is performed, whether by the defendant or whether by anyone else?" In *People v. Nelson*, 153 N. Y. 90, 60 Am. St. Rep. 592, 46 N. E. 1040, the defendant was charged with seduction upon a "female of previous chaste character." Many acts of intercourse between the parties were testified to, occurring prior to the offense charged in the indictment. Held, that the conviction could not be sustained, upon the ground that, having indulged in frequent sexual intercourse with the defendant, the complaining witness was on the day charged not an unmarried female of previously chaste character. In *Carpenter v. People*, 8 Barb. 603, the act charged was abduction, under a statute describing the female as one "of previous chaste character." The time fixed was June, 1849. Evidence was given of an act of intercourse in 1846. The court held the female was not of previously chaste character, and said: "The word 'previous' in this connection must be understood to mean immediately previous, or to refer to a period terminating immediately previous to the commencement of the guilty conduct of the defendant."

So, in the case before us, the use of those words in the information meant the time just preceding the commission of the crime charged, June 30th. By her own evidence, the prosecutrix was not then a female child of previously chaste character. Neither was she on June 8th, when the law went into effect. She was not then within the description of the statute, and therefore not within its protection; and the motion of the defendant for a directed verdict should have been granted.

We do not wish to be understood as holding that a single act, or a number of acts, of sexual intercourse, will forever deprive a woman of the protection of a statute requiring previous chastity. It has been often held that a woman may reform in law as well as in morals, and for the second time become the victim of the seducer's lust. But we have no such case here. There was no evidence of any reformation prior to June 30th, nor of any assault then upon virtue's barrier. It was from first to last mutual desire and mutual gratification.

The judgment is reversed, and the cause remanded, with instructions to discharge the defendant.

Rudkin, Ch. J., and Parker and Gosc, JJ., concur.
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WEST VIRGINIA SUPREME COURT OF APPEALS.

H. L. SMITH, Appt.,
v.
C. M. ROOT et al.

(66 W. Va. 633, 66 S. E. 1005.)

Equity — jurisdiction — oil lease — removal of oil — injunction.

1. Equity has jurisdiction of a suit brought by the senior lessee in an oil lease against his lessor and a junior lessee of the same land from the same lessor, for the purpose of enjoining the removal of the oil from the leased premises and for specific execution of his lease; and, in such a suit, the court can settle the conflicting claims of the lessees, and grant such relief to either claimant as the pleadings and proof may warrant.

Oil and gas lease — construction — title to minerals.

2. An oil and gas lease giving the lessee the right, for the period of ten years, to explore for oil and gas, and providing that if a well is not completed on the leased premises within three months from the date of the lease, the lessee shall pay to the lessor, in advance, a quarterly cash rental for each additional three months the completion of a well is delayed, is an executory contract, and vests no title in the lessee to the oil and gas in place.

Same — abandonment.

3. Such a contract contemplates development of the leased premises within a reasonable time, and the lessee may lose his rights thereunder before the expiration of the ten years by abandonment of the lease, notwithstanding there is no forfeiture clause in the contract.

Same — establishment.

4. If the lessee has not actually entered upon the land, the relinquishment of his right to do so, or his abandonment, becomes purely a question of his intention, and may be established by proof of such facts and circumstances as evince a voluntary waiver of his rights.

Same — evidence — sufficiency.

5. A case in which the evidence proves a voluntary abandonment of the lease by the lessee.

(January 25, 1910.)

Headnotes by WILLIAMS, J.

Note. — Effect of provisions for minimum royalties or an annual rental upon right to forfeit oil or gas lease for failure to prosecute work.

The above title is the subject of a note in 11 L.R.A. (N.S.) 417, and it is intended to include herein only cases decided subsequently thereto.

In *Howerton v. Kansas Natural Gas Co.* 81 Kan. 553, post, —, 106 Pac. 47, the court, in considering the construction of a

A PPEAL by plaintiff from a decree of the Circuit Court for Roane County dismissing a bill filed to enjoin the removal of oil from certain lands under a lease thereof which was alleged to infringe rights granted to plaintiff under a prior lease, and to have such subsequent lease canceled as a cloud on title. Affirmed.

The facts are stated in the opinion.

Messrs. John B. Chapman, V. B. Archer, and George F. Cunningham for appellant.

Messrs. A. D. Follett and Van Winkle & Ambler, for appellees:

The failure of the contract to contain a forfeiture clause does not preclude its abandonment.

Urpman v. Lowther Oil Co. 53 W. Va.

lease of land for the development of gas or oil wells as affected by laches in development, quoted from said note as follows: "Generally all leases of land for the exploration and development of minerals are executed by the lessor in the hope and upon the condition, either express or implied, that the land shall be developed for minerals, and it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold under it any considerable length of time without making any effort at all to develop it according to the express or implied purpose of the lease; and, in general, while equity abhors a forfeiture, yet when such a forfeiture works equity, and is essential to public and private interests in the development of minerals in land, the landowner, as well as the public, will be protected from the laches of the lessee, and the forfeiture of the lease allowed, where such forfeiture does not contravene plain and unambiguous stipulations in the lease. This principle will be more readily enforced and applied by the court as to gas and oil cases because of the peculiar nature of those minerals and the danger of entire loss to the lessor of oil or gas in his lands by reason of well drilling on adjacent lands." The court added that this statement was grounded in reason and supported by the authorities. In that case the lease contained no provision for the payment of an annual rental, and it was based upon the nominal consideration of \$1. There was a delay of four years in exploring and developing the land for gas or oil purposes, except that one gas well was developed within one year from the date of the lease. Although there was no express provision for diligence in exploring and developing the land for purposes contemplated by the lease, the court, applying the doctrine quoted from, held that the contract contemplated or implied diligence, and that a delay of four years was unreasonable, and the lease was therefore canceled and set aside as forfeited. Although adhering to the doctrine of the foregoing opinion, the decision in this case was reversed upon a rehearing 30 L.R.A. (N.S.)

505, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656; Starn v. Huffman, 62 W. Va. 422, 59 S. E. 179; Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220; Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; Huggins v. Daley, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 606, 20 Mor. Min. Rep. 377; Foster v. Elk Fork Oil & Gas Co. 32 C. C. A. 560, 61 U. S. App. 570, 90 Fed. 178; Toothman v. Courtney, 62 W. Va. 167, 58 S. E. 915; Sult v. A. Hochstetter Oil Co. 63 W. Va. 317, 61 S. E. 308; Steelsmith v. Gartlan, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; Hooks v. Forst, 165 Pa. 238, 30 Atl. 846, 18 Mor. Min. Rep. 139; Thornton, Oil & Gas, 164.

(82 Kan. 367, 108 Pac. 813), on the ground that, in order to entitle himself to the aid of equity to forfeit an oil and gas lease for failure to develop, the lessor must allege and show that he has not an adequate remedy at law by an action for damages, and this it was held the lessor had failed to do. On this point the court said: "The default consisted in the failure properly to develop the leased territory by drilling and operating a reasonable number of wells necessary for that purpose, and the failure to market gas from, and make the payments stipulated for, the well completed. No reason is shown why witnesses of experience, acquainted with the gas field, may not testify with reasonable accuracy as to the number of wells which should have been drilled on the leased land, both for protection from drainage by neighboring leaseholds and to obtain the gas underneath the land. No insurmountable obstacle to such proof is perceived by the court, and, in the absence of evidence that it cannot be produced, it is concluded that the plaintiffs are not entitled to a remedy by forfeiture or cancellation of the lease."

In addition to the many cases cited in said note, and also those cited and commented upon in the original opinion in Howerton v. Kansas Natural Gas Co., as well as those considered and cited in Smith v. Root, the doctrine also finds support in the following cases, which, however, are not within the scope of this note as to the facts: Doddridge County Oil & Gas Co. v. Smith, 154 Fed. 970; Stahl v. Illinois Oil Co. (Ind. App.) 90 N. E. 632; Conkling v. Krandsusky, 127 App. Div. 761, 112 N. Y. Supp. 13; Federal Betterment Co. v. Blaes, 75 Kan. 69, 88 Pac. 555; Mills v. Hartz, 77 Kan. 218, 94 Pac. 142; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. 119 La. 793, 44 So. 481.

The contrary rule is apparently applied in Illinois. Poe v. Ulrey, 233 Ill. 56, 84 N. E. 46; Gillespie v. Fulton Oil & Gas Co. 236 Ill. 188, 86 N. E. 219.

The doctrine was also applied in Kimball Oil Co. v. Keeton, 31 Ky. L. Rep. 146, 101 S. W. 887, and the forfeiture clause in

Where one party fails to carry out his contract, the other may rescind it and treat it as abandoned.

Davison v. Von Lingen, 113 U. S. 40, 28 L. ed. 885, 5 Sup. Ct. Rep. 346; *Shaeffer v. Blair*, 149 U. S. 248, 37 L. ed. 721, 13 Sup. Ct. Rep. 856; *Lowther Oil Co. v. Miller-Sibley Oil Co.* 53 W. Va. 507, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656; *DeSollar v. Hanscome*, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 810; *McCabe v. Matthews*, 155 U. S. 550, 39 L. ed. 256, 15 Sup. Ct. Rep. 190.

Title under an oil lease is inchoate and for purpose of exploration only, until oil or gas is found, and if not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned.

Calhoun v. Neely, 201 Pa. 97, 50 Atl. 967, 21 Mor. Min. Rep. 754; *Urpman v. Lowther Oil Co.* 53 W. Va. 507, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656; *Steelsmith v. Gartlan*, supra.

The law recognizes a distinction between

the abandonment of operations under an oil lease, and an intention to abandon or surrender the lease itself; and unless bound by the terms of the lease so to do, it will not permit the lessee to hold the lease without operating under it, and thereby prevent the lessor from operating on the land or leasing it to others.

Parish Fork Oil Co. v. Bridgewater Gas Co. supra; *Johnston v. Standard Min. Co.* 148 U. S. 360, 37 L. ed. 480, 13 Sup. Ct. Rep. 585, 17 Mor. Min. Rep. 554; *DeSollar v. Hanscome* and *McCabe v. Matthews*, supra; *Felix v. Patrick*, 145 U. S. 317, 334, 36 L. ed. 719, 727, 12 Sup. Ct. Rep. 862; *Hoyt v. Latham*, 143 U. S. 553, 567, 36 L. ed. 259, 264, 12 Sup. Ct. Rep. 568; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; *Great West Min. Co. v. Woodmas of Alston Min. Co.* 14 Colo. 90, 23 Pac. 908; *Patterson v. Hewitt*, 195 U. S. 309, 49 L. ed. 214, 25 Sup. Ct. Rep. 35.

Equity has power to cancel oil leases for delay of development.

a lease was enforced for failure of the lessee to complete a gas or oil well as therein provided, although the provision of the lease was for forfeiture for failure to complete a well within a designated time, or pay a rental. It does not appear that any rental was paid or tendered, and the lease was declared forfeited for the failure to complete a well, without making any reference to the question of the rental.

In *Poe v. Ulrey*, supra, the lessees of land for purposes of exploring and developing the same for gas and oil did not complete a well thereon within the time agreed upon, but they attempted to exercise an option given them by the lease to pay the sum of \$1 per acre per year, payable quarterly, in lieu of such exploration and development. This rental was tendered the lessors, who refused to receive the same, but insisted upon the exploration and development of the land, and later they filed their bill in equity to set aside the lease as void on account of want of mutuality, and because it was unfair, harsh, and unconscionable, and also upon the ground that the lessee had failed to comply with the terms thereof as to completing the well. In refusing to sustain any of these contentions, the court said that the parties having agreed upon an amount to be paid as compensation for rights granted by the lease in case the well should not be drilled upon the lessors' land within twelve months, they could not be relieved from such contract upon the proposition that there was an implied agreement that the lessee would drill wells sufficient reasonably to develop the leased premises for the production of oil and gas, and that the lease should be canceled by the court, and the rights under it forfeited for failure so to do, even though compensation for such failure had been agreed upon. The court 30 L.R.A. (N.S.)

said: "The argument would have greater force if the lease had not contained a provision that it could be forfeited for a failure to complete a test well on the block of leases before the 1st day of May, 1905. That agreement would imply an exclusion of other grounds of forfeiture, and the agreement for compensation effectually excludes a forfeiture not stipulated for. The remedy for the breach of that contract would be by an action for damages."

It is of interest to compare the foregoing case with *SMITH v. ROOT*, which is very similar as to facts, and which holds that equity has jurisdiction to set aside such a lease for failure to explore and develop, although the lease is for a definite period of time, and provides for the payment of compensation for failure to explore and develop, and this, too, although the lease contains no express provision as to forfeiture.

The doctrine that equity will favor the forfeiture of such leases for an unreasonable delay in exploring and developing the leased premises will not be applied to enable the lessor to overreach and defraud the lessee out of his vested rights acquired by the assumption of the risk and the expenditure of large sums of money in the search for and production of the gas or oil with reference to which the lease was executed. *Doddridge County Oil & Gas Co. v. Smith*, supra.

Neither will equity apply this doctrine to enable the lessor to forfeit such a lease for any default of the lessee caused by his own acts in interfering with the operations of the lessee in exploring and developing the leased premises. *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836.

A. G. S.

Lowther Oil Co. v. Miller-Sibley Oil Co. 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 650; *Starn v. Huffman*, supra.

Mr. Thomas P. Ryan, also, for appellees:

Though a lease contains no provision of express forfeiture, under some circumstances of delay or fraudulent evasion of duty of development, equity will cancel an oil lease, as development is regarded as the real intent of the lessor.

Crawford v. Ritchey, 43 W. Va. 252, 27 S. E. 220; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493; *Bettman v. Harness*, 42 W. Va. 433, 36 L.R.A. 566, 26 S. E. 271, 18 Mor. Min. Rep. 500; *Elk Fork Oil & Gas Co. v. Jennings*, 84 Fed. 839; *Lowther Oil Co. v. Miller-Sibley Oil Co.* 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 650.

In construing contracts relating to oil and gas in place, and creating reciprocal rights in respect to it, courts recognize an implied obligation or covenant on the part of the lessee to develop the property with reasonable diligence, so that the lessor may come into possession of the benefit which it was intended he should receive, as otherwise the contract would be one-sided, leaving the lessor at the mercy of the lessee, and subject to any arbitrary action he might see fit to take.

Parish Fork Oil Co. v. Bridgewater Gas Co. 51 W. Va. 583, 59 L.R.A. 566, 42 S. E. 655, 22 Mor. Min. Rep. 145; *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915; *Petroleum Co. v. Coal, Coke & Mfg. Co.* 89 Tenn. 381, 18 S. W. 65; *Conrad v. Morehead*, 89 N. C. 31; *Munroe v. Armstrong*, 96 Pa. 307; *Huggins v. Daley*, 48 L.R.A. 320, 40 C. C. A. 12, 99 Fed. 613, 20 Mor. Min. Rep. 377; *Ray v. Western Pennsylvania Natural Gas Co.* 138 Pa. 576, 12 L.R.A. 290, 21 Am. St. Rep. 922, 20 Atl. 1065, 17 Mor. Min. Rep. 374; *Starn v. Huffman*, 62 W. Va. 422, 59 S. E. 179; *Lowther Oil Co. v. Miller-Sibley Oil Co.* supra; *Foster v. Elk Fork Oil & Gas Co.* 32 C. C. A. 500, 61 U. S. App. 576, 90 Fed. 180; *Elk Fork Oil & Gas Co. v. Jennings*, 84 Fed. 848; *Guffy v. Hukill*, 34 W. Va. 49, 8 L.R.A. 750, 26 Am. St. Rep. 901, 11 S. E. 754; *Mullan v. Carper*, 37 W. Va. 215, 16 S. E. 527; *Bluestone Coal Co. v. Bell*; *Bettman v. Harness*; and *Crawford v. Ritchey*,—supra; *McNish v. Stone*, 152 Pa. 457, note; *Whitcomb v. Hoyt*, 30 Pa. 409; *Brown v. Vandergrift*, 80 Pa. 142; *Duffield v. Hue*, 129 Pa. 94, 18 Atl. 566, 17 Mor. Min. Rep. 253; *Venture Oil Co. v. Fretts*, 152 Pa. 451, 25 Atl. 732, 17 Mor. Min. Rep. 543; *McKnight v. Manufacturers' Natural Gas Co.* 146 Pa. 185, 28 Am. St. Rep. 790, 23 30 L.R.A.(N.S.)

Atl. 164, 17 Mor. Min. Rep. 429; *Barnhart v. Lockwood*, 152 Pa. 82, 25 Atl. 237; *Bartley v. Phillips*, 165 Pa. 328, 30 Atl. 842, 18 Mor. Min. Rep. 145; *Cowan v. Radford Iron Co.* 83 Va. 547, 3 S. E. 120, 15 Mor. Min. Rep. 453; *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 Am. St. Rep. 285, 2 S. E. 713; *Ohio Oil Co. v. Kelley*, 9 Ohio C. C. 511; *Eaton v. Allegany Gas Co.* 122 N. Y. 416, 25 N. E. 981; *Donahue, Petroleum & Gas*, §§ 6, 8; *Cleminger v. Baben Gas Co.* 159 Pa. 16, 28 Atl. 293; *Marshall v. Forest Oil Co.* 198 Pa. 83, 47 Atl. 927, 21 Mor. Min. Rep. 179.

Williams, J., delivered the opinion of the court:

This is an appeal from a decree of the circuit court of Roane county, pronounced on the 29th day of August, 1907, dissolving an injunction which had previously been awarded to plaintiff, and dismissing his bill upon a hearing of the cause.

The suit grows out of conflicting oil and gas leases executed by Mrs. D. M. Hall and C. J. Hall, her husband, on a tract of 106 acres of land in Roane county. The plaintiff claims under a contract executed by the Halls to Lee Goff and A. S. Heck, bearing date February 29, 1904, and the defendants claim under a contract made by said Halls to S. L. Thornily, dated June 27, 1905. Both contracts were duly recorded, the first on May 4, 1904, and the second on August 7, 1905.

The object of the suit is to enjoin the defendants from operating on said land, and from removing and disposing of the oil produced from the wells drilled by them on the premises in controversy, and to have the second lease canceled as constituting a cloud upon plaintiff's title. Defendant demurred to the bill and also filed a cross-bill answer averring an abandonment of the first lease by Goff and Heck, the original lessees, under whom plaintiff claims, and praying for a cancelation of that lease as constituting a cloud upon their title. The demurrer to the bill raises the question of the jurisdiction of the court. It is hardly necessary to discuss this question, because it has been frequently held by this court, and the question apparently settled, that a court of equity has jurisdiction of such a suit. In the present case it has jurisdiction on two grounds: First, to prevent waste,—that is, the extraction and removal of the oil from the land; second, for specific enforcement of the lease contract; and, having jurisdiction, the court will administer complete relief. *Williamson v. Jones*, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 411, 19 Mor. Min. Rep. 19; *Crawford v. Ritchey*, 43 W.

Va. 252, 27 S. E. 220; Eclipse Oil Co. v. South Penn Oil Co. 47 W. Va. 84, 34 S. E. 923, 20 Mor. Min. Rep. 234; Urpman v. Lowther Oil Co. 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656; Carney v. Barnes, 56 W. Va. 581, 49 S. E. 423; Starn v. Huffman, 62 W. Va. 422, 59 S. E. 179; Eastern Oil Co. v. Coulehan, 65 W. Va. 531, 64 S. E. 836.

The lease to Goff and Heck was to remain in force for ten years, and as much longer as either oil or gas should be produced. The lessees were to deliver to the credit of the lessors, free of cost in the pipe line, one eighth part of all the oil, and were to pay \$200 a year for every gas well the product from which should be marketed and used off the premises. The lease contract contained also the following provision: "Second party (Goff and Heck) covenants and agrees to . . . complete a well on said premises within three months from the date hereof, or pay at the rate of \$26.50 quarterly, in advance, for each additional three months such completion is delayed, from the time above mentioned for the completion of such well until a well is completed; and it is agreed that the drilling of such well, productive or otherwise, shall be and operate as full liquidation of all rental under this provision during the remainder of this lease. Such payment may be made direct to lessor, or deposited to their credit in the Roane County Bank, at Spencer, West Virginia. It is agreed that the second party is to have the privilege of using sufficient water from the premises to run all necessary machinery, and at any time to remove all machinery and fixtures placed on said premises, and further, upon the payment of \$1 at any time by the party of the second part, their successors or assigns, to the parties of the first part, their heirs or assigns, said party of the second part, their successors or assigns, shall have the right to surrender this lease for cancellation, after which all payments and liabilities thereafter to accrue under and by virtue of its terms shall cease and determine, and this lease become absolutely null and void."

About the same time Goff and Heck procured oil and gas leases upon other tracts of land in the same neighborhood, some of which were contiguous to the Hall tract. Shortly after obtaining these leases, Goff and Heck and others procured a charter and organized the Lucky Oil & Gas Company. Goff and Heck assigned to it all the working interest in said leases, except one eighth which they retained for themselves. The contract of assignment provided that the Lucky Oil & Gas Company was to pay the rentals thereafter to become due, and 30 L.R.A. (N.S.)

was to carry Goff and Heck for the full one-eighth interest free of cost to them, and bound said corporation to drill at least one test well on the territory covered by the leases, and gave it the privilege of drilling other wells on the premises. It further provided "that all surrenders and forfeitures of said leases, or any of them, shall be to said first parties,"—that is, to Goff and Heck; and that "in no event shall any or either of said leases be forfeited or surrendered by the said second party to the original lessors or their assignee or grantee or any person or persons for them."

The first two quarterly rentals falling due on the Hall land were paid by the Lucky Oil & Gas Company. When the third became due, to wit, on November 29, 1904, it was not paid, but Goff and Heck applied to the Halls for an extension of the time without payment of the rent, which was refused. No well was ever drilled on the Hall land by anyone claiming under this lease; but the Lucky Oil & Gas Company did, in the summer and fall of 1904, drill a well on the Conohue tract of land adjoining the Hall tract. It was completed just prior to the time the third quarterly rental on the Hall tract became due, and proved to be a dry well. In the drilling of this well the company had exhausted its capital. It then ceased to do business and immediately surrendered its charter. The casing was removed from the dry well, and the machinery and casing belonging to the company were sold, and the proceeds applied to the payment of its debts. Nothing further was done toward the discovery of oil or gas until in the early part of the year 1906, when the defendants began operations on the Hall land under the lease to Thornily, made June 27, 1905. Defendants completed their first well June 28, 1906, and their second well September 28, 1906, both of which produced oil. They began to drill the third well on October 25, 1906, but were enjoined by order of court in this suit before the well was completed. The injunction order was later modified so as to permit the completion of this well, which also proved to be an oil-producing well. All three of these wells are on the Hall tract. The plaintiff, Smith, claims the exclusive right to the oil and gas in the Hall tract and in a number of other tracts in its vicinity, by assignment from Goff and Heck made on the 6th of February, 1906. At the time of this assignment to Smith, five quarterly rentals were past due on the Hall lease to Goff and Heck, and on the day after the assignment Goff and Heck deposited to the credit of the Halls in the Roane County Bank \$132.50, to pay these back rentals. This money is now in the bank.

The vital question in the case is whether or not the Goff and Heck lease had been voluntarily abandoned, or their rights thereunder relinquished by them before June 27, 1905, at which time the Halls made the second lease to Thornily, the lease under which defendants claim. It is true, as counsel for appellant contends, that there is no express forfeiture clause in the contract, but this does not prevent the lessees from voluntarily abandoning the lease. The contract expressly gave them the right to surrender the lease at any time, upon the payment to the lessor of \$1. This provision in the contract was evidently intended for the benefit of the lessee, and to avoid the payment of any further cash rental. This is one method by which the lease could certainly have been ended, but it did not preclude the possibility of terminating the contract by some other method. If the lessees chose to abandon the enterprise, and thus to put an end to the contract, without an actual return to the lessor of the lease contract and the payment to him of the \$1, they could surely do so, but not without liability to him for the cash rental then due. On the other hand, the lessor could waive his right to collect the cash rental, and, in the event of an actual abandonment by the lessees, could release the premises. This contract, commonly called an oil and gas lease, did not invest Goff and Heck with any estate in the oil and gas in place; it simply gave them the exclusive right to make exploration upon this land for oil and gas. Their right was simply an inchoate right, not a vested estate in land. The lease is an executory contract in the nature of a license to enter upon the land and make exploration for oil and gas for a period of ten years, and longer if oil or gas should be discovered, and to extract them from the earth. No estate could vest until discovery. Consequently, the rights of the respective parties under this lease are not to be determined solely by the rules of law applicable in determining whether or not an estate in lands once vested has been forfeited. Neither is it necessary that a lease such as the one under consideration should contain a forfeiture clause before it can be shown that the lessee actually relinquished all his rights thereunder; in other words, that he abandoned the lease. A lessee may abandon the premises notwithstanding there is no forfeiture clause. His failure to pay the cash rentals stipulated in the contract may not alone be sufficient to prove abandonment; but his failure to pay taken in connection with other facts and circumstances evincing a clear intention to abandon the enterprise, coupled with the fact that no operations

were ever begun upon the land, is sufficient to prove relinquishment of lessee's right. If abandonment by a lessee who has taken possession and begun operations on the premises can be established by proving a relinquishment of the leased premises, coupled with an intention to abandon, it certainly follows that an abandonment, or what is practically the same thing, a relinquishment of his rights, by a lessee who has never taken possession, or begun operations on the leased premises, may be established by proving that he had abandoned his intention to do so. *Urpman v. Lowther Oil Co.* 53 W. Va. 501, 97 Am. St. Rep. 1027, 44 S. E. 433, 22 Mor. Min. Rep. 656; *Steel-smith v. Gartlan*, 45 W. Va. 27, 44 L.R.A. 107, 29 S. E. 978, 19 Mor. Min. Rep. 315; *Parish Fork Oil Co. v. Bridgewater Gas Co.* 51 W. Va. 583, 59 L.R.A. 566, 42 42 S. E. 655, 22 Mor. Min. Rep. 145; *Crawford v. Ritchey*, 43 W. Va. 252, 27 S. E. 220; *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915; *Sult v. A. Hochstetter Oil Co.* 63 W. Va. 317, 61 S. E. 307.

There is an implied covenant in the lease under consideration that lessees will use diligence to develop the property. *Steel-smith v. Gartlan*; *Toothman v. Courtney*; and *Parish Fork Oil Co. v. Bridgewater Gas Co.*,—*supra*. In view of this implied agreement to use diligence in making development, the failure to do so, or to pay the cash rentals for a long time, becomes a potent element of proof of intention to abandon.

Did Goff and Heck actually abandon their right to make exploration? Whether they did or not is a matter of intention; and their intention is to be determined from their conduct and declarations. It is shown by the testimony of a number of witnesses that both Goff and Heck considered that their rights to make further exploration terminated on the 29th of November, 1904, when the third quarterly cash rental became due, and was not paid. But it is argued by counsel for appellant that this was a misconstruction of the contract, a misapprehension of their legal rights, a mistake of law by which they should not be bound. But if such was their understanding of the agreement, and they acted upon it, how can they be heard to complain of their own mistake of law? If such was their interpretation of the writing, then it might well be said that such was in fact their agreement, so long as it did not militate against the rights of the lessor. The lessor and lessees both put the same construction on the contract; they both thought that a failure to pay the cash quarterly rental promptly in advance terminated the contract; and if the lessees abandoned their rights in ignorance of what

those rights actually were, they were not misled by the lessor to do so, and they have only themselves to blame. They were not vested with title to real estate by the contract; they simply had the right, by its terms, to hold the lease for a period of ten years, even without making any effort to develop. But they were also bound to pay at the rate of \$26.50 a quarter as a consideration for this right; and, thinking their rights would cease if payment was not promptly made, they applied to the lessor for a continuation of the lease through another quarter without pay of rental, and this was refused. This shows the understanding of the contracting parties. Neither was misled by the other. The lessees are now, in effect, asking to be relieved against the consequences of a mistake of law committed by themselves. It is a rule almost universally applied by the courts, that relief cannot be given in favor of one who has committed a mistake of law. *Zollman v. Moore*, 21 Gratt. 313; *Meem v. Rucker*, 10 Gratt. 506; *Harner v. Price*, 17 W. Va. 523; *Home Sewing Mach. Co. v. Floding*, 27 W. Va. 540; *Shriver v. Garrison*, 30 W. Va. 456, 4 S. E. 660. Consequently, the reason or motive for the abandonment, if one actually occurred, becomes immaterial.

But it seems to be very clearly proven that Goff and Heck regarded the lease of no value, and that this is the reason for their abandoning the enterprise. Goff and Heck were both officers of the Lucky Oil & Gas company, which they had been instrumental in organizing for the purpose of developing this property. This company bored one dry well on a contiguous farm, and exhausted its funds in doing so. It hastened the completion of this well before the 29th of November, 1904, for the purpose of avoiding the payment of the cash quarterly rental then to become due. As soon as the dry well was completed the Lucky Oil & Gas Company ceased to do business and surrendered its charter. Shortly after the third rental became due, Heck told Sherman Nicholson, under whom they held an oil lease in the same territory, that the Lucky Oil & Gas Company had gone out of business, and that if Nicholson wanted to give another lease on his land "to go ahead and lease." This witness further says that Heck told him that the reason why they did not surrender the leases was because it would cost at least \$16 to do so. John Nutter, who had also leased to them and whose lands joined the Donohue land, says that he had a conversation with Goff and Heck after the dry well was bored on the Donohue place, and that in that conversation they told him that they had nothing to do with the leases, that they had sold the leases to the Lucky Oil & Gas Company. This was after the third rental had become due to Nutter, whose lease was of the same date as the Hall lease. Linnie Nutter, wife of John Nutter, says that Heck was at their home in January, 1906, and asked her if Nutter had leased his land, and when she told him that he had "optioned it," he replied that he was sorry because he wanted to lease it himself. Adam Goebel, who had also given Goff and Heck a lease for oil and gas on March 2, 1904, and which is also one of the leases transferred to the Lucky Oil & Gas Company by Goff and Heck, and later sold by them to Smith, the plaintiff, says that after the third rental became due on his lease, and was not paid, he had a talk with Heck about December 2, 1904, and that Heck then told him that he had nothing to do with the lease, that the Lucky Oil & Gas Company had surrendered its charter, and that the lease was null and void. J. A. Epling, another one of their lessors, says that he had a conversation with Heck in January, 1906, and Heck wanted to know of him if he had leased his land, and when witness told him he had "optioned it," Heck said that he was sorry; that he would have advanced him 10 cents an acre on the first rental. Similar testimony was given by a number of other witnesses. Some of this testimony is denied by Goff and Heck, but much of it is admitted substantially as related by the witnesses. All of this testimony is in relation to conversations had between the witnesses and either Goff or Heck, before the time of the assignment of leases by Goff and Heck to H. L. Smith. They relate also to leases which Goff and Heck held upon other tracts of land in the vicinity of the Hall tract, some of which adjoined the Hall tract, and are some of the same leases which Goff and Heck turned over to the Lucky Oil & Gas Company, and which, they claim, were later returned to them by the said company at the time of its dissolution. This testimony was admissible only for the purpose of showing the intention of Goff and Heck to abandon the leases in that territory, and the Hall tract was one of them. The Hall tract was also one of the leases which had been assigned to the Lucky Oil & Gas Company. At the time when Heck wanted to know of Epling if he had leased his land, a producing well had been drilled in the neighborhood on a tract known as the "Bee tract," and interest in the oil business was very much revived thereby. This fact, no doubt, explains Heck's anxiety to obtain another lease from Epling at that time. All of this testimony clearly shows that Goff and Heck had abandoned whatever rights they had under their leases which had been once held by the Lucky Oil & Gas Company. The

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drilling of the dry well, and the expenditure of \$6,500 by the Lucky Oil & Gas Company in the drilling of it, seem to have been sufficient to satisfy Goff and Heck that they would be losing money by the payment of any further cash rentals, and they then made up their minds to abandon prospecting any further. Failure to pay the quarterly rentals, taken by itself, would not be sufficient to prove intention to abandon, but it is an evidential fact which may properly be considered in determining intention. It materially strengthens the evidence of intention to abandon which other facts tend to prove. The failure of Goff and Heck to make any exploration for oil and gas on the Hall tract for more than a year after the date of their lease, and their failure to pay three successive quarterly rentals, taken in connection with the other facts and circumstances hereinbefore adverted to, we think clearly prove that they had abandoned their rights under the lease. Such abandonment operated as a surrender in law of their lease, and gave the Halls the right to execute the lease to Thornily, under which the defendants claim.

The fact that Goff and Heck were financially responsible for the cash rentals, and that such rentals could have been collected by legal process, does not affect the merits of the controversy. The Halls could waive their right to sue, and had a right to treat the contract as at an end whenever Goff and Heck voluntarily abandoned their right to make further exploration.

There is another circumstance in the record which tends strongly to show abandonment. It is this, the minutes of the stockholders' meeting of the Lucky Oil & Gas Company held for the purpose of dissolution are entered upon the book of said corporation in two places, one entry on page 9 and another on page 11 of the corporation's book. The entry on page 9 was made a few days after the meeting of the stockholders which was held on the 24th of November, 1904, and appears to have been made by A. S. Heck. The resolution authorizing the return of the leases to Goff and Heck was not entered in the body of the minutes, but was entered on the margin of the page in pencil, afterwards by him. The same minutes are re-entered on pages 11 and 12 of the corporation book by Mr. G. F. Hopkins about fourteen months after the meeting, after the corporation was dissolved. This fact tends to prove two things: (1) That Goff and Heck regarded the leases of no value, and forgot to have a resolution passed providing for the return of them; and (2) that it was desirable to present to Smith an unsuspicious record which would show a return of the leases to Goff and Heck by the corporation.

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We think the court below was clearly warranted by the facts in finding that Goff and Heck had voluntarily abandoned their rights under the lease from the Halls prior to the execution of the second lease by the Halls to Thornily, and finding no error in the decree of the lower court, the same will be affirmed.

IDAHO SUPREME COURT.

MATTHEW SCULLY, Appt.,

v.

LOUISE SQUIER et al., Respnts.

(13 Idaho, 417, 90 Pac. 573.)

Public lands — town site — disposal of lots.

1. The city of Lewiston was located on the public domain of the United States, and under the provisions of § 2387 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 1457, was entered by the mayor in trust for the several use and benefit of the occupants thereof according to their respective interests. Said section of the statute provides that the execution of such trust as to the disposal of the lots in

Headnotes by SULLIVAN, J.

Note. — Right to change lot lines of occupants after entry under the town-site act.

In harmony with the rule announced in SCULLY v. SQUIER, the cases hold that the title to occupied lots becomes vested in the trustee for the benefit of the occupants severally at the time the entry is made, under the act of March 2, 1867, U. S. Rev. Stat. § 2387, U. S. Comp. Stat. 1901, p. 1457, and the rights of the parties as beneficiaries must be determined as of that date; that the occupants have a vested interest in the streets and boundaries of their lots as they then existed, which cannot be interfered with by a new plan or survey that diminishes the lines, or cuts off any of their property rights, affirmed in 215 U. S. 144, 54 L. ed. 131, 30 Sup. Ct. Rep. 51; Parchen v. Ashby, 5 Mont. 68, 1 Pac. 204; Pueblo v. Budd, 19 Colo. 579, 36 Pac. 599; Jones v. Petaluma, 38 Cal. 397; Globe v. Slack, 11 Ariz. 408, 95 Pac. 126; Bingham v. Walla Walla, 3 Wash. Terr. 68, 13 Pac. 408.

In Ashby v. Hall, 119 U. S. 526, 30 L. ed. 469, 7 Sup. Ct. Rep. 308, it was held that the interests which the occupants of land within the limits of a town site entered under the act of March 2, 1867, had at the time of entry, either in the land occupied by them or any rights of way over adjoining streets and alleys, could not be diminished by the state or territorial legislature under the authority conferred by the town-site act.

In Aleman v. Petaluma, 38 Cal. 553, it

such town and the proceeds of the sale thereof must be conducted under such regulations as may be prescribed by the legislative authority of the territory.

Same — survey.

2. In compliance with the provisions of said section, the territorial legislature passed an act entitled, "An Act to Provide for the Survey, Platting, and Disposal of the Land in the City of Lewiston, Nez Percé County, Idaho, Pursuant to the United States Statutes Made and Provided," which act was approved January 8, 1873 (Sess. Laws 1872-73, p. 16).

Same — conveyances.

3. Under the provisions of said act, a surveyor was employed to survey and plat the lands in said town, and was directed by said act to so arrange and adjust the plat as to conform to the conditions of the improvements and occupation of the lots, and the mayor was thereafter directed to make and deliver to the bona fide occupants of said lands good and sufficient deeds of conveyance in fee simple and the title to the lots claimed by them according to their respective interests, under the provisions of said law.

Same — change of lot lines.

4. The said plat cut off from the northerly ends of the lots in block 24 about 4 feet, and included the part cut off in D street. At the time said plat was made, said lots, for their entire length, were covered by improvements and possessed and occupied.

Same — surveyor — powers.

5. Said surveyor had no authority or right to cut off a portion of said lots, and include it in a street.

was held that the map which the town authorities were entitled to make under the state statute passed in pursuance of the town-site act was only such as represented the existing streets, alleys, and squares, and such as the occupants of the property might consent to.

To the same effect is *Jones v. Petaluma*, supra; *Jones v. Petaluma*, 36 Cal. 230.

So, in *Parchen v. Ashby*, supra, it was held that the mere fact that the plat and survey, made after the entry, failed to designate a street or alley as it existed before the entry, did not thereby destroy such street or alley, and change the ground so occupied into a lot that could be conveyed. And for the same reason, where the plat and survey designated land which had before entry been occupied, as an existing street, it would not in any manner affect the right of the occupant to his lot, since all the powers of the trustee were exhausted when he conveyed to the occupants their lots according to their rights and interests under the statute.

And in *Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817, it was held that the act of the probate judge in embracing lands in possession of defendants as a portion of a street in the map filed under the statute 30 L.R.A. (N.S.)

Same — rights of occupants.

6. The rules and regulations made by the legislature did not enlarge or diminish the rights of the occupants of the lots, as the rights of the occupants accrued at the time of the entry of the town site, and could not be defeated by the surveyor.

Same — entry — effect.

7. The interests which the occupants possessed previous to the entry, either in the land occupied by them or in the rights of way over adjoining streets and alleys, were secured by such entry.

Same — "disposal" of lots.

8. Under the provisions of said § 2387, Revised Statutes, the execution of the trust imposed on the mayor as to the disposal of the lots was conducted under the regulations established by the legislature. The word "disposal" as used in that section must be construed to mean "distribution" when applied to the lots that were actually occupied and possessed, for under said section such lots were already disposed of; that is, they became the property of the occupants, and the occupant of a town lot at the time of the entry of a town site is its real owner.

Same — title.

9. The trust imposed on the mayor of an incorporated town is for the benefit of the inhabitants, first as individuals, and after that, collectively, as a community, and the title to the occupied lots becomes vested in the trustee for the benefit of the occupants severally at the time such entry is made, and neither the surveyor nor the mayor can deprive them of that title.

Same — surveyor — powers.

10. The surveyor cannot make a paper

after entry was void where the land was never used as a street or recognized as such by the occupants, and that the municipality could not afterwards recover the land in ejectment on the ground that it had been dedicated as a public street, since no dedication could result from the survey and the filing of the map under the circumstances.

In *Bingham v. Walla Walla*, supra, it appeared that a part of the land occupied by a settler formed part of a street as shown by a survey and plat made after the entry, under the town-site statute, and it was held that the acceptance by the occupant of a deed from the town authorities conveying the legal title to only a portion of the land, and describing it as abutting on a certain street as designated on the plan, would not operate as an estoppel against the grantee or those claiming under him from afterwards laying claim to the part not conveyed, and forming part of the street named in the deed as one of the boundaries, where the city authorities were informed by the grantee that he did not intend to relinquish his right to the land not conveyed by them, until paid for the same.

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street in such town, and deprive the actual occupants of vested rights, as the only authority the surveyor had was to plat the town in conformity to the use and occupancy of the lots and blocks.

Same — change of lot lines.

11. The surveyor had no authority to establish streets through and over buildings, nor to cut off any portion or parts of buildings for street purposes.

Same — rights of beneficiaries.

12. The mayor or surveyor had no authority to change the beneficiaries under such trust.

(May 18, 1907.)

APPEAL by plaintiff from a judgment of the District Court for Nez Percé County dismissing a suit to enjoin an alleged encroachment upon a highway by owners of town site lots, and from an order denying a new trial. **Affirmed.**

The facts are stated in the opinion.

Mr. Benjamin F. Tweedy, for appellant:

The official survey of the town site is a necessary, essential part of the confirmations accepted in 1875 by the predecessors of the parties to this action, and when the town site occupants accept deeds from the trustee and in confirmation of all their equitable rights, they can never thereafter in a court of law or equity claim that they ought to have had another and different confirmation, and that all their equitable rights had not been confirmed to them; but the official survey and the confirmation thereupon become the exclusive, conclusive, and only evidence of not only their legal rights, but all their equitable rights.

Smith v. Pipe, 3 Colo. 187; **State ex rel. Hicklin v. Webster**, 28 Mont. 104, 72 Pac. 295; **Ming v. Foote**, 9 Mont. 201, 23 Pac. 515; **Anderson v. Bartels**, 7 Colo. 256, 3 Pac. 225; **Polk v. Wendal**, 9 Cranch, 87, 3 L. ed. 665; **Moore v. Walla Walla**, 2 Wash. Terr. 184, 2 Pac. 187; **Boise City v. Flanagan**, 6 Idaho, 149, 53 Pac. 453; **Laughlin v. Denver**, 24 Colo. 255, 50 Pac. 917; **Ashby v. Hall**, 119 U. S. 526, 30 L. ed. 469, 7 Sup. Ct. Rep. 308; **Cofield v. McClellan**, 16 Wall. 334, 21 L. ed. 340; **Newhouse v. Simino**, 3 Wash. 648, 29 Pac. 263; **Cragin v. Powell**, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; **Carondelet v. St. Louis**, 1 Black, 179, 17 L. ed. 102; **Galt v. Galloway**, 4 Pet. 332, 7 L. ed. 876; **Haydel v. Dufresne**, 17 How. 23, 15 L. ed. 115; **Greer v. Mezes**, 24 How. 268, 16 L. ed. 661; **Harrington v. Boehmer**, 134 Cal. 196, 66 Pac. 214, 489; **Whiting v. Gardner**, 80 Cal. 78, 22 Pac. 71; **Martin v. Carlin**, 19 Wis. 454, 88 Am. Dec. 696; **McEvoy v. Clark**, 31 Wis. 142; **Campbell v. Clark**, 8 30 L.R.A. (N.S.)

Mo. 553; Greer v. Squire, 9 Wash. 359, 37 Pac. 545; **Amador County v. Gilbert**, 133 Cal. 51, 65 Pac. 130; **Parchen v. Ashby**, 5 Mont. 68, 1 Pac. 204; **Watkins v. Havighorst**, 13 Okla. 128, 74 Pac. 318; **Stoneroad v. Stoneroad**, 158 U. S. 240, 30 L. ed. 966, 15 Sup. Ct. Rep. 822.

Congress intended an official survey under regulations of the state or territory in order to designate and fix the boundaries of the several congressional grants brought into existence under U. S. Rev. Stat. § 2387, U. S. Comp. Stat. 1901, p. 1457, upon entry of the town site, in order to separate the grants from each other, that confirmation as separated might be given by the trustee acting as an officer of the United States in the enforcement of a trust created by that section, and the rules of law relating to an official survey by the officers of the land department of the United States apply with equal force to the survey of the trustee.

West v. Cochran, 17 How. 403, 15 L. ed. 110; **Central P. R. Co. v. Nevada**, 162 U. S. 526, 40 L. ed. 1061, 16 Sup. Ct. Rep. 885; **Clemmons v. Gillette**, 33 Mont. 321, 114 Am. St. Rep. 814, 83 Pac. 879; **United States v. Birdseye**, 70 C. C. A. 100, 137 Fed. 516; **Robinson v. Forest**, 29 Cal. 325; **Territory v. Delinquent Taxpayers**, 12 N. M. 169, 76 Pac. 316; **Maguire v. Tyler**, 8 Wall. 650, 19 L. ed. 320; **Ledoux v. Black**, 18 How. 473, 15 L. ed. 457; **Meard v. Massey**, 8 How. 301, 12 L. ed. 1088; **Tubbs v. Wilhoit**, 138 U. S. 134, 34 L. ed. 887, 11 Sup. Ct. Rep. 279; **United States v. Curtner**, 38 Fed. 1; **Denver v. Kent**, 1 Colo. 336.

The state courts cannot, upon parol, after confirmation by the trustee, without an official survey of that land claimed by the defendants as private property to be confirmed to them, even attempt to enforce any trust under U. S. Rev. Stat. § 2387, when the land has remained surveyed as a part of a street for over thirty years, without an attempt on the part of anyone to have the land claimed surveyed officially as private property.

Loeber v. Butte General Electric Co. 16 Mont. 1, 50 Am. St. Rep. 468, 39 Pac. 912; **Hershfield v. Rocky Mountain Bell Teleph. Co.** 12 Mont. 102, 29 Pac. 883; **Kenyon v. Knipe**, 2 Wash. 394, 13 L.R.A. 142, 27 Pac. 227; **Hardin v. Jordan**, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; **Abraham v. Ordway**, 158 U. S. 416, 39 L. ed. 1036, 15 Sup. Ct. Rep. 894; **Penn Mut. L. Ins. Co. v. Austin**, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; **Galliher v. Cadwell**, 145 U. S. 368, 36 L. ed. 738, 12 Sup. Ct. Rep. 873; **Cooke v. Barrett**, 155 Mass. 413, 29 N. E.

625; *Lutjen v. Lutjen*, 64 N. J. Eq. 773, 53 Atl. 625.

It was never the intention of Congress to have confirmation of equitable titles by "parcels," one part by the trustees and the other part by the court; and without the land claimed by the defendants being surveyed as private property officially by the trustee, the court is without jurisdiction to enforce any trust under U. S. Rev. Stat. § 2387.

The occupation of a part of the officially surveyed, established street in conflict with the official survey and the accepted confirmation upon the official survey by the predecessors of the parties to this action, is the maintenance of a public and private nuisance, and can be abated by the plaintiff, however long continued, in order to protect his rights of equity merging in the confirmation accepted by his predecessor under U. S. Rev. Stat. § 2387, as by such section he is the owner of private rights in the street appurtenant to his lot.

Woodruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 517, 18 Fed. 753; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *McLean v. Llewellyn Iron Works*, 2 Cal. App. 346, 83 Pac. 1083, 1085; *Laughlin v. Denver*, 24 Colo. 255, 50 Pac. 917; *Moore v. Walla Walla and Boise City v. Flanagan*, supra; *Dooly Block v. Salt Lake Rapid Transit Co.* 9 Utah, 31, 24 L.R.A. 610, 33 Pac. 229; *Grogan v. Hayward*, 6 Sawy. 498, 4 Fed. 161; *Simplot v. Chicago, M. & St. P. R. Co.* 5 McCrary, 158, 16 Fed. 350; *First Nat. Bank v. Tyson*, 133 Ala. 459, 59 L.R.A. 399, 91 Am. St. Rep. 46, 32 So. 144; *Brauer v. Baltimore Refrigerating & Heating Co.* 99 Md. 367, 66 L.R.A. 403, 105 Am. St. Rep. 304, 58 Atl. 21; *Healey v. Kelly*, 24 R. I. 581, 54 Atl. 588; *Ashby v. Hall*, 119 U. S. 526, 30 L. ed. 469, 7 Sup. Ct. Rep. 308.

The official survey of D street was for the benefit and use of all abutting property as surveyed and established, and the owners of such abutting property when they accepted their deeds consented to such use of the street as surveyed, and the boundaries cannot be changed by parol evidence in 1907, so many years after confirmation.

Moore v. Walla Walla; Boise City v. Flanagan; Laughlin v. Denver; and Dooly Block v. Salt Lake Rapid Transit Co.,—supra; *Hall v. Breyfogle*, 162 Ind. 494, 70 N. E. 883; *Wolfe v. Sullivan*, 133 Ind. 331, 32 N. E. 1018.

The right of use and benefit extend to adjoining property.

First Nat. Bank v. Tyson and Healey 30 L.R.A. (N.S.)

v. Kelly, supra; *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 105 Am. St. Rep. 1007, 98 N. W. 969; *Brauer v. Baltimore Refrigerating & Heating Co.* and *Ashby v. Hall*, supra.

Mr. Isham N. Smith, for respondents:

The nature of the grant under the Federal town-site laws is that of confirmation of rights in existence. No new grant is made,—simply the ascertainment of rights already in existence and their certification; *Goldberg v. Kidd*, 5 S. D. 169, 58 N. W. 577; *Pueblo v. Budd*, 19 Colo. 579, 36 Pac. 599; *Coffield v. McClelland*, 16 Wall. 334, 21 L. ed. 340; *Stringfellow v. Cain*, 99 U. S. 610, 25 L. ed. 421; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Rathbone v. Sterling*, 25 Kan. 444; *Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817; *McCloskey v. Pacific Coast Co.* 22 L.R.A. (N.S.) 673, 87 C. C. A. 568, 100 Fed. 794.

The statute having set forth, defined, and limited the authority of the mayor-trustee and surveyor, any act of theirs in excess of the authority is absolutely void.

United States v. Thurber, 28 Fed. 56.

The mayor-trustee and the surveyor could not take private property.

Parchen v. Ashby, 5 Mont. 68, 1 Pac. 204; *Ashby v. Hall*, 119 U. S. 526, 30 L. ed. 469, 7 Sup. Ct. Rep. 308; *Bingham v. Walla Walla*, 3 Wash. Terr. 68, 13 Pac. 412; *Goldberg v. Kidd; Coffield v. McClelland; Stringfellow v. Cain; McCloskey v. Pacific Coast Co.; Pueblo v. Budd; and Helena v. Albertose*,—supra; *Treadway v. Wilder*, 8 Nev. 91; *Hall v. Ashby*, 2 Mont. 489; *Alemany v. Petaluma*, 38 Cal. 553; *Aspen v. Rucker*, 10 Colo. 184, 15 Pac. 791; *Denver v. Kent*, 1 Colo. 336; *Winfield Town Co. v. Maris*, 11 Kan. 128; *Rathbone v. Sterling*, 25 Kan. 444.

Sullivan, J., delivered the opinion of the court:

This is an action to prevent alleged encroachments on D street in the city of Lewiston. The appellant as plaintiff brought this action against the respondents, alleging that they were encroaching upon said D street, and charging them with having taken for their private use approximately 4 feet off the south side of said street, and of extending their buildings over and upon said 4 feet of land wrongfully.

The nature of this action is a suit in equity to abate a nuisance alleged to be a public nuisance, damaging to the public as well as to the plaintiff's private rights, and praying that the same be abated and removed, and that an injunction be issued restraining and prohibiting defendants and

each of them from encroaching upon said street, and for a mandatory injunction against the defendants, and to restore said street to its width as claimed to have been established by the official survey of E. B. True, to wit, 80 feet.

The defendants deny any encroachment upon said street, and allege affirmatively the incorporation of the city of Lewiston, surveying and platting of the city long prior to the said True survey; that, according to said original plat and survey, the lots in question were 50 feet in length north and south, except where they widened at the bend in E street (said E street is also called Main street and Montgomery street); that about the year 1874, and long after the rights of the defendants and their predecessors were vested to the premises in controversy, the town site of Lewiston was entered by the mayor, Henry W. Stainton, under the Federal town-site act; that the defendants and their predecessors in interest were, long prior to 1874, in the actual occupancy, the use, and enjoyment of the premises in controversy, which they were enjoying at the time of the commencement of this suit, on which premises they are now attempting to erect the three-story brick buildings referred to in the complaint; that a patent was issued by the United States to the mayor as trustee, and thereafter the official survey was made; that said survey was ordered under the Federal and territorial laws; that the declaratory statement therefor was No. 39, and was made in the United States land office at Lewiston, November 21, 1871, by Levi Ankeny, in trust for the inhabitants of the city of Lewiston, claiming settlement in 1861; that cash entry was made June 6, 1874, therefor, by said Henry W. Stainton in trust; that said True was employed to make the survey, and was commanded as follows: "To so adjust the said plat as to conform to the condition of the improvements of and occupation of the lands affected thereby, and the mayor-trustee was authorized, empowered, and required to make and deliver to the bona fide occupants of such land described in the patent, good and sufficient deeds in fee simple, according to their respective interests, and for that purpose was authorized to carry the act into effect;" that in making said survey, more especially the survey of the south line of said D street, the said True did not pay regard to or attention to the several use and uses of the land as the same was then occupied by the inhabitants of the city of Lewiston, and more especially did not pay any attention to the quantity of land then used and occupied by the defendants and their

predecessors in interest, and that said True did not conform said D street as it was known and used prior to said survey, nor did he pay due or any regard to the actual use, occupancy, and improvements of the said lots; that the south line of said D street as surveyed and delineated by said True cut several feet off the north end of the lots of the various inhabitants of Lewiston, which lots had a frontage on D street, and so cut off the lots in controversy owned by these defendants and their predecessors; that said street as surveyed by said True crossed and interfered with buildings then standing on the same, and attempted to divest certain vested rights; that said True did not conform D street to the use of lands, nor did he make D street, as marked on his map or plat, conform to or coincide with the actual south line thereof, as the same had been and then was used and treated as a public street; that thereafter and after the approval of the said True survey, such steps were taken that in many instances the plat and survey were corrected and changed, and that, notwithstanding the erroneous work of said True, the various citizens still continued in the actual use and occupancy of their said lands, and the predecessors of defendants did the same as to the lots involved in this case, and which are owned and possessed by them, and that such claim was by occupancy, buildings, and improvements, continued from the first occupancy, thence hitherto, and that the land involved, being about 4 feet on the north end of said lots, never at any time, nor at all, was used or occupied as a street, but was used and occupied by defendants and their predecessors; that after True had made his plat, it was amended, and the defendants aver that the correct south line thereof is now and was by such amendment shown in red ink, and that the red ink line conformed to the true south line and to the several uses and occupancy of the lands involved; that respondent Moxley owned lot 3 in said block 24, having an area of 1,250 square feet, both prior to and after said True survey, but that said True gave it only 1,136 square feet; that lot 2 in said block as shown by said True survey contained but 1,131 square feet, whereas, long prior to the said survey and at the time thereof and since, the said lot has in truth and in fact contained 1,250 square feet; that the difference between 1,250 square feet and 1,131 square feet is the strip of approximately 4 feet wide by 25 feet in length, which appellant seeks to enjoin the respondent Squier from holding; that such lot as claimed by the said Squier has been actually covered by a

building for more than thirty-five years last past, and was so occupied by said building long prior to the survey of True; that respondent Moxley obtained title to lot 3, said block, by direct deed from Henry D. Stainton, mayor-trustee, and that the plat of the True survey and the size of this lot as stated by him were amended prior to the recordation of said plat, and that True's survey gave said lot only 1,136 square feet, but the same with an amendment was deeded to said Moxley by said mayor-trustee, and the strip involved herein is the amendment which said mayor deeded to Moxley.

The answer then alleges the rights of respondent Fix, and avers that his right through predecessors antedates said True survey, and that the land claimed by him in addition to that specified in True's survey never was a street or highway, but that said strip was long prior to said survey in the actual, visible, exclusive, and notorious possession of said defendant and his predecessors in interest, and never constituted a part of D street; that that state of facts existed at the time said True made his survey, and that the appellant when erecting his building did not cover the ground theretofore occupied by his old building, nor by the predecessors in interest of said Scully; that the Grostein building situated on the lot immediately west of the Scully lot, was erected seventeen years ago, and that said building extends far out beyond Scully's building, and was built bordering on the south line of D street then given to said Grostein by city officers; that said Scully placed his building entirely off of and away from the south line of said D street as it then existed; that the field notes and plat of block 24 as made by said True did not correspond, and that the same are incorrect, which errors interfered with vested property rights.

The answer then alleges that said respondents are attempting to use only the same ground that they and their predecessors have always used; that the premises of each of the respondents extends to the south line of D street as actually used.

From the foregoing statement, the real issue in the case is very clearly presented. The appellant claims that the defendants have encroached upon and erected their buildings about 4 feet out on and into said street, while the respondents contend that they have not done so, but that their buildings only extend northward to the line which has been occupied and on which buildings have been erected for more than thirty years. The entire controversy arises

over the correctness of the said True survey and his field notes thereof.

After the trial of the case, the court made quite elaborate findings of fact, and deduced therefrom conclusions of law to the effect that the case made on behalf of the appellant was devoid of equity, and that he was without any standing in a court of equity; that he has no such interest as would permit him to maintain this action, and that the defendants were entitled to judgment and decree in their favor, and judgment was entered accordingly, dismissing the action. This appeal is from the judgment and the order denying a new trial.

In deciding this case, it becomes necessary to recur to a few of the historical facts connected with the location and settlement of the city of Lewiston. It was first settled in the year 1861, upon what was then a part of the Nez Percé reservation. At that time the territory now included in the state of Idaho was a part of the territories of Washington, Nebraska, Dakota, and Utah. (See *People v. Williams*, 1 Idaho, 85.) Nez Percé county, in which the city of Lewiston is located, was organized under an act of the legislature of Washington territory on December 20, 1861. The territory of Idaho was organized under an act of Congress approved March 3, 1863, and its first territorial legislature convened on the 7th of December, 1863, and adjourned on the 4th day of February, 1864, which session was held at the city of Lewiston. At that session of the legislature, by an act approved February 4, 1864, the boundaries of Nez Percé county were changed, and that county reorganized. (1 Sess. Laws, p. 628.) Lewiston at that time was a distributing point for the various mining camps to the northeast, east, and southwest. The city of Lewiston was incorporated under the laws of Washington territory, by an act approved January 15, 1863, and was reincorporated by an act of the legislature of Idaho in 1866. (Sess. Laws 1866, 4th Session, p. 87.)

The 1st section of that act defines the boundaries of said city, and recites that the territory incorporated "constitute in square form, as near as practicable, according to government survey, 1 square mile, intended to include the square mile of land stipulated for in favor of said town in the treaty between the United States and the Nez Percé tribe of Indians now pending, is hereby organized into a municipal corporation under the name of 'The City of Lewiston.'" It would appear from this that a treaty was then pending between the United States and the Nez Percé

tribe of Indians for the tract of land on which the city of Lewiston stood, to the extent of 1 square mile.

Levi Ankeny was mayor of the city of Lewiston in 1871, and on November 21st of that year filed his declaratory statement No. 39 in the United States land office at Lewiston, proposing to enter the lands included within the borders of said incorporation in trust for the inhabitants of the city of Lewiston, claiming settlement in 1861. Cash entry was made for said lands on June 6, 1874, by Henry W. Stainton, mayor, in trust for the inhabitants of said city.

This entry was made under the provisions of § 2387 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 1457, which section is as follows: "Entry of town authorities in trust for occupants. Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject to entry under the agricultural preemption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated."

The trust provided for by this section is dual in its nature. It exists for the benefit of the occupants as individuals, and also collectively as a community. The title to occupants of lots vested in the mayor-trustee for their benefit severally when the entry was made. The title to lots to which no valid claims are held by individuals is taken in trust by the trustee for the occupants of the town site collectively. (See notes to said § 2387, 6 Fed. Stat. Anno. p. 344.) Under the provisions of said section, the execution of the trust created, as to the disposal of the lots in such town, must be conducted under such regulations as may be prescribed by the legislature of the state wherein such town is located.

The legislature of the territory by an act approved January 8, 1873, (7 Sess. Laws, p. 16), provided for the survey, platting, and disposal of the land in the city of Lewiston, pursuant to the United 30 L.R.A. (N.S.)

States statutes in regard to such matters. Said act provides that the mayor-trustee shall cause to be made and filed in his office by a competent person a plat of the land within said city, divided into blocks and lots, and "to make and deliver to the bona fide occupants of such portions of said land described in said patent from the government of the United States, who may be entitled thereto, good and sufficient deeds of conveyance in fee simple according to their respective rights."

Under the provisions of said laws, one E. B. True was employed to survey and plat the lands in said town, and was commanded to adjust said plat so as to conform to the conditions of the improvements and the use and occupation of such lands by the settler, and the mayor was required to make and deliver to the bona fide occupants of such lands good and sufficient deeds of conveyance in fee simple according to their respective interests, under the provisions of said law.

It appears from the evidence in the case that said True made a plat of said town including block 24, in which block are the lots involved in this case, so as to make the lots about 46 feet long, north and south, when, as a matter of fact, most, if not all, of the lots in that block were 50 feet long north and south, as indicated by the buildings and other improvements thereon. The question is fairly presented as to whether said True had any authority whatever to make said plat so as to interfere with and cut off a part of the buildings and improvements of the occupants of such lots. In other words, whether under the law a surveyor who is employed to plat such a town site after its entry by the proper officer can widen a street, and in doing so cut off a portion of the buildings and improvements of the lot owners bordering on such street.

It must be kept in mind that Lewiston existed prior to the True survey. The settlers did not acquire their right under the plat nor by virtue of it. The survey and plat was made for them; they were not made for the survey and plat.

In *Parthen v. Ashby*, 5 Mont. 68, 1 Pac. 204, a Montana case, the court had under consideration a controversy over a strip of land 16 feet wide on Rodney street in the town of Helena. That town site was entered by the probate judge, and the court there held that the survey must conform as near as may be to the existing rights and interests of the occupants, and that no valid and subsisting easements could be destroyed by the survey and the acceptance of the plat by the county commis-

sioners. The court, in referring to the requirements prescribed by the legislature of Montana, said: "These regulations could not enlarge or diminish the rights or interests of occupants of the lots. And so our legislature provided that the survey and plat of the town site should conform as near as might be to the existing rights, interests, and claims of the occupants thereof. The lots were to be surveyed, and the streets and alleys as they existed prior to the entry were to be respected and recognized. For in no other manner could the occupants obtain title to their lots according to their several rights and interests. The plat and survey of the probate judge must conform to the old survey, by which the occupants had held and occupied their lots prior to the entry of the town site; otherwise his plat and survey are so far void. . . . The rights of occupants accrued before the entry of the town site by the probate judge, and the mere fact that his plat and survey failed to designate a street or alley as it existed before his entry and survey does not thereby destroy such street or alley, and change the ground occupied by the same into a lot that can be sold. And so, for the same reason, if this plat and survey had designated ground theretofore occupied as a lot, as an alley or a street, such designation would not in any manner affect the right of the occupant to his lot."

It is there held that the plat and survey could not in any manner affect the right of the occupant to his lot. The rights of the occupant had attached prior to True's survey, and the entry of the town site was made in trust for the occupants who were in possession of particular tracts of land as well as for the community in general. The surveyor could not divest them of their rights. The survey was for their benefit, and should have confirmed those rights.

In *Ashby v. Hall*, 119 U. S. 526, 30 L. ed. 469, 7 Sup. Ct. Rep. 308, the supreme court of the United States held that the interests which the occupants possessed previous to the entry, either in the land occupied by them or in rights of way over adjoining streets and alleys, were secured by it. The court said: "The power vested in the legislature of the territory . . . was confined to regulations for the disposal of the lots and the proceeds of the sales. These regulations might extend to provisions for the ascertainment of the nature and extent of the occupancy of different claimants of lots, and the execution and delivery to those found to be occupants in good faith of some official rec-

ognition of title in the nature of a conveyance. But they could not authorize any diminution of the rights of the occupants when the extent of their occupancy was established." Upon this point, see also *Bingham v. Walla Walla*, 3 Wash. Terr. 68, 13 Pac. 408.

In *Goldberg v. Kidd*, 5 S. D. 169, 58 N. W. 574, in commenting upon the word "disposal" as used in § 2387, Revised Statutes of the United States, the court said: "As to the lots actually occupied when the entry was made, we think the word 'disposal' must be understood to mean 'distribution,' which words are often used synonymously, for, as to such lots, they were already disposed of, that is, they became at once the property equitably of their occupants."

In *Stringfellow v. Cain*, 99 U. S. 610, 25 L. ed. 421, the court said: "The occupant of a lot at the time the entry of a town site is made is its real owner."

In the case of *Pueblo v. Budd*, 19 Colo. 579, 36 Pac. 599, it is said: "The entry of the town site, therefore, being 'in trust for the several use and benefit of the occupants thereof according to their respective interests,' each of such occupants at the time of the entry became, to the extent of their respective holdings, beneficiaries of the trust, and were vested with the equitable ownership of the lot or parcel of land to the extent of their occupancy."

E. B. True had no authority to attempt to take private property for street purposes, nor did the fact that he ran his survey where he did deprive any of the owners of their property rights which were then vested. (*Helena v. Albertose*, 8 Mont. 499, 20 Pac. 817; *Treadway v. Wilder*, 8 Nev. 91; *Bingham v. Walla Walla* and *Parchen v. Ashby*, supra; *Hall v. Ashby*, 2 Mont. 489; *Aleman v. Petaluma*, 38 Cal. 553; *Aspen v. Rucker*, 10 Colo. 184, 15 Pac. 791; *Denver v. Kent*, 1 Colo. 336.)

It would appear from the provisions of said § 2387 of the Revised Statutes of the United States, that such land is permitted to be entered by the proper authority for the use and benefit of the occupants thereof according to their respective interests. As above stated, such trusts exist for the benefit of the inhabitants, first as individuals, and after that, collectively, as a community. And the title to the occupied lots becomes vested in the trustee for the benefit of the occupants severally at the time such entry is made. If the surveyor who is employed to plat the town has the authority to cut off 4 feet from the lots on a certain block, he certainly has the au-

thority to cut off more, and where is the line to be drawn? Can the surveyor make a paper street in such a town, and deprive the actual occupants of vested rights? We think not. The occupants possessed certain rights in and to the lots occupied by them before the entry, and the only authority the surveyor had was to plat the town in conformity to the use and occupancy of the lots and blocks. The plat must be made for the benefit and use of the occupants. The surveyor's power was limited; he had no authority to establish streets through and over buildings, nor to cut off any portions or parts of buildings for that purpose. If that were not true, it would have been better for the occupants not to have had the entry made, for they had the right to occupy their lots as they were then occupying them. If the entry was not made in their interests, their rights were not as well established after the entry as before. The object and purpose of the statutes was to benefit the occupants, and not to destroy their rights. In this case the occupants had property rights in the premises occupied by them, and the surveyor had no authority to take private property for street purposes, or to establish any portion of a street on private property. The occupant's right and ownership did not come by virtue of the plat and survey; it came by reason of his possession and occupancy and the improvements that he had placed upon his lot.

As before stated, the trust of the mayor was dual in its nature. The occupants of the lots, each as individuals, were entitled to deeds to their lots as occupied by them. The community of the city as a whole was entitled to the unoccupied lots, and the public in general were entitled to the streets. The individual had no right under the law to encroach upon the streets, and the city had no right to appropriate a portion of the lots of the occupants for a street. The mayor and the surveyor had no authority to change the beneficiaries under this trust.

There is no dispute in the evidence but that the defendants and their predecessors in interest claimed and occupied the lots in question to their full length. Buildings and other improvements had entirely covered the said lots. The owners occupied and possessed said lots 50 feet in length. It is not claimed or shown that any of said lots were ever used as a street, or any part thereof, nor that the city ever claimed any part thereof as a portion of the street, and the city surveyor cannot make any portion of said lots a street by simply making a plat and indicating on such plat that said lots were only 45

or 46 feet in length. The mayor-trustee had no judicial power in this matter,—neither had the surveyor. The surveyor and mayor cannot dedicate to the public as a street parts of lots occupied and possessed by individuals.

The appellant rests his case here on the making and approval of said plat. If private rights can be taken in that way, it is a novel proceeding and a proposition unknown to our law. The record clearly shows that the mayor recognized the incorrectness of the plat, as he executed deeds showing that fact long prior to the time that said plat was filed. While the plat was made and approved in 1875, it was not recorded until 1879. The city of Lewiston is not here complaining of the erection of buildings on the lots referred to in her streets. The record clearly shows that the city has for forty-five years known that the occupants of the lots on said block 24 were claiming that such lots were 50 feet in length, and that they had buildings and other improvements covering said lots.

It is contended by counsel for appellant that none of the respondents can question the boundaries of D street without establishing a legal or equitable title owned by him at the time of the encroachment with the buildings upon the boundaries of such street, and that no equitable title vests in an occupant other than at the time of the day of filing the application in the land office of the United States.

We think it sufficiently appears from the evidence that the lots in question were occupied, claimed, and possessed ever since long before the application was made to enter said land, either by the present owners or their predecessors in interest, and, as heretofore stated, it also appears that they claimed their said lots to be 50 feet in length, and that they or their predecessors have had improvements of some kind covering said entire 50 feet. That being true, the counsel's contention is fully met by the proof in the case.

Taking the whole record, it sufficiently appears that that portion of D street in controversy has never been possessed and occupied and used as a street, although the other parts of the street have been used since 1861, about forty-six years. We have no doubt but what appellant, regardless of the suggestions of the city engineer, has the right to extend his building out even with the other buildings placed along said street and that the city has no right to the use of said 4 feet, or thereabouts, for a part of D street.

The judgment of the court below must

be affirmed, with costs in favor of the respondents.

Allshie, Ch. J., concurs.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down June 18, 1907:

A petition for rehearing has been filed in this case. We will say at the outset that no discourtesy to counsel for appellant was intended in any of the statements contained in the opinion in this case. We have the utmost confidence in counsel's honor and ability.

Counsel states that in the commencement of this action and in its prosecution he largely relied on the case of *Boisé City v. Flanagan*, 6 Idaho, 149, 53 Pac. 453. The facts of that case and the case at bar are not similar or parallel. In that case one James Stout claimed the tract in controversy. A part of it he had inclosed and improved, and the remaining part was not inclosed. Both the inclosed and the unincluded lots he claimed as one tract. On the 2d day of May, 1870, the United States conveyed by patent the land included in said Boisé City town site to Henry Elliot Prickett, then mayor of said city, in trust for the several use and benefit of the occupants of said town site. The mayor had the same platted into blocks, streets, and alleys, and the part of the tract so claimed by Stout, which had not been inclosed by him or improved in any way or manner, lay in the street. Upon proper application by Stout to the mayor for a deed to the part so platted, a deed was issued to him by the mayor for said fractional block, as it was called. Stout thereafter, in May, 1871, sold and conveyed said fractional block to one James Dunn, in which conveyance he also described the land in controversy and platted as a street. The land so platted as a street had not been inclosed up to that date, May, 1871, and was not inclosed by said Dunn until June, 1878, and, from the time that Dunn inclosed it on down to the commencement of the action, the city repeatedly asserted its control and right to control over said tract as a part of the streets of said city, and repeatedly notified Dunn to remove all fences and improvements, which he promised to do.

In the case at bar, the defendants and their grantors had been in the exclusive, actual possession of all of said lots, and had them covered with buildings, and the parts not covered with buildings were inclosed by fences. They were in *possessio pedis* of every square foot of said lots. That being true, the city authorities had

notice of their claims, and the surveyor had notice that they were in actual occupation and possession of said lots 50 feet in length, and had improvements thereon.

In the Flanagan Case, when the surveyor came to plat Boisé City, he found no improvements whatever on the tract in controversy, and platted the portion claimed by Dunn as a part of the streets of said city. Said tract laid open as a part of said street until 1878,—for more than six years after Dunn had purchased the fractional block of Stout,—before he fenced it, and when he was notified by the city authorities to remove his fence from said premises, he promised to remove it. That case is very different from the one at bar, for, regardless of the *E. B. True* survey, and regardless of the city authorities, which authorities never at any time claimed any portion of the lots of defendants in this case, nor notified them to remove their improvements from any part of the lots, the defendants and their grantors had steadfastly claimed the same, and the most of them had received deeds from the mayor for said lots 50 feet in length. Their actions and conduct could not be taken as an estoppel against them; while the actions and conduct of Stout and Dunn in the Flanagan Case clearly show that if they had any rights to the land in controversy in that case, they were such as to estop them from claiming them against the city.

In the case at bar we find no laches, waiver of rights, or ratifications of survey such as would estop the defendants from claiming said lots 50 feet in length. So far as the record shows, the city never has questioned the right of the defendants in this action in and to said lots for their full length, 50 feet.

Counsel also cites *Moore v. Walla Walla*, 2 Wash. Terr. 184, 2 Pac. 187, as a case supporting his contention. The court held therein that a party may by his acts so recognize boundaries as marked out in a recorded plat of a city as to estop him from denying the correctness of such boundaries. The court in that opinion says: "The only title claimed by defendants was derived from one D. S. Baker, and if the said D. S. Baker was not in a situation to assert his title to said land as against the public at the time he conveyed the land, it will follow, under the circumstances of this case, that defendant will occupy the same situation."

It would seem from that statement in the opinion, that the grantor of the defendants in that case, at the time he sold said lots to them, was not in a position to assert his title to said land as against

the city authorities. But not so in the case at bar. The grantors of the defendants in the case at bar were in a position or situation to assert their title to said lots as against the city of Lewiston, for the reason that they had buildings or inclosures covering said entire lots, and were claiming them at the time the entry was made by the mayor. There are other facts stated in the opinion in that case which show that the defendants recognized the boundaries of said streets and lots, and the court held as follows: "These acts and some others of a similar nature appearing in the record, in our opinion, estop him as above stated." That is not a case in point.

Counsel also cites *Laughlin v. Denver*, 24 Colo. 255, 50 Pac. 917. In that case it appears from the averments of the complaint that Laughlin entered upon the land in dispute, July 13, 1865, under a deed from Andrew and Elizabeth Sagendorf, and had held exclusive, continued, and uninterrupted possession of said land until February, 1893, when the defendant city, without leave and over the protest of plaintiff, forcibly entered upon said land, and removed certain houses and fences, and cut down and removed certain trees, ousted and ejected the plaintiff therefrom, and converted and used said land for a street. It appears that on May 29, 1865, the city surveyor filed with the clerk of said city of Denver a map of the then city of Denver, which was approved by the city council on June 22, 1865, and filed for record with the clerk and recorder of the county in which said city is located on June 29, 1865. There is shown on said map outlot or block No. 257 in what is known as the "western division" of the city of Denver, and to the west of said outlot is marked "Jefferson street." The land in dispute in that case was a part of Jefferson street, and so marked. On August 29, 1865, the probate judge, in pursuance of the territorial statute, conveyed by deed to the defendant city the streets, lanes, avenues, and alleys of the city of Denver lying within the tract of land included in said surveyor's plat, including Jefferson street, which deed was recorded on June 8, 1867. On July 13, 1865, Laughlin bought from Sagendorf and wife, the occupants thereof, a tract of land inclosed by a certain fence, which included the land described in the complaint, upon which there stood at the time a log house, and also the land described in said surveyor's map as outlot or block No. 257, and received from them a quitclaim deed, which Laughlin supposed described the whole tract, but which in fact conveyed only that portion designat-

ed as outlot No. 257. Laughlin entered into possession of the land so purchased, and occupied and lived in the log house situated thereon, and in 1866 planted trees and built a stable, corral, barn, and out-houses, and in 1871 built a frame house on the land in dispute, plowed and used the balance of the land for gardening and grazing purposes; occupied and used, cultivated, and possessed said land uninterruptedly from July 13, 1865, to February 10, 1893, when the city, under claim of title as aforesaid, entered upon said land and cut down and removed the trees, houses, and other improvements therefrom, and took possession of the land in controversy as a portion of Jefferson street, which, up to the latter date, had not been opened or used by the defendant.

At the outset the court says in that case that, on the foregoing statement of facts, the question determinative of the right of the parties is whether the execution of the deed of August 29, 1865, by the probate judge, was a valid exercise of his authority as trustee, and vested in the city the legal title and the right to the possession of the land in controversy, and if so, whether such title and right has been lost by nonuser. In that case the plaintiff contended that the deed was unauthorized so far as the land in dispute was concerned, because no street was laid out over the same at the time of its execution, and the court says: "This objection would merit very serious consideration if the plaintiff was in a position to urge it, since the streets which the people or legal authorities have a right to have conveyed are such only as are actually used or laid out at the time of the entry of the town site."

And further says: "A trustee is not authorized to designate any of the site in the possession of an actual occupant, as a part of a street."

This last statement is what we hold in this case; that the trustee-mayor had no authority to designate any part of the town site that was in the possession of an actual occupant, as a part of a street. The court then proceeds and says: "But in view of the relation that the plaintiff holds to the property, in our opinion he is precluded from assailing the validity of this deed upon this ground. He was not an occupant of the land at the time the town site was entered, and the title thereto vested in the trustee, nor has he ever succeeded to the right of the then occupants."

While in the case at bar we hold from the evidence that the respondents did derive their rights from the fact of being on the land at the time it was entered by the mayor, or derived their rights from their

predecessors who were on the lots at the time. However, if in fact the rule laid down in that case is contrary to the rule that we have laid down in this case, we are not inclined to follow it. In that case the court held that Laughlin had no right by adverse possession, as the deed under which he claimed did not purport to convey the land in controversy, and therefore did not constitute color of title. In the case at bar, the respondents in their predecessors in interest have been in the actual physical possession of the said lots their entire length, 50 feet, for thirty-five or forty years, and the city has not at any time molested, interfered with, or disputed their right and ownership therein.

Laches cannot be imputed to the respondents because they have not brought an action against the city to determine their rights, as they were in possession and in absolute control of said lots. The respondents and their predecessors in interest having been in possession of the lots involved in this case, with improvements covering the entire lots, claiming them as their own and exercising acts of ownership over them, the principle of estoppel cannot be invoked against them because they have not been more aggressive, and brought suits against the city for the purpose of establishing their rights thereto.

A rehearing is denied.

Affirmed by Supreme Court of the United States, Nov. 29, 1909, 215 U. S. 144, 54 L. ed. 131, 30 Sup. Ct. Rep. 51.

KANSAS SUPREME COURT.

BETHANY HOSPITAL COMPANY

v.

NELLE K. HUBBARD PHILIPPI, Appt.

(82 Kan. 64, 107 Pac. 530.)

Jury — right to, in will contest.

1. An action by a devisee under a will conceded to be valid, to cancel and set aside a deed which the maker of the will was fraudulently procured to execute when he was of unsound mind, is equitable in character, and therefore neither party is entitled to a jury trial of the same as a matter of right.

Trial — submission to jury — effect.

2. The trial court, having called a jury to answer special questions of fact, was at liberty either to adopt the answers returned by the jury, or to ignore them and make findings of its own, based upon an independent consideration of the testimony.

Headnotes by JOHNSTON, Ch. J.
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Action — by devisee under will — premature commencement.

3. Where the devisee of the will brought the action before the will was probated, and later, when it was probated, filed an amended and supplemental petition on which the cause of action was tried, the objection that the action was prematurely brought became immaterial.

Deed — execution by insane person — validity — cancellation — will — revocation — rights of devisee.

4. A deed executed by an insane person to one who has knowledge of the mental incapacity of the grantor, and who gives no substantial consideration for the property, is an absolute nullity, which does not operate to revoke a valid will previously made by the grantor, and a devisee under the will has sufficient interest to justify him in maintaining an action against the grantee to declare the deed to be void, although there has been no prior disaffirmance of the deed, or a tender back of the nominal consideration paid by the grantee.

Pleading — duplicity.

5. A petition alleging that the deed was void because of the mental weakness of the grantor and the undue influence exercised upon him while in that condition, and asking to have the deed adjudged to be void, states only a single cause of action.

Deed — validity — mental capacity of grantor — evidence — sufficiency.

6. The testimony examined, and held to be sufficient to uphold the finding of the trial court that the grantor was without mental capacity to execute the deed in question.

(March 12, 1910.)

Note. — Right of devisee or legatee to attack conveyance or transfer by testator.

The rule declared in the above case that a devisee has sufficient interest in the property devised to him to enable him to attack a transfer by his testator of the property devised, finds support in *Rickman v. Meier*, 213 Ill. 507, 72 N. E. 1121, in which a deed obtained by undue influence was set aside after the grantor's death at the suit of the residuary devisees under his will. The court declared the law to be: "That where a deed or other conveyance has been procured by undue influence, if it be not ratified by the party making it after the undue influence has ceased to operate, it may be set aside after his death at the suit of those who succeed to his rights."

And in *Valpey v. Rea*, 130 Mass. 384, it was held that a judgment creditor of a devisee whose testator had some time after the execution of his will conveyed the premises to the tenant could, upon the trial of a writ of entry for the land devised, show that the grantor was insane at the time he executed the deed. The court laid down the following rule of law: "The deed of an insane person is ineffectual to convey a title to land, good against the grantor, or

APPEAL by defendant from a judgment of the District Court for Allen County quieting title to certain real property. Affirmed.

The facts are stated in the opinion.

Messrs. W. Littlefield, Campbell & Goshorn, William H. Clark, W. J. Costigan, and F. M. Harris for appellant.

Messrs. Ewing, Gard, & Gard with Messrs. W. S. Jenks, Nelson Case, and L. W. Keplinger for appellee.

Johnston, Ch. J., delivered the opinion of the court:

This action was brought by the Bethany Hospital Company, to which certain property was devised by the will of Samuel B. Rohrbaugh, to declare a deed to be void and to enjoin the conveyance or encumbrance of the property by the defendant, Nelle K. Hubbard Philippi, who claimed the property under a deed alleged to be absolutely void and to have been fraudulently obtained. It appears that in March, 1903, Samuel B. Rohrbaugh executed a will which, among other devisees, gave the hospital company property in the city of Ottawa, known as the Boston Store Building, worth about \$25,000, and it is conceded that the testator was of sound and disposing mind when the will was made. On February 22, 1907,

about two months before Rohrbaugh died, he signed a deed which purported to convey the property in question to Nelle K. Hubbard Philippi. This conveyance is attacked by the hospital company on the ground that Rohrbaugh was of unsound mind at the time it was made, and further that defendant and others interested took advantage of the grantor's enfeebled mental condition and by undue influence obtained the execution of the deed. It appears that Rohrbaugh had been successfully engaged in the lumber business in Ottawa for about forty years, and until his death, in 1907. During that time he had acquired property worth about \$150,000. In the last years of his life the active charge and detailed work of the business, including the payment of bills, the collection of accounts, and the signing of checks and contracts, was attended to by Charles H. Constant, who had a partnership interest in the lumber business. Since 1905, however, Samuel R. Hubbard, a nephew of Rohrbaugh and a brother of defendant, who also had an interest, assisted to some extent in the management of the business. In 1882 Rohrbaugh's wife died, when their son was four years old, and the boy made his home with Mrs. Hubbard, a sister of Mrs. Rohrbaugh, until his death about sixteen years later. Rohrbaugh

against his heirs and devisees, unless it is confirmed by the grantor himself when of sound mind, or by his legally constituted guardian, or by his heirs or devisees."

And the language quoted from the case last cited was repeated in *Brigham v. Fayerweather*, 144 Mass. 48, 10 N. E. 735, and it was held that a devisee could maintain a bill in equity to set aside, upon the ground of mental incapacity, a mortgage executed by his testatrix to a creditor who practised no fraud.

And in *Le Gendre v. Goodridge*, 46 N. J. Eq. 419, 19 Atl. 543, it was held that though the executors under a will by which property was conveyed to them in trust for certain beneficiaries were proper parties to bring an action to set aside a deed of the testatrix conveying the property so devised, such beneficiaries had a right to bring the action without first asking the executors to bring it or notifying them that judicial relief was desired against the deed. The court said: "The complainants are the only persons who, as between the executors and themselves, have the least beneficial interest in the result of this suit. If the deed is set aside and the lands are recovered, they will go, it is true, to the executors, but not for their benefit, but for the benefit of the complainants. If a wrong exists, the complainants are the persons who are injured, and not the executors, so that it would seem to be undeniable that, unless it be true that a person may suffer a wrong without having a right to demand judicial

redress in his own name against the wrongdoer, this action is properly brought."

And in *Van Deusen v. Sweet*, 51 N. Y. 378, an action of ejectment by a devisee against one claiming under a deed from the testator, and in which it was contended that if the plaintiff had any remedy based upon the alleged incompetency of the grantor to execute the deed, in the absence of fraud and before office found, it was by an equitable action to set aside the deed, the court declared that the deed of a "totally and positively incompetent" person was not merely voidable, but absolutely void, and never had any legal existence or vitality; that therefore there was nothing to be set aside by the interposition of a court of equity; and that the fact of its absolute nullity was available to overcome and avoid the defense set up under it to defeat plaintiff's claim. Chief Commissioner Lott, after arriving at this conclusion, said that he deemed it proper to add that he did not wish to be understood or to intimate that he had any doubt that it would have been competent for the plaintiff to have shown that the deed was voidable if that had been necessary to defeat the defendant's claim.

And in *Goodyear v. Adams*, 1 Silv. Sup. Ct. 185, 5 N. Y. Supp. 275, which was an action to foreclose a mortgage, it was held that the defendants, who claimed title to the mortgaged premises through a will from the mortgagor's grantor, could show the mental incapacity of the grantor when he executed his deed to the mortgagor.

boarded with the Hubbard family most of the time after the death of his wife, and it appears that he was greatly attached to Nelle K. Hubbard, generously contributing towards her education, and was greatly pleased with her progress. In the will mentioned Rohrbaugh gave defendant and the several members of the Hubbard family a number of pieces of real property, which together were worth approximately \$55,000, and also considerable personal property. It appeared, too, that he was a member of the Methodist church, to which he had given liberally of his means, and he had made provisions for it and other Methodist institutions in his will. There is evidence tending to show that early in 1906, Rohrbaugh then being about seventy-six years of age and affected with rheumatism and other ailments, became weak of body and feeble of mind, and that his mental degeneration gradually increased until his death. On February 20, 1907, a proceeding to inquire into his mental condition and for the appointment of a guardian to take care of him and his estate was begun on the application of some of his neighbors who were members of his church. According to much of the testimony he did not comprehend the nature of the proceeding, and seemed to understand that he was un-

der arrest, and was therefore very much angered at those who instituted it and greatly agitated because of it. A hearing of the application was had on February 26, 1907, but the jury failed to agree. While the proceeding was pending, and while Rohrbaugh was surrounded by the Hubbards and witnesses chosen by them and their attorney, he signed deeds prepared for him which on their faces conveyed to defendant and other members of the Hubbard family nearly his entire estate for a nominal consideration and his love and affection for the grantees. Shortly after the execution of the deeds and the hearing mentioned Mrs. Hubbard took him to Excelsior Springs, and there he rapidly grew weaker, and died on April 15, 1907. Before the will had been offered for probate, and on April 24, 1907, this action was begun. The will was probated on April 29, 1907, and on May 3, 1907, an amended and supplemental petition was filed, setting forth a copy of the will and the probate of the same, and under it the case was tried. The defendant answered, setting up her deed from Rohrbaugh, and asking that her title be quieted as against the plaintiff, and that it be barred from claiming any interest or estate in the property. The defendant demanded a jury trial as a matter of right, which was

In *Bensell v. Chancellor*, 5 Whart. 371, 34 Am. Dec. 561, an action of ejectment by devisees against one claiming under a deed from their testator, plaintiffs were held to be barred by the statute of limitations, but no question was raised, apparently, as to their right to maintain the action.

In *Powell v. Powell*, 30 Ala. 697, which was a contest of a will offered by the legatees therein and contested by the testator's distributees and next of kin, upon the ground, among others, that the testator had by deed conveyed the entire property devised and bequeathed by the instrument propounded, it was held that by statute an alteration of the estate devised or bequeathed did not *per se* revoke the will, but whatever interest remained in the testator passed by the will to his devisee or legatee, unless an intention to revoke expressly appeared. The court said: "Applying this rule to the case before us, we find that a substantial interest remained in the testator; either a large balance of unpaid purchase money, or, more likely, a right to vacate the deed . . . on account of fraud in its procurement." Accordingly, a demurrer was sustained to a plea setting forth the ground mentioned.

In *Wolf v. Harris* (Or.) 106 Pac. 1016, a deed of a deceased was set aside upon the ground that it was procured by fraud and undue influence, at the suit either of his heirs or devisees, probably the latter, since the court refers to a will that the deceased made after the execution of the deed. No 30 L.R.A. (N.S.)

question appears to have been raised as to the right of the plaintiff to maintain the action.

An extensive search has disclosed no specific holding which throws any doubt upon the rule as established by the cases here reviewed, though in *Hunt v. Weir*, 4 Dana, 347, the court, in holding that a purchaser under a land contract seeking a rescission thereof on the ground that the title was derived through the mesne grantor, who was insane, must show that the conveyance had been set aside at the instance of those who had a right to avoid it, used the following language: "If the grantor were insane, still his deed passed the legal title, subject to be defeated not by the mere allegation and proof of the fact of insanity, by anyone who might feel an interest in overturning the deed; but, after the death of the grantor, only at the election of his heirs, made under circumstances which do not preclude them from setting it aside;" and in *Hunt v. Rabitoay*, 125 Mich. 137, 84 Am. St. Rep. 563, 84 N. W. 59, which was an action for partition where the complainants claimed title under a deed from the state as escheated land, the court denied their right to question a former deed of partition, one of the parties to which was an incompetent person, upon the ground that they were "neither privies in blood nor legal representatives" of such incompetent person, "and only these two classes can avoid the deed of an insane grantor."

J. A. C.

denied. Some special questions, however, were submitted to a jury to aid the court, but that jury failed to agree, and another was called, to which issues of fact were referred, but the answers returned, which in the main were favorable to defendant, were not adopted by the court. Upon independent consideration of the evidence the court made findings of its own.

Although demanded by the appellant, she was not entitled to a jury trial. The action was equitable in its nature, brought to declare a deed void, and to remove a cloud upon the title which it is claimed passed to appellee under the provisions of the will. In connection with this relief an injunction against transferring or encumbering the property by the grantee in the deed was asked. The appellant in her answer recognized the equitable character of the proceeding, and asked to have her title quieted as against the claim of appellee. In such a case a jury may be called to answer special questions submitted to it, but the answers of the jury are not binding on the court. It may ignore them, and upon independent considerations make findings of its own, as the trial court did in this instance. *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 307, 58 Pac. 982. There is a contention, however, that appellee did not have such an interest in the property as warranted it in maintaining an action against appellant. It is first argued that the will was not probated when the original petition was filed, but this is accounted for in the averments of the pleading. The question is not a practical one, as the amended and supplemental petition was filed after the will had been probated, and besides the due execution of the will was not in controversy. The probating of the will furnishes evidence of an effective gift and the transfer of title, and the will when probated takes effect by relation from the time of the testator's death. It is earnestly argued that the deed, being valid on its face, and at most only voidable, operated to revoke the will, that if a fraud was committed on Rohrbaugh, he was the only party who could complain, and that one subsequently acquiring an interest in the property cannot set up the fraud of appellant in obtaining the conveyance. Rohrbaugh, it is said, was at liberty to forgive the wrong, and in any event his right to contest the validity of the deed was incapable of transfer to anyone. It is further contended that there was no disaffirmance by Rohrbaugh, or anyone in his behalf, although there was ample time for such action between the execution of the deed and his death, and that disaffirmance must precede the bringing of an action.

It is true that while the testator lives, a 30 L.R.A. (N.S.)

gift or devise is only a possibility, and, further, that a will only speaks from the time of the testator's death. It is also true that one who attacks a deed or other instrument of revocation must have a vested interest in the property. On the theory of appellee it had an interest when the action was brought. It contended, and the trial court found, that the deed was an absolute nullity. If Rohrbaugh had no capacity to execute a deed, no property was conveyed. If the instrument signed was an utter nullity, Rohrbaugh was the owner of the property, at the time of his death. If the title of the property was in Rohrbaugh when he died, it became subject to the provisions of the will and passed to the appellee. The theory of the appellee was not that the deed was merely voidable, but that it was utterly void, and hence the rules suggested by appellant are not applicable. If the deed did not transfer the title from Rohrbaugh, then appellee acquired the complete title to the property upon the death of Rohrbaugh, and also the right to bring an action to have the deed declared void. This question was raised and directly decided in *Waller v. Julius*, 68 Kan. 314, 74 Pac. 157. That was an action to cancel a deed made without consideration by one of unsound mind. Waller claimed title under an agreement with the grantor and her husband, to the effect that if she cared for them during their lives, the property would become hers. After the death of her husband the grantor conveyed the property to Julius. Waller brought the action, and it was argued that she had no interest and no standing to challenge the deed for fraud or want of consideration. The court met this claim by saying: "The action is not an attack upon a deed voidable for fraud and want of consideration, but an effort to clear the record of an apparent deed that is in fact no deed at all, because made by an insane grantor to a grantee who knew of her incapacity, and who gave nothing for it. True, it is said that as a general rule a deed made by a person of unsound mind, who has not been judicially declared insane, is not wholly void. . . . But this rule grows out of practical considerations and is for the benefit of innocent grantees for value. One who takes a deed, paying nothing for it, and knowing the grantor to be insane, is not within its reason, and is not protected by it. The caution with which this court has held that the deed of an insane person can ever be treated otherwise than as absolutely void confirms this." The case of *Gribben v. Maxwell*, 34 Kan. 8, 55 Am. Rep. 233, 7 Pac. 584, cited by appellant, belongs in an exceptional class of cases, and lays down the rule that one who in good faith pur-

chases property from an insane person before there is an inquisition, without knowledge of the insanity, for a fair and reasonable consideration, no advantage being taken by the purchaser, does not lose everything, and the guardian of the insane person is not permitted to recover the land without returning the consideration. This rule is applied for the protection of an innocent party, and to prevent a representative of the insane person from obtaining and keeping the property, as well as the consideration honestly paid. Even in that case the court took pains to state the general rule to be that "the contract of a lunatic is void *per se*. The concurring assent of two minds is wanting. 'They who have no mind cannot "concur in mind" with one another, and, as this is the essence of a contract, they cannot enter into a contract,'"—citing *Powell v. Powell*, 18 Kan. 371, 26 Am. Rep. 774. *Leavitt v. Files*, 38 Kan. 26, 15 Pac. 891, belongs in the same class, and applies the rule that if a contract is entered into in good faith, and no advantage is taken of the person of unsound mind, it would be inequitable to allow him to recover the property and retain the price paid by the purchaser. Strictly speaking, a party dealing with a person *non compos mentis* does not recover on the contract itself, but, having dealt fairly with the person of unsound mind, and in ignorance of his incapacity, he is deemed to be entitled to that with which he has honestly parted, and is not required to surrender both the property and its price. The present case, however, does not come within any of these exceptions to the general rule. According to the averments and much of the evidence, no substantial consideration was paid. The conveyance was not obtained in good faith by the grantee. She had knowledge of the incapacity of the grantor. She did take advantage of his mental weakness, and by undue influence procured the execution of the deed. If these facts are established, the deed was absolutely void. Even if there had been good faith, there was no consideration to return, because, as we have seen, only a nominal consideration was paid. If the deed had no existence or force, it had no effect on the will which is admitted to be valid, and so it has been said that "if the deed is void or inoperative as a deed, it should not be allowed an incidental operation by way of revocation." [1 Redfield, Wills, 4th ed. p. 344]; *Graham v. Burch*, 47 Minn. 171, 28 Am. St. Rep. 339, 49 N. W. 697.

A formal disaffirmance was not a prerequisite step to the bringing of the action to get rid of the void conveyance. Disaffirmance by one without mental capacity

would have been unavailing, and so far as appellee is concerned, it appears to have taken prompt action after the death of the testator and the passing of the property to it.

Error is assigned on the refusal of the court to require appellee to elect upon which cause of action it would rely. Appellant's theory appears to be that the petition sets out two causes of action; the first that the grantor of the deed was without mental capacity, and the second that the execution of the deed was procured by undue influence, and, further, that these are inconsistent claims. There was in fact but one cause of action,—one main object sought, and that was the getting rid of the void deed. Only one deed was involved, and it was alleged to be void because of the mental weakness of the grantor and the undue influence exercised upon him in his weak condition. These grounds may co-exist, and are not inconsistent in the sense that will prevent proof showing both. Each is a reason for adjudging the deed to be a nullity, and together they give but one right of relief and constitute but one cause of action. *Washington Nat. Bank v. Woodrum*, 60 Kan. 34, 55 Pac. 330; *Howard v. Carter*, 71 Kan. 85, 80 Pac. 61; *Lattin v. McCarty*, 41 N. Y. 107; *Maxwell*, Code Pl. 96.

Two objections to rulings on testimony are briefly presented, but neither of them are deemed to be material. It is said that Judge Smart, the executor of the will, was permitted to relate conversations with Rohrbaugh which occurred when the relation of attorney and client existed between them. We find no basis in the evidence for holding that such relation then existed. The other objection is the exclusion of the testimony of a physician called to treat Rohrbaugh at Excelsior Springs relating to his condition at that time. The doctor was asked, and not allowed to give his opinion, as to Rohrbaugh's sanity based on information outside of what he had obtained in a professional way. It would have been very difficult to have found a line between the professional and nonprofessional information of this witness, and it is very doubtful if any of the proposed testimony would have been competent. Each party produced a great volume of testimony relating to the mental condition of Rohrbaugh; and, even if any of the testimony of the doctor was other than confidential, or could have been brought within the region of competency, its exclusion can hardly be regarded as material error.

The remaining question as to the mental condition of Rohrbaugh when the deed was executed has been determined upon the tes-

timony of those who were near to and associated with him in the last year of his life, as well as upon the evidence given by experts, who testified as to the mental disease with which he was afflicted. While there was a sharp conflict in the testimony on this question, there was a great deal of evidence of a convincing character tending to show incapacity. The findings of the trial court indicate the nature of his malady, and the stage to which it had progressed when the deed was signed. Among other things the court found:

"(11) That the mental malady with which said Samuel B. Rohrbaugh was afflicted seemed progressive in character, and grew worse, showing a gradual but sure impairment of the mental faculties, more especially those of memory, will power, concentration of thought, and judgment; such features and symptoms being manifested as early as February, 1900, and gradually growing worse until the same culminated in his death. He spent much of his time during the last months of his life sitting in his lumber-yard office; he would sit in a posture inclined forward, have a vacant expression on his face, and seemingly totally oblivious to surroundings; he would awake from such stupors, and would make attempts to transact business, but would immediately forget prices and quantities and qualities; this condition of mind, by September, 1906, manifested itself in his becoming unable to dress himself unaided; he became subject to delusions, at times imagining that burglars had been in his room at nights, and having conflicts with them; at times imagining seeing men and teams and other objects where none existed; on different occasions he became lost, and had to be assisted and guarded in going to and from his meals only a short distance, and along a route long and familiarly known to him for years before; on different occasions he wandered into the house or onto the premises of neighbors adjoining his boarding place; on one occasion during the month of November, 1906, he imagined he had been robbed, or there were burglars in his room, and opened his windows at night, making an outcry; soon after these demonstrations on the part of Samuel B. Rohrbaugh, Mrs. Ida Hubbard and her family took him, the said Samuel B. Rohrbaugh, to their home, where he continued to room until about February 1, 1907, when Mrs. Hubbard and her daughter, Nelle K. Hubbard, defendant, with Samuel B. Rohrbaugh, moved into the new residence above mentioned. So far as the evidence discloses, the

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husband of Mrs. Hubbard was home very little during the last year of Mr. Rohrbaugh's life. During the month of December, 1906, the acts and conduct, as before mentioned, of the said Samuel B. Rohrbaugh became so pronounced that the Hubbard family procured a man to come to their home at night to guard Samuel B. Rohrbaugh and care for him at night, and this person remained to wait upon the said Samuel B. Rohrbaugh by night for about two months, or until about the 20th of February, 1907; and during said period, to wit, during the two months preceding the 20th of February, 1907, said Samuel B. Rohrbaugh in his enfeebled and diseased condition of mind imagined he saw . . . imps and devils in his room. He became careless in the use of his tobacco, although formerly he had been clean, and was unable to wait upon himself in the toilet room without direction, mistaking the bath tub for a urinal. However, the evidence fails to disclose that he was violent, but was easily persuaded and tractable with those with whom he was acquainted. That for two or three months prior to the date of the execution of the deed in controversy in this action, the mental condition of the said Samuel B. Rohrbaugh became such that on different occasions he was unable to recognize property belonging to himself upon which he had erected costly improvements, denying that it belonged to him, on one occasion pointing out his own lumber yard as that of a rival in business; and, though having been familiar with the fact of the death of an associate and friend of years gone by, he made inquiries concerning the health of the deceased. Having received payment of a claim in litigation, he made inquiry of the attorney on the next day after such payment as to the progress of the case; seemed to lose power of location of places familiar to him, mistaking the day of the week and the hour of the day. Though Samuel B. Rohrbaugh had large experience in building, and was thoroughly conversant with the prices of lumber and the cost of building, yet at the time the building referred to in finding number 10 was just about completed, he had no knowledge as to the cost of the building, and supposed it to be only about \$5,000, although, as before stated, it cost about \$17,000, and, also, while he had personal knowledge that stone was contracted for to the amount of \$1,000 for certain portions of the work in part of the house, and after considerable part of the stones had been actually used in the building, and the greater part of the re-

mainder was on the ground, he was entirely ignorant or forgetful of the fact, and insisted on getting wood for the same purpose."

In other findings the court stated:

"(22) That upon the day on which the deed in controversy as well as the other deeds were executed, to wit, February 22, 1907, Samuel B. Rohrbaugh was suffering from such physical and mental weakness as to be unable to dress himself properly without assistance, and it would have been unsafe and unwise to permit him to go to the closet or out upon the streets without an attendant; that his memory and mental powers were so impaired and weakened as to incapacitate him from remembering his prior wills or the provisions thereof; that he was mentally incapable of concentrating his attention upon such matters, or his relations to the interests provided for in said will, or his relations thereto, or acting with intelligence with regard to the matters therein contained; that he, the said Samuel B. Rohrbaugh, was not on said day of sound mind and memory."

"(17) That on the day succeeding that of the execution of the deed to defendant the said Samuel B. Rohrbaugh, leaving the house unattended, became lost on the streets of Ottawa, Kansas, and was brought back by parties who, together with the Hubbard family, were in search of him, and on the third and fourth day after the execution of the deeds the said Rohrbaugh pointed out an imaginary one-legged chicken, which he thought he saw running in the parlor in which he was seated, and also referred to an imaginary packing house in the city of Ottawa, Kansas, where he then was, and stated that he used to work there thirty-five years ago, although in fact there was no packing house there, and the only time and place he ever worked in any packing house was in Springfield, Illinois, forty years ago."

While the credibility of the witnesses and the probative force of their testimony were questions for the trial court, and while its findings based on competent testimony are binding on this court, a reading of the testimony as written in the record satisfies us that it not only supports, but that it abundantly sustains, the finding of incapacity. That being established, the deed in question is a nullity, regardless of whether undue influence was exercised upon the grantor by anyone, and hence the judgment of the District Court must be affirmed.

All the Justices concur, except Benson, J., who did not sit.
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KENTUCKY COURT OF APPEALS.

CHARLES A. TANNER, Appt.,

v.

ADELAIDE STEVENSON.

(138 Ky. 578, 128 S. W. 878.)

Libel — school superintendent — applicant's license.

1. A county superintendent of schools is not absolutely privileged in requesting the state board of examiners to refuse a teacher's license because of lack of good moral character of the applicant.

Same — malicious attack on character.

2. A county school superintendent who, from malicious motives, attacks the character of an applicant for a state license to teach school, by making false charges of immoral character against him, is guilty of libel.

Trial — libel — privilege — jury.

3. When a petition for damages for libel is sufficient, and there is evidence of malice in fact in making the publication, the question whether or not the defense of qualified privilege has been made out is for the jury.

Libel — privilege — actual malice — burden of proof.

4. Plaintiff must show actual malice to recover in a libel case where the defendant is entitled to a qualified privilege.

Evidence — libel — burden of proof — privilege.

5. The burden of showing the falsity of the publication is not placed on plaintiff by a plea of privilege in an action for libel in attacking plaintiff's moral character.

(June 7, 1910.)

Note. — Libel and slander: privilege of school superintendent or other officer in reporting to school authorities upon character of teacher.

The rule as laid down in *TANNER v. STEVENSON*, that a report of a school superintendent or other official to the school authorities in regard to the character of a teacher is not absolutely privileged, is apparently well established, but in none of the cases is there much of any discussion of the question. *Rausch v. Anderson*, 75 Ill. App. 520; *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981, second appeal, 23 Ind. App. 305, 51 N. E. 497.

The question was raised but not decided in *Finley v. Steele*, 159 Mo. 299, 52 L.R.A. 852, 60 S. W. 108.

A suggestion of a contrary rule is found in *Hemmens v. Nelson*, 138 N. Y. 517, 20 L.R.A. 440, 34 N. E. 342, where the court, in speaking of a report by the principal of a deaf mute institute, to the executive committee thereof, in respect to a teacher's character, says: "The courts have refused to extend the class of cases where absolute privilege applies, and I shall assume it

APPEAL by defendant from a judgment of the Circuit Court for Clark County in plaintiff's favor in an action brought to recover damages for the publication of an alleged libel. Affirmed.

The facts are stated in the opinion.

Messrs. Pendleton, Bush & Bush, J. Smith Hays, and T. B. McGregor for appellant.

Messrs. J. M. Stevenson and F. H. Haggard for appellee.

Carroll, J., delivered the opinion of the court:

This is an action for libel growing out of a letter concerning the appellee, Adelaide Stevenson, written by the appellant, Tanner, while superintendent of common schools in Clark county, to J. H. Fuqua, state superintendent of public instruction. Miss Stevenson, who had been teaching in the common schools of Clark county for several years, was examined in June, 1907, as required by law, for the purpose of obtaining a certificate that would enable her to continue teaching in the public schools. At the time of her examination, the appellant, Tanner, was county superintendent of common schools, and, in connection with two competent persons, constituted a county board who examined applicants for certificates. This board had authority to refuse a certificate to any applicant who did not pass a satisfactory examination, or who did not have a

good moral character. There was also a state board of examiners, of which the state superintendent of public instruction was chairman, and this board had the authority to examine applicants for teachers' certificates, and to grant or refuse them for the same reasons that the county board did.

It is charged in substance in the petition that Miss Stevenson, having presented herself before the state board of examiners as an applicant for a state teacher's certificate, passed an examination that entitled her to a certificate, but that, before the certificate was issued, Tanner maliciously, and with the intention of injuring her, and to prevent her from getting a certificate from the state board, composed and sent to Fuqua, superintendent of public instruction, the following false and scandalous letter: "You know that J. H. Thomas, with Miss Stevenson, recently stood the examination in Frankfort. In July Miss Stevenson failed in her examination here. As to Miss Stevenson, I have heard from E. L. Butler, trustee of district No. 16, in this county, where she once taught, and G. W. Lee and L. C. Cockrill and J. I. Glover, trustees in district No. 46, in this county, and J. E. Lanter and D. M. Tanner and others whom I have not talked to recently, that she was not of a good moral character. I know nothing except what I have been told by these gentlemen as to whether this is true or not; but some of these gentlemen have volunteered this infor-

does not apply to this case, though it would perhaps be difficult to make a satisfactory distinction, founded upon principle, between the case of defamatory words in a petition to a legislative body or committee, or the reports of military officers, and the character of the charge in this case, and the circumstances under which it was made."

But the reports of superintendents and other officers to the school authorities in respect to the character of teachers are generally held to be qualifiedly privileged, especially when the making of the report is in the line of the officer's duty, so that such reports, although injurious and false, are not actionable in the absence of express malice. These cases may be considered as indirect authority for the proposition that such reports are not absolutely privileged.

Thus, in *Finley v. Steele*, supra, it was held that members of the school board would not, in the absence of anything to show actual malice, be guilty of libel in sending a request for the revocation of a teacher's license to the school commissioner, who had statutory authority to revoke the license upon certain specified grounds, although they did not, in preferring the charges, follow the exact words of the statute, where the charges were made in the discharge of their duty, after complaint by parents, and in response to a communication from the commissioner.

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So, statements by the principal of a deaf mute institute, who was really its executive head and manager, charged with the duty carefully to observe the moral conduct of teachers as well as scholars, made to the executive committee and president of the board of trustees, which had a corresponding duty in respect to the welfare of the institution, to the effect that the superintendent of one of the departments and a teacher therein had sent to his wife an obscene publication, were held in *Hemmens v. Nelson*, supra, to be confidential and privileged if believed by him to be true, and not actionable unless express malice or malice in fact was shown on his part.

And the report of the principal of a school to the city superintendent, that one of his teachers was "careless in regard to blackboard work," is privileged, and, in the absence of all evidence of express malice, is not actionable. *Walker v. Best*, 107 App. Div. 304, 95 N. Y. Supp. 151.

So, statements made in the report of a school superintendent to the board of school visitors, concerning a teacher in the school, are privileged, so that he is protected, if he honestly believed the statements to be true, and he need not have had "good reason" or "reasonable grounds" for believing them to be true. *Barry v. McCollom*, 81 Conn. 293, 129 Am. St. Rep. 215, 70 Atl. 1035.

In *Henry v. Moberly*, 6 Ind. App. 490, 33 N. E. 981, a communication in respect to

mation, and have said they would testify to the same if called upon at any time. In view of these facts, both as to Mr. Thomas and Miss Stevenson, I do not think a certificate should be issued to either of them, but of course I submit the matter to your judgment." In his answer, Tanner pleaded in substance that, at the time he wrote the letter, Miss Stevenson was a resident of Clark county, and he believed that she intended, if she received the state certificate, to teach in the common schools of Clark county; that he was the duly elected and acting superintendent of common schools in that county, and had received the information as to her character contained in the letter, and believed it to be true; that the letter, which was mailed directly to the state superintendent of public instruction, was written in good faith, in the discharge of his duties as county superintendent, and without any wicked or malicious intent to injure Miss Stevenson in her good name, or otherwise or to bring her into public scandal or disgrace, and with no other purpose than to acquaint the state superintendent with the information therein set out, and submit the matter for his consideration. He further pleaded that, in stating in the letter that he had heard from the parties named that the plaintiff was not of good moral character, he intended, and said letter meant simply, that this was her reputation, and what he had heard as to her reputation referred and related to her conduct with

the character of an applicant for teacher, made by a school trustee to the other members of the board of trustees, which board was charged with the duty of hiring teachers, was held to be qualifiedly privileged, and a complaint in an action for libel, based on such a communication, which fails to allege actual or express malice on the part of the trustee in publishing it, is demurrable. When the case came before the court again on an amended petition (23 Ind. App. 305, 51 N. E. 497), it was held that, the communication being qualifiedly privileged, the burden was upon the plaintiff to show malice. (See on the latter point, note to Denver Public Warehouse Co. v. Halloway, 3 L.R.A.(N.S.) 696.)

And acts of a board of school trustees in gathering evidence of dereliction on the part of a school principal, and presenting it to the tribunal having authority to discipline such principal, are in the line of public duties and consequently privileged. Galligan v. Kelly, 64 N. Y. S. R. 197, 31 N. Y. Supp. 561. The argument of the court is apparently directed against the contention that no privilege whatever attached to the communications of the trustees, so that, although the language of the court would appear to be broad enough to imply that such communications were absolutely privileged, yet it is not probable that the court intend-

men; and that he intended to and did state that her reputation in Clark county for moral character was not good. He further charged that at the time he wrote the letter Miss Stevenson did not have in that county a good reputation for morality in her conduct with men. Upon a trial before a jury, a verdict was returned in favor of appellee, assessing the damages at \$5,000. The judgment upon this verdict we are asked to reverse for errors committed in failing to properly instruct the jury.

Before coming to the legal questions involved, and to better understand the respective contentions of counsel concerning them, it will be appropriate to state briefly what the evidence conduced to show. The appellee, at the time she was examined in 1907 by the county board of Clark county, had a third-class certificate, and under the authority of this certificate and previous like certificates had been teaching in the common schools of Clark county and at different places for a number of years. A day or so after submitting to the examination, but before receiving any certificate, she learned that she had received a second-class certificate. Being of the opinion that she was entitled to a first-class certificate, she asked superintendent Tanner to tell her in what subjects of her examination she had failed to pass, and requested permission to look over her examination papers. In reply to this request, Tanner told her in substance

ed so to decide, for later in the opinion it is said that "the charges were certainly made with probable cause to believe them to be true," which fact would, of course, be immaterial if the communications were absolutely privileged.

In *Rausch v. Anderson*, 75 Ill. App. 526, the court said, *obiter*, that a school superintendent had the right, in good faith, and for justifiable motives, to communicate to the school board his reasons for revoking a teacher's certificate, and that such a communication would be at least conditionally privileged.

It is to be noted in *TANNER v. STEVENSON* that the court, after holding that a communication of a school superintendent to the school authorities was not absolutely privileged, shows that, as a matter of fact, the report was not made in the line of any duty imposed upon the superintendent, so that he was in the same position as a private citizen. Upon this point the case is distinguishable from the cases cited above, and is similar to the cases gathered in a note upon Privileged character of complaints to public officer against subordinate, attached to *Jozsa v. Moroney*, 27 L.R.A.(N.S.) 1041.

As to official report by executive or administrative officer as privileged communication, see note to *De Arnaud v. Ainsworth*, 5 L.R.A.(N.S.) 163. W. M. G.

that she could either take the certificate that had been issued to her, but not yet delivered, or stand a re-examination. The result of interviews between herself and Tanner was that she did not accept or receive the second-class certificate, and Tanner indorsed on his records that she had been re-examined and a certificate refused. Shortly after the matter was thus ended, she made application to the state board of examiners, of which J. H. Fuqua, as state superintendent of schools was chairman, and there passed an examination entitling her to what is known as a "state certificate;" but before this certificate was delivered, the superintendent of public instruction had received from Tanner the letter before mentioned, and held up the certificate. There was also evidence to the effect that, although Miss Stevenson had not really stood an examination that entitled her to a second-class certificate, the examiners, including Tanner, had agreed to issue her one, but that before the certificate was delivered, Tanner learned from reputable gentlemen living in school districts in which the appellee had taught, that she was not of good moral character, and was induced by this information to decline to deliver the certificate. In respect to the reputation of appellee for morality, there was evidence tending to prove that it was good, and also evidence conducing to show that it was bad. To make a long story short, so far as the voluminous facts contained in the record are concerned, it is the contention of appellee, supported by some evidence, that Tanner took offense because she requested the privilege of looking at her examination papers, and for this reason he refused to deliver to her the certificate that the board of examiners had agreed to issue. And that, becoming more aggravated when he learned that she had passed a satisfactory examination before the state board, he attempted to prevent her from getting a state certificate by writing the letter to Fuqua, and was prompted to write this letter by malice and ill will towards her. On the other hand, Tanner insists that in writing the Fuqua letter he was actuated solely by a sense of duty to the public schools, of which he was an official, and did not entertain towards Miss Stevenson any ill feeling, hatred, or malice, and in this position he is sustained by some evidence.

The first and most important legal question to be considered is: Did the Fuqua letter come within the scope of what is known in law as an "absolutely privileged communication?" If it did, then the court should have directed a verdict for Tanner notwithstanding the evidence of his malice, hatred, or ill will towards Miss Stevenson, and without any regard to the motives

that induced him to write the letter. If it was protected by this high privilege, it is of no account whether his motives were good or bad, or whether the matter contained in the letter was true or false. Nor could any inquiry be made into the state of feeling existing between the parties,—it was all the same whether they were the best of friends or the bitterest of enemies.

In support of the proposition that the letter was absolutely privileged, the argument is made that Tanner, at the time he wrote it, was superintendent of common schools in Clark county, and as such superintendent was charged in an especial manner with the duty of protecting the schools from the bad influence of teachers who did not possess a good moral character, and so it was his privilege and right to place Fuqua, as superintendent of public instruction, in possession of the information he had concerning the moral character of Miss Stevenson. But in our opinion the law of absolute privilege cannot be invoked to protect Tanner from the consequences of this letter. The cases to which this privilege applies are few in number and ought not to be enlarged. It would be a dangerous and vicious thing to license people to write and speak without any restraint. There are many evil-minded and recklessly disposed who would shelter if they could under the protection afforded by absolute privilege, and give free bridle to tongue and pen to injure or destroy an enemy. It would place in the power of revengeful and unscrupulous persons the right to malign at will those who had incurred their displeasure, and allow the traducer to scatter without stint scandalous and defamatory matter about all who might come within the circle of his enmity. The law holds good character in high esteem, and has made it a serious offense to wantonly assault it; but there are a few instances in which the interest of the public is esteemed more important than that of the individual, and occasions in which private rights must yield to public good. In these cases there is no penalty attached to malice or falsehood. The utmost liberty is deemed allowable, and communications that under other circumstances would be actionable are treated as permissible. But the cases to which this immunity from liability applies are confined to judicial and legislative proceedings, matters involving military affairs, and communications made in the discharge of a duty under express authority of law, by or to heads of executive departments of the state. A full discussion of the principles upon which this doctrine rests, and the persons to whom it applies, may be found in Cooley on Torts, p. 210; Townshend on Slander & Libel, § 208; Newell on Slander & Libel, p.

388; 25 Cyc. Law & Proc. p. 375; and 18 Am. & Eng. Enc. Law, p. 1023; as well as in *Morgan v. Booth*, 13 Bush, 480; *Gaines v. Aetna Ins. Co.* 104 Ky. 695, 47 S. W. 884; *Beiser v. Scripps-McRae Pub. Co.* 113 Ky. 383, 68 S. W. 457; *Yancey v. Com.* 135 Ky. 207, 25 L.R.A.(N.S.) 455, 122 S. W. 123; *Spalding v. Vilas*, 101 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631.

Not being protected by the rule of absolute privilege, we will now proceed to consider the attitude Tanner occupied in writing this letter, and the limitations that surrounded him. He did not write in obedience to any statute, for there was no statute imposing upon superintendents of county schools the duty of bringing to the notice of the state superintendent facts affecting the moral character of applicants for teachers' certificates. In respect to school affairs outside of Clark county, Tanner, as superintendent, did not occupy, in writing this letter, any better position than any other good citizen of the state, interested in the welfare of the common-school system, would occupy. Tanner's official duties were limited to Clark county. Outside of that county he had no more connection with the common schools than did any other citizen of Clark county. He had the right, and it was his duty, as superintendent of common schools of that county, to carefully look after the educational as well as the moral and personal qualifications of persons who taught school in that county, or who applied to the board of which he was a member for certificates to teach school. But the letter written to Fuqua had no more connection or reference to the schools in Clark county than it did to the schools of any other county in the state. Tanner, as superintendent of common schools, had as much right and liberty to write a letter to the state superintendent about an applicant for a teacher's certificate who resided in any other county as he did about one who resided in that county. The application of Miss Stevenson to the state board did not concern the schools of Clark county any more than it did the schools of any other county in the state. When he refused her the certificate, that ended his connection in an official capacity with Miss Stevenson, unless she again applied to him for a certificate, or sought to teach school in Clark county. Ifaving this view of this feature of the case, we will treat the letter without reference to Tanner's official position, and it is therefore not pertinent to the matter before us to consider with more particularity what the privilege of Tanner as superintendent would be in conducting an inquiry into, or making a statement concerning, the character of a teacher in Clark county, or an applicant for 30 L.R.A.(N.S.)

a certificate before the board of that county, or to consider the protection afforded by the provisions of the statute relative to the powers and duties of Tanner as superintendent in inquiring into the moral character of applicants for certificates, and his right to refuse a certificate to any applicant not of exceptionally high moral character.

Considering the case, then, from the standpoint that Tanner was acting merely in his capacity as a good citizen, interested in the welfare of the public schools of the state, let us see what his rights and privileges were. Upon this point we are of the opinion that he or any other good citizen of the state, who has knowledge affecting the moral character of an applicant for a teacher's certificate, may in good faith, based upon reasonable information, communicate what he knows to the person or board to whom the application is made, or convey it to trustees who contemplate employing the person in the public schools, and in so doing he will be protected unless it can be shown that he was actuated by express malice. This privilege finds ample support in the conviction that it is of the highest importance to the youth of the state, who attend the public schools, that their teachers shall be persons of good moral character. A person not of good moral character, holding the close and confidential relations to children that teachers do, has opportunities without number to poison the mind of the child at its most impressionable age, and make a lasting influence for evil upon those put under their care. Outside of the home there is no person who has so much to do with inculcating in young minds sentiments of virtue and honor as the teacher. The state is deeply interested in the moral training and education of all her children, and is vitally concerned that they shall be brought up under clean and good influences, so that they will grow into men and women with pure ideals and high aspirations. In the welfare and usefulness of the common-school system every citizen of the state should be personally interested. Whatever hurts the system in one place in the state injures it in a more or less degree in all other parts of the state. It is a piece of machinery in which every individual in the state is a part. In its larger and broader sense, the state is the unit, as the doors of every public school-house in the state stand wide open, and every child in the commonwealth is an invited guest. Any child within school years has the right to attend the public schools wherever he may be, and he is not limited to the place of his actual residence or domicile, or to his district or county. And so any good citizen, in good faith, and upon reason-

able grounds to believe that what he writes or speaks is true, if free from malice or ill will, and actuated solely by his interest in the common schools, may safely bring to the notice of those who hold any place as officials in the system any information that will enable them to perform with more efficiency their duties; and he will be protected as coming within the scope of qualified privilege, although the communication may be false as well as *prima facie* libelous. But if the person making the publication is prompted by actual malice or ill will towards the person concerning whom it is written or spoken, then the fact that it was believed to be true, or the fact that it was made in good faith, or the fact that it was made under circumstances that, except for this malice, would make it privileged, will not be allowed to save the person making the publication from the consequences of his act. When a person from malicious motives makes an attack upon the character of another, he puts himself beyond the protection that qualified privilege affords. Newell, *Slander & Libel*, p. 475; Cooley, *Torts*, p. 214; Townshend, *Slander & Libel*, § 208; Ranson v. West, 125 Ky. 457, 101 S. W. 885; Caldwell v. Story, 107 Ky. 10, 45 L.R.A. 735, 52 S. W. 850; Nix v. Caldwell, 81 Ky. 203, 50 Am. Rep. 163; Sharp v. Bowlar, 103 Ky. 282, 45 S. W. 90; Stewart v. Hall, 83 Ky. 375; Edwards v. Kevil, 133 Ky. 392, 28 L.R.A. (N.S.) 551, 134 Am. St. Rep. 463, 118 S. W. 273; Finley v. Steele, 150 Mo. 299, 52 L.R.A. 852, 60 S. W. 108.

But the plea of qualified privilege, as argued by counsel, does not present a question of law for the court. Of course, upon the pleadings, as well as upon the evidence, the court may rule in these as well as other actions, that the plaintiff has failed to make out his case, or that the pleadings are not sufficient; but when the petition is sufficient, and there is any evidence of actual malice or malice in fact, the case should go to the jury. The only difference between cases where qualified privilege is relied on and cases where the defense is a general denial or justification is that where privilege is pleaded, the burden of showing actual malice is put upon the plaintiff. In other cases, if the actionable matter is *per se* libelous, the law will presume malice, and consequently it is not necessary to a recovery that the plaintiff should show actual malice in its publication. In other words, the circumstances under which the publication was made, if it is privileged, rebut the inference of malice that, under ordinary conditions, would arise from such a publication. As under this rule the burden of showing actual malice was placed upon the plaintiff, it was of course necessary that she should introduce some

evidence tending to show that the publication was induced by malicious motives, and this we think she sufficiently did to justify the court in letting the case go to the jury.

Nor was it necessary that the plaintiff should, in the first instance, introduce evidence to show the falsity of the publication complained of. The law presumes that every person has a good character, and this presumption is not overcome by the plea that the publication was privileged. This plea only rebuts the presumption of malice. It does not refute the presumption of falsity. In *Greenleaf on Evidence*, vol. 2, § 419, it is said: "In ordinary cases, under the general issue the plaintiff will not be permitted to prove the falsity of the charges made by the defendant, either to show malice or to enhance the damages; for his innocence is presumed, unless the defendant seeks to protect himself under color of the circumstances and occasion of writing or speaking the words, in which case it seems that evidence that the charge was false, and that the defendant knew it to be so, is admissible to rebut the defense." To the same effect is *McIntyre v. Bransford*, 13 Ky. L. Rep. 454, 17 S. W. 359. In this case, Tanner made two defenses: First, that the publication was privileged; and, second, that it was true. To avoid the first defense the plaintiff had only to prove that the publication was actuated by express malice. If it was, the privilege pleaded did not justify it, nor did the fact that Tanner was acting in good faith or upon reasonable information protect him. In other words, if Tanner was influenced by malice or ill will towards Miss Stevenson in writing the letter, he was guilty of actionable libel unless the publication was true. So that, on the part of the plaintiff, it was only necessary, in order to take the case to the jury and sustain a verdict, to prove actual malice or malice in fact; and on the part of Tanner, to defeat a recovery, it was essential that he should establish either that the publication was true, or that it was made without malice, and upon information that he believed to be true. This view of the law applicable to the case was given to the jury in the following instructions:

"No. 1. If the jury believe from the evidence that, in writing the letter of September 2, 1907, to J. H. Fuqua, and in imparting to said Fuqua by said letter the information therein contained with reference to the moral character of the plaintiff, the defendant was prompted by actual malice, that is, actual ill will or hatred on the part of the defendant toward plaintiff, or a reckless disregard of the plaintiff's rights by the

defendant, the jury should, unless they believe as stated in the third instruction, find for the plaintiff, and fix the damages according to the fifth instruction.

"No. 2. If the jury believe from the evidence that, at the time the defendant wrote the letter mentioned in the first instruction, the defendant had received from sources which he believed to be reliable the information contained in said letter with reference to the moral character of the plaintiff, and if they believe from the evidence that, at the time the defendant wrote said letter and imparted by it the information therein contained with reference to the plaintiff's moral character, he believed that the statement contained in said letter with reference to her moral character was true; and if they further believe from the evidence that, in writing said letter, and imparting to Fuqua the information therein contained with reference to the plaintiff's moral character, the defendant was prompted by a desire to protect the public schools of the county or state, the jury should find for the defendant, unless they believe as stated in the first instruction.

"No. 3. If the jury believe from the evidence that the defendant meant to state in the letter mentioned in the first instruction that the plaintiff's reputation in Clark county for moral character was not good, and if they further believe from the evidence that, at the time said letter was written, it was true that the plaintiff's reputation in Clark county was that of being immoral in her conduct with men, the jury should find for the defendant.

"No. 4. 'Reputation,' as used in the third instruction, means the estimate which the community has of the person's character, while 'moral character' related to what a man or a woman actually is morally.

"No. 5. If the jury find for the plaintiff, they should fix the damage at such a sum as they may believe from the evidence will fairly and reasonably compensate the plaintiff for the injury, if any, that the jury may believe from the evidence resulted to the plaintiff's business or profession of teacher, and to her reputation and character, by reason of the writing in the letter mentioned in the first instruction of the statements therein contained with reference to the moral character of the plaintiff, and for any humiliation and mental distress suffered by plaintiff by reason of same; and, if the jury find for the plaintiff, they may, in their discretion, allow her, in addition to the compensatory damages above defined, such further sum by way of punitive damages as the jury may deem proper under all the circumstances introduced in evidence; but, if any damages are allowed the plaintiff, the total should not 30 L.R.A. (N.S.)

exceed \$20,000, the amount claimed by the plaintiff in the petition."

Perceiving no error in the judgment, it is affirmed.

LOUISIANA SUPREME COURT.

V. POLIZZOTTO et al.

v.

PEOPLE'S BANK.

RE PEOPLE'S BANK.

(125 La. 770, 51 So. 843.)

Bank — check — payment on other than agreed signature.

The signature upon which the depositor is to be bound and the bank is to disburse his money may be whatever they agree on, and where the signature, entered upon the signature book, reads, "John Doe, per R. R.," all in the handwriting of Richard Roe, that is the signature and the writing which the bank should exact. And so, where a particular form of private check is prepared, having the name "John Doe" printed, and the word "per" printed below, followed by a blank space or line, and it is agreed that the signature "Richard Roe" following the word "per" shall be good for the drawing of the money deposited to the credit of John Doe, the bank should require a check in that form and so signed, and a check, the whole body of which and the name of John Doe is written by a hand other than that of Richard Roe will not protect it with regard to the payment of the money of the depositor, where it turns out that the signature of Richard Roe was written by him on a blank piece of paper for another purpose, and that the balance of the instrument was written by someone else without authority, and with intent to defraud.

(March 14, 1910.)

Headnote by MONROE, J.

Note. — Payment by bank of check signed by authorized person in different form than that agreed upon.

The peculiarity of *POLIZZOTTO v. PEOPLE'S BANK* lies in the fact that the bank was concededly authorized to pay checks against the firm's account upon the signature of the member who signed his name to the paper subsequently presented as a check, and the question was, therefore, not as to the authority of the signer, but as to the effect of the departure from the stipulated form. The case is, therefore, quite different from the numerous class of cases like *Ellis v. Western Nat. Bank*, 136 Ky. 310, 124 S. W. 334, involving the right of a bank to pay a check against a corporation's account upon the signature of the president alone, where it had agreed that checks should only be

CERTIORARI to the Court of Appeal to review a judgment affirming a judgment of the District Court for the Parish of Iberville in plaintiffs' favor in an action brought to recover the amount of a check which was alleged to have been wrongfully charged against plaintiffs' deposit account by defendant. Affirmed.

The facts are stated in the opinion.

Mr. C. S. Hebert for defendant.

Messrs. E. B. Talbot, F. P. Wilbert, and P. G. Borron for plaintiffs.

Monroe, J., delivered the opinion of the court:

V. Polizzotto, a commercial firm composed of Vincent, Sam, and Frank Polizzotto, obtained judgment against the defendant bank for \$571.11, on the ground that the bank had charged their deposit account with that amount without authority; the facts disclosed upon the trial of the case being as follows: About November 24, 1908, a man representing himself to be the agent and solicitor of the Florence Distilling Company (said to have been an Eastern, but as it turned out a fictitious, concern), called at the store of V. Polizzotto, in Plaquemine, and obtained from Sam Polizzotto the firm's order for an invoice of liquors, which he appeared to be selling at a low price. He then asked Sam Polizzotto to give him some references, and he was given the names of several merchants, of the Iberville Bank & Trust Company, and of the People's Bank. He then asked which of the banks V. Polizzotto did business with, and having been given that information and having written the names of the references on a piece or sheet of writing paper, with the name "People's Bank" below the others, and having also been informed that Sam Polizzotto signed the checks of the firm, some of which

(canceled) were exhibited to him, he requested Sam Polizzotto to put his signature on the paper, at a place indicated by him, and which was about the width of, say, four lines below the name "People's Bank" already written by himself, which request Polizzotto complied with, writing his name, "S. Polizzotto." On December 6th following, there came to the People's Bank for payment through the mail, in the usual course of business, from the German Insurance Bank, a reputable bank in Louisville, Kentucky, a check, bearing the signature "V. Polizzotto, by S. Polizzotto," the "S. Polizzotto" being underneath the "V. Polizzotto," and being the same that had been placed there by Sam Polizzotto, on November 24th. The check was payable to the order of the "Florence Distilling Co.," and appeared to bear the indorsements of that concern, of the Stitzel Distilling Company, and of the German Insurance Bank. It was wholly in writing and was dated "Plaquemine, La., November 24, 1908." It arrived on Sunday, and was received by an officer of the bank whose attention was attracted by its unusual appearance, and on the following day (Monday, December 7th) he and the cashier and the president consulted about it, and the cashier tried to reach Sam Polizzotto by telephone, but calling up the store and being told that Sam Polizzotto was absent or busy (he was unable to remember which) he, or they, compared the signature on the check in question with the signature of the firm of V. Polizzotto on the signature book and on other checks, and concluded that it was good and that no further inquiry was necessary. He (the cashier) accordingly (on December 7th) mailed to the German Insurance Bank a draft on New York for \$571.11, which draft was presented and paid on December 12th. In the

paid when signed by the president and countersigned by another officer.

Although no direct authority has been found it would seem that there can be little question as to the soundness of the decision in *POLIZZOTTO v. PEOPLE'S BANK*, holding that a bank is not protected where payment is made on a check drawn in a form other than that agreed upon, although it is signed by the person authorized to check upon the deposit.

A depositor clearly has a right to designate the particular form of signature upon which the bank shall be authorized to make payments. Numerous reasons, some it may be solely within the knowledge of the depositor, can be advanced why a depositor should wish to adopt a particular form of signature. The case of *POLIZZOTTO v. PEOPLE'S BANK* furnished an excellent example of the protection which such a signature affords against fraud. Had the bank officials in this instance used the degree of care which 30 L.R.A. (N.S.)

their good judgment first suggested, and communicated with the drawer of the check, no payment would have been made, and consequently no loss would have resulted either to the bank or the depositor. A person having a large amount on deposit, and wishing to interpose an additional safeguard against duress in forcing him to sign a check, might prudently agree with the bank that no check bearing his signature should be paid unless, for example, a blot or other mark appeared at a given place on or after the signature. Under such an agreement the blot or mark would become a material part of the signature, and the bank would clearly have no authority to pay checks upon which the agreed mark did not appear. Of course, if the person who signs the paper intends it to be paid as a check, and receives the benefit of it, although the form agreed upon is not followed, a different question is presented. J. T. W.

meanwhile—that is to say, on the day that the draft was mailed—Sam Polizzotto called at the bank and made a deposit, and he says he had a conversation with the cashier (which, however, the cashier does not remember), but that nothing was said to him about the check which is now in dispute. On December 12th (the day upon which the draft on New York was paid), the account of V. Polizzotto with the defendant bank was balanced, and the canceled checks returned, and, on the evening, or night, of December 15th, the bookkeeper of the firm (who worked for it only at intervals) noticed the check in question, thought there must be something out of the way about it, and asked Sam Polizzotto for information, and he was told that he (Polizzotto) had never issued any such check. The cashier of the bank was then called up out of bed and interviewed, and next morning he endeavored to stop payment of the draft, which had, however, been paid. It appears from the evidence that the firm of V. Polizzotto had been doing business with defendant for a number of years; that the firm account had always been kept in the firm name, but that no member of the firm had ever signed its checks except Sam Polizzotto; that up to, say, the fall of 1907, the firm checks had been drawn on the ordinary printed forms which are in common use, and signed “V. Polizzotto, per S. P.” (the whole of it being written by Sam Polizzotto). At the period mentioned (say the fall of 1907), the firm had a form of check printed, with their business card on the upper left-hand corner, and the name “V. Polizzotto” printed in the place for the signature, and with the word “per” followed by a blank line printed underneath it, and Sam Polizzotto called upon defendant’s cashier and showing him the form told him that, on those checks, he would write, after the word “per,” on the line left blank for that purpose, his signature, “S. Polizzotto,” in full, but that the old form of check, when used, would be signed as before; so that there were to be two signatures, to wit, the wholly written “V. Polizzotto, per S. P.” on the old checks, and partly printed and partly written “V. Polizzotto, per S. Polizzotto,” on the new checks, and the bank had no other signatures on which it was authorized to make any payments for the firm. It seems, however, that on July 13, 1900, S. Polizzotto had opened a small private account with the bank, which was closed on July 7, 1903, and for the purposes of which he gave the bank his signature, “S. Polizzotto,” and it is now contended that the signature “S. Polizzotto” is good so far as the bank and the firm of V. Polizzotto are concerned, for the purposes of the check in 30 L.R.A.(N.S.)

dispute. In fact, the cashier of the defendant seems to hold that the money of the firm of V. Polizzotto could properly be drawn out on checks signed “S. Polizzotto,” though the name of V. Polizzotto nowhere appeared on them.

Thus his cross-examination at one time proceeds as follows:

Q. Mr. Barker, is it not a fact that Mr. S. Polizzotto has no personal account with your bank, and has not had for some time?

A. It is a fact.

Q. That being a fact, Mr. Barker, should you receive a check on your bank signed “S. Polizzotto,” would you pay the check?

A. In the absence of Mr. Polizzotto, I would pay the check and charge the amount.

Q. To whose account would you charge it?

A. Charge it to V. Polizzotto, unless I could see Sam Polizzotto.

The cashier and another officer of the bank, whose functions appear to be general, testify, in effect, that the payment of the check in dispute was proper under the circumstances, and Mr. Clay, a banker, called by defendant as an expert, seemed to sustain that view until the circumstances which plaintiff thinks should have excited defendant’s distrust were stated, when he said that he would not have paid the check without hearing from the drawer. Mr. Desobry, a banker, called as an expert by plaintiff, after hearing a statement of the facts, testified that he would not have paid the check, and it was admitted that Mr. Grace, another banker, would have testified to like effect.

In our view, the signature upon which a depositor is to be bound and the bank is to be authorized to disburse his money may be whatever they agree on (in some cases, where the depositor is unable to write, it being a mere hieroglyphic). But as neither the firm of V. Polizzotto, nor any of its members acting for the firm, ever agreed with the defendant bank that the money of the firm should be disbursed on the signature attached to the check here in dispute, we are unable to see upon what theory they are to be held bound by such disbursement. The only authorized signature which the bank had on its signature book was “V. Polizzotto, per S. P.,” the whole of it in the handwriting of Sam Polizzotto. The other authorized signature, not on the signature book, was “V. Polizzotto” (printed) “per” (printed) “S. Polizzotto” (written by Sam Polizzotto). The signature on which the bank paid the money was “V. Polizzotto” (written by another hand than that of Sam Polizzotto) “by” (also written by another

hand) "S. Polizzotto" (written by S. Polizzotto), and that signature was attached to a check such as V. Polizzotto had never issued, and which was so unusual in appearance as at once to attract the attention of the officers of the bank and of the book-keeper of V. Polizzotto, and which the bank had ample time to inquire about before paying. In view of these conclusions, we consider it unnecessary to inquire into the liability of persons who have affixed their signatures to incomplete instruments, or into the question whether the paper upon which Sam Polizzotto wrote his signature could be regarded as an incomplete check, those questions, in our opinion, not being in this case.

It is therefore ordered, adjudged, and decreed that the application herein made be now dismissed at the cost of the applicant, and that the judgment of the Court of Appeal, here made the subject of review, remain undisturbed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MAYOR AND ALDERMEN OF CITY OF PATERSON, Plffs. in Err.,

v.

ERIE RAILROAD COMPANY.

(— N. J. —, 75 Atl. 922.)

Municipal corporation — negligence of agent — imputability.

1. Negligence in the performance of public duties by municipal agents or instrumentalities intrusted therewith is not imputable to the municipality.

Same — effect on rights.

2. A fire engine belonging to the city of P. was injured in a collision with a railroad train at a highway crossing. The collision occurred through the joint negligence of the persons operating the train and the driver of the engine. Held, that the negligence of the driver of the engine constituted no bar to the right of the municipality to recover compensation from the railroad company.

(February 28, 1910.)

ERROR to the Supreme Court to review a judgment of nonsuit in an action brought to recover the value of a fire engine for the destruction of which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Mr. Edward F. Merrey, plaintiffs in error:

Negligence of the driver of the fire engine cannot be imputed to the plaintiff.

Headnotes by GUMMERE, Ch. J.
30 L.R.A. (N.S.)

29 Cyc. Law & Proc. pp. 542, 543, 1267, 1304; Wild v. Paterson, 47 N. J. L. 412, 1 Atl. 490; Condict v. Jersey City, 46 N. J. L. 157; Tomlin v. Hildreth, 65 N. J. L. 439, 47 Atl. 649; Dill. Mun. Corp. 4th ed. ¶¶ 976, 1199; Smith, Mun. Corp. § 792, p. 197; 20 Am. & Eng. Enc. Law. 2d ed. p. 1205; Dodge v. Granger, 17 R. I. 664, 15 L.R.A. 781, 33 Am. St. Rep. 901, 24 Atl. 100.

Messrs. Collins & Corbin for defendant in error.

Gummere, Ch. J., delivered the opinion of the court:

This suit was brought by the city of Paterson to recover damages for injuries received by one of its fire engines in a collision between it and a train of the defendant company at a railroad crossing in the city. The plaintiff's proofs showed that the crossing gates were not down, and that no bell was rung, or whistle blown, on the train as it approached the crossing. It also appeared in the plaintiff's case that the driver of the fire engine came onto the crossing without using care to see whether or not a train was approaching. At the close of the plaintiff's case a nonsuit was ordered, upon

Note. — An extended search has disclosed no other case discussing the effect of the negligence of an officer or agent of a municipal corporation contributing to the injury of its property, as a bar to a recovery by the municipality against the wrongdoer. The assumption in *PATERSON v. ERIE R. Co.* that a municipality is not responsible for injuries inflicted by the negligence of a member of its fire department, for the reason that the activities of such department pertain to the public functions of the municipality, is sustained by the weight of authority. (See note to *Cunningham v. Seattle*, 4 L.R.A. (N.S.) 629.) The reasoning of the court would, of course, not apply if the agent of the municipality were performing one of its private or corporate functions.

The conclusion that the negligence of the driver of the engine contributing to the injury would not prevent a recovery by the municipality against the railroad company was regarded by the court as a logical inference or deduction from the established principle that a municipality is not responsible for injuries inflicted by officers or agents in the performance of its public functions, or rather from the proposition, which the court apparently regarded as the foundation of that principle, that the negligence of such an officer or agent is not imputable to the municipality. It may be doubted, however, whether that proposition is the real foundation of the principle.

It is true that many of the decisions exonerating a municipality from responsibility for negligent injury inflicted by its agent upon a third person are apparently

the ground that its right of recovery was barred by the contributory negligence of the driver of the engine. The plaintiff in error now challenges the soundness of that ruling.

A person whose negligent act produces injury to another cannot escape liability therefor merely by showing that the injury was contributed to by the careless act of a third person. In order to relieve him from such liability, it must also appear that the act of the third person was one for which the injured party was responsible, under the doctrine of *respondent superior*. In the absence of proof of that fact, the injured person is entitled to compel both or either of the wrongdoers to compensate him for his injuries. The correctness of the ruling of the trial court depends, therefore, upon whether the negligence of the driver of the fire engine is imputable to the city.

Municipal corporations are engaged in the performance of public services, in which they have no particular interest, and from which they derive no special benefit in their corporate capacity. The persons employed by them in the rendering of such service act as public servants, charged with a public duty. They are mere agencies, or instrumentalities, by which such duties are performed, and the doctrine of *respondent*

superior does not apply to such employment. *Condict v. Jersey City*, 46 N. J. L. 157; *Wild v. Paterson*, 47 N. J. L. 406, 1 Atl. 490. Accordingly it was held by this court in the first of the cited cases that a municipality was not liable for an injury occasioned by the act of a driver of an ash cart, employed by its board of public works to remove ashes and refuse from boxes and barrels placed on the sidewalk, in carelessly making a dump from his cart; and in the second case it was considered by the supreme court that a municipality was not responsible to a member of its fire department, who was run over and injured while assisting to haul an engine to a fire, the accident having occurred because the persons in charge of the engine had carelessly permitted its brake to get out of order. Many cases to the same effect, and resting upon the same ground, will be found collated in 20 Am. & Eng. Enc. Law, 2d ed. p. 1205, and in 29 Cyc. Law & Proc. pp. 1267, 1304.

The concrete principle established by these decisions is that negligence in the performance of public duties by municipal agents or instrumentalities, intrusted therewith, is not chargeable against the municipality. Applying this principle to the present case, it is apparent that the ordering of

referred to the proposition that the doctrine of *respondent superior* or of imputed negligence does not apply where the agent is performing one of the public functions of the municipality. This formula serves well enough the practical purposes of such a case, but it does not reflect the real reason for the municipality's immunity, and is misleading when used, as in *PATERSON v. ERIE R. Co.*, as the basis for an inference that the contributory negligence of the agent will not prevent a recovery by the municipality against a third person.

Regarding the rule of municipal immunity as merely the result of a denial of the applicability of the doctrine *respondent superior*, or of imputed negligence to acts of an agent in the exercise of the public functions of the municipality, personal acts of misfeasance of the municipality without the intervention of an agent—if it could be conceived as so acting—would not fall within the protection of the rule; and yet it is clear that the broad ground of public policy underlying the rule would be as much opposed to holding the municipality responsible in such a case as when it acts through an agent. The immunity of the municipality from liability for the misfeasance of its agent, therefore, seems to be a mere deduction from its immunity from its own acts of misfeasance while in the exercise of a public function, rather than the result of a principle which takes such cases out of the operation of the doctrine of *respondent superior* or imputed negligence. If the negligence of the agent were to be imputed to the municipality, it would be in no worse position

than if the negligence had been its own personal act, but even then the rule of immunity would apply if the act were one which pertained to its public functions.

Logically, no question as to *respondent superior* or imputed negligence properly arises unless it be assumed, for the purposes of the point at least, that the party sought to be held responsible for the misfeasance of its agent would have been responsible if the misfeasance had been its own personal act. Hence, if the municipality would not be responsible if the misfeasance could be conceived of as its own personal act, committed without the intervention of an agent, there is no necessity of negating imputed negligence in order to relieve it of responsibility when the misfeasance is committed through the instrumentality of an agent. In this view the premise assumed by the court, namely, that the negligence of the driver of the fire engine was not imputable to the municipality, and the conclusion based thereon that such negligence would not preclude a recovery by the municipality against the railroad, are left without any substantial foundation. It is a long step from the assumed nonliability of the municipality for an injury inflicted upon a third person by the negligence of the driver of the fire engine, to the liability of the railroad company to the municipality for injury to its property notwithstanding the negligence of the driver to whose care it was intrusted. The question deserves more consideration than the court in the reported case appears to have given to it.

G. H. P.

a nonsuit was erroneous; for, unless the negligence of the driver of the fire engine was imputable to the plaintiff, it no more constituted a bar to the plaintiff's right of action against the defendant than the contributing negligent act of any other person. Entirely disconnected with the plaintiff, would have done.

The judgment under review will be reversed, and a venire de novo awarded.

NORTH DAKOTA SUPREME COURT.

STATE OF NORTH DAKOTA, Resp't.,
v.

FRANK E. FUNK et al., Appts.

(— N. D. —, 127 N. W. 722.)

Bail bond — defense — detention on other charge.

1. It is a good defense to an action against the sureties on a bail bond that the state, intermediate the date of such bond and the time when, by the terms thereof, the principal was obligated to appear in court, caused the arrest of such principal on a criminal charge in another county, and kept him confined in the county jail thereof until after the date designated in the bond for his appearance.

Same — effect.

2. By such arrest and detention of the principal, performance of the conditions of the bail bond was rendered impossible by the state, the obligee in the bond, and therefore the default of the principal in failing to appear is excusable.

(June 24, 1910.)

APPEAL by defendants from a judgment of the District Court for McLean County in plaintiff's favor in an action brought to recover the amount alleged to be due on certain bail bonds. Reversed.

The facts are stated in the opinion.

Messrs. W. S. Lauder and J. M. Austin, for appellants:

Bail will be exonerated where performance

Headnotes by FISK, J.

Note.—*Liability of bail where principal fails to appear through no fault of his own.*

This question is discussed in the note to *Hargis v. Begley*, 23 L.R.A.(N.S.) 137. Since the preparation of that note, it has been held in *United States v. Marrin*, 170 Fed. 476, that where a principal in a bail bond voluntarily goes into another jurisdiction, with knowledge that criminal charges are there pending against him, with the result that he is there convicted and imprisoned, the sureties on his bond are not for that reason discharged of liability for his nonappearance.
J. A. C.
30 L.R.A.(N.S.)

of the conditions of the bond is rendered impossible by the act of the obligee or the act of the law.

Taylor v. Taintor, 16 Wall. 366, 21 L. ed. 287; *Com. v. Overby*, 80 Ky. 208, 44 Am. Rep. 471; *Cooper v. State*, 5 Tex. App. 215, 32 Am. Rep. 571; *Taintor v. Taylor*, 36 Conn. 242, 4 Am. Rep. 58; *Belding v. State*, 99 Am. Dec. 214 and note, 25 Ark. 315, 4 Am. Rep. 26; *Steelman v. Mattix*, 38 N. J. L. 247, 20 Am. Rep. 389; *Scully v. Kirkpatrick*, 79 Pa. 324, 21 Am. Rep. 62; *Bufington v. Smith*, 58 Ga. 341; *West v. Colquitt*, 71 Ga. 559, 51 Am. Rep. 277; *People v. Tubbs*, 37 N. Y. 586; *People v. Manning*, 8 Cow. 297, 18 Am. Dec. 451; *People v. Cook*, 30 How. Pr. 110; *People v. Bartlett*, 3 Hill, 570; *Medlin v. Com.* 11 Bush, 605; *People v. Moore*, 4 N. Y. Crim. Rep. 205; *Smith v. State*, 12 Neb. 309, 11 N. W. 317; *State v. Allen*, 2 Humph. 258; *People v. Stager*, 10 Wend. 431; *Re James*, 18 Fed. 853; *Com. v. Webster*, 1 Bush, 616; *Smith v. Com.* 91 Ky. 588, 16 S. W. 532; *State v. Crosby*, 114 Ala. 11, 22 So. 110; *Taylor v. Taintor*, supra; *State v. McAllister*, 54 N. H. 156; *Re Beavers*, 131 Fed. 366; *Canby v. Griffin*, 3 Harr. (Del.) 333; *Co. Litt.* 306; *Coster v. Dilworth*, 8 Cow. 299; *Hunt's Case*, 3 Petersdorff, Abr. 356.

Mr. J. E. Nelson, for the State:

Where a defendant is arrested upon another charge, and merely held prior to trial and conviction and sentence, the sureties are not released.

Belding v. State, 25 Ark. 315, 99 Am. Dec. 214, 4 Am. Rep. 26; *West v. Colquitt*, 71 Ga. 559, 51 Am. Rep. 277; *State v. Merrihew*, 47 Iowa, 112, 29 Am. Rep. 464; *Alguire v. Com.* 3 B. Mon. 349.

Fisk, J., delivered the opinion of the court:

This is an appeal from a judgment of the district court of McLean county. The facts are all stipulated, and are substantially as follows:

At the June, 1906, term of district court in and for McLean county, commencing June 11, 1906, one Alexander Larron was informed against, charged with the crime of grand larceny. On June 14th he was arraigned, and pleaded not guilty. On his motion a change of venue was taken, and by order of court the action was transferred to Stark county, and Larron was admitted to bail in the sum of \$2,000 in each case, there being two cases. On November 19, 1906, Larron, as principal, and defendants, as sureties, executed and delivered their undertakings, whereby they jointly and severally undertook and agreed that said Larron should appear and answer such informations at the adjourned September 11, 1906, term

of the district court of Stark county, to be held at Dickinson on December 3, 1906, being the next term thereof, and at all times hold himself amenable to the orders and process of the court, and, if convicted, to appear for judgment and render himself in execution thereof, or, if he fail to perform either of said conditions, that he pay to plaintiff the sum of \$2,000 on each of said bonds, which bonds were approved by the clerk and by the acting judge, who ordered the release of Larron thereunder. During all times subsequent to June 14, 1906, Larron was held in custody in the county jail of McLean county by the sheriff thereof under instructions of the court, and on November 23d, and as soon as he was advised by his counsel so to do, under and by virtue of said undertakings, their filing, approval, and the order of the court, the said sheriff advised Larron that he was then and there released and discharged from custody on the charges on which he had been theretofore held, but immediately advised him that he, such sheriff, had been instructed and requested by the sheriff of Rolette county North Dakota, to arrest and hold him in the event that Larron should be released on bail, and immediately informed him that he was then rearrested and to be held awaiting the arrival of the sheriff of Rolette county, and he was not permitted to leave such jail. At the time the sheriff said to Larron that he was released, he further stated: "You are rearrested, and held for the sheriff of Rolette county." Thereafter the sheriff of Rolette county took Larron into his custody, conveying him to Rolette county without his consent or procurement, and against his will, and over his protest, and against the will and over the protest of these defendants. On December 4, 1906, being the second day of the adjourned September 11, 1906, term of the district court in and for Stark county, said cases were moved for trial. Larron failed to appear according to the conditions of such undertakings, and thereupon the court duly declared such undertakings forfeited. At no time prior to the final adjournment of said court did said Larron or defendants or either of them, or anyone in his or their behalf, appear and excuse or offer to excuse or explain Larron's failure to appear according to the terms of such undertakings, and at no time thereafter did Larron surrender himself, nor was he surrendered to any court or officer. Said sum of \$4,000, the penalty of said undertakings, has not, nor any part thereof, been paid.

On November 30, 1906, and for a long time after December 4, 1906, and after the final adjournment of the said term of court in Stark county, Larron was forcibly and against his will held in custody and im-

prisonment in the county jail of Rolette county upon an alleged criminal charge, under process of law, and by the officers of said county; that solely on account of such imprisonment, and not otherwise, the said Larron could not and did not appear for trial in the district court of Stark county, in discharge of the obligations of said bonds or undertakings, and that the charge upon which the said Larron was arrested and held in custody in the said county of Rolette, as aforesaid, was not alleged to have been committed subsequent to the filing of the bonds aforesaid. While Larron was being held in custody in the county jail of McLean county, as aforesaid, and after such bonds had been thus approved and filed, and after the order directing that Larron be discharged from custody had been filed, and while the sheriff of McLean county was holding Larron for the sheriff of Rolette county, defendants, as such sureties, demanded of such sheriff that he surrender to them the custody of Larron, which demand was refused. Larron died on or about June 15, 1907, subsequent to the final adjournment of the adjourned September, 1906, term of the district court of Stark county. At the time of his death he was not held in custody, but was a fugitive from justice. After the adjournment of such term of court, and until the death of said Larron, there was no term of court held in Stark county at which said criminal actions could have been tried, and such actions remained pending in said court until the time of his death.

On these facts the district court directed the entry of judgment in favor of the state, and against these sureties, for the amount of such undertakings, together with costs and disbursements. The appeal is from such judgment. Appellants urge three reasons in support of their contention that the judgment should be reversed. These are the following: "First. Larron, for whose appearance in court the bail bond was given, having been, by authority of the state, imprisoned in the county jail of Rolette county at the time fixed for his appearance for trial in the district court of Stark county, and when the order of forfeiture was made, his nonappearance was, as matter of law, thereby excused, and the appellants were not liable in this action. Second. Larron never having been discharged from custody or given his liberty, in consideration of the giving and filing of the bail bond, the bond never became operative, and was wholly without consideration, and was therefore null and void, and appellants were not liable thereon. Third. The state, by its officers, having prevented the appellants, sureties on the bail bond, from taking Larron into their personal custody for their own protection,

appellants were thereby, as matter of law, released from all further liability on said bond." We shall notice the first ground only.

The authorities are somewhat in conflict regarding the rights and liabilities of sureties under facts similar to the foregoing. Some courts have upheld the right of the state to enforce forfeitures under similar facts. The case of *State v. Merrihew*, 47 Iowa, 112, 29 Am. Rep. 464, is much relied on by respondent's counsel, owing to the claimed similarity of our Code provisions with the statute of Iowa. Certain sections of the Iowa statute are very similar to the Code of this state; but the provision of the Iowa law (Code 1873, § 4600), which was deemed controlling in that case, reads as follows: "If, before judgment is entered against the bail, the defendant be surrendered or arrested, the court may, in its discretion, remit the whole or any part of the sum specified in the undertaking." Following the rule announced in *State v. Scott*, 20 Iowa, 63, the court in the later case seems to have held that, after forfeiture, the only provision of the statute of that state that aids a bail is the section above quoted. We have no such statutory provision. Section 10,270, Rev. Codes 1905, cited by respondent's counsel, is widely different. That section provides: "Any surety on such undertaking may be discharged from further liability thereon, at any time before final judgment against him, by surrendering to the court or proper officer the principal in such undertaking, if such principal is a defendant in a criminal action, or if such principal is held as a witness in such action and it has not been tried; or by paying to the clerk of the court the amount specified in such undertaking, with costs, as the court may direct." This section is 8460 in the Revised Codes of 1895. An error crept into the 1905 compilation by leaving out in the last line after the word "with" the word "such." It will readily be seen from the Iowa statute that no right was conferred upon the bail to a remission of the whole or any part of the sum specified, but it was made wholly discretionary with the court whether it would remit the whole or any portion thereof. Our statute, on the contrary, seems to confer on any surety the right to be discharged from liability by surrendering the principal at any time before final judgment against such surety on the undertaking. If this is a correct construction of § 10,270, then it would seem plain that, if the principal dies before judgment is entered against the surety, the latter's liability would thereby terminate, for it is obvious that by such death the surety is deprived of what otherwise would or might

be a valuable right to him. The facts in the case at bar differ from those in the Iowa case in this respect.

We have reached the conclusion that the judgment of the lower court must be reversed. We do not rest our decision, however, solely upon what we have above stated relative to the construction of § 10,270. We are convinced that the weight of authority, both on principle and reasoning, supports appellants' contention that when one is bound as bail for another, for his appearance in a particular court at a particular time, and the state, before the time stipulated for the appearance, arrests the principal and detains him at another place, thus preventing him from appearing at the time and place stipulated, the bail will be exonerated during such detention. There are many authorities which might be cited in support of this rule. We cite the following: *People v. Bartlett*, 3 Hill, 570; *Com. v. House*, 13 Bush, 679; *Woods v. State*, 51 Tex. Crim. Rep. 595, 103 S. W. 895; *State v. Row*, 89 Iowa, 581, 57 N. W. 306; *People v. Robb*, 98 Mich. 307, 57 N. W. 257; *Buffington v. Smith*, 58 Ga. 341; 3 Am. & Eng. Enc. Law, 2d ed. p. 719. In *State v. Row*, the Iowa court, among other things, said: "It is not to be said, as a legal conclusion, that, had he not been imprisoned at the instance of the state, he would neither have appeared, nor his sureties produced him, when his appearance was called for. The state, by placing him in the penitentiary, had rendered it absolutely impossible for him to appear, or for the sureties on his bond to produce him. Under such circumstances there could be no default." In *Woods v. State*, supra, the Texas court tersely said: "It may be that appellant was properly indicted in the county of Hamilton, and in one sense this may have been a fault on his part; still, in our view, it would constitute, no matter whether he was rightly or wrongly indicted in the other county, a sufficient cause for his exoneration, inasmuch as the very government which held him amenable to the charge in Bosque county had taken jurisdiction of him in Hamilton county." It is true the court in that case was considering a statute which provides that sickness of the principal or some uncontrollable circumstance preventing his appearance at court is a defense against forfeiture of the bail bond, but we think that, in the absence of such a statute, the rule is and should be that uncontrollable circumstances preventing appearance pursuant to the stipulations in the bond should be sufficient to excuse a forfeiture. The Michigan court in *People v. Robb*, supra, cited with approval *People v. Bartlett*, supra; and other cases, and said: "No doubt the arrest

and continued detention of the principal by the state on another charge, when such detention makes it impossible for the surety to produce the principal, must operate to discharge the surety from liability." As we understand the brief of respondent's counsel, he does not seriously question the correctness of the rule announced in the majority of the cases, but he contends that, under our Code provisions upon the subject, these authorities are not in point. We cannot concur in this view.

The judgment appealed from is accordingly reversed, and the District Court is directed to dismiss the action.

All concur, except Morgan, Ch. J., not participating.

Petition for rehearing denied, September 12, 1910.

OKLAHOMA SUPREME COURT.

FRED B. HANNAN, Plff. in Err.,
v.

BOARD OF EDUCATION OF CITY OF
LAWTON et al.

(— Okla. —, 107 Pac. 646.)

Public improvement — advertisement for bids — necessity for definite plans.

1. Section 8027, art. 5, chap. 102, Okla. Comp. Laws 1909, referring to boards of education of cities of the first class, and providing that they shall make no contracts involving an expenditure of more than \$500 for the purpose of erecting any public buildings or making any improvements, except upon sealed proposals and to the lowest responsible bidder, contemplates that, before advertising for bids, a plan or plans open to all shall be prepared with specifications not of a general character, but so definite and detailed as to disclose the specific thing to be undertaken.

Same — award to lowest bidder — purpose of requirement.

2. The true intent and purpose of the statute (§ 8027, supra) requiring certain contracts to be let only on sealed proposals to the lowest responsible bidder is to secure economy, and protect the public from collusive contracts, favoritism, or fraud, and to promote actual, honest, effective competition in the construction of public work by requiring of boards the presentation of a common standard previously ascertained, to the end that each proposal or bid received and considered may be in competition with all others, and to preclude the consideration and acceptance of proposals or bids on plans and specifications not open to all.

Headnotes by DUNN, J.
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Same — scope of discretion as to letting of contract.

3. The requirement of the statute (§ 8027, supra) that the contract shall be let to the lowest responsible bidder involves a consideration by the board of more than merely which bid was the lowest in price; it requires the ascertainment of the ability of bidders to respond in the discharge of all the obligations assumed in accordance with what is expected or may be demanded under the terms of contracts.

Parties — illegal disposition of public funds — taxpayer's rights.

4. A resident taxpayer, although he shows no special private interest, may invoke the interposition of a court of equity to prevent an illegal disposition of the money of a municipality, or the illegal creation of a debt which he in common with the other property owners may otherwise be compelled to pay.

(December 21, 1909.)

Note. — Sufficiency of specifications for guidance of bidder for public contract.

This note is confined to the sufficiency of specifications prepared for the guidance of bidders, and does not include cases dealing with sufficiency of specifications furnished for information of taxpayers or by bidder in connection with his bid. Cases are omitted which deal with right of officials to reserve the right to vary terms of specifications in case it should thereafter become desirable to modify plans or provide for extra work. In general, as to rights of lowest bidder on a public contract, see note to *Anderson v. St. Louis Public Schools*, 26 L.R.A. 707. And as to the remedy of lowest bidder for refusal of authorities to award contract to him, see note to *Molloy v. New Rochelle*, ante, 120. As to municipal contracts for work or articles which embody a patented invention, see note to *Kilvington v. Superior*, 18 L.R.A. 45. As to validity of contract for material patented or held in monopoly, where a public letting to the lowest bidder is required, see note to *Allen v. Milwaukee*, 5 L.R.A. (N.S.) 680; also see *Saunders v. Iowa City*, 9 L.R.A. (N.S.) 392.

Necessity and sufficiency of specifications in general.

There are many constitutional and statutory provisions requiring the awarding of public contracts to the lowest bidder. In order to comply with such requirement, there must, so far as the subject-matter will allow, be an opportunity for competition on equal terms; and in order that all may be able to compete on equal terms, there must be established in advance a basis for an exact comparison of bids, so that all may bid on the same thing. Accordingly, it has been held that such provisions are not complied with unless plans and specifications are prepared in advance sufficiently

ERROR to the District Court for Comanche County to review a judgment dismissing a petition filed to restrain the performance of an alleged illegal contract for the installation of a heating and ventilating system in a certain proposed public building. Reversed.

The fact are stated in the opinion.

Messrs. Charles Mitschrich and F. R. Ellis for plaintiff in error.

Messrs. McElhoes & Ferris and Dumas & Vaught, for defendants in error:

The purpose of a provision requiring a contract to be let to the lowest responsible bidder is to secure competition among contractors for public works and supplies, and to give the public the benefit thereof, and something is necessarily left to the discre-

tion of the city authorities, and they must determine in each case what competition the nature of the case will admit of, and what is the best method to secure it.

Atty. Gen. ex rel. Cook v. Detroit, 26 Mich. 262; Interstate Vitriified Brick & Pav. Co. v. Philadelphia, 164 Pa. 477, 30 Atl. 383; Douglass v. Com. 108 Pa. 559; Com. ex rel. Snyder v. Mitchell, 82 Pa. 343.

When there is a common standard providing enough information upon which an intelligent bid can be made, the law, both in letter and spirit, has been complied with.

Detroit v. Hosmer, 79 Mich. 384, 44 N. W. 622; Ampt v. Cincinnati, 8 Ohio S. & C. P. Dec. 624, affirmed in 17 Ohio C. C. 516, and again in 60 Ohio St. 621, 54 N. E. 1097; Baltimore v. Flack, 104 Md. 107, 64

definite and explicit to enable bidders to prepare their bids intelligently on a common basis. 20 Am. & Eng. Enc. Law, 2d ed. p. 1167; Fones Bros. Hardware Co. v. Erb, 54 Ark. 645, 13 L.R.A. 353, 17 S. W. 7; Ertle v. Leary, 114 Cal. 238, 46 Pac. 1; Bolton v. Gilleran, 105 Cal. 244, 45 Am. St. Rep. 33, 38 Pac. 881; California Improv. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802; Andrews v. Ada County, 7 Idaho, 453, 63 Pac. 592; Littler v. Jayne, 124 Ill. 123, 16 N. E. 374; Bluffton v. Miller, 33 Ind. App. 521, 70 N. E. 989; Huntington County v. Pashong, 41 Ind. App. 69, 83 N. E. 383; Packard v. Hayes, 94 Md. 233, 51 Atl. 32; Detroit Free Press Co. v. State Auditors, 47 Mich. 135, 10 N. W. 171; Detroit v. Hosmer, 79 Mich. 384, 44 N. W. 622; Louisiana v. Shafner, 104 Mo. App. 101, 78 S. W. 287; People ex rel. Putnam v. Buffalo County, 4 Neb. 150; Browning v. Bergen County (N. J.) 76 Atl. 1054; Wilson v. Collingswood (N. J. L.) 77 Atl. 1033 (holding specifications for a waterworks system incomplete); Brady v. New York, 20 N. Y. 312, 18 How. Pr. 343; People ex rel. Ream Pav. Co. v. Board of Improvement, 43 N. Y. 227; Mazet v. Pittsburgh, 137 Pa. 548, 20 Atl. 693; Kneeland v. Milwaukee, 18 Wis. 412; Wells v. Burnham, 20 Wis. 113; Kneeland v. Furlong, 20 Wis. 438; Chipewa Bridge Co. v. Durand, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603.

More general specifications which leave a wide margin for difference in type and cost of the proposed work are insufficient. Fones Bros. Hardware Co. v. Erb, supra.

Specifications which leave to an official the relative amounts of different materials to be used are defective, as the cost and profit of the work would be thereby affected. California Improv. Co. v. Reynolds, supra.

When no plans for a sewer, the construction of which is to be let to the lowest bidder, have ever been made, and the specifications do not show or specify the grade of the proposed sewer, nor the depth of the excavations of the trench, nor the manner and style of the construction of the manholes therein, but these are left to the discretion of the officials, the contract is void as 30 L.R.A. (N.S.)

no one can bid intelligently. Wells v. Burnham, supra.

The reservation by officials of "the right to divide the work" after bids have been received, "according to the ability of the contractors to do the same, or as they may think for the best interest of the property affected, and that of the public," leaves uncertain the amount of work to be done, and renders any subsequent contract void. Kneeland v. Furlong, supra.

Plans and specifications are sufficient if contractors and others skilled in such matters are able to determine what is required. Yaryan v. Toledo, 28 Ohio C. C. 259, affirmed without opinion in 76 Ohio St. 584, 81 N. E. 1199.

Specifications are sufficient which duly inform bidders as to the nature, quality, and quantity of the materials to be furnished and the work to be done, and the same information is furnished to all. Schwitzer v. Board of Education (N. J. L.) 75 Atl. 447.

In Yaryan v. Toledo, 28 Ohio C. C. 278, affirmed without opinion in 76 Ohio St. 584, 81 N. E. 1199, the court said: "When the construction consists of the mere assembling and putting in place of parts of standard machinery, or the ordinary construction of edifices or works made of brick and mortar, wood, cement, and the like, the making of complete plans may be expedient and legally necessary; but we are not prepared to say that it is either required by the law or expedient where, as in a case like this, much depends upon adjustment of means to ends in the perfection of the system, so as to make it work well, and where efficiency is the great desideratum, and where an enforceable guaranty thereof may be essential to save the city from fruitless expense of great magnitude."

A specification that a city is to be lighted in the manner then in use is sufficiently definite. Detroit v. Hosmer, supra.

Specifications calling for lights of a certain candle power, without naming the system, are sufficient, as the end to be reached is obtaining light of a certain degree of brilliancy. Ibid.

Atl. 702; *Jenney v. Des Moines*, 103 Iowa, 347, 72 N. W. 550; *State, Moreland, Prosecutor, v. Passaic*, 63 N. J. L. 208, 42 Atl. 1058; *Campbell v. Southern Bitulithic Co.* 32 Ky. L. Rep. 799, 106 S. W. 1189; *Trapp v. Newport*, 115 Ky. 840, 74 S. W. 110; *Galbreath v. Newton*, 45 Mo. App. 312.

Dunn, J., delivered the opinion of the court:

The board of education of the city of Lawton, Oklahoma, being engaged in the construction of a high school building in that city, published the following notice: "The board of education of Lawton, Oklahoma, will receive bids up to 8 o'clock P. M., April 28th, for the erection of a high school building to be erected on their property in ac-

cordance with plans and specifications as furnished for same by Hair & Smith of Oklahoma City. Each bid must be accompanied by a certificate of \$500 to guarantee that contractor will accept the contract for the amount of his proposal, and further that he will furnish satisfactory bond for 50 per cent of the amount of his contract. Plans may be obtained at the clerk of the board's office or at architect's by depositing a \$100 certified check, which will be returned upon the return of drawings in good condition. They further will receive bids for the plumbing accompanied by a certified check for \$500, subject to conditions as per above. Plans may be obtained by depositing \$10 for their safe return. They will further receive bids ac-

It is not necessary that plans in the sense of sketches or drawings be prepared, if the necessary information be given in written specifications. *Yaryan v. Toledo*, 28 Ohio C. C. 259, affirmed without opinion in 76 Ohio St. 584, 81 N. E. 1199.

The manifest intention of a statute requiring schedules of articles and materials desired to be made, and bids asked for furnishing the same, is to require that the schedules shall be so prepared that each item of every classification therein contained shall be sufficiently explicit as to make clear what is to be furnished under that item. *Com. v. Sanderson*, 40 Pa. Super. Ct. 416.

A statute providing that when a public improvement is ordered, the board of public works of a city "shall cause proposals for doing said work to be advertised in the official paper of the city, a plan and profile of the work to be done, accompanied with specifications for doing the same, being first deposited with the clerk of said board" for public inspection, is sufficiently complied with, in seeking bids for paving a street, when the advertisement and specification describes the work as "a wooden block pavement" on a certain street, and a cross section of the pavement is filed showing its thickness, its level as compared with the level of the sidewalks, its slopes from the center of the street to the center of the gutters, and from the center of the gutters to the curbing. *Rogers v. St. Paul*, 22 Minn. 494.

Under a statute requiring specifications to be made and filed before calling for bids, the validity of a tax to pay for a sewer will not be impaired though the specifications filed leave uncertain the exact number of manholes required, if the expense therefor will be so trifling as compared to that of the whole work as not to affect the bidding. *Houghton v. Burnham*, 22 Wis. 301.

Letting a contract for a garbage crematory, without making or filing any plan of the proposed plant, or adopting any system of garbage cremation, or specifying the dimensions of buildings or description of

machinery to be used, but merely calling for a complete garbage cremation plant that will destroy a certain quantity of garbage per day, leaving the bidders to submit plans and specifications showing a description of the buildings, machinery, furnaces, and appurtenances, is in violation of a statute which requires an advertisement for such work after a plan or profile of the work, accompanied with specifications or other appropriate and sufficient description of the work, has first been placed on file for the information of bidders and others. *Ricketson v. Milwaukee*, 105 Wis. 591, 47 L.R.A. 685, 81 N. W. 864.

When the authority of an official is purely statutory, and the statute requires him to prepare both plans and specifications, a preparation of specifications alone is insufficient, though they may be sufficiently definite without the plans. *Kneeland v. Milwaukee*, supra (semble).

When a statute requires the notice to contain specifications, written specifications incomplete in themselves cannot be supplemented by verbal explanations, as this would tend to the admission of the mischief the statute was designed to remedy. *Littler v. Jayne*, supra.

—where statutes state what specifications shall contain.

The difficulty of deciding how detailed plans and specifications should be is as well illustrated in *Ampt ex rel. Cincinnati v. Cincinnati*, 17 Ohio C. C. 516, affirmed without opinion in 60 Ohio St. 621, 54 N. E. 1097, as anywhere, and as it contains an able discussion of the matter, it will be set out with some fullness. There, a new pumping plant was desired for the city of Cincinnati, and the sufficiency of the plans and specifications of the pumps and engines was challenged. A statute provided that the commissioners having charge of the matter "shall, before entering into any contract, cause plans and specifications, detailed drawings, and forms of bids to be prepared, and careful estimates of cost to be made." The court said: "To what extent

accompanied by plans and specifications in form of proposal for a steam force blast system of heating and ventilation, controlled by automatic heat regulation in all rooms other than halls and toilets, board and superintendent room, wall radiation. Each pupil in each room is to receive 1,800 cubic feet of air per hour. All recitation, board, instructors, assemblies, studies, and domestic rooms are to be guaranteed a heat of 70 degrees in coldest weather. The halls, toilets, gymnasium, and manual training rooms being heated to 60 degrees in coldest weather. The plans may be obtained by depositing \$10 for the safe return. The proposals shall be accompanied by a certified check for \$2,000, subject to conditions as per above." April 28th, 1909, plans and

specifications accompanied by bids on the heating and ventilating system were submitted by Lewis & Kitchen, defendants in error, defendants below, and also by McMahon Company, and by Fred B. Hannan, plaintiff in error herein, plaintiff below. The bid of the first company was for \$11,340; the McMahon Company's bid, \$10,730; and the bid of plaintiff was \$10,500. On considering the said bids the board of education entered into a contract with the defendants Lewis & Kitchen, and agreed to pay them for the construction of the heating and ventilating system the sum of \$11,340, whereupon Fred B. Hannan brought this action of injunction in the district court of Comanche county, seeking to enjoin the said defendants Lewis & Kitchen

were detailed drawings and specifications to go? Must it be the minutest detail in which every part of the machinery was to be drawn and specified, or was it sufficient to give specific and minute specifications as to what the machinery was to accomplish, the exact kinds of material to be used, the manner in which all the work should be done, and the exact nature and kind of all the parts which were given, how all such machinery should be constructed, such as valves, riveting, bolts, etc.? The specifications of this class cover sixteen pages of printed matter, and as far as it goes it is as specific as it could well be. The detailed drawings and specifications, however, did not go to the extent of showing in detail every part and proportion of the work. What is called the 'working plans' of this machinery will cover more than a thousand pages. The question is: Did the law require that the specifications and drawings should go to this extent? Possibly to give the law a literal interpretation would require the detailed drawings and specifications to include each and every part of the machinery, and in doing this the trustees might have omitted to require that the machinery should perform certain work, as they did do; for by this contract each of the pumps must have a capacity to pump 30,000,000 gallons of water every twenty-four hours, and must stand the test of 180,000,000 gallons of water in six consecutive days; and, furthermore, must perform the work required of it for one year to the satisfaction of the trustees; and during that time all alterations and repairs are to be borne by the builders.

"Certainly what the trustees wanted to get for the city was engines and pumps that would pump a certain quantity of water in a given time. It was wholly immaterial to them where each nut, bolt, valve, and piece of material was to be located. All such details were nonessentials. It is to be borne in mind that these engines and pumps were to be made to do a certain work. In one sense, they were not inanimate, like a house or building, but they had a great work to perform, and it must
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be done in the most economical and approved way. What the trustees did was to leave out the nonessentials in their specifications and drawings, but all the essentials of the result desired, as to the capacity of the pumps to perform the work required, and the manner of the workmanship, and the materials to be used in their construction, are most specifically looked after and detailed.

"In constructing statutes it is a well-known and valuable rule of the law that a thing may be within the law, and yet not within the letter of the law, and a thing may be within the letter of the law, and still not within the law; and so it seems to us in this case that it is within the letter of the law that these specifications and detailed drawings mentioned in the statute should give every detail of every part of this great and complex machinery, but we do not believe it is within the meaning of the law that they should do so.

"The first object of the law was to afford to the people who were to pay the cost of this work the assurance that it should be done for the least amount of money, and these provisions were placed there to bring about this result. Of course, the law is founded upon the theory that the people are to get work which is the best possible to be had. Bearing these two fundamental ideas in mind, we apply them to the subject-matter.

"The machinery required for this work is only capable of being built by ten firms in the United States. Of these eight were bidders on this work. The difficulty that presented itself at once to the trustees in making exact drawings and specifications of every part was this: Machinery of this magnitude has as yet not reached that state of perfection, and probably never will, where all builders build to any certain and fixed plan as to details. In this respect each builder has his own detailed plans, and no two are alike, and their tools and patterns are made to produce their own work after their own plans; therefore, if the detailed plan of this complicated work was to be given in all of its parts, the

from carrying out their contract, and the board of education from paying any funds of the district on the same. No other notice was given, and no other or different plans and specifications on the heating and ventilating system were adopted or furnished than the details mentioned in the published notice, and plaintiff insists that the board was without power to let the contract thereon, as they did not comply with the statute, and a letting thereon was in violation thereof. The defendants answered, admitted that there was no other publication or call for bids except the one given in the said notice, and that the contract was let to Lewis & Kitchen upon their plans and specifications with no opportunity given to other bidders to compete upon the plans and

specifications submitted to them. At the trial of the cause, the parties entered into the following agreed statement of facts:

"It is hereby agreed by and between the parties hereto that the following shall be admitted in evidence as facts, and shall be received without the introduction of evidence to maintain the same. Other evidence material and competent and upon other issues in the case may be offered in evidence by either party. (1) The city of Lawton, state of Oklahoma, is a municipal corporation organized and existing under and by virtue of the laws of the state of Oklahoma, as a city of the first class, and constituting a separate school district in the county of Comanche, state of Oklahoma. (2) The defendant board of education of the city

trustees were either compelled to adopt the plans of one of the concerns which had produced such work, or else get up a plan of the same kind of their own. It will be seen at once that the object of the law would be defeated if the board were to adopt the detailed plans of any one of the firms, for this would virtually destroy all bidding by firms other than the one whose plan was adopted, and place the trustees at the mercy of that firm. The price to the city would in all probability be much greater than it should be. This would destroy competition in bidding, the very thing the law was intended to bring about, and this must not be except from necessity.

"But a still greater difficulty met the trustees in getting up a detailed plan of their own. The evidence showed that at the present time there is only one such pump in operation in the United States, although numerous such pumps have been built, but only to prove costly failures. And no city is able to furnish a better example of this than the city of Cincinnati with its celebrated Shields pump, which has cost the city thousands upon thousands of dollars, and is now perfectly worthless, its only value being as old junk.

"In the first place, the work and time required to produce these plans is very great, the testimony of the chief engineer being to the effect that it would require a year and a half to do it. And in the next place, no firm could construct such machinery so well or so cheaply as it could machinery of its own pattern and design. And then lastly, which is the most important of all, it would, when constructed, be more or less experimental, and might not perform the work required of it."

A statute and ordinance requiring that "proposals for bids shall state the amount and different kinds of material to be furnished" is sufficiently complied with when the plans and specifications are so full that they furnish all the data from which to determine by computation the exact amount and kind of all the materials necessary for the structure. *Jenny v. Des Moines*, 103 30 L.R.A. (N.S.)

Iowa, 347, 72 N. W. 550; *Arnold v. Ft. Dodge*, 111 Iowa, 152, 82 N. W. 495.

When the specifications in an ordinance providing for macadamizing, curbing, and guttering certain streets are sufficiently explicit, it is not necessary for further specifications to be prepared, notwithstanding the provision of a general ordinance applicable to all public work, which requires a plan or profile of the work, accompanied by specifications, to be on file when bids are advertised for. *Morley v. Weakley*, 86 Mo. 451.

Under such circumstances it is not necessary that advertisements for bids for paving shall state the amount of work to be done, when they show between what streets and on what streets the work is to be done, stating the different classes of work. *Ibid.*

Under a statute requiring contracts to be awarded to lowest bidder after public notice, stating "the extent of the work, the kind of materials," etc., a notice is insufficient which states that bids will be received "for the following described work, as per plans and specifications now on file. . . . Brick paving. Two courses of brick, on sand foundation, with top filler, as described on pages 9 and 10 of specifications. First. West Grand avenue from Twenty-eighth street to 400 feet west of Park Lane." *Windsor v. Des Moines*, 101 Iowa, 343, 70 N. W. 214.

So, also, under such a statute, a notice calling for bids for sewer construction is insufficient though it states the estimated number of linear feet of sewer, the sizes of pipe, the number of flush tanks and man-holes, if it does not give definite information respecting the condition under which the work is to be done, and the manner in which it will be required to be done. *Bennett v. Emmetsburg*, 138 Iowa, 67, 115 N. W. 582.

Under the provisions of a city ordinance that the proposals for estimates prescribed by the department making the same shall state the quantity and quality of the supplies, or the nature or extent, as near as possible, of the work required, specifications

of Lawton, state of Oklahoma, is a corporation duly organized and existing under and by virtue of the laws of the state of Oklahoma, and having direct charge and supervision of all matters and affairs of said school district. (3) The defendants Edward C. Lewis and John H. Kitchen are partners doing business under the firm name and style of Lewis & Kitchen, and engaged in the business of engineering and contracting, with their principal office and place of business in Chicago, Illinois, and in Kansas City, state of Missouri. (4) That the plaintiff, Fred B. Hannan, is a resident taxpayer of the city of Lawton, Oklahoma. (5) That on the 3d day of November, 1908, at an election duly and legally held for that purpose, the duly qualified voters in said school dis-

trict authorized issuance of bonds in the sum of \$100,000, for the erection, construction, and equipment of a high school building. (6) That pursuant to the authority given at said election, the defendant board of education of the city of Lawton, Oklahoma, on the 10th day of April, 1909, caused an advertisement and notice for bids for the construction of said school building, and for the construction of a plumbing system for said building, and for the construction and plans and specifications for a heating and ventilating system for said building to be made; that said advertisement was duly and legally made, and for the required length of time; that Exhibit A attached to the petition of the plaintiff herein is a full, true, correct, and complete copy of

for a bridge prepared by a department are fatally indefinite and defective, which leave it uncertain whether nickel steel or high carbon steel will be required, or who shall determine which shall be used, and when it is conceded that nickel steel is the more expensive, and it is left uncertain whether in case high carbon steel were selected more would be required than if nickel steel were selected, and when bids are asked in a lump sum, which would be the same whichever material were chosen. *Gage v. New York*, 110 App. Div. 403, 97 N. Y. Supp. 157.

—where statutes require amount of security, terms, and time of payment to be stated.

A notice advertising for bids is insufficient when it does not state the amount in which security will be required of bidders, as provided in the ordinance authorizing the work. *Smith v. New York*, 10 N. Y. 504.

Where the notice and advertisement did not state "the terms and time of payment" as required by statute, a contract made in accordance with a bid submitted under such defective notice and advertisement is illegal. *Dyer v. Erwin*, 106 Ga. 845, 33 S. E. 63; *Manly Bldg. Co. v. Newton*, 114 Ga. 245, 40 S. E. 274; *Scott v. Crow*, 121 Ga. 68, 48 S. E. 691.

Under such a statute, a notice is insufficient which states that certain proportionate parts of the contract price shall be paid at certain stages of the construction, without fixing the dates when such payment shall be made, or when the building shall be commenced or finished. *Scott v. Crow*, supra.

Such a statutory provision, however, does not require that the authorities shall state in such publication an exact or an approximate price at which the contract will be let. *Pilcher v. English*, 133 Ga. 496, 66 S. E. 163.

—where bidder is asked to furnish specifications.

Such constitutional and statutory provisions requiring public contracts to be let to the lowest bidder are violated where the 30 L.R.A. (N.S.)

officials having the matter in charge advertise at the same time for plans and specifications and bids based thereon, and then after bids are received, adopt one of the offered plans with its specifications and accept the accompanying bid. *Fones Bros. Hardware Co. v. Erb*, 54 Ark. 645, 13 L.R.A. 353, 17 S. W. 7; *Ertle v. Leary*, 114 Cal. 238, 46 Pac. 1; *Huntington County v. Pashong*, 41 Ind. App. 69, 83 N. E. 383 (even though general specifications were prepared in advance by authorities); *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32; *People ex rel. Putnam v. Buffalo County*, 4 Neb. 150.

Thus, the provision requiring letting a public contract to the lowest bidder is violated when the advertisement for bids for the collection, removal, and disposal of garbage, though explicit as to the collection and removal of garbage, fails to specify the method of disposal, but provides that "each bidder must submit with his bid the scheme of garbage disposal which he proposes to establish, . . . including such plan, specification, and other information as may be necessary to enable the said commissioner to determine the feasibility of it." *Packard v. Hayes*, supra.

Under a statute providing for letting public contracts to the lowest bidder, and requiring plans and specifications to be on file with an official, a contract is void where the plans and specifications on file were incomplete, and bidders were required to furnish detailed specifications with their bids. *Huntington County v. Pashong*, supra; *Mazet v. Pittsburgh*, 137 Pa. 548, 20 Atl. 693.

The provision in specifications for a bridge, that each bidder must submit with his bid "strain sheet and fully detailed plan" does not affect the validity of the award of a contract to a bidder, on the theory that the proposals called for bids based on said plans furnished by the bidder, and hence that each may bid on his own plans and specifications, when the plans and specifications furnished by the officials were full and complete, and the object of the provision was to advise the authorities of

said notice. (7) That prior to April 28, 1909, the said board had not prepared plans and specifications for the construction of said heating and ventilating system, except as to the requirements set forth in said advertisement, and did not select or adopt any such plans or specifications until after the same had been filed with said board by bidders. (8) That there were three bidders, to wit, Fred B. Hannan, of Lawton, Oklahoma, the McMahon Company, of Kansas City, Missouri, and the defendants Lewis & Kitchen; and the plans and specifications submitted by each of the three bidders were each different, and not the same. (9) That immediately after the submission and consideration of the plans and specifications by the several bidders therefor, the

said board adopted the plans and specifications submitted by the defendants Lewis & Kitchen, and entered into a contract in accordance therewith. (10) That each bidder complied with the rules as to security and the deposit of certified checks required by the board. (11) That the amount bid by Fred B. Hannan for the construction of the heating and ventilating system, upon the plans and specifications submitted by him, was \$10,500. (12) That the amount bid by the McMahon Company, upon the plans and specifications submitted by them, was \$10,730. (13) That the amount bid by Lewis & Kitchen, upon the plans and specifications submitted by them, was \$11,340; that no other advertisement, other than the one set out in Exhibit A, herein referred

the interpretation of its plans and specifications by the bidder and their method of execution. *Jenney v. Des Moines*, supra.

—where specifications are not contained in notice, but are accessible.

The notice and advertisement are not defective because they state the work to be done in general terms only, if they refer to complete plans and specifications accessible to bidders for further information. *Pilcher v. English*, supra; *Bozarth v. McGillicuddy*, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042; *Jenney v. Des Moines*, 103 Iowa, 347, 72 N. W. 550; *Arnold v. Ft. Dodge*, 111 Iowa, 152, 82 N. W. 495; *Owens v. Marion*, 127 Iowa, 460, 103 N. W. 381; *Fullerton v. Des Moines (Iowa)* 126 N. W. 159; *Dixon v. Greene County*, 76 Miss. 794, 25 So. 665; *Swift v. St. Louis*, 180 Mo. 80, 79 S. W. 172; *Gilsonite Constr. Co. v. Arkansas McAlester Coal Co.* 205 Mo. 49, 103 S. W. 93; *State ex rel. Baldwin v. Williams County*, 3 Ohio C. C. 403; *Ampt ex rel. Cincinnati v. Cincinnati*, 17 Ohio C. C. 516, affirmed in 60 Ohio St. 621, 54 N. E. 1097; *Taylor v. Wapakoneta*, 26 Ohio C. C. 285; *Houghton v. Burnham*, 22 Wis. 301.

But in *Wilkins v. Detroit*, 46 Mich. 120, 8 N. W. 701, 9 N. W. 427, the court, in discussing the language of a city charter declaring that "no paving contract . . . shall be made until advertised proposals and specifications therefor shall have been duly published," said: "This language is very clear, and we think it is in the same direction with much state and congressional legislation which requires notices for proposals to furnish bidders full knowledge of what they are to bid upon, without requiring a personal visit to any office, where there may be difficulty, among many bidders, in consulting the one set of documents conveniently, and where persons under bodily weakness could not always consult them at all. . . . But it does not follow that such a notice is to contain all the verbiage which is often, and probably was here, set out in a formal document called specifications. In a paving contract all the

essentials to inform bidders might easily be contained in a very few lines."

The fact that specifications on which bids were based referred to the work on two streets is immaterial, where profile maps showing the work on each street were separately made and filed with the specifications, and proposals were invited for the work on each. *Tingue v. Port Chester*, 101 N. Y. 294, 4 N. E. 625.

An advertisement calling for bids is insufficient which does not contain specifications, but refers to an ordinance for the same, when the ordinance referred to contains no specifications. *Louisiana v. Shaffner*, 104 Mo. App. 101, 78 S. W. 287.

A notice inviting sealed proposals for street work, which does not refer to a diagram and specifications of the proposed work as required by statute, is so defective as to render a subsequent assessment invalid. *Stockton v. Clark*, 53 Cal. 82.

Unbalanced bids.

A provision requiring contracts to be let to the lowest bidder is not complied with where the advertisement asks bids on many different kinds of work, at rates to be specified for each, but in determining who is the lowest bidder all the offers are aggregated in one bid, and no basis for determining the amount of each kind of work is given, since the varying amount of each kind required will necessarily affect the question as to who is the lowest bidder. *Detroit Free Press Co. v. State Auditors*, 47 Mich. 135, 10 N. W. 171.

Under a statute providing that where materials are desired, full specifications must be given, and a contract to furnish the same given to the lowest bidder, specifications of various kinds of lumber desired are fatally defective, which give merely the different qualities desired, and give no statement as to the quantity; because, as much of one quality may be desired, and but little of another, there is no way to tell who is the lowest bidder. *Bigler v. New York*, 5 Abb. N. C. 51.

In *Re Anderson*, 109 N. Y. 554, 17 N. E.

to, was ever made for the construction of a heating and ventilating system. Complete plans and specifications for the construction of the main building, not including plans and specifications for the heating and ventilating system, were on file with the clerk of defendant board for the use of bidders under said Exhibit A; that unless restrained by the court, the defendants Lewis & Kitchen will proceed to comply with said contract, and are now doing so, and the defendant board will pay therefor the contract price upon the compliance with said contract."

In addition to the foregoing agreed statement of facts some other evidence was offered, and the court, after hearing it, rendered judgment dismissing plaintiff's peti-

tion, from which judgment the cause was appealed to this court, and, owing to the public interest involved therein, has been advanced standing on the docket for early consideration.

Section 8027 of the Compiled Laws of Oklahoma 1909, relating to school districts in cities of the first class, provides: "No expenditures involving an amount greater than \$200 shall be made except in accordance with the provisions of a written contract, and no contract involving an expenditure of more than \$500, for the purpose of erecting any public buildings or making any improvements, shall be made except upon sealed proposals and to the lowest responsible bidder." Laws of this and a similar character, relating to the letting

209, the following estimates of the work to be done were contained in the proposals submitted to the bidders: "10,000 cubic yards of earth excavation, 20,000 cubic yards of rock excavation." These estimates were made without tests, and had no basis to rest on. The successful bidder bid \$1.62½ per yard for earth, and 2 cents for rock excavation, and taking the quantities estimated his bid was the lowest, and he was awarded the contract. The actual quantities were found to be 20,576 cubic yards of earth and 9,241 cubic yards of rock excavation, which made him nearly the highest bidder. A fair value for rock excavation was \$1.70 per yard and of earth 30 cents. It was held that the city ordinance requiring the quantity of each kind of material and its nature to be stated as nearly as possible was in no sense complied with, and furnished no basis for a valid contract, and that the facts created an inference of fraud and collusion. The court, however, said: "We do not hold that every unbalanced bid is *per se* fraudulent or evidence of substantial error. An unbalanced bid that does not materially enhance the aggregate cost of the work cannot be complained of. If there is no deception or mistake as to the quantities, and if the ordinances have fairly been complied with, and the quantity and quality of the work have been estimated as nearly as practical, there is no ground for alleging substantial error merely because of an unbalanced bid under which the contract was let. And if the cost of the work has not thereby been enhanced, there is no ground for alleging fraud."

In *Walter v. McClellan*, 113 App. Div. 295, 99 N. Y. Supp. 78, affirmed without opinion in 190 N. Y. 505, 83 N. E. 1133, where it was difficult or impossible to determine the exact amount of work to be done and materials furnished, and an estimate was prepared as accurate as it was feasible to make it, it was held not to be improper to ask for bids, not for a lump sum, but at unit prices, for doing the work and furnishing the materials, and which might be increased or diminished as the work progressed, based on such estimate of

quantities, the lowest bidder to be determined by using the estimate as the basis of comparison.

Bids on alternative materials or work.

It is generally held that the provision that contracts shall be let to the lowest bidder is not violated when plans and specifications are drawn for different materials or articles answering the same general purpose, and bids are sought on the different kinds, and a choice is not to be made by the proper officers, between the alternative materials or articles, until all bids are in. *Connersville v. Merrill*, 14 Ind. App. 303, 42 N. E. 1112; *Barber Asphalt Paving Co. v. Garr*, 115 Ky. 334, 73 S. W. 1106; *Trapp v. Newport*, 115 Ky. 840, 74 S. W. 1109; *Fineran v. Central Bitulithic Paving Co.* 116 Ky. 505, 76 S. W. 415, 3 A. & E. Ann. Cas. 741; *Ex parte Paducah*, 28 Ky. L. Rep. 412, 89 S. W. 302; *Campbell v. Southern Bitulithic Co.* 32 Ky. L. Rep. 799, 106 S. W. 1189; *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702; *Baltimore v. Gahan*, 104 Md. 145, 64 Atl. 716; *Atty. Gen. ex rel. Cook v. Detroit*, 26 Mich. 263; *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622; *Muff v. Cameron*, 134 Mo. App. 607, 114 S. W. 1125, 117 S. W. 116; *Dixey v. Atlantic City & D. River Quarry & Constr. Co.* 71 N. J. L. 120, 58 Atl. 370; *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841; *Schieffelin v. New York*, 65 Misc. 609, 122 N. Y. Supp. 502; *Ampt ex rel. Cincinnati v. Cincinnati*, supra; *Polhamus v. Board of Education*, 21 Ohio C. C. 257; *Parker v. Philadelphia*, 220 Pa. 208, 69 Atl. 670 (at least where articles desired are patented).

Thus, it has been held that the provision is not violated by a city ordinance providing that the improvement of a street shall be made of either free or limestone flagging or of artificial cement stone, as the common council may determine on reception of bids therefor. *Connersville v. Merrill*, supra.

Nor is the provision violated where bids are asked on two different kinds of asphalt pavement, and after bids are received the more expensive kind is adopted. *Barber Asphalt Paving Co. v. Garr*, supra.

of contracts for the construction of public buildings and improvements or the purchase of public supplies, exist in nearly, if not quite, all of the states of the Union. It is well known that many public boards serving as purchasing and contracting agents, charged with the most responsible duties, are made up of men who in many instances receive little or no pay for the service which they render. Moreover, they are constantly shifting in their membership, and often comprised of men with no particular or special qualification for the duties which they are required to perform other than are generally possessed by the public at large. Notwithstanding these things, there is, by virtue of the operation of popular government, placed in their

hands duties of the weightiest kind, carrying with them in many instances the expenditures of large sums of the public funds. By reason of the recognized lack of keen personal interest in the affairs of the public that a citizen generally feels in his own, prompting him to secure the most advantageous terms, there is very generally, in reference to the larger dealings, thrown around such agencies the salutary safeguards intended to be secured in the foregoing statute, to wit, that purchases or contracts shall be let upon sealed proposals to the lowest responsible bidder. Courts before which controversies have come over contracts let under laws of this character have had frequent occasion to inquire into the purposes of such enactments, and to

Nor is the provision violated when proposals for paving are to be in the alternative, either brick or bituminous macadam, and after bids are in one kind is chosen, though not the cheapest in price. *Trapp v. Newport*, supra.

Nor where bids are asked for vitrified brick, bitulithis, and bituminous macadam (*Ex parte Paducah*, supra); for vitrified brick and bitulithic paving (*Campbell v. Southern Bitulithic Co.* supra); for asphalt, vitrified brick, and bitulithic paving (*Baltimore v. Flack*, supra); for sheet asphalt, asphalt blocks, and bitulithic paving (*Baltimore v. Gahan*, supra); for wood and stone or different varieties of wood (*Atty. Gen. ex rel. Cook v. Detroit*, supra).

The court, in *Connerville v. Merrill*, supra, said: "There was no uncertainty in the material to be used, so far as the bidders were concerned. Thus, the bidders were put upon an equality, and the city and the property owners had the benefit of competition on each brand or special kind of the general material to be used. They were invited to submit bids for the improvement on three different kinds of material. The bids were made on this basis, and the lowest and best bid for either kind of improvement, that is to say, the lowest bid for artificial stone, was accepted."

Specifications otherwise sufficient are not objectionable in requiring estimates on certain alternatives therein named as to a part of the work. *Schwitzer v. Board of Education* (N. J. L.) 75 Atl. 447.

—under statutes expressly requiring specifications.

Under a statute providing that the city council, when desirous of making a street improvement, shall state the "kind" of improvement, and fix a date for receiving bids, etc., and giving the owners of two thirds of the adjoining property the right to veto the proposed improvement, it was held that a resolution of council which states that one of several named kinds of pavement will be used, to be selected after bids are received, is defective and void, 30 L.R.A. (N.S.)

as the abutting owners have a right to know the precise kind of pavement it is proposed to use, in order to know whether to object, and because the competitive bidding contemplated by statute would not necessarily be secured where bids are invited on various kind of improvements. *Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989.

So, also, it was held that a statute providing that public contracts shall be entered into with the lowest bidder, that the bids shall conform to the published notice, and that the notice "shall contain a description of the kind and amount of work to be done, and material to be furnished, as near as practicable," necessarily implies a determination by the officials, in advance of the publication of the notice, of the kind of material to be used in the proposed work; for without such determination it would be impossible to comply with the requirement as to the contents of the notice; and is not complied with when the advertisement is "for all the different kinds of modern pavements now in use." *Coggeshall v. Des Moines*, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 630.

The court said: "It may be that combinations among bidders, or collusions between them and the council, would be as effectually prevented, and fair competition secured, by that as by any other plan that could be adopted. But it is a sufficient answer to all that was said in argument by counsel on that question, to say that the statute leaves to the council no discretion as to the course which shall be pursued."

So, under a statute authorizing a board of improvement to cause a street to be graded and paved or graveled or macadamized, and completed and improved according to such plan as they might adopt, and to let the work on ten days' notice to the parties who shall offer to do the same at the lowest prices in accordance with the plans and specifications of said board, it was held that the board must adopt plans and specifications for some one kind of pavement first, and cannot make plans and specifications for several kinds of pavements,

make comment thereon. It is said: "The law requiring contracts to be let to the lowest bidder is based upon public economy, and originated perhaps in distrust of public officers whose duty it is to make contracts. It is of great importance to taxpayers, and ought not to be frittered away by exceptions. Contracts made in violation of it have been held void, and we think rightly." *Wells v. Burnham*, 20 Wis. 112, 116. "The object of the law is to protect the public against collusive contracts and prevent favoritism." *State ex rel. Whedon v. York County*, 13 Neb. 57, 12 N. W. 816. "The purpose of the rule is to secure fair competition upon equal terms to all bidders, and to remove all temptation for collusion, and opportunity for gain at the expense of the property owners by the municipal authorities." *Diamond v. Mankato*, 89 Minn. 48, 61 L.R.A. 448, 93 N. W. 911. "It cannot be doubted that the true intent of the act of 1874, and the ordinance passed in pursuance thereof, regulating the awarding of public contracts, is to secure the city the benefit and advantage of fair and just competition between bidders, and at the same time close, as far as possible, every avenue to favorit-

ism and fraud in its varied forms." *Mazet v. Pittsburgh*, 137 Pa. 548, 561, 562, 20 Atl. 693, 697. "The constitutional provision was designed to secure economy in the line of public improvements to which it relates. Extravagance therein might arise either from the inattention or incompetency of the contracting officer, and his consequent failure to obtain favorable offers for contracts, or it might arise from the corruption or favoritism of such officer, and his consequent refusal to accept favorable offers when made. To prevent extravagance from the first source, the plan of public letting is adopted, the public are informed of contracts to be let, and its self-interest and rivalry are appealed to for proper offers upon them; to prevent extravagance from the latter source, all discretion is withheld from the contracting officer, he is bound to give the contract to the lowest bidder, and cannot let it out for individual gain or as a reward to another." *Fones Bros. Hardware Co. v. Erb*, 54 Ark. 645, 650, 13 L.R.A. 353, 17 S. W. 7, 8. Such being the purpose and objects to be accomplished by the law, let us examine the facts in the case at bar, and see if a con-

and decide which to adopt, after bids are received. *People ex rel. Ream Pav. Co. v. Board of Improvement*, 43 N. Y. 227.

And this is true though some of the kinds of pavements specified were patented. *Ibid.* The court said that the statute "designed to open no such way for the exercise of favoritism. It designed that the work should be competed for as to price by contractors, and that this should be done in such a way that the lowest bidder could be determined by calculation without any exercise of judgment as to the relative advantages of different kinds of pavement."

In *State ex rel. McMahon v. McKenzie*, 9 Ohio C. C. N. S. 105, the court said: "In the matter of general materials for a public building, no discretion as to the choice can lawfully be reserved until after the bids are opened, when the statute expressly requires, as it does here, that specifications should be made in advance, and that the contract should be let to the lowest bidder." Accordingly, they held that under their statute a courthouse commission could not in their advertisement ask bids for limestone, sandstone, and granite of several varieties, and after bids were opened award a contract to the lowest bidder on any variety of granite.

In *Stocking v. Warren Bros. Co.* 134 Wis. 235, 114 N. W. 789, one section of a city charter provided generally that all public works estimated to cost exceeding \$1,000 shall be let by contract to the lowest responsible and satisfactory bidder, and that the board of public works shall advertise for proposals, and that before advertising "a profile or plan of the work to be done, together with the specifications, shall be

placed on file" for the inspection of bidders; another section specially applicable to street or paving contracts provided that "when any of the works before mentioned shall have been ordered to be done, and the plans for the same containing a description of the work, the material to be used, and such other matters as will give an intelligent idea of the work required, shall have been filed" for the inspection of bidders, bids may be advertised for. It was held (two judges dissenting) that bids could not be asked for several different kinds of pavements, the kind to be selected after bids were opened, even though the specifications as to each kind were complete, if it had been the sole one advertised for.

The writer of this note suggests that most, if not all, of the objections urged against specifications which name several different kinds of materials, one of which is to be chosen after bids are in, would be obviated if the contracting board would in advance decide upon the relative numerical efficiency and desirability of the different materials sought, and cause their determination to be inserted in the specifications. For example, if bids for paving are asked for brick and also for creosoted blocks, and it is determined in advance that their relative efficiency is as 2:3, then, if a bid for the former is \$1,000 and for the latter \$1,400, it may be easily known by a mere calculation that the latter is the better bid, uncertainty and the consequent danger of favoritism would be thus overcome, the field of competition widened, and the danger of combinations to enhance prices lessened by increasing the number of persons who may compete.

R. A. E.

tract let as this one was, would, if uniformly pursued by all contracting agencies for the public in the state, effect the results desired.

Council for defendants in error have, in an excellent and well-considered brief, said for this contract all which is possible to be said for it. It appears from the agreed statement of facts and the notice that plans and specifications for the main building were on file and available to all parties seeking to bid. They showed the size of the building, the rooms, every opening and partition, and doubtless disclosed the exact dimensions of every part of the structure. It was the heating and ventilating system which the parties involved in this controversy sought to bid on, and they, with the public, had before them the definite plans and specifications of the building. Furthermore, they were informed that the system to be installed was to be a steam force blast system, which, doubtless, to the men engaged in that business, had a definite, certain meaning. The system to be bid upon was to be controlled by automatic heat regulation in all rooms other than halls and toilets, board and superintendent room, wall radiation. This information, as is said, was doubtless well understood by men engaged in the business of installing heat and ventilation systems. With reference to the amount of air each pupil was to receive, and the degrees to which the different portions of the building were to be heated in the coldest weather, all were given information. Here, again, with the knowledge which men schooled in this line of work have, with the plans of the building before them giving information of the number and size of openings, size of the rooms, and other matters which they were to take into consideration, and knowing the temperature of the latitude where Lawton is situated, they would be able to figure very closely the size of the system necessary to be installed in order to bring about these results. But is not the foregoing all that can be said for the information given by the notice on which the board called for bids? It appears from the agreed statement of facts that the complete plans and specifications for the construction of the main building did not include plans and specifications for the heating and ventilating system. It is suggested by counsel for plaintiff in error that under the terms contained in the notice set out the steam force blast system to be installed might use boilers known as the high pressure tubular or low pressure tubular, and there might be used the high or low fire box boiler, commonly known as the locomotive type; that there might be used a low pressure cast-

iron sectional boiler, or there might be used a water safety tube boiler; and that, in the matter of power, either gasoline power, steam power, electric or water motor power might be used, and in the matter of radiation, there might be used cast-iron radiation or pipe coil radiation, and that in the matter of registers, there might be used what are known as diffusers, or there might be used valve opening and closing apparatus or grilled or screen opening registers, and in reference to the automatic regulation, there might be used any one of three different systems, and it is contended by counsel that a variation in the adoption of these different kinds of engines or appliances would mean a difference in the cost to the purchaser. Furthermore, to our minds the absence of any specific plans or definite specifications leaves it uncertain whether one, two, or three boilers were desired, also their weight, durability, and also what would be the character of the pipes or conduits for the conveyance of the heat from the place where generated to the different parts of the building, whether of iron, sheet iron, or tin, and whether with or without asbestos wrapping, and numerous other details, all of which would make for either expense or economy in the system. These things would involve the permanence, desirability, and durability of the system proposed, and determine no doubt in a great measure whether it would endure and serve during the life of the building, or require renewal at an earlier date. There were likewise many other details left entirely to conjecture. For instance, there was no provision whatever as to which the successful bidder or the general contractors should perform the work and bear the burden of expense incident to arranging the basement walls to conform to the heating plans, provide fresh air intake from the outside air, or inlet to the tempering coils, or to provide for foul air gathering rooms in the attic, or who should set the roof ventilators furnished by the heating and plumbing contractors, or who should build in the floor sleeves, castings, and hangers as required. Neither was it determined in advance who should cut the openings in the walls, floors, partitions, ceilings, or roof as required: nor was there anything said in reference to who was to do the excavating required for the ducts and foundations, nor was it determined who should furnish the smokestack nor how it was to be built. If these things were to be performed by the contractor constructing the building, then the contractor securing the heating and ventilating contract would be relieved of it, and his bid to that extent would be diminished. If, on the other hand, he would be required to do this work, then his bid would be to that extent increased,

and, without definite knowledge in advance, there was no way to compare bids for this work. To cover these details, therefore, the successful bidder herein as a part of his bid required all of this work to be done by the general contractor, and it was testified on his behalf that the work referred to above is the work required of the general contractor,—that is, the most of it, if not entirely all of it, in his contract. It was testified by plaintiff that there was no provision in the general plans for any intake or foul air gathering chambers, and that he expected to provide that and put it in, and that it was a part of the heating contractor's business to put in the hangers and to do his own excavating necessary to install his work. Necessarily, therefore, from these considerations, the successful bidder did not include in his bid the expense for this work, while at least one other contractor from his evidence expected to do it, and doubtless charged for it, all of which, while probably not materially affecting the system to be installed, did doubtless have a material effect on the price charged. Unquestionably each of the bidders who submitted his proposal to construct this system did so with the hope of securing the contract. There is no evidence in the record to raise a doubt on this proposition. And yet, two of them, each of whom submitted a cheaper bid than the one who received the contract, had their bids rejected, and the agreed statement of facts is that each of the plans and specifications was different. In other words, this simply meant that each party bid on his own plans and work, along with the material which he proposed to use to carry it out. No other bidder bid on that plan and on that material, but each likewise bid on another plan and work and different material, and the consequence is that while the result sought to be attained, to wit, the heat and ventilation for the building, might have been accomplished under the system adopted, there was but one bid offered, and no competition on it, and this bid may as well be termed the highest as the lowest.

The laws of Pennsylvania relating to the letting of city contracts provided (§ 6, act May 23, 1874, P. L. 233) that the same shall be let to the lowest responsible bidder. In the case of *Mazet v. Pittsburgh*, supra, the bidders on a certain kind of pavement were directed to prepare their own specifications, which was accordingly done. On a controversy arising, the supreme court, in the consideration of this law, and these facts, said: "There were no specifications as to what is called an asphalt pavement." As to that kind of pavement, bidders were directed, as charged in the bill, to prepare their own specifications, and that was ac-

cordingly done by each of the bidders. . . . In the face of the facts above referred to, all of which appear in the pleadings, it is idle to contend that the contract in question was regularly awarded in accordance with the charter and ordinances of the city. The charter requires contracts 'to be given to the lowest responsible bidder.' How can there be a lowest bidder, when parties proposing to bid are instructed to prepare their own specifications and submit them with their respective bids? The expression 'lowest bidder' necessarily implies a common standard by which to measure the respective bids, and that common standard must necessarily be previously prepared specifications of the work to be done, and materials to be furnished, etc., specifications freely accessible to all who may desire to compete for the contract, and upon which alone their respective bids must be based. The court was therefore clearly right in pronouncing the contract in question 'illegal, null, and void.' Not a respectable authority can be anywhere found to sustain it as a valid contract, under any system of competitive bidding such as the charter and ordinances of the city of Pittsburgh require."

The Constitution of the state of Arkansas (§ 16, art. 19) provides that all contracts for erecting public buildings shall be given to the lowest responsible bidder. The construction of this section was before the supreme court in the case of *Fones Bros. Hardware Co. v. Erb*, 54 Ark. 645, 13 L.R.A. 353, 17 S. W. 7, and of it the court said: "The method prescribed is well understood, clearly defined, and of distinctive character, specially adapting it to a conservation of public interests. It embodies three vital principles,—an offering to the public, an opportunity for competition, and a basis for an exact comparison of bids; and any statutory regulation of the matter which excludes or ignores either principle destroys the distinctive character of the system, and thwarts the purpose of its adoption. Any arrangement which excludes competition prevents a letting to the lowest bidder, and it does not matter that such an arrangement maintains the form of public letting; if it excludes the essential principle of competition, there can be no real public letting. . . . When a contract to build a bridge is to be let, there are two kinds of competition that may arise: First, that between persons desiring to build different kinds of bridges; and, second, that between those desiring to build the same kind. And, as was said by Judge Christianity in discussing a provision similar to that under consideration, the bidding which it contemplates is of the latter kind,—bidding for

the same particular thing, to be done according to the same specifications. For, says he, no bids for different kinds of work, and referring to different specifications, could be recognized as coming in competition with each other for the purpose of determining the lowest bid, within the requirement of this section, without opening the door to the same corrupt combinations, and furnishing facilities for the same fraudulent practices, which it was the purpose of this provision to prevent. *Atty. Gen. ex rel. Cook v. Detroit*, 26 Mich. 263. As the competition contemplated is that between those desiring to do the same particular thing according to the same specifications, it is obviously essential that an opportunity should be given all persons to enter into competition for the specific thing which is the subject of the letting; and such opportunity cannot be afforded, unless the specific thing to be let has been determined upon and made known. The Constitution contains no express provision with regard to plans and specifications, but the requirement of an award to the lowest bidder implies the further requirement that such information shall be put within the reach of bidders as will enable them to understand the offering and bid intelligently, and enable the representatives of the county to know who is the lowest bidder."

In the case of *Chippewa Bridge Co. v. Durand*, 122 Wis. 85, 106 Am. St. Rep. 931, 99 N. W. 603, it appears that in reference to a certain bridge which was being built, the definite plans and specifications were not agreed upon in advance, each bidder being permitted to arrange details to suit his own manufacturing facilities, subject to general specifications and subject to the approval of the city engineer. The laws of Wisconsin under which this work was done provided in substance that all contracts for work should be let to the lowest reasonable, responsible bidder. In reference to this law and the contract, the court said: "The reason for such enactments as the one in question is, in the main, to preclude public officers from making contracts in such a way as to enable them to sacrifice the public interests to satisfy favoritism, mere improvidence, or to a corrupt desire for private gain. There is no better safeguard against infidelity of officials in that respect yet discovered, than to require municipal contracts to be publicly let, the scope of the service to be performed and the terms of payment being so definitely mapped out in advance as to enable persons experienced in respect thereto to estimate with reasonable certainty the actual cost thereof, and to require the award to be made without change in such service or terms. A require-

ment of that kind forms part of the governmental system of nearly every political organization from the nation itself down to the minor governmental agencies in towns. . . . Many charters contain such express direction. In such circumstances it has been uniformly held that failure to call for bids in the prescribed way, or to provide plans and specifications for the work within the convenient reach of bidders, is fatal to the proceeding. . . . In harmony with that, we hold that the charter in question required, as an essential to the validity of the contracts for the bridge, the preparation of proper plans and specifications for those parts of the bridge proposed to be let separately, the placing thereof within convenient reach of all desiring to consult the same for the purpose of bidding for the work, and the giving of public notice in some way reasonably appropriate to reach all persons likely to desire to participate in the competition."

In the case of *Ricketson v. Milwaukee*, 105 Wis. 591, 47 L.R.A. 685, 81 N. W. 864, it appears there was a call made by the board of public works of the city for contracts for the construction of a garbage crematory including all necessary buildings, which were required to be of brick, with stone foundation and iron roof, for the incineration of all garbage within the city limits, such buildings and equipments suitable for the reduction and disposal of 100 tons of garbage per day. The bidder was to specify the system, the size, dimensions, and manner of construction, along with the number of tons of fuel required, and the number of men necessary for its operation. Some other details were given. General plans and specifications were prepared by the board of public works, but the bidders were left to submit the plans and specifications of the building, showing a description of the buildings, machinery, furnaces, and appurtenances. The law contemplated that there should be competition among bidders for the work, and that a plan or profile accompanied by specifications for doing the same, along with a description of the kind and quality of material furnished, should be placed on file at the office of the board for information of bidders and others. Speaking of the general specifications adopted, the supreme court of Wisconsin in the foregoing case said: "The general specifications adopted required each bidder to submit with their bids, 'complete plans and specifications, fully showing and describing the buildings, machinery, furnaces, and other necessary appurtenances of the entire cremation plant in detail, with all dimensions given.' This was a plunge in the dark. In a general way, such specifi-

cations called for the construction of a complete garbage cremation plant capable of destroying not less than 100 tons of garbage per day. No system of garbage cremation was adopted. No dimensions of buildings or description of machinery was given. Each bidder might bid with reference to using the smokestack of the sewerage pumping works, if it was of sufficient height and capacity, and the board approved of its use. Each bidder was to use his judgment as to what were 'proper foundations,' except that they were to be stone or concrete. Ample provisions for windows were to be made, but how many, or what dimensions or quality, was left to the bidder. A coal shed of sufficient size to store six months' supply of fuel was to be erected, leaving it for the contractor to determine its size and shape. No attempt was made to describe or locate the machinery or any of the necessary appurtenances. The number of furnaces was left to the discretion of the bidder, except that the daily capacity must be as stated. "The plant must be complete in every respect," a result greatly to be hoped for, but left to the judgment of each individual bidder. . . . 'The indefinite character of the specifications, and the absence of plans, had the effect of stifling all competition. Each bidder was called upon to make a proposal, resting largely upon his own judgment, with absolutely no guide as to details. No one could tell which was the lowest bid, because no two would be on the same basis. That fact alone condemns the action taken. . . . If the city has not a sufficiently definite idea of what it wants, to cause proper plans and specifications to be made, then it must wait until further information can be secured, or the plan has become so far developed as to be more than a long-felt want."

But, say counsel for defendants, to pursue such a policy, and specify the particular thing required, would necessarily exclude everything else, and thereby defeat the statute by limiting competition, one of the very things which the law was intended to secure. Counsel in this contention, it seems to us, are correct if the board seeking to secure a heating system should have designated the identical make of engines, and the identical regulators, and the specific make of each article which was to go into the system, if this would throw the furnishing of these different articles into the hands of people who had a monopoly thereon, and thereby exclude from actual competition all other bidders. It is not the intention of the law that such a condition shall arise, nor yet that the public be denied the benefit thereof where a patented article is shown to be better for the purpose desired than

another. A discussion of this proposition by the learned Justice Cooley of the supreme court of Michigan is contained in the case of *Atty. Gen. ex rel. Cook v. Detroit*, 26 Mich. 263, wherein it is said: "The requirement that contracts shall be let to the lowest bidder is, in many cases, peculiarly susceptible of abuse. Its purpose is to secure competition among contractors for public works and supplies, and to give the public the benefit thereof. In some cases the most ample competition would be invited by presenting to bidders complete and particular specifications, which indicate the precise things wanted or which are to be done, and leave nothing to discretion or negotiation afterwards. But this could only be true where the case was such that many persons could bid for the work or materials, and would have a legal right to do the one and furnish the other, and where the materials were not monopolized in single hands, but were readily obtainable from several sources. If a patented article were desired, which was owned by a single person who refused to sell the right to territory or to fix a royalty, or if stone or any other material were required, and a single person owned all within a practicable distance of the place where it was to be used, nothing could be more obvious than that proposals which confined bids to the particular article or material would invite no valuable competition, and that the protection of the public must lie in the power of the council to reject unreasonable offers. In such a case nothing is easier than for the council to obey strictly the letter of the law, and yet dishonestly and corruptly award a contract to one who is lowest bidder for no other reason than because no one can bid against him, and who, having a practical monopoly, is allowed to fix his own terms. Now, if the purpose of the charter is to secure competition of work or supplies for the public, something is necessarily left to the discretion of the council; and they must determine in each case what competition the nature of the case will admit of, and what is the best method to secure it. If they invite proposals for a particular thing or process, they necessarily, in so doing, exclude everything else which might have been substituted for the thing called for; and there is no clearer field for corruption and favoritism than in shaping proposals, if in fact the city is in corrupt hands. The matter of paving affords an apt illustration of this truth. From the proposals before us, it would be a reasonable inference that there are several patented wood pavements nearly equal in value and cost; but if the council call for proposals for one only, they necessarily exclude all the others; and I

am aware of no legislation, and I can conceive of no process, by which they can be compelled always to make the selection from public motives exclusively, if their disposition shall be to do otherwise. It would be worse than idle for the law to mark out, or for the council to follow, any one unvarying course in these cases. The same course which under some circumstances would be manifestly proper and most for the public good, under others, would be so plainly detrimental, and place the public so completely at the mercy of interested parties, that it could not be adopted by a body having any liberty of choice without justly subjecting themselves to the charge of corruption. It must therefore be manifest that any inflexible rule which the law should lay down, and which should trust nothing to the integrity, and nothing to the discretion, of the council, must necessarily work mischief in many cases, and it would be productive of good, I think, in few cases, if any."

Counsel also ask, Is it the purpose of the law to leave nothing to the integrity, discretion, or judgment of the board? In our judgment this question is in a measure, at least, answered in the case last discussed. In that case the common council of the city of Detroit determined to have a certain avenue paved, and instead of determining in advance what particular kind of pavement should be put down, and confining their invitation for proposals to that kind, caused definite plans and specifications for each of several different kinds of wood and stone pavement to be prepared and filed with the comptroller, and then advertised that sealed proposals would be received for paving the avenue with either of the different kinds already named. Thus, there was submitted to all an opportunity to bid on the different plans, kinds, and characters of paving which were to be considered by the council. Each bidder could bid on all or any, but no bidder could select something different and prepare his own plans and specifications, and then quietly bid upon them and have them considered. There was, by the council, determined in advance definitely what they desired to have bids upon, and thus there was known to each bidder in advance the identical things which would be considered by the council, and each bidder was enabled and required thereby to compete with every other bidder; hence each would be in direct competition with all others. This character of discretion seems to meet the sanction of nearly if not quite all of the courts, and especially is this true of many cases to which counsel for defendants have called our attention. For instance, in the case of *Ampt v. Cincinnati*, 8 Ohio S. & C. P. 30 L.R.A. (N.S.)

Dec. 624, and afterward affirmed by the supreme court of the state, the syllabus reads as follows: "Under the statute in question there can be no objection to inviting bids for certain kinds of work in a certain event, and for certain kinds of work in another event; so long as the work to be done, under the circumstances and surroundings under which it is to be done, is understood and fully known by both parties, then there can be no objection to alternative bidding. In such cases the bidders can bid upon the specific work to be done, and the commissioners can adopt whichever plan or system they think best."

Also, in the case of *Baltimore v. Flack*, 104 Md. 107, 64 Atl. 702, the commissioners of the city of Baltimore for opening streets prepared three separate and distinct specifications, each exact and complete in itself, and each calling for a different kind and character of pavement. After advertisement one bid was submitted on one kind, two on another, and three on the third; the first bid was rejected because it was not based upon specifications furnished, but which the bidder claimed would produce a pavement as good as that called for. In the consideration of that case, the court of appeals of Maryland said: "Competition was invited and secured both as to materials and as to price, and the contract was awarded to the lowest responsible bidder on the material selected, though there was another bidder whose price was lower on a different material. Was this method of procedure and this action in violation of §§ 14 and 15 of the charter? There are two kinds of competition,—the one, competition between different things which will equally answer the same general purpose; and the other, competition between the prices bid respectively upon each of those distinct things. . . . Thus, by the selection of the materials or the kind of pavement after the bids have been received, combinations between bidders to inflate prices may be in a great measure avoided, since it is altogether improbable that parties who compete for the adoption of their respective materials will all ask exorbitant prices, as each party will most likely strive by depressing prices to secure the contract. As in such an instance no bidder knows in advance which kind of pavement will be selected, each is in reality stimulated to propose terms which, in order to secure him the contract, will produce the best results so far as the public are concerned. . . . That such a method as that pursued in this instance may be open to the charge of being dominated by favoritism, or of being corruptly manipulated, may be true, but it is equally true, and much more likely, that both

favoritism and fraud will control if the material is secretly selected, and the bids are confined to that one material, since, by inviting proposals for one particular thing or process, the public officials necessarily exclude everything else which might have been substituted for the thing called for, and there is no clearer field for corruption and favoritism than in secretly shaping proposals, if in fact the city is in corrupt hands."

Thus, it will be seen that there is in certain instances and cases a discretion vested in boards charged with duties similar to the school board in this case. Nor does this seem to be the sole discretion, for, by the phrase "lowest responsible bidder," as used in the statute, it is not intended to limit the power of the board to a simple examination of the different bids tendered without reference from whom they come, and blindly select the one solely from the consideration that it is the lowest in price, but it requires the board to select the bidder who, all things being considered, has ability to respond to the requirements of the contract, having full regard to the subject-matter thereof. *People ex rel. Assyrian Asphalt Co. v. Kent*, 160 Ill. 655, 43 N. E. 760; *Boseker v. Wabash County*, 88 Ind. 267; *Hoole v. Kinkead*, 16 Nev. 217. Or, as is said in the case of *Com. ex rel. Snyder v. Mitchell*, 82 Pa. 343: "The word 'responsible,' as employed in the act, when applied to contracts requiring for their execution not only pecuniary ability, but also judgment and skill, imposes, not merely a ministerial duty upon the city authorities, such as would result did their powers extend no further than to ascertain whose was the lowest bid, and the pecuniary responsibility of the bidder and his sureties, but also duties and powers which are deliberative and discretionary. In this we concur with the court below. For it is scarcely open to doubt but that the word under consideration, as it is used in the statute, means something more than pecuniary ability. In a contract such as the one in controversy, the work must be promptly, faithfully, and well done; it must or ought to be conscientious work. To do such work requires prompt, skilful, and faithful men. A dishonest contractor may impose work upon the city, in spite of the utmost caution of the superintending engineer, apparently good, and even capable of bearing its duty for a time, which in the end may prove to be a total failure, and worse than useless. Granted that from such a contract or pecuniary damages may be recovered by an action at law, this is at best but a last resort, that often produces more vexation than profit,—a mere patch upon a bad job,

an exceedingly meager compensation, at best, for the delay and incalculable damage resulting to a great city from the want of a competent supply of water. The city requires honest work, not lawsuits. Were we to accept the interpretation insisted upon by the relators, the difference of a single dollar in a bid for the most important contract might determine the question in favor of some unskilful rogue as against an upright and skilful mechanic. Again, we know that, as a rule, cheap work and cheap workmen are but convertible terms for poor work and poor workmen; and if the city, for the mere sake of cheapness, must put up with these, it is indeed in a most unfortunate position."

And, in our judgment, the discretion which counsel for defendants insist is vested in the school board is limited to that set forth in the foregoing authorities. To extend it further, and to allow the board to make general plans and specifications without definitely and specifically enumerating and fixing the quality and quantity of the thing required and the manner of the construction, so that all parties bidding will have presented to them the same thing, would be to open the door for the entrance of every element which the statute intended to exclude. Counsel asks in all seriousness, Shall the board be required to specify the size of the bolts, rivets, etc.? This question in our judgment is answered in the case of *Ampt v. Cincinnati*, supra, cited by counsel to sustain their contention which holds in substance that, where plans and specifications previously adopted are sufficiently definite to convey to the bidders or those engaged in the work the required knowledge upon which to base a definite bid for the work to be done, this will be considered a compliance with the statute, no matter how meager such plans and specifications may appear to persons unaccustomed to such matters. This holding virtually states the conclusion to which we arrive in this case, to wit, that the plans and specifications previously adopted must be sufficiently definite to enable all bidders to make a definite bid for definite work to be done. Now, if it is necessary in order to furnish a definite basis for a definite bid in this or any other case, to specify the size of the bolts, rivets, etc., then it is necessary to do this in order to comply with the statute. Otherwise, not. That it was necessary for the plans and specifications to be more definite than the information contained in the published notice gave is manifest from the agreed statement, which shows that the plans bid upon and submitted by the different parties were all different. The information given by the

board was not sufficiently definite for similar plans to be prepared, and the bids range all the way from \$10,500 to \$11,340. The plans and specifications accompanied by the highest bid were by the board accepted, and it may have been that both the other bidders would have offered a lower bid thereon, had they been given an opportunity, and perhaps many other bidders would have participated had they seen them, and some responsible party might have bid much less than either. The taxpayers who will be required to meet the amount bid were entitled under this statute to have the benefit of that chance, and the successful bidders were not entitled to have considered, nor was the board authorized to accept, a bid upon such unadopted plans and specifications.

From the foregoing consideration it will be seen that the judgment of the trial court rendered herein is reversed. We wish to say, however, that this is not done in response to anything leading us to believe that the board in the course taken committed either fraud or favoritism, or that the successful bidders did aught else than in good faith respond to the call made, and secured the contract in an honest and conscientious endeavor. In holding as we do we give to the statute the only construction to which we deem it susceptible, and in which public policy and the law both meet. The state of Oklahoma and its several subdivisions, counties, townships, cities, school districts, etc., are entering upon an era of public improvement. A statehouse is to be built, college and school buildings, courthouses, and bridges are to be erected and constructed all over the state. These improvements are to be paid for from taxes levied upon our whole people, and thousands and hundreds of thousands of dollars are to be expended therefor. The boards and public agencies intrusted with the important and responsible duties of selecting the materials, deciding upon the character of the work, letting the contracts, and spending this money, should be surrounded by every reasonable safeguard possible. This should be done not only for the safety of the funds and the public welfare, but for their own protection. They are seldom engaged because of any peculiar training or fitness they possess over that common to all, and their compensation is frequently wholly inadequate to cover the time and energy they are required to bring to their labor. Under these circumstances a requirement that shall fix in advance upon certain definite plans and specifications or propositions to be considered, and then submit these for open competition upon sealed proposals, the

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contract then to be awarded in an impartial way to the lowest responsible bidder, will tend to remove them from temptation and opportunity for fraud or favoritism. It will do more; it will materially assist in removing suspicion of unfairness and favoritism, and relieve honest men upon whom these duties devolve of unjust charges.

Taking judicial notice of these conditions and speaking thereto, the supreme court of Michigan in the case of *Holmes v. Detroit*, 120 Mich. 226, 45 L.R.A. 121, 77 Am. St. Rep. 587, 79 N. W. 200, says: "When a public work is to be undertaken, those having it in charge are seldom left to conduct their negotiations, make the contracts, and answer to the public for a faithful performance of duty. Everyone who has anything to sell insists on being heard; one accuses another of bribery; the board having the matter in charge, and its individual members, are accused of corruption; and after the award the work is delayed by litigation and injunctions, to the great inconvenience and cost of the taxpayers, and almost uniformly without any good result. So prevalent are these practices that they have become most serious obstacles to public improvement, and prolific sources of slander and vituperation, until many of our best citizens refuse to give to municipalities the benefit of their services, lest they be subjected to such charges. These things are so common that we may properly take notice of them, and we may well doubt a construction of a law which shall encourage them and produce such results." Likewise speaks the Supreme Court of the United States through the late Justice Peckham in the case of *McMullen v. Hoffman*, 174 U. S. 639, 651, 43 L. ed. 1117, 1122, 19 Sup. Ct. Rep. 839: "Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids. Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals, but who in truth are secretly banded together for the purpose of obtaining contracts from public bodies such as municipal and other corporations at a higher figure than they otherwise would. Just how the fraud is to be successfully worked out by the combination, it is not necessary to show. It is enough to see what the natural tendency is. Public policy requires that officers of such corporations, acting in the interest of others, and not using the sharp eye of a practical man engaged in the conduct of his own

business, and not controlled by the powerful motive of self-interest, should, so far as possible, and for the sake of the public whom they represent, be protected from the dangers arising out of a concealed combination, and from fictitious bids." If the public is to receive the services of its best men for these unremunerative, but important, duties, it should, to the extent that is possible, shield them from temptation, and, entering honest, enable them to come out unsullied. The conclusion to which we have come is not only responsive to the language of the act, but will most nearly attain and effect these salutary results. Under this, good men, without fear of being corrupted or slandered, will be more inclined to tender their services, and the dishonest man will find more difficulty in plundering the public. All of which is of the highest importance to the citizenship of Oklahoma, just entering upon an era of extraordinary public improvement.

No other questions raised have had our consideration. The plaintiff is a resident taxpayer, and as such has such interest as will give him a standing to bring this action. *Kellogg v. School Dist. No. 10*, 13 Okla. 285, 74 Pac. 110.

The judgment is accordingly reversed, and the case is remanded to the District Court of Comanche county, with instructions to set it aside and enter one sustaining plaintiff's petition.

Kane, Ch. J., and Turner, Williams, and Hayes, JJ., concur.

OKLAHOMA SUPREME COURT.

FOSTER LUMBER COMPANY, Plff. in Err.,
v.
ARKANSAS VALLEY & WESTERN RAILWAY COMPANY.

(20 Okla. 583, 95 Pac. 224.)

Property — injury — right of action — title.

1. One who owns the equitable title to real property, and is in possession of same, may maintain an action for permanent injuries thereto.

Railroad in street — right of abutting owner.

2. An abutting property owner whose means of access to his property has been cut off or materially interrupted by the building of a railway track upon the street in front of said property may recover damages therefor.

(April 13, 1908.)

Headnotes by HAYES, J.

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ERROR to the District Court for Noble County to review a judgment in defendant's favor in an action brought to recover damages for injuries to plaintiff's property by the obstruction by defendant of a street. Reversed.

Statement by Hayes, J.:

This action was brought by the plaintiff in error as plaintiff in the district court of Noble county, Oklahoma territory, against defendant in error as defendant, seeking to recover damages alleged to have been sustained by plaintiff in error on account of the construction of a railway by the defendant in error upon one of the streets in the city of Perry. Plaintiff alleges in its petition that it is the owner of two certain

Note. — Sufficiency of equitable title to sustain action for injury to real property.

The general question as to the sufficiency of an equitable title to sustain an action for trespass to land, is considered in the note to *Russell v. Meyer*, 47 L.R.A. 637. As suggested in that note, it is unnecessary to invoke or rely upon an equitable title where one in actual possession brings trespass for injury to the possession against a mere intruder, or one who cannot show a better legal title or right of possession. In some cases (*e. g.*, *Witheral v. Muskegon Booming Co.* 68 Mich. 48, 13 Am. St. Rep. 325, 35 N. W. 758; *Honsee v. Hammond*, 39 Barb. 89; *Arnold v. Pfoutz*, 117 Pa. 103, 11 Atl. 871; *Hough v. Patrick*, 26 Vt. 435), where the action was by one in actual possession, against a mere intruder, for an injury to the possession, the fact that the plaintiff was the equitable owner, or was in possession under a contract with the owner, is alluded to, but the actual possession alone seems to have been sufficient to sustain the action.

As is said in *George v. Fisk*, 32 N. H. 45: "Where the plaintiff is in possession, in describing his right or interest in the property against a wrongdoer for the recovery of damages, and not the land itself, it is sufficient to state in the declaration that the plaintiff, at the time of the injury, was possessed of the land. His rights and interest are matters of evidence only."

When, however, as in *Russell v. Meyer*, supra, the plaintiff has neither legal title nor actual possession, the question may arise whether his equitable title will draw to itself the constructive possession, so as to entitle him to maintain the action.

In *Texas & P. R. Co. v. Bullard* (Tex. Civ. App.) 127 S. W. 1152, it was held that a purchaser of land under an executory contract, afterwards fully performed, was entitled to maintain an action against a railroad company for damage to the grass by fire, notwithstanding that, at the time of the injury, the vendor was in possession. It is stated in this case that the vendor remained in possession but a very short time

lots in the city of Perry fronting upon A street, a public street in said city, and that about the 1st day of October, 1903, the defendant, without the consent of plaintiff, erected a large fill immediately in front of the plaintiff's property, and built in front of said property a steam railway track a distance of about 20 feet from the curb line of plaintiff's property, thereby greatly obstructing the means of ingress and egress to and from said lots, and rendering them unfit for business purposes, and that, on account of such obstruction, said property of the plaintiff was diminished and depreciated in value in the total sum of \$3,000. A second cause of action was alleged in plaintiff's complaint, but, as same appears to have been abandoned by plaintiff in the

trial of the case, we do not consider it necessary to make further reference to same. Defendant filed its answer, and denied that plaintiff was the owner of the lots at the time said railway was built by it, and at the time said damages alleged to have been sustained by plaintiff occurred, and further averred that it had obtained from the city of Perry a grant, granting to it the right to use and occupy certain of the parks, streets, and alleys in the city of Perry; that A street is one of the streets, the use of which for railway purposes had been granted to it by the city of Perry, and that it erected railway tracks, roadbeds, and switches complained of in plaintiff's petition on said street by virtue of and under the authority conferred and granted to it

after the fire, and distinctly disavowed any injury to himself.

But in *Gates v. Comstock*, 107 Mich. 546, 65 N. W. 544, although the defendant was apparently a mere intruder, or at least, was not connected with the legal title, the court said that, in order to maintain trespass, one must have the legal title or be in actual possession of the premises; and that a vendee in a land contract who had neither actual nor constructive possession could not maintain the action. In this case, however, the plaintiff, at the time of the trespass, merely held a license to enter upon the land for the purpose of cutting timber, from one who had an executory contract for the purchase of the land; and it is expressly stated that he could not cut or allow the timber to be cut without the consent of his licensor (the purchaser under the executory contract). Subsequently to the trespass, the plaintiff procured an assignment both from the vendor and the purchaser; but, as it was not alleged in the declaration, he could not rely thereon.

And in *Olson v. Minnesota & N. W. R. Co.* 89 Minn. 280, 94 N. W. 871, it was held that a purchaser under an executory contract, entitled by implication to the right of possession, but not in actual possession, could not maintain an action of trespass *quare clausum* against defendant, apparently a mere intruder, for the reason that the constructive possession was in the vendor, as the owner of the legal title, if no other person was in actual possession. The court cited in support of its decision *Moon v. Avery*, 42 Minn. 405, 44 N. W. 257, but that case merely held that the plaintiff could not maintain an action of trespass committed before he acquired the title to the property, and at a time when, so far as appears, he had neither actual possession nor equitable title.

In *Gilbert v. McDonald*, 94 Minn. 289, 110 Am. St. Rep. 368, 102 N. W. 712, the right of plaintiff to maintain an action for trespass committed by mere intruders while the plaintiff had an equitable or inchoate title by virtue of the filing of an application for a specific tract of land under a

soldier's additional homestead certificate was upheld. And under similar circumstances the right to maintain an action for conversion of logs was sustained in *Hastay v. Bonness*, 84 Minn. 120, 86 N. W. 896. But in these cases the patent had issued from the government subsequently to the trespass, and was held to relate back to the date of the application.

In *Newman v. Mountain Park Land Co.* 85 Ark. 208, 122 Am. St. Rep. 27, 107 S. W. 391, the right of one who, at the time of the alleged trespass, was merely a vendee under an executory contract, and not in actual possession, to maintain an action of trespass under the statute to recover treble damages against the vendor and a third person, was denied upon the ground that to entitle one to maintain an action of trespass to realty he must have the legal title to, or be in actual possession of, the land. It was held, however, that the action could be maintained against the vendor as an equitable action for waste upon removal to the chancery court, but that the third person was not a party to the action. It will be observed that one of the defendants in this case was the vendor, and the other defendant was perhaps acting under the vendor's authority. The court might perhaps have ruled otherwise as to the right to maintain trespass if the defendants had been mere intruders without title.

The right of the owner of the equitable title, not in actual possession, to maintain an action of trespass, is also denied in *Van Buskirk v. Dunlap*, 2 Ohio Dec. Reprint, 233. The defendant in this case was apparently a mere intruder. The damage was apparently one to the freehold, or a permanent damage, though the decision is not expressly limited to such a case.

See also note in 47 L.R.A. 638, for other cases on the question whether the equitable title will draw to itself the constructive possession, so as to enable the holder thereof to maintain the action.

When, as in *FOSTER LUMBER CO. v. ARKANSAS VALLEY & WESTERN R. CO.*, the owner of the equitable title, though in actual possession, seeks to maintain an action

under the ordinance of the city of Perry, granting it the right to build upon said street a railway. Plaintiff introduced evidence to sustain the allegations of its complaint, and rested its case. Thereupon defendant demurred to the plaintiff's evidence, which was sustained, and judgment rendered for defendant. A further statement of facts will appear in the opinion of the court.

Messrs. H. B. Martin and D. M. Tibbetts for plaintiff in error.

Messrs. James B. Diggs and Flynn & Ames for defendant in error.

Hayes, J., delivered the opinion of the court:

Plaintiff introduced in evidence in sup-

port of its allegation of ownership of said lots a deed from Timothy McGrath, Amos B. Fitts, and Fred L. Bailey, as trustees for the town site of Perry, Oklahoma, to Thomas S. Foster, of date the 2d day of April, 1895, conveying to the said Thos. S. Foster lots 7 and 8, in block 46, in the city of Perry, and being the lots involved in this action, and further introduced in evidence a deed of date the 25th day of July, 1896, from Thos. S. Foster, conveying said lots to Benj. B. Foster. The deposition of Benj. B. Foster was then read in evidence, by which it was proved that about the time of the opening of the town site of Perry, said Thos. S. Foster and Benj. B. Foster, as a partnership, were engaged in the lumber business in the city of Perry; that said

for permanent injuries to the property, the equitable title must be invoked and relied on, since the actual possession alone would not be sufficient to sustain the action, even as against a mere wrongdoer. The distinction in this respect between an action for injury to the possession and an action for permanent injury to the freehold is clearly indicated by *McKenzie v. Ohio River R. Co.* 27 W. Va. 306, where it is said that the wife's actual possession of the property would of itself have entitled her alone to recover for a mere nuisance or disturbance of the possession, without joining her husband; and her equitable title to the fee, under a conveyance directly from her husband to her, which, by the local statute, only gave her an equitable estate, was sufficient to support the action by her for a permanent injury to the freehold. To the same effect is *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883, 27 S. E. 368.

In *McDonald v. Bear River & A. Water & Min. Co.* 13 Cal. 220, 1 Mor. Min. Rep. 626, it was held that an instrument, insufficient to pass the legal title, because not under seal, created an equitable interest, which, being united with the present possession, enabled the grantee to maintain an action for an interruption of the possession or any injury to the property.

And the right of the vendee in actual possession of land under an executory contract, to maintain an action against the wrongdoer for permanent injury, is upheld in *Hueston v. Mississippi & R. River Boom Co.* 76 Minn. 251, 79 N. W. 92 (injury by boom causing overflow of land); *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123, 16 N. W. 762; *Omaha & R. Valley R. Co. v. Brown*, 29 Neb. 492, 46 N. W. 39; *Gartner v. Chicago, R. I. & P. R. Co.* 71 Neb. 444, 98 N. W. 1052 (damage by railroad embankment); *Gotshall v. J. Langdon & Co.* 16 Pa. Super. Ct. 158 (trespasser mining coal on land); *Virginia R. Co. v. Jeffries*, 110 Va. 471, 66 S. E. 731 (damage by railroad embankment).

In the *Hueston Case*, the court said: "The plaintiff was rightfully in possession under his contract, the terms and conditions 30 L.R.A. (N.S.)

of which he had kept and performed up to that date. He was the equitable owner of the land, and the vendor held the legal title merely as security for the deferred payments of the purchase money. Upon full performance of his contract plaintiff was entitled to the conveyance of the property. The general rule is that damages in an action of trespass upon real property may be such as are appropriate to the tenure by which the plaintiff holds. Possession alone will entitle him to recover damages for any injury solely affecting it. . . . In this case, the injury is wholly to plaintiff. He will have to pay his vendor the full contract price, notwithstanding that the premises may have been depreciated in value by the trespass."

In *Honsee v. Hammond*, 39 Barb. 91, upholding the right to maintain the action for injury to the possession, the court said it was unnecessary to inquire whether the plaintiff, who was in actual possession as holder of an executory contract, was entitled to recover for an injury to the freehold.

In *Virginia R. Co. v. Jeffries*, supra, it was further held that, the contract having been performed subsequently to the injury, the wrongdoer could not take advantage of the fact that, at the time of the trespass, it could not have been enforced against the vendor if the latter had objected.

Wrightsville & T. R. Co. v. Holmes, 85 Ga. 668, 11 S. E. 658, merely denies the right of a husband and wife to maintain jointly an action of trespass to recover for a damage to the freehold, where the husband purchased the land with money belonging to the wife, and took the deed to himself. The court did not pass upon the right of the wife, as the equitable owner, to maintain an action in her own name.

But the right of a vendee in possession under an executory contract which did not give him any possessory interest in the land, to recover against a stranger for damages to the freehold, was denied in *Des Jardins v. Thunder Bay River Boom Co.* 95 Mich. 140, 54 N. W. 718, upon authority of *Moyer v. Scott*, 30 Mich. 345 (cited in the earlier note).

partnership occupied said lots as a lumber yard during the existence of the partnership; that later there was organized the Foster Lumber Company, a corporation, to whom was sold all the property and assets, including the real estate, of the partnership theretofore composed of Thos. S. Foster and Benj. B. Foster; that from the time of the opening of the town site of Perry, said lots had been occupied either by the partnership or by the plaintiff in this action; that while the deed to said lots was taken in the name of Thos. S. Foster, who afterwards conveyed the same to Benj. B. Foster, the purchase price of same was paid out of the funds of the partnership, and that said lots never, in fact, belonged to either of the Fosters, but were at all times the property of the partnership, and that, when the assets of said partnership were sold to the Foster Lumber Company, plaintiff in error, said lots were sold to and became the property of said Foster Lumber Company, but that no deed of conveyance was ever executed by Benj. B. Foster to the plaintiff; that the Foster Lumber Company paid for all the improvements on the lots, which amounted to something over \$1,000, and that said company had paid the taxes thereon. To the introduction of this testimony defendant objected. The court at the time sustained the objection as to part of same, and later, upon motion of defendant, struck out all that part of the deposition that tended to prove that plaintiff was the owner of said lots, and that, while the legal title to the same was in Benj. B. Foster at the time the alleged damages were sustained and at the time of the trial, he had no interest whatever in said lots; that he had never occupied or been in possession of the same; and that said lots had

been paid for by plaintiff, and had been occupied by it as a lumber yard for a number of years.

To the action of the court rejecting said evidence, plaintiff in error makes its first assignment of error. The question presented by this assignment of error resolves itself into the proposition whether an action for damages to real property may be maintained by the holder of the equitable title. If it cannot, then said evidence was incompetent. The evidence offered by plaintiff and excluded by the court tended to prove that Benj. B. Foster held at the time of the trial and at the time of the alleged injuries involved in this action the legal title to said lots as the trustee in resulting trust for the benefit of the plaintiff. It is contended by defendant in error that this action, being for the recovery of permanent injuries or damages to the freehold, cannot be maintained by any other person than the one holding the legal title to the property injured. Sutherland on Damages, § 1012, says: "Damages in this action [referring to an action for trespass] may be such as are appropriate to the tenure by which the plaintiff holds, and such as result from the injury suffered. Possession alone will entitle him to recover damages for any injury solely affecting it. If he seeks to recover for the future, he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right, unless he holds in such relation to the other parties interested that his recovery will bar their claim." In the case of *Houston v. Mississippi & R. River Boom Co.* 76 Minn. 251, 79 N. W. 92, the plaintiff sought to recover damages resulting to a certain mill and lands adjacent thereto by reason of the de-

As to whether the equitable title will sustain an action for permanent injury or injury to the freehold, see also the case cited in the note in 47 L.R.A. 639.

The question as to the effect of the equitable title to sustain the action also arises where the action is against the owner of the legal title, or one claiming under him.

Thus, a vendee who goes into possession under an executory agreement is but a tenant at will, and cannot maintain ejectment or trespass against the vendor, or one taking title from him. *Bick v. Hill*, 27 Mo. App. 554; *Richardson v. Thornton*, 52 N. C. (7 Jones, L.) 458.

But in *Skinner v. Terry*, 134 N. C. 305, 46 S. E. 517, it was held that the equitable title of the purchaser under a decree for specific performance would have entitled him to maintain an action against the vendor for possession of the land, or for trespass thereon, and would, therefore, enable him to maintain an action for an injury to his possession against one who claimed under a deed from the vendor, sub-30 L.R.A. (N.S.)

sequently to the rendition of the decree. See further on this point, the cases cited in the note in 47 L.R.A. 637.

In *Ruggles v. Nantucket*, 11 Cush. 433, the court said that even assuming that a full and clear equitable title would enable one to maintain an action against a town for the destruction of a house to prevent a fire, under a statute giving such right of action to the "owner," yet that one who merely held a parol contract for the land, under which he would be entitled to a deed upon payment of the entire purchase money, only part of which had been paid, was not the equitable owner, and could not maintain the action. See also cases cited in note in 47 L.R.A. 639.

Cases like *Brown v. Arkansas C. R. Co.* 72 Ark. 456, 81 S. W. 613, and *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201, as to the equitable owner's right to compensation when the land is taken for a public use, are, of course, not within the scope of this note.

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defendant's having built on an island in the Mississippi river a short distance below plaintiff's lands a boom for the purpose of catching logs, thereby causing the river to overflow plaintiff's land, and to break into his mill, and to greatly injure his land and mill. The evidence developed that the plaintiff occupied the land at the time the injury was suffered as the vendee under an executory contract of sale. Defendant denied plaintiff's right of recovery on the ground that plaintiff did not possess the legal title to the property injured, and contended that the right of recovery for same, if any, was in his vendor. The court held that plaintiff could recover both for the injuries to the land and to the mill, and, commenting upon same, said: "The general rule is that damages in an action for trespass upon real property may be such as are appropriate to the tenure by which the plaintiff holds. Possession alone will entitle him to recover damages for any injury solely affecting it. If he seeks to recover for the future, he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right, unless he holds in such relation to other parties interested that his recovery will bar their claim. . . . In this case the injury is wholly to plaintiff. He will have to pay to his vendor the full contract price, notwithstanding that the premises may have been depreciated in value by the trespass. . . . Whether he could in equity impound the damages recovered in this action if the injury to the premises was so great as to leave them inadequate security for the unpaid instalments of purchase money, it is unnecessary now to inquire."

It was held in *McKenzie v. Ohio River R. Co.* 27 W. Va. 366, that the plaintiff, who held the equitable title to certain real estate, could maintain an action for damages thereto with or without her husband, in whom was the legal title, joining in the action. The rule announced in that case was adopted by the same court in the case of *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883, 27 S. E. 368, in which case the court holds that, where a conveyance of land has been made to a trustee for the benefit of the wife of another person, by which she is permitted to have the possession and use of said land, although she is vested with only an equitable title, she and her husband or she alone may maintain an action for trespass to both possession and the inheritance. In *Hastings & G. R. Co. v. Ingalls*, 15 Neb. 123, 16 N. W. 762, the plaintiff in the court below sought to recover damages from the defendant for building its road, for use as a

railway, upon a public road a portion of which was on plaintiff's land, thereby imposing additional burdens upon the land of plaintiff. It developed in the progress of the trial that the legal title to the property at the time of the alleged injury was in another person than the plaintiff; that plaintiff occupied the same under a contract for purchase, and was at said time in default of payment on his contract; and that his contract, under which he held and was in possession of said land, was subject to forfeiture. The vendor, in whom the legal title existed, however, had not taken advantage of the default. The defendant in the court below insisted that no recovery could be had because defendant in error had not the legal title at the time the injury occurred, and did not have the legal title at the time of the trial. The court held in that case that defendant in error was entitled to recover; that, at most, there was a defect of parties; and that, no objection having been raised by the pleadings to such defect of parties, the same was waived. The same rule was adopted by the supreme court of Nebraska in *Omaha & R. Valley R. Co. v. Brown*, 29 Neb. 513, 48 N. W. 46, in which case the court said: "It would be very strange, indeed, if the purchaser of real estate who, in equity, is treated as the owner, should be powerless to protect his rights in case his real estate, held under a valid contract, was injured; but such is not the law." And the same court in *Gartner v. Chicago, R. I. & P. R. Co.* 71 Neb. 444, 98 N. W. 1052, held that one who is in possession of real estate under a contract with the owner for the purchase thereof has sufficient title to maintain an action for damages to the land. That a person holding the equitable estate in land may maintain an action for injury to the freehold has been held in the following cases: *Miller v. Zufall*, 113 Pa. 317, 6 Atl. 350; *Cleaveland v. Grand Trunk R. Co.* 42 Vt. 449; *Rood v. New York & E. R. Co.* 18 Barb. 80; *Russell v. Meyer*, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262; *Chouteau v. Boughton*, 100 Mo. 406, 13 S. W. 877.

The facts offered to be proved by that part of the deposition of Benj. B. Foster excluded by the court would have established that Benj. B. Foster had the naked legal title to said lots as a trustee in resulting trust in favor of the plaintiff in this action. Plaintiff was in possession, and had been ever since it was organized as a corporation, and had paid the purchase price of said lots, paid for the improvements thereon, and paid the taxes. Benj. B. Foster had never been in possession. Whatever injury occurred to said property, resulting

in the depreciation in the value thereof, was the loss of the plaintiff. Whatever increase in the value of the same might occur would be the gain of the plaintiff. The plaintiff is the real party in interest, and in equity would be regarded as the owner of the lots, and a judgment in its favor in this case could be pleaded by defendant in an action against it by the said Benj. B. Foster, upon proof of the facts offered to be proved by the plaintiff, as a bar to a recovery by Benj. B. Foster. While it would have been better practice to have made the person holding the legal title a party to the suit, not having done so does not defeat the right of recovery of the plaintiff in this action, and the action of the court in rejecting said evidence was error.

The evidence introduced by plaintiff established that its lots fronted on A street, in the city of Perry, and that the same had been occupied and used as a lumber yard by plaintiff for several years; that the defendant had built upon A street in front of said lots its main line of railway and four switch tracks; that the nearest track of said railway was 10 feet from the door of the building on plaintiff's lots. The evidence further establishes that said lots are located on a corner; that on the south side of same is Seventh street, but that said street is not passable on account of there being a creek across same, over which there is no bridge; that the space between plaintiff's property and the nearest railroad track was not sufficient for teams to go in and out. There is no evidence in the record disclosing what right defendant had to build its railway track upon A street, or whether any permission had been granted it by the city of Perry to build the same upon said street; but it appears from the record that the case was tried in the court below upon the theory that authority had been obtained from the city of Perry by the defendant to construct its railroad upon said street, and such is the theory of the case as presented by the briefs of both parties filed in this court, and we shall therefore consider the case upon the theory upon which it was tried in the court below and as presented in the briefs of the parties.

It is contended by plaintiff that defendant, by constructing its tracks of railway, the nearest of which is within 10 feet of plaintiff's property, has greatly obstructed and injured its means of ingress and egress to and from its said lots, and has rendered the same unfit for business purposes, and for the purposes for which plaintiff was using them, and that, on account of such obstruction to plaintiff's means of ingress and egress to and from its lots, the same

have been greatly diminished and depreciated in value, and that such acts of defendant constitute a "taking" of plaintiff's property. Plaintiff has, by virtue of its ownership of said lots, an interest in A street on which said lots abut, and a right therein common with the public to pass over the same as a public highway. In addition thereto, it has a special right in said street, not common to the public, to wit, the right of ingress and egress over the same, to and from its lots. The decisions of the courts, made under statute or constitutional provision, to the effect that the complaining party can recover only where there is a "taking of private property for public use," are nearly uniform on the question that, where the injury complained of by the abutting property owner is one that is common to the general public, such injury is *damnum absque injuria*. The decisions of the courts, however, are by no means uniform upon what constitutes a "taking" of property in cases similar to the one at bar, but we believe the weight of the better authorities, if not the greater in number, is that such a "taking" may result without conversion of the property or any part thereof, as under statutes and constitutional provisions which provide that private property shall not be taken for public use without compensation. Some of the courts have held that, where no conversion of the property is made, there must be a physical injury to the same, or a physical invasion thereof, before a right of recovery exists. Chicago, B. & Q. R. Co. v. McGinnis, 79 Ill. 269.

The Supreme Court of the United States in *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557, held that it is not necessary that property should be taken in the narrow sense of the word to bring the case within the protection of a statute or a constitutional provision that private property cannot be taken for public use without compensation. The court held in that case that there may be such a serious interruption to the common and necessary use of property as will be equivalent to a "taking." In that case the interruption to the common and necessary use of the property complained of was that the defendant had built a dam across a river which formed the outlet of a lake, by which dam the waters of the lake were raised so high as to overflow the land of plaintiff, and to tear up his trees and grass by the roots, and wash them, with his hay thereon, away, and to choke up the ditches on the land, and to saturate some of his land with water, and to dirty and injure other parts thereof by leaving thereon deposits of sand. The facts in that case do

not establish a "taking" of the property in the narrow sense of the word. The injury sustained for which a recovery was sought in that action was a physical injury to the land. But we do not understand the court in holding that a recovery could be had therefor to limit the injury for which a recovery may be had to a physical injury where there is a "taking" of the property in the narrow sense of the word. On the other hand, the reasoning of the court in that case is that the test by which it may be determined whether there has been a "taking" is not the manner in which the injury was done, but whether one's common and necessary use of his property has been seriously interrupted. Plaintiff in the case at bar, by virtue of its ownership of said lots, had the right of access over A street to the same. Such right is one peculiar to itself, in which the general public has no interest, and exists in the nature of an incorporeal hereditament attached to said lots, and is a valuable property right,—one that, under some circumstances, may constitute the greater element of value of the abutting property, and is one that cannot be taken away or materially impaired without compensation. *Elliott, Railroads*, ¶ 1085. In *Reining v. New York, L. & W. R. Co.* 128 N. Y. 157, 14 L.R.A. 133, 28 N. E. 640, a case in which the defendant had built a railroad upon a street, several feet high, with perpendicular walls, leaving a space of only about 8 or 9 feet for carriage way between said walls and the plaintiffs' property, the New York court of appeals held that the owners' right of ingress and egress to and from such abutting property had been substantially closed against them for ordinary street purposes, and that they were entitled to recover. The right of the abutting property owner to access over the street adjacent to his property, as an appurtenance to his property, and to have such access protected from material obstruction, has been recognized by many of the courts, and it has been held by such courts that an obstruction that materially injures or deprives the abutting property owner of ingress and egress to and from his property over the street is a "taking" of his property, for which recovery may be had. *Newport & C. Bridge Co. v. Foote*, 9 Bush, 265; *Parrot v. Cincinnati, H. & D. R. Co.* 10 Ohio St. 625 (in this latter case the obstruction was 20 feet from plaintiff's property); *Protzman v. Indianapolis & C. R. Co.* 9 Ind. 467, 68 Am. Dec. 650; *Central Branch Union P. R. Co. v. Twine*, 23 Kan. 585, 33 Am. Rep. 203; *Central Branch Union P. R. Co. v. Andrews*, 26 Kan. 702; *Chicago, K. & W. R. Co. v. Union Invest. Co.* 51 Kan. 600, 33 Pac. 378; *Ft. Scott, W.* 30 L.R.A.(N.S.)

& *W. R. Co. v. Fox*, 42 Kan. 490, 22 Pac. 583; *Cincinnati & G. S. Ave. Street R. Co. v. Cumminsville*, 14 Ohio St. 524; *Weatherford v. Com.* 10 Bush, 196; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L.R.A. 493, 12 Am. St. Rep. 644, 39 N. W. 629; *Lamm v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 73, 10 L.R.A. 268, 47 N. W. 455; *Abendroth v. Manhattan R. Co.* 122 N. Y. 1, 11 L.R.A. 634, 19 Am. St. Rep. 461, 25 N. E. 496. The supreme court of the territory of Oklahoma in the case of *Scrutchfield v. Choctaw, O. & W. R. Co.* 18 Okla. 308, 9 L.R.A.(N.S.) 496, 88 Pac. 1048, recognizes, we think, the correct rule of law governing in cases similar to the case at bar. In the syllabus of that opinion, the court says: "The location and operation of a railroad upon a public highway may occasion incidental inconvenience and injury to an abutting landowner, but until it cuts off or materially interrupts his means of access to his property, or imposes some additional burden on his soil, his injury is the same in kind as that suffered by the community in general, and he cannot recover in an action therefor." Mr. Justice Gillette, who delivered the opinion of the court, further said in the opinion: "Every person has the same interest and right in a public street or thoroughfare that any other person has, except that property owners have a special right of ingress and egress to their property from the street, which right may not be taken from them without just compensation, because this is an injury peculiar to the particular property owners so affected." If the evidence in this case fairly tended to show that the construction of defendant's railroad tracks in the street in front of plaintiff's property was such as to cut off or materially interrupt plaintiff's means of access to its property, such acts of the defendant amounted to a "taking" of plaintiff's property, for which defendant would be liable. The evidence establishes that the nearest track of the railway lies within 10 feet of plaintiff's property line; and, while there is no evidence as to the width of the sidewalk next to the property of plaintiff nearest the railway track, there is evidence that the space between said track and the property of plaintiff is too narrow for teams to go in and out. Since there was some evidence that plaintiff's means of ingress and egress to and from its property over A street had been materially interrupted, it was for the jury to find whether such right of plaintiff had been materially impaired.

It is suggested by defendant in error that the lumber company has a means of access to its property over Seventh street, adjoining its property on the south. The deci-

sions of the courts upon the right of the abutting property owner to recover where his access is obstructed on one street, but where he has a means of access from another street, are not uniform. Some courts have held both ways upon this proposition. In the case of *Kansas, N. & D. R. Co. v. Cuykendall*, 42 Kan. 234, 16 Am. St. Rep. 479, 21 Pac. 1051, the supreme court of Kansas held that where the abutting property owner's ingress and egress was obstructed on one street, but he had a means of access from another street, there was no right of recovery. In this opinion all the justices concurred. In the case of *Ft. Scott, W. & W. R. Co. v. Fox*, supra, the same court held, all the justices concurring, that an abutting property owner is entitled to recover his damages for the permanent appropriation of the street in front of his property, although it is accessible from another street. We can see no reason that will justify the taking of one's special property right in one street because he may have a special property right in another street. If the plaintiff's property in this case is situated upon a corner of the block, and therefore adjacent to two streets, he has a right of ingress and egress to and from said property over both streets; and he who obstructs this access from one street, and deprives the owner of the property of such property right, cannot relieve himself of liability by pleading that the owner of the property may reach his property from another direction. The accessibility of one's property may in some instances constitute a great part of its value, and to permit a material impairment of his access would result in the destruction of a great part of the value of his property, and his property is therefore as effectually taken as if a physical invasion was made thereon and a physical injury done thereto.

There is some evidence tending reasonably to establish the material averments alleged in plaintiff's cause of action, and, if plaintiff had been permitted to prove its ownership of the property, there was sufficient evidence to go to the jury; and the cause will be reversed and remanded.

Williams, Ch. J., and Dunn and Kane, JJ., concur.

Turner, J., concurs in the result.

A petition for rehearing having been made **Hayes, J.**, on March 9, 1909, filed the following additional opinion:

We are asked, on rehearing in this case, to reverse the opinion rendered by this court on the original hearing (20 Okla. 583, 95 Pac. 224), for the reason that it 30 L.R.A. (N.S.)

conflicts with the following decisions of the Supreme Court of the United States: *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, and *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48. The decisions of the Supreme Court of the United States upon rules of law were controlling upon the courts of the territory of Oklahoma at the time this case originated and was tried in the lower court; and, if the decisions of that court above cited are applicable to the case at bar, and the opinion heretofore rendered by us is in conflict with them, then our former opinion should be reversed, and the judgment of the trial court affirmed.

In *Northern Transp. Co. v. Chicago*, supra, the damages sustained by the abutting property owner resulted from the construction by the agents of the city of a tunnel along one of its streets under the Chicago river, where the river crossed said street. In the construction of the tunnel, the city authorities materially obstructed the abutting property owner's access to his property from the street and his access to the river, which his property adjoined. The court held that for this obstruction to his access the law afforded him no remedy, for the reason that such obstruction, caused by the act of the city in making public improvements, was not a taking of private property for public use. In the cases of *Gibson v. United States* and *Scranton v. Wheeler*, supra, the interference with the riparian owner's access to the navigable waters resulted from public improvements made by the government or its agents. In each of these cases the improvements were made by the government, solely for public use, and the effect of the opinions of the court in these cases is that the private right of the riparian owner to access to the navigable stream which his land adjoins is subordinate to the public right, that such right of access is subservient to the public right of navigation, and the control of Congress over that right, and that if an injury occurs to his means of access, by public improvements made by Congress in the exercise of its right to improve navigable streams, no violation of any right to him occurs, for the reason that such right of access ceases the moment it comes in conflict with the rights of the government to control navigable streams. But none of these decisions holds that the abutting owner's right of access is subordinate to the right of a railway company which constructs a steam railway upon a street, under legislative authority; and although this case has been reargued upon rehearing,

and ably and exhaustively rebriefed by counsel, no decision of the Supreme Court of the United States in which it has been held that the abutting owner's access to his property may be destroyed in such manner without compensation has been called to our attention, in which that court was uncontrolled by a rule of property of a state court, and we think none exists. There are decisions, however, from that court, which follow the rule of property of state courts, and hold that damages cannot be recovered where the construction of the railroad interferes with the access of the abutting owner, where the title to the street is in the public. *Meyer v. Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106, is one of such cases. That case arose in the courts of Virginia, and was an action for damages resulting from the obstruction of an abutting owner's access to a street by a railroad built upon the street, not in front of the abutting property, but across the street, to the north of it. The supreme court of appeals of Virginia held that such obstruction was not a taking under the Constitution and laws of Virginia, and this construction by the court of that state of the Constitution and laws of that state was, as to the Supreme Court of the United States, a rule of property which that court did not undertake to review. Mr. Justice McKenna, who delivered the opinion of the court, uses the following language: "The substantial thing is not that one may be damaged by an obstruction in a street,—not that one may be specially damaged beyond others,—but is such damage a deprivation of property, within the meaning of the constitutional provision? According to the Virginia cases, an additional servitude may be said to be another physical appropriation, and hence another taking, and must be compensated. But the plaintiff's case is not within this doctrine, nor is there anything in the decisions of Virginia which make consequential damages to property a taking, within the meaning of the Constitution of that state. Decisions in other states we need not resort to or review. Those of this court furnish a sufficient guide. *Northern Transp. Co. v. Chicago*, supra; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820; *Marchant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 906, 17 Sup. Ct. Rep. 578."

If the language quoted, referring to other cases of the Supreme Court of the United States, can be construed as an expression that the rule of that court in those cases is in harmony with the court of Virginia in holding that the obstruction to the access

of the abutting owner is not a taking, then we have an expression of the Supreme Court of the United States which appears to indicate that the cases of *Northern Transp. Co. v. Chicago* and *Gibson v. United States* establish the rule contended for by defendant in error in this case; but our construction of the language used by the court is that the intention of the court in referring to those decisions was not to indicate that the rule of property adopted by the supreme court of appeals of Virginia was supported by those decisions, but that, the supreme court of appeals of Virginia having held that the abutting owner had no right of access in the street which constituted property which could be taken in the manner complained of, then such damages as were sustained by the abutting owner were consequential damages, and that the cases cited support the rule that consequential damages do not constitute a taking of property. In discussing this question, in one of the cases referred to, the court said: "The first proposition asserted by the plaintiff, that her private property has been taken from her without just compensation having been first made or secured, involves certain questions of fact. Was the plaintiff the owner of private property, and was such property taken, injured, or destroyed by a corporation invested with the privilege of taking private property for public use? The title of the plaintiff to the property affected was not disputed, nor that the railroad company was a corporation invested with the privilege of taking private property for public use. But it was adjudged by the supreme court of Pennsylvania that the acts of the defendant which were complained of did not, under the laws and Constitution of the state, constitute a taking, an injury, or a destruction of the plaintiff's property. We are not authorized to inquire into the grounds and reasons upon which the supreme court of Pennsylvania proceeded in its construction of the statutes and Constitution of that state; and, if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason." [172 U. S. 98.] In determining, therefore, whether there is a difference between the abutting owner's right of access as against a railway corporation constructing its railroad upon the street, under legislative authority, and between such abutting owner's rights and the right of the public or of the government to improve the street for public purposes, we are compelled

to resort to reason and decisions of the state courts for answer.

It is the doctrine of the courts of nearly all the states that an abutting property owner cannot recover for damages to his property resulting from change of grade in the street, made by the municipal authorities, under authority of law, where there is no physical injury to his property. His right in the street is subject to the right of the public to grade and improve it for a public highway, and the injury he sustains therefrom is not a taking. And this doctrine prevails whether the fee is in the abutting owner or in the public. 1 Lewis, Em. Dom. 2d ed. § 96, and *Sauer v. New York*, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686. Two classes of cases have arisen in the courts under statutory or constitutional provisions similar to the one now under consideration. The first class consists of those cases where the title to the street was in the abutting owner, and the second class consists of those cases where the title to the street was in the public. There are some cases that hold that an abutting owner who owns the title to the street cannot recover the damages he sustains from the building of a railroad on the street in front of his property, where it is built under legislative authority (*Perry v. New Orleans*, M. & C. R. Co. 55 Ala. 413, 28 Am. Rep. 740; *Mercer v. Pittsburgh*, Ft. W. & C. R. Co. 36 Pa. 99; *Snyder v. Pennsylvania R. Co.* 55 Pa. 340); but the doctrine of these cases is against the weight of authority (§ 115, 2d ed. 1 Lewis, Em. Dom.). The reasoning of the courts upon which they have established the general rule that, where the fee is in the abutting owner, there is a taking, is not uniform. Many of the courts place it upon the ground that the location of the track of a railroad upon a street is an additional burden and servitude upon the owner's land, for which he is entitled to additional compensation. Other courts place it upon the ground that it is an exclusive appropriation by the railroad company of the soil of the street to its own use, and that, since the owner of the title has the right of use of the soil for all purposes not inconsistent with the easement in favor of the public, the act of the railroad company in placing its tracks upon the street is a taking, and compensation is allowed. But the courts, upon whichever ground they place the right of recovery, as a rule permit the recovery, not only for the additional burden or servitude upon the land of the abutting owner in the street, or for the taking from him the use of the soil of the street, to which he has the right to use except so far as it in conflict with the right of the

public, but to recover also for depreciation in the value of his abutting property.

We do not, however, refer to this class of cases to discuss the reasoning upon which the courts have permitted abutting property owners to recover, but that it may be noticed that the decided weight of authorities, where the abutting property owner owns the fee to the street, makes a distinction between his right of ingress and egress over the street as against the public, and his right therein as against a railway company, building upon the streets under authority of law. His right as to the public is a subservient right, but as to the railway company it is a superior right, which may not be materially interfered with or destroyed without compensation. There is, however, great conflict among the decisions of the second class, to which the case at bar belongs, and in some instances the decisions of the same court are irreconcilable. In some of the states the rights of the abutting owner in the street, the title to which is in the public, are regarded as of the same degree as those of the public, and no recovery is permitted for interfering with his right of egress and ingress over the street to his property, where such interference occurs from the construction of a railroad upon the street, under legislative authority; but the doctrine of the courts in all the following cases is sufficiently broad to permit a recovery where the abutting property owner's access to the street is destroyed or materially obstructed or interfered with: *Reining v. New York*, L. & W. R. Co. 128 N. Y. 157, 14 L.R.A. 133, 28 N. E. 640; *Leavenworth, N. & S. R. Co. v. Curtan*, 51 Kan. 432, 33 Pac. 297; *Atchison, T. & S. F. R. Co. v. Davidson*, 52 Kan. 739, 35 Pac. 787; *Willamette Iron Works v. Oregon R. Co.* 26 Or. 224, 29 L.R.A. 88, 46 Am. St. Rep. 620, 37 Pac. 1016; *White v. Northwestern North Carolina R. Co.* 113 N. C. 610, 22 L.R.A. 627, 37 Am. St. Rep. 630, 18 S. E. 330; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L.R.A. 493, 12 Am. St. Rep. 644, 39 N. W. 629; *Lamm v. Chicago*, St. P. M. & O. R. Co. 45 Minn. 71, 10 L.R.A. 268, 47 N. W. 455; *Ft. Scott, W. & W. R. Co. v. Fox*, 42 Kan. 490, 22 Pac. 583; *Central Branch Union P. R. Co. v. Twine*, 23 Kan. 585, 33 Am. Rep. 203; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Egerer v. New York C. & H. R. Co.* 130 N. Y. 108, 14 L.R.A. 381, 29 N. E. 95; *Burlington & M. River R. Co. v. Reinhackle*, 15 Neb. 279, 48 Am. Rep. 342, 18 N. W. 69; *Callen v. Columbus Edison Electric Light Co.* 66 Ohio St. 166, 58 L.R.A. 782, 64 N. E. 141; *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 285, 4 L.R.A. 735, 14 Am. St. Rep. 564, 6 So. 230; *Indiana, B. &*

W. R. Co. v. Eberle, 110 Ind. 542, 50 Am. Rep. 225, 11 N. E. 467; Pittsburgh, C. C. & St. L. R. Co. v. Noftager, 148 Ind. 101, 47 N. E. 332. There are other cases which support or recognize the doctrine of these cases, but it is unnecessary to prolong this opinion by citing them or quoting therefrom.

The cases cited are cases that arose under statutes or constitutional provisions providing that private property shall not be "taken" for public purpose without compensation. In some of the states, subsequent to the decisions cited, statutes have been enacted, or constitutional provisions adopted, which extend the terms of the statutes or constitutional provisions theretofore existing by providing that private property shall not be "taken, damaged, or injured" for public purposes without compensation. The decisions of the courts under these statutes or Constitutions as amended are not applicable to the case at bar. The reasoning upon which the courts have permitted the abutting owner to recover when his access to his property has been materially interfered with is by no means uniform. Some of them do not place it upon the ground that there has been a taking of property, but that his right has been interfered with. In some of the states the rule is broader than in others. In some the building of the road upon the street entitles the abutting property owner to recover, although the road is built upon the grade of the street; in others no right of recovery exists unless the construction of the railroad upon the street is such as to interfere with his right of access to his property; and in others there is no right of recovery unless the abutting owner's access has been entirely destroyed.

In *Reining v. New York, L. & W. R. Co.* supra, the abutting owner recovered damages resulting from the railroad company's constructing an embankment upon the street in front of his property, on which the company placed its railroad tracks. The court of appeals of New York said: "It is no longer open to debate in this state that owners of lots abutting on a city street, the fee of which is in the municipality for street uses, although they have no title to the soil, are nevertheless entitled to the benefit of the street in front of their premises for access and other purposes, of which they cannot be deprived except upon compensation. The right of abutting owners in the streets is not, however, of that absolute character that they can resist or prevent any and all interference with the street to their detriment, or which can be asserted to stay the hand of the municipality in the control, regulation, or improvement of the streets in the public interest, although it

may be made to appear that the privileges which they had theretofore enjoyed, and the benefits they had derived from the street in its existing condition, would be curtailed or impaired to their injury by the changes proposed."

The right of the abutting owner to have free access over the street to his property, and the relation of such right to the right of the public to make public improvements upon the street, and to the right of agencies acting under legislative authority, in making improvements on the street other than for the purpose of a highway or street uses, is well expressed in 1 *Lewis on Eminent Domain* (§ 91e, p. 172) in the following language: "But as all streets are established primarily for the public use and general good, the right of the public is paramount to the right of the individual. And so the private rights of access, light, and air are held and enjoyed subject to the paramount right of the public to use and improve the street for the purposes of a highway. And as these private rights are thus subject to the right of the public to use and improve as a highway, it follows that, when such uses or improvements are made, no private right is interfered with, and consequently no private property is taken. It follows also that, as these private rights are subject only to the use and improvement of the street by the public for the purpose of a highway, an interference with these rights by the use or improvement of the street for any other purpose, or by any other agency, under legislative authority, is a taking of private property to the extent of such interference."

The three cases from the Supreme Court of the United States relied upon by defendant in error in its petition for rehearing, which have been referred to supra, are cases in which the riparian owner's access to the navigable stream, or the abutting property owner's access to the adjoining street, were interfered with by improvements made by the public, and for the purpose of improving either the navigable stream or the street as a highway. The same author, in the sentence preceding the above quotation, says: "Numerous cases, decided since the first edition of this work, establish beyond question the existence of these rights or easements of light, air, and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves." This language is quoted with approval by the Supreme Court of the United States in *Muhlker v. New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522. That case, as well as others announcing the doctrine, is often referred to as the "Elevated Railroad

Cases," and supports the doctrine that the abutting owner's easements of light and air may not be interfered with by the construction of an elevated railroad in the street in front of his property, under legislative authority, without compensation. Able counsel for defendant in error contend that the rule in this class of cases is not applicable to the case at bar, and we are aware that there are expressions from some of the courts that such is the case, but to our minds it is mockery to say that a railway company, acting under legislative authority, may not take away or interfere with the abutting owner's easements of light and air without compensation, but that the same company may, without compensation to the abutting owner, construct upon the street in front of his property obstructions that destroy, or materially interfere with, his access to his property, the very means by which he may enjoy the other easements which the court holds the law protects him in the enjoyment of from the interference of such railway company, or other agencies, acting under legislative authority. On this subject Mr. Lewis, in his work on Eminent Domain (vol. 1, p. 233), says: "Highways are established to accommodate the public in traveling from place to place. From time immemorial, prior to the discovery of steam, they were for the common use of every citizen, by any means of locomotion he chose to select. They were not used by one person in any way which was not open to all. No one had a private right or any exclusive privilege therein. It was free to all upon like conditions. Such being the character of the public highway, it was subject to use by any new means of locomotion which could be employed by all the public, and was not destructive of the old methods of travel. A carriage propelled upon the ordinary surface of the road by steam or electricity would be just as legitimate as a carriage drawn by horses. Such use would be equally open to every citizen. The railroad does not fall within the scope of such uses. It requires a permanent structure in the street, the use of which is private and exclusive. It gives to an individual or corporation a franchise and easement in the street, inconsistent with the public right. To hold that a railroad is one of the proper and legitimate uses of a street leads to the absurd consequence that a street might be filled with parallel tracks which would practically exclude all ordinary travel, and still be devoted to the ordinary uses of a highway."

The fee in the street, in the case at bar,
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is in the public for street uses, and upon a vacation of said street, the same would become the property of plaintiff. *Blackwell, E. & S. W. R. Co. v. Gist*, 18 Okla. 516, 90 Pac. 889. The construction of a steam railway upon the street, although a public use, and made by a private corporation engaged in a public service, is not a legitimate street use. It is true that the legislative department of a state may grant to a steam railway company the right to construct its tracks upon the streets of a city, or, as in this case, a municipality, under authority from the legislature, may grant such right, but such authority granted relieves the company only from liability to suits, civil and criminal, by the public, and does not authorize it to interfere with any of the private property rights of the abutting owners. It has only the effect to make that legitimate which would otherwise be a nuisance and actionable as such. If railway tracks are constructed under legislative authority, upon the surface of the street, at the grade thereof, and the abutting owner's means of access are not materially interfered with, he cannot complain; but if, as in this case, where five tracks of railroad have been constructed in the street in front of plaintiff's property, the nearest of which is so near the property line of plaintiff that teams cannot pass each other, and so constructed, according to the testimony of one witness, as to render it almost impossible for plaintiff's lumber yard upon its property to be reached by vehicles, the railway is so constructed as to destroy, or materially interfere with, the abutting owner's means of ingress and egress to and from his lot, and the value thereof is destroyed or depreciated from such cause, its property is as effectually taken as if a physical invasion had been made. We cannot say that the conclusion here reached is, numerically speaking, supported by the weight of the decisions from the state courts; but, in the absence of any decision from the Supreme Court of the United States directly upon the question here involved, which, if it existed, we should feel it our duty to follow as controlling in this case, we are constrained to adopt that construction and follow that rule which to us appears to be supported by the best reasoning, and that will best serve the purposes of justice.

We therefore adhere to our former opinion.

Kane, Ch. J., and Williams and Dunn, JJ., concur. Turner, J., concurs in result.

SOUTH CAROLINA SUPREME COURT.

BEAUFORT LAND & INVESTMENT
COMPANY, Appt.,
v.

NEW RIVER LUMBER COMPANY,
Resp't.

(— S. C. —, 68 S. E. 637.)

Pleading — variance — title and possession.

1. One alleging title and possession may recover damages for trespass on proof of possession and invasion by defendant, without proving a perfect title.

Trespass — title of defendant — power of court to determine.

2. The court cannot, in an action to recover damages for trespass to real estate, de-

termine that defendant's title, which is not connected with a grant from the state, is perfect.

Same — adverse possession — sufficiency.

3. The court cannot, in an action to recover damages for trespass upon real estate, direct a verdict for defendant in case the *locus in quo* is not covered by plaintiff's written chain of title, if he also relies on adverse possession.

Evidence — boundary — declarations of former owner.

4. In an action for damages for trespass upon real estate, declarations of defendant's predecessor in title, as to the boundary lines made while he was owner of the property, are admissible in evidence against defendant.

(July 18, 1910.)

Note. — Necessity and character of title or possession of plaintiff to sustain action of trespass *quare clausum fregit*.

The question of the sufficiency of an equitable title to sustain an action of trespass to land is not included within the scope of this annotation, but is covered by a note in 47 L.R.A. 637, and a supplemental note to Foster Lumber Co. v. Arkansas Valley & W. R. Co. ante, 231.

Authorities on the right of a widow, prior to assignment of dower, to maintain trespass *quare clausum fregit*, are collected in a note in 13 L.R.A. (N.S.) 209; and cases on the subject of trespass *quare clausum fregit* by a tenant in common of realty against a cotenant are collected in a note in 10 L.R.A. (N.S.) 212.

Necessity of possession, actual or constructive.

The doctrine is well established by the authorities that to maintain an action of trespass *quare clausum fregit* the plaintiff must, at the time of the trespass, be in the actual or constructive possession of the land upon which the acts of the trespass were committed. This doctrine is based on the theory that trespass *quare clausum fregit* is an injury to the right of possession only.

United States.—O'Neale v. Brown, 1 Cranch, C. C. 79, Fed. Cas. No. 10,514; Holmead v. Corcoran, 2 Cranch, C. C. 119, Fed. Cas. No. 6,627; Fraser v. Hunter, 5 Cranch, C. C. 470, Fed. Cas. No. 5,063; Burt v. Panjaud, 99 U. S. 180, 25 L. ed. 451; Tayloe v. Varden, 2 Cranch, C. C. 37, Fed. Cas. No. 13,771.

Alabama.—Davis v. Young, 20 Ala. 151; Boswell v. Carlisle, 70 Ala. 244; Louisville & N. R. Co. v. Hall, 131 Ala. 161, 32 So. 603; Rogers v. Brooks, 99 Ala. 31, 11 So. 753; Louisville & N. R. Co. v. Higginbotham, 153 Ala. 334, 44 So. 872; Carwile v. House, 6 Ala. 710; Garrett v. Sewell, 108 Ala. 521, 18 So. 737.

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Arkansas.—Little Rock & Ft. S. R. Co. v. Dyer, 35 Ark. 360; McKinney v. Demby, 44 Ark. 74; Ledbetter v. Fitzgerald 1 Ark. 448.

California.—Uttendorffer v. Saegers, 50 Cal. 496.

Colorado.—Huginin v. McCunniff, 2 Colo. 367, 14 Mor. Min. Rep. 463; McClellan v. Hurd, 21 Colo. 197, 40 Pac. 445.

Connecticut.—Wheeler v. Hotchkiss, 10 Conn. 225; Chatham v. Brainerd, 11 Conn. 60; Bulkley v. Dolbeare, 7 Conn. 232; Church v. Meeker, 34 Conn. 421; Fitch v. New York, P. & B. R. Co. 59 Conn. 414, 10 L.R.A. 188, 20 Atl. 345; Toby v. Reed, 9 Conn. 216; Treat v. Peck, 5 Conn. 287; Payne v. Clark, 20 Conn. 35; Waterbury Clock Co. v. Irion, 71 Conn. 254, 41 Atl. 827.

Delaware.—Steam v. Anderson, 4 Harr. (Del.) 209; Daisey v. Hudson, 5 Harr. (Del.) 320; Quillen v. Betts, 1 Penn. (Del.) 53, 39 Atl. 595.

Florida.—Knight v. Empire Land Co. 55 Fla. 301, 45 So. 887, 1025.

Georgia.—Alaculsky Lumber Co. v. Gudger, 134 Ga. 603, 68 S. E. 427; McDonough v. Carter, 98 Ga. 703; Whiddon v. Williams Lumber Co. 98 Ga. 700, 25 S. E. 770; Southern R. Co. v. Thompson, 129 Ga. 367, 58 S. E. 1044; Gaskins v. Gray Lumber Co. 6 Ga. App. 167, 64 S. E. 714; Clower v. Maynard, 112 Ga. 340, 37 S. E. 370; Ault v. Meager, 112 Ga. 148, 37 S. E. 185; Phillips v. Babcock Bros. Lumber Co. 5 Ga. App. 634, 63 S. E. 808.

Idaho.—Steltz v. Morgan, 16 Idaho, 368, 28 L.R.A. (N.S.) 398, 101 Pac. 1057.

Illinois.—Webb v. Sturtevant, 2 Ill. 181; American Teleph. & Teleg. Co. v. Jones, 78 Ill. App. 372; Smith v. Wunderlich, 70 Ill. 426; Dean v. Comstock, 32 Ill. 173; Western Book & Stationery Co. v. Jevne, 78 Ill. App. 668, affirmed in 179 Ill. 71, 53 N. E. 565; Halligan v. Chicago & R. I. R. Co. 15 Ill. 558; Williams v. Shade, 13 Ill. App. 337.

Iowa.—Brown v. Bridges, 31 Iowa, 138; Blunck v. Chicago & N. W. R. Co. (Iowa) 115 N. W. 1013,

A PPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Beaufort County in defendant's favor in an action brought to recover damages for alleged trespass to certain real estate and to restrain further trespass. Reversed.

The facts are stated in the opinion.

Messrs. W. J. Thomas and W. L. Clay for appellant.

Mr. W. Huger Fitz Simons, for respondent:

It was necessary for plaintiff to prove its title, possession not being sufficient.

Heyward v. Farmers' Min. Co. 42 S. C. 138, 28 L.R.A. 42, 46 Am. St. Rep. 702, 19 S. E. 963, 20 S. E. 64; Geiger v. Kaigler, 15 S. C. 262; Bratton v. Catawba Power Co. 80 S. C. 262, 60 S. E. 673; Love v. Turner,

71 S. C. 322, 51 S. E. 101; Alston v. Limehouse, 60 S. C. 559, 39 S. E. 188, 61 S. C. 1, 39 S. E. 192; Loan & Exch. Bank v. Peterkin, 52 S. C. 236, 68 Am. St. Rep. 900, 29 S. E. 546; 28 Am. & Eng. Enc. Law, p. 631; Harlock v. Jackson, 1 Treadway, Const. 135; Toomer v. Purkey, 1 Mill, Const. 323, 12 Am. Dec. 634; Young v. Watson, 1 McMull. L. 449; Mazyck v. Birt, 2 Brev. 155; Sims v. Randal, 1 Brev. 85; Johnson v. Jones, 72 S. C. 287, 51 S. E. 805; Lancaster v. Lee, 71 S. C. 280, 51 S. E. 139; Connor v. Jackson, 59 S. C. 131, 37 S. E. 240; Anderson v. Lynch, 37 S. C. 578, 16 S. E. 773; Johnson v. M'Ilwain, Rice, L. 368; Reams v. Spann, 28 S. C. 533, 6 S. E. 325; Carri-gan v. Evans, 31 S. C. 265, 9 S. E. 852; Williams v. Halford, 67 S. C. 304, 45 S. E.

Kansas.—Fitzpatrick v. Gebhart, 7 Kan. 35.

Kentucky.—Walton v. Clarke, 4 Bibb, 218; McClain v. Todd, 5 J. J. Marsh. 335, 22 Am. Dec. 37; Wilson v. Bibb, 1 Dana, 7, 25 Am. Dec. 118; Shaw v. Robinson, 111 Ky. 715, 64 S. W. 620; Carrine v. Westerfield, 3 A. K. Marsh. 331; Ohio & B. S. R. Co. v. Wooten, 20 Ky. L. Rep. 383, 46 S. W. 681; Phillips v. Beattyville Mineral & Timber Co. 28 Ky. L. Rep. 12, 88 S. W. 1058.

Louisiana.—Besse v. Aycock, 5 La. Ann. 134; Chinn v. Blanchard, 6 La. Ann. 66; Millard v. Richard, 13 La. Ann. 572; Garland v. Wunderlich, 117 La. 346, 41 So. 644.

Maine.—Vassalborough v. Somersset & K. R. Co. 43 Me. 337; Munsey v. Hanly, 102 Me. 423, 13 L.R.A. (N.S.) 209, 67 Atl. 217; Dolloff v. Hardy, 26 Me. 545; Abbott v. Abbott, 51 Me. 575.

Maryland.—Norwood v. Shipley, 1 Harr. & J. 295; Zimmerman v. Shreeve, 59 Md. 357; Richardson v. Milburn, 11 Md. 340; Gent v. Lynch, 23 Md. 58, 87 Am. Dec. 558; Maryland Teleph. & Teleg. Co. v. Ruth, 106 Md. 644, 14 L.R.A. (N.S.) 427, 124 Am. St. Rep. 506, 14 A. & E. Ann. Cas. 576, 68 Atl. 358; West v. Pusey (Md.) 77 Atl. 973; Carter v. Maryland & P. R. Co. 112 Md. 599, 77 Atl. 301.

Massachusetts.—Taylor v. Townsend, 8 Mass. 411, 5 Am. Dec. 107; Kempton v. Cook, 4 Pick. 305; Bascom v. Dempsey, 143 Mass. 409, 9 N. E. 744; Barnstable v. Thacher, 3 Met. 239; Merriam v. Willis, 10 Allen, 118; Fletcher v. Livingston, 153 Mass. 388; 26 N. E. 1001; French v. Fuller, 23 Pick. 104; Codman v. Jenkins, 14 Mass. 96; Allen v. Thayer, 17 Mass. 299; Bigelow v. Jones, 10 Pick. 161.

Michigan.—Hayward v. School Dist. No. 9, 139 Mich. 539, 102 N. W. 999; Miller v. Wellman, 75 Mich. 353, 42 N. W. 843; Ruggles v. Sands, 40 Mich. 559; Newcomb v. Love, 112 Mich. 115, 70 N. W. 443; Goetchius v. Sanborn, 46 Mich. 330, 9 N. W. 437; Donaldson v. Crane, 120 Mich. 369, 79 N. W. 569.

Minnesota.—Moon v. Avery, 42 Minn. 405, 44 N. W. 257.
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Mississippi.—Gathings v. Miller, 76 Miss. 651, 24 So. 964.

Missouri.—Materson v. West-End Nar-row-Gauge R. Co. 5 Mo. App. 575; Holli-day-Klotz Land & Lumber Co. v. Markham, 96 Mo. App. 51; Rannels v. Rannels, 52 Mo. 108; Harris v. Sconce, 66 Mo. App. 345; Hampton v. Massey, 53 Mo. App. 501; McMenamy v. Cohick, 1 Mo. App. 529; Zeiting v. Hackworth, 117 Mo. 505, 23 S. W. 763; Phillips v. Stewart, 87 Mo. App. 486.

Nebraska.—Chicago, R. I. & P. R. Co. v. Shepherd, 39 Neb. 523, 58 N. W. 189; Nelson v. Jenkins, 42 Neb. 133, 60 N. W. 311; Hanlon v. Union P. R. Co. 40 Neb. 52, 58 N. W. 590.

New Hampshire.—Brown v. Manter, 22 N. H. 468; Jewett v. Berry, 20 N. H. 36.

New York.—Holmes v. Seely, 19 Wend. 507; Campbell v. Arnold, 1 Johns. 512; Wickham v. Freeman, 12 Johns. 183; Stuyvesant v. Thompkins, 9 Johns. 61; Dewey v. Osborn, 4 Cow. 329; Price v. Brown, 101 N. Y. 669, 5 N. E. 434; Delamater v. Folz, 50 Hun, 528, 3 N. Y. Supp. 711; Steenburgh v. McRorie, 60 Misc. 510, 113 N. Y. Supp. 1118; Alt v. Gray, 55 App. Div. 563, 87 N. Y. Supp. 411; Carter v. Pitcher, 87 Hun, 580, 34 N. Y. Supp. 549; De Grauw v. Warner, 89 Hun, 9, 35 N. Y. Supp. 59; Zorn v. Haake, 75 Hun, 235, 27 N. Y. Supp. 38; Townsend v. Bis-sell, 3 Hun, 556; Cowenhoven v. Brooklyn, 38 Barb. 9; Sparks v. Leavy, 1 Robt. 530, 19 Abb. P. 364; Rich v. Baker, 3 Denio, 79; Phillips v. DeGroat, 2 Lans. 192.

New Jersey.—State v. Stenner, 50 N. J. L. 59, 11 Atl. 131.

North Carolina.—Gordner v. Blades Lum-ber Co. 144 N. C. 110, 56 S. E. 695; Fri-see v. Marshall, 122 N. C. 760, 30 S. E. 21; Drake v. Howell, 133 N. C. 162, 45 S. E. 539; Patterson v. Bordenhammer, 33 N. C. (11 Ired. L.) 4; Latham v. Roanoke R. & Lumber Co. 139 N. C. 9, 11 Am. St. Rep. 764, 51 S. E. 780; McMillan v. Haf-ley, 4 N. C. (2 Car. Law. Repos. 89); Dobbs v. Gullidge, 20 N. C. 197 (4 Dev. & B. L. 68); Tredwell v. Reddick, 23 N. C. (1 Ired. L.) 56; Presnell v. Ramsour, 30

207; Lancaster v. Lee, 71 S. C. 282, 51 S. E. 139; Johnson v. Johnson, 44 S. C. 364, 22 S. E. 419; Capell v. Moses, 36 S. C. 559, 15 S. E. 711; De Walt v. Kinard, 19 S. C. 286; Sires v. Sires, 43 S. C. 266, 21 S. E. 115.

Woods, J., delivered the opinion of the court:

The verdict and judgment were in favor of the defendant. The numerous exceptions submitted on behalf of the plaintiff, relating mainly to alleged errors in the charge of the circuit judge, will be more clearly understood after a brief statement of the pleadings.

The complaint alleges "that the plaintiff is the owner in fee and in possession of that

tract of land known as the 'Crapse Purchase' or 'Wiggin Land,' containing 1,800 acres, more or less, according to a plat made by O. P. Law, surveyor, April 17, 1885, and has the following distances and bearings; . . . that the defendant, its agents, and servants at numerous times have entered on the land with force and arms and cut much valuable timber and committed irreparable waste thereon, and, disregarding plaintiff's warnings, threatened to continue the acts of trespass; that the said acts of defendant are without any right or authority whatever and contrary to law, and are an irreparable loss to plaintiff; that the defendant could not respond in damages, and that plaintiff has already been damaged to the amount of \$2,000." The prayer is for judgment for

N. C. (8 Ired. L.) 505; Whitfield v. Bodenhammer, 61 N. C. 362.

Ohio.—Rowland v. Rowland, 8 Ohio, 40; Beggs v. Thompson, 2 Ohio, 105, 15 Am. Dec. 539.

Oklahoma.—Casey v. Mason, 8 Okla. 665, 59 Pac. 252.

Pennsylvania. — Alderman v. Way, 4 Yeates, 218; Zell v. Ream, 31 Pa. 304; Wilkinson v. Connell, 158 Pa. 126, 27 Atl. 870; Tustin v. Sammons, 23 Pa. Super. Ct. 175; Ward v. Taylor, 1 Pa. St. 238; Enterprise Transit Co. v. Hazelwood Oil Co. 20 Pa. Super. Ct. 127; Weitzel v. Marr, 46 Pa. 463; Roe v. Wilbur, 57 Pa. 406; Collins v. Beatty, 148 Pa. 65, 23 Atl. 982.

Rhode Island.—Sayles v. Mitchell, 22 R. I. 238, 47 Atl. 320.

South Carolina.—Peareson v. Dansby, 2 Hill, L. 466; Brandon v. Grimke, 1 Nott. & M'C. 356; Johnson v. M'Ilwain, Rice, L. 368; Skinner v. M'Dowell, 2 Nott. & M'C. 68; Davis v. Clancy, 3 M'Cord, L. 422; M'Colman v. Wilkes, 3 Strobb. L. 465, 51 Am. Dec. 637; Steen v. Mark, 32 S. C. 286, 11 S. E. 93; Rhodes v. Bunch, 3 M'Cord, L. 66.

South Dakota.—Arneson v. Spawn, 2 S. D. 269, 39 Am. St. Rep. 783, 49 N. W. 1066.

Texas.—Paraffine Oil Co. v. Berry (Tex. Civ. App.) 93 S. W. 1089.

Vermont.—Bowne v. Graham, 2 Tyler (Vt.) 411; Religious Cong. Soc. v. Baker, 15 Vt. 119, 40 Am. Dec. 668; Ripley v. Yale, 16 Vt. 257.

Virginia.—Cooke v. Thornton, 6 Rand. (Va.) 8.

West Virginia. — Wilson v. Phoenix Powder Mfg. Co. 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035; Gillison v. Charleston, 16 W. Va. 282, 37 Am. Rep. 763; High v. Pancake, 42 W. Va. 602, 26 S. E. 536; Clay v. St. Albans, 43 W. Va. 539, 64 Am. St. Rep. 883, 27 S. E. 368.

English and Canadian.—Turner v. Cameron's Coalbrook Steam Coal Co. 5 Exch. 932; Pilgrim v. Southampton & D. R. Co. 8 C. B. 25; Roys v. Cramer, 12 U. C. Q. B. 165; Heck v. Knapp, 20 U. C. Q. B. 360; Campbell v. Cushman, 4 U. C. Q. B. 9.

It is said in 9 Bacon's Abr. 458, that 30 L.R.A. (N.S.)

"only the person who has the possession in fact of the real property to which an injury has been done can maintain an action of trespass" for the injury, because the gist of an action of trespass for an injury to either real or personal property is the being disturbed in the possession of the property; and the having the general property does not, in the case of real property, as it does in the case of personal, draw to it a possession in fact.

"A plaintiff cannot recover in trespass *quare clausum*," said the court in Moon v. Avery, supra, "when he negatives possession in his pleadings, for the gist of the action is the breaking and entering his close. Without possession, either actual or constructive, trespass cannot be maintained." A similar statement was made by the court in Rogers v. Brooks, 99 Ala. 31, 11 So. 753.

An oral agreement establishing a boundary line under which no occupancy or acquiescence is shown is insufficient to authorize a party to maintain an action of trespass for the removal of a fence which he erected along such claimed boundary. Hooper v. Herald, 154 Mich. 529, 118 N. W. 3, 16 A. & E. Ann. Cas. 149.

For want of actual possession, the court in Taylor v. Townsend, supra, denied the right of a mortgagor to maintain an action of trespass *quare clausum fregit* against a mortgagee in possession, after the recovery of a bill in equity by the former to redeem, but before possession was taken under the judgment.

Absence of possession of the *locus in quo* defeated, in Schufelt v. Sweet, 15 N. Y. Week. Dig. 1, the right of one to maintain an action of trespass on land for which he had contracted in behalf of his wife, to whom the deed was subsequently given.

And in Brown v. Hartzell, 87 Mo. 564, want of actual possession defeated the right of a vendor of land to maintain an action of trespass upon lands which were, at the time the alleged act was committed, in the possession of defendant under a contract of sale.

\$2,000 and for an injunction against further trespass.

The defendant by its answer, in addition to a general denial, alleges twenty years' possession in itself and its grantors, and specifically denies that the plaintiff and those under whom it claims have been in possession of the land within twenty years, or within ten years, prior to the commencement of the action; it alleges further that any right which the plaintiff may have had accrued more than ten years before the commencement of the action; and that the land is the property of W. R. Pritchard and others, who conveyed to the defendant the timber thereon, and that defendant's entry was made under that conveyance.

Under these pleadings the court charged:

In *Broker v. Scobey*, 56 Ind. 588, which was an action of trespass, it was held that where the evidence showed that, prior to the commission of the alleged acts of trespass, the plaintiff had delivered possession of the *locus in quo* to another pursuant to a contract of sale, it was error for the court to refuse to charge the jury that if such possession was delivered pursuant to the contract of sale, evidence by a written memorandum thereof, and such sale had not been rescinded, the plaintiff was not entitled to recover.

The seceding members of a religious organization who induced the owner of the parcel of land on which a wooden building had been erected and leased to the society, to indorse a cancellation on the back of the lease and sell the building to them, have no such title to the building as will enable them to maintain an action of trespass against one who broke the lock and entered therein. *Payne v. Davis*, 128 Mass. 383.

Parties who contributed their share for the construction and maintenance of a small building to be constructed by individual contributions of money for the use and benefit of the people of "Walnut creek neighborhood," as a school building when subscriptions for such purpose could from time to time be raised, have no such interest or title in the building as will authorize them to maintain an action of trespass in taking the same away. *Lomax v. Phillips*, 113 La. 850, 68 L.R.A. 661, 37 So. 777.

On the theory that actual and exclusive possession is necessary to maintain an action of trespass *quare clausum fregit*, it was held in *Religious Cong. Soc. v. Baker*, supra, that a religious society which was permitted by the owner of a building to hold services therein cannot maintain an action of trespass *quare clausum fregit* against another religious organization which assembled therein, thereby preventing the former from holding its services.

After the termination of a contract of employment, a servant who occupied a house as a part of the contract price for 30 L.R.A. (N.S.)

"I charge you that before you can render a verdict in behalf of the plaintiff for damages in this case you must be satisfied from the evidence that the plaintiff has a complete and perfect title to the land described in the complaint." The plaintiff contends that while this is a correct statement of the law in an action to recover possession of land, it was erroneous in this action, which was not to recover possession, but for damages for a trespass, and that therefore the charge should have been to the effect "that if the plaintiff has satisfied you that it was in actual possession of the tract of land described in the complaint, and that defendant has committed trespass within the lines of said tract, then the plaintiff will be entitled to recover, unless the defendant has satis-

services to be performed by him has no such possession of the *locus in quo* as will entitle him to maintain an action of trespass *quare clausum fregit* against the former employer for a disturbance of his possession. *Heffelfinger v. Fulton*, 25 Ind. App. 33, 56 N. E. 688.

Proof of actual possession essential to the maintenance of an action of trespass is not shown by evidence of a survey of the land made for the purpose of locating a certain lake, of an advertisement of the land for sale or rent, and of a notice to a certain party to keep his cattle off "that land." *Odd Fellows' Sav. Bank v. Turman* (Cal.) 30 Pac. 966.

A reversioner has no right in the property, which enables him to maintain an action of trespass *quare clausum fregit* for cutting and carrying trees from land by another under authority of a tenant in dower. *Shattuck v. Gragg*, 23 Pick. 88; *Livingston v. Mott*, 2 Wend. 605.

But a reversioner who regained possession of the demised property wrongfully is entitled, being *in pedis possessio*, to maintain an action of trespass *quare clausum fregit* against a stranger who invaded his possession. *Rollins v. Clay*, 33 Me. 132.

A remainderman, not being entitled to possession, cannot maintain an action of trespass *quare clausum* for cutting standing trees. *Lawry v. Lawry*, 88 Me. 482, 34 Atl. 273.

And an heir cannot maintain an action of trespass committed upon the quarantine lands of the widow before assignment of dower, not being in possession before that time. *Latham v. Latham*, 3 Call. (Va.) 181.

The heirs of a deceased owner of land have no title which will authorize them to maintain trespass to land owned by the decedent at the time of his death, but sold for the payment of the debts of the estate many years before the alleged trespass was committed. *Belangia v. Branning Mfg. Co.* 152 N. C. 3, 67 S. E. 48.

But a sole devisee in possession of land pending the settlement of the estate is entitled to maintain an action of trespass

fled the jury that it has good title in itself to the land upon which the alleged trespass was committed, or that it did the acts complained of as trespass by the permission or under a license from the real owner of the land."

The important question is thus raised whether a plaintiff alleging both title and possession is entitled to recover damages upon proof of his possession and the invasion of it by the defendant, without proving also that he has a perfect title. The question must be answered in the affirmative. One person who finds another in possession of land cannot, by seizing the possession or invading it, put him whose possession he seized or invaded to proof of his title. In such a case possession is *prima facie* evi-

dence of title, and he who invades it must establish his title. If this were not so, the holders of land could be put to proof of title against the world by anyone who might choose to trespass or squat upon their lands. This conclusion is well supported by authority. When the plaintiff alleges an invasion of his possession this gives character to the action, as one in the nature of the old action of trespass *quare clausum fregit*. *Couch v. Burke*, 2 Hill, L. 534; *Connor v. Johnson*, 59 S. C. 115, 37 S. E. 240.

The court in *Young v. Watson*, 1 McMull. L. 449, intimated by the words we have italicized that the possession of a plaintiff of which he had been deprived by the entry of a defendant would support even an action of trespass to try title; for the court said, as

in her own name against one engaged in blasting in an adjoining lot. *Colton v. Onderdonk*, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395.

In *Dexter v. Sullivan*, 34 N. H. 478, the court held that a will stating, "All the residue and remainder of my estate, whether real, personal, or mixed, I direct my executors to sell at such times as they may deem expedient," gives the executors no estate in the land, and therefore an heir in possession is entitled to maintain an action of trespass *quare clausum fregit*.

A widow in actual possession of lands claimed to be held as a homestead, may maintain an action of trespass against an adult heir at law of her husband who disturbed her possession. *Patterson v. Patterson*, 49 Mich. 176, 13 N. W. 504.

The grandchildren of a life tenant holding under a devise to her for life, and upon her death to her children and the children of such as are dead, cannot, for want of possession, maintain an action of trespass in removing timber from the land devised. *Latham v. Roanoke R. & Lumber Co.* 139 N. C. 9, 111 Am. St. Rep. 764, 51 S. E. 780.

Exclusive possession necessary to maintain an action of trespass *quare clausum fregit* was held not to have been established in *Church v. Meeker*, 34 Conn. 421, in which it appeared that the *locus in quo* was a line of beach between ordinary and extraordinary high-water mark; the beach was not in any inclosure of the plaintiff, nor connected with any upland upon which the tide ever flowed, but was upon the side of an extended field of salt meadows, and was formed by an abrasion of the shore and the washing and piling up of coarse sand and gravel by the action of the waves on that arm of the sea. The public had immemorially used the beach by passing and driving over it and taking seaweed from it. The plaintiff owned the adjoining shore between high and low water mark, but neither the plaintiff nor his grantors had used the beach other than in the way it had been used by the public. The plaintiff's father had, in a few instances, for-

bidden individuals to remove the seaweed, and the plaintiff had at one time set up a sign prohibiting entry upon the land, but the notice had been generally disregarded.

In *Newcomb v. Love*, 112 Mich. 115, 70 N. W. 443, it appeared beyond dispute that the defendant had used the land in question for farming purposes for seven years, that it was situated on his side of a fence built by him to mark the boundary line, and that the plaintiff acquired his alleged possession by breaking through the fence. In an action of trespass *quare clausum fregit* the court held that the plaintiff failed to show actual possession, and therefore could not maintain the action.

A mere claim of ownership, with frequent cutting and removing of timber from the tract from which the alleged acts of trespass were committed, does not constitute actual possession or occupancy within the meaning of the rule. *Ohio & B. S. R. Co. v. Wooten*, 20 Ky. L. Rep. 383, 46 S. W. 681.

An action of trespass *quare clausum fregit* will not lie in favor of one having a right of way across a proprietor's land, against another for using such way by permission of the proprietor, since the plaintiff is not entitled to the right of exclusive possession of the land. *Morgan v. Boyes*, 65 Me. 125.

Proof that all of a piece of timber land is occupied as a wood lot for the purpose of fuel and fencing was held in *Argotsinger v. Vines*, 82 N. Y. 308, to be sufficient evidence of actual possession to sustain an action of trespass for cutting and carrying away timber.

And evidence that the lots on which the acts of trespass were alleged to have been committed had been used for about twenty years as a wood lot to the farm on which the plaintiff lived; that during all of such time the plaintiff and his father, under whom the former claimed title, had cut their wood, saw logs, and rail timber, had made maple sugar thereon, and had constructed a house for that purpose; and that it was the only wood lot the plaintiff had, —was held in *Machin v. Geortner*, 14 Wend.

to the mere prior possession of the plaintiff: "It cannot be allowed to prevail against the actual possession of the defendant, *who did not enter upon the plaintiff*, and which, for aught that appears, may be as rightful as that which the plaintiff formerly held;" and Judge O'Neill, in a concurring opinion, said: "Where the plaintiff's possession, actual or constructive, is entered upon, I think that such possession is evidence of title to put the defendant to prove his title." In *Connor v. Johnson*, *supra*, the court held that the action was in the nature of trespass *quare clausum fregit*,—that is, an action for the invasion of the possession of plaintiff,—where the complaint alleged the plaintiff to be in possession *under a paper title*, and that the defendant had trespassed, and the

answer denied all the allegations, including, of course, the allegations of plaintiff's possession and his paper title, and set up title in himself. In such an action it was held that it was only necessary for the plaintiff to show possession, and that for defendant to prevent a recovery it was not sufficient to show that the plaintiff had no title, but that he must show title in himself. That case seems conclusive of the point under discussion. To the same effect is *Hillhouse v. Jennings*, 60 S. C. 401, 38 S. E. 599, where the court says: "We may say, however, that when the allegations of the complaint are such as would have sustained an action of trespass *quare clausum fregit* under the former practice, peaceable possession alone is sufficient to support the action, and

239, to be sufficient proof of actual possession to sustain an action of trespass *quare clausum fregit*, although the proof does not show that the lot was inclosed by a fence or that there was any clearing upon it.

—right of landlord.

Trespass *quare clausum fregit* being a possessory action, a landlord, not being in actual possession, is not entitled to maintain the action. He has, of course, an appropriate remedy for any injury to the freehold. *Tilghman v. Cruson*, 4 Harr. (Del.) 341; *Gould v. Sternburg*, 4 Ill. App. 439; *Walden v. Conn*, 84 Ky. 312, 4 Am. St. Rep. 204, 1 S. W. 537; *Ross v. Philbrick*, 39 Me. 29; *French v. Fuller*, 23 Pick. 104; *Bascom v. Dempsey*, 143 Mass. 409, 9 N. E. 744; *New Jersey Midland R. Co. v. Van Syckle*, 37 N. J. L. 496; *Robertson v. George*, 7 N. H. 306; *Anderson v. Nesmith*, 7 N. H. 167; *Cannon v. Hatcher*, 1 Hill, L. 260, 26 Am. Dec. 177; *Torrence v. Irwin*, 2 Yeates, 210, 1 Am. Dec. 340; *Greber v. Kleckner*, 2 Pa. St. 289; *Reynolds v. Williams*, 1 Tex. 311; *Kretzer v. Wyson*, 5 Gratt. 9; *Roys v. Cramer*, 12 U. C. Q. B. 165.

A landlord, not being in possession of the land, is not entitled to maintain an action of trespass *quare clausum fregit* for entering upon the land and cutting grass. *Bartlett v. Perkins*, 13 Me. 87; *Lyford v. Toothaker*, 39 Me. 28.

And trespass *quare clausum fregit* cannot be maintained by the owner of land against a third person for passing and re-passing over the land while the premises are in the actual occupation of a tenant. *Holmes v. Seeley*, 19 Wend. 507.

Likewise, in *Clark v. Smith*, 25 Pa. 137, the court held that the owner of land which another holds under a parol agreement indefinite as to the term of occupancy cannot, before an entry upon the premises, maintain an action of trespass *quare clausum fregit*.

A lessor has no right of action against one who entered upon the land in the possession of a tenant, and built a fence there-

on, thereby depriving the tenant of the use and enjoyment of a portion of the premises. Speaking with reference to the right of action for an injury to the possession, the court said: "It is a well-settled rule that when a contract of tenancy is consummated by the entry of the tenant, the exclusive right of possession is thereby instantly changed from the landlord to the tenant during his term, and, for any injury to that possession, the right of action is exclusively in him. This is so whether he retains the possession or not, because it is his exclusive right of possession that gives him the exclusive right of action for any injury done to it, either by the landlord himself or a stranger, during the existence of that exclusive right. During the continuance of the tenant's right of possession, the landlord has no right of action for any injury done to it by a stranger or the tenant himself. His right is confined to the protection of his reversionary interest merely. For any injury to his reversionary interest, either by his tenant or a stranger, he may have any appropriate action of redress, but not an action of trespass, because that action lies alone for an immediate and direct injury to the possession, and the tenant having the exclusive right to the possession, he alone can resort to that kind of action." *Walden v. Conn*, 84 Ky. 312, 4 Am. St. Rep. 204, 1 S. W. 537.

On the same theory it has been held that one who had let the *locus in quo* for the term of one year cannot, after his re-entry, maintain an action of trespass *quare clausum fregit* against another for cutting and destroying apple trees committed while the tenant held over under the lease. *Wickham v. Freeman*, *supra*.

It was held in *Miller v. Fulton*, 4 Ohio, 434, that one who had leased to another a water gristmill, and lands adjoining, for an indefinite period, receiving as rent a portion of the proceeds of the mill, cannot, not being in possession, maintain an action of trespass *quare clausum fregit* against a stranger who entered upon the premises and destroyed the milldam.

throws upon the defendant the burden of proving a better title." *Turner v. Poston*, 63 S. C. 244, 41 S. E. 296; *Watts v. Blalock*, 17 S. C. 163. In the case last cited the reason for the rule is thus well stated: "If the defendant in this case had brought his action against the plaintiff, he could not have recovered on such a title as he has shown in this case, and he cannot be allowed to put himself in a better position by committing a trespass on the plaintiff. The right of possession is a very sacred one, and the court will not allow the repose which it gives to be endangered by giving improper advantages to a trespasser. If defendant had a good title he should have resorted to the courts, where he could have obtained any redress to which by law he was

entitled." The same principle has been laid down by the Supreme Court of the United States in *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451; *Bradshaw v. Ashley*, 180 U. S. 59, 45 L. ed. 423, 21 Sup. Ct. Rep. 297, and other cases. The cases relied on by defendant's counsel are very clearly distinguished, and are in no sense opposed to the rule stated.

In *Geiger v. Kaigler*, 15 S. C. 262, the action was exclusively for the recovery of the possession of land; the allegation of the complaint being that the defendant had acquired possession in 1863, many years before the action was brought, from the executor of the will under which plaintiffs claimed. There was no allegation that the plaintiffs had ever been in possession. The defendant

But a lessor who retains certain possessory rights in the demised premises is entitled to maintain the action. Thus, in *Jordan v. Staples*, 57 Me. 352, the court held that a landlord who by the terms of the lease retained the right to occupy a barn on the leased premises for the purpose of storing hay, etc., therein, may maintain an action of trespass *quare clausum fregit* against a stranger for entering the barn and removing the hay.

In *Wickham v. Freeman*, supra, mere evidence that the plaintiff leased the premises in question for a year, without proof that he had the title, was held insufficient to bring him within the New York statute giving an action of trespass to a remainderman or reversioner notwithstanding an intervening estate for life or years. There also seems to be an implication that the fact that the term of the lease had expired at the time of the trespass would prevent the application of the statute, although the tenant was holding over at the time of the trespass. It was also held that such evidence would not sustain the action as to a trespass committed after the tenant had vacated, and while the premises were vacant, since it did not show any title which would, in judgment of law, draw after it the possession.

In *Jones v. Taylor*, 12 N. C. (1 Dev. L.) 434, it was held that the fact that one is in possession of land under an equitable title, with the consent of the legal owner, but with no estate cognizable by a court of law, does not prevent the legal owner from maintaining trespass *quare clausum* against a third person for an injury by cutting and removing trees.

—when tenancy is at will.

Some of the cases have made an exception where the tenant in possession is merely a tenant at will, and hold that in such a case the landlord may maintain trespass *quare clausum fregit* for an injury to the freehold. This view was adopted in *Starr v. Jackson*, 11 Mass. 519, after a thorough investigation of the subject.

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This exception to the general rule is also supported by *Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Rep. 149 (*obiter*, the real ground of the decision being that the occupation of two or three rooms in a building by tenants did not deprive the owner of possession, preventing him from maintaining trespass for injury to the building as a whole); *Davis v. Nash*, 32 Me. 411 (*Little v. Palister*, 3 Me. 6, and *Bartlett v. Perkins*, 13 Me. 87, denying the right of the owner to maintain trespass *q. c. f.*, the property being in possession of a tenant at will, are distinguishable for the reason that the injury was to the possession only, and not to the freehold); *Hingham v. Sprague*, 15 Pick. 102; *Cushing v. Adams*, 18 Pick. 110; *Allen v. Thayer*, 17 Mass. 299 (*obiter*); *Spencer v. Weatherly*, 46 N. C. (1 Jones, L.) 327; *Cannon v. Hatcher*, 1 Hill, L. 260, 26 Am. Dec. 177 (*obiter*); *M'Colman v. Wilkes*, 3 Strobb. L. 465, 51 Am. Dec. 637 (*obiter*, the persons in possession in this case being regarded as agents, rather than tenants).

In *Woodman v. Francis*, 14 Allen, 198, it was declared in effect that if the property at the time of the trespass was in possession of a tenant at will paying rent, that in itself would defeat an action of trespass *quare clausum fregit* by the landlord, notwithstanding that some of the acts of the trespasser were of such a character that they would give a cause of action to a reversioner. This case is perhaps distinguishable from *Starr v. Jackson*, for the reason that, as the opinion states, the action was for a violation of the plaintiff's possession, and the acts done upon the land were alleged merely in aggravation, and not in such a manner as to make them the foundation of the suit.

The right of the landlord to maintain trespass *quare clausum fregit* for acts committed while the property was in possession of a tenant at will was also denied in *Hersey v. Chapin*, 162 Mass. 176, 38 N. E. 442. That the injury in this case included damage to the freehold is apparent from the fact that recovery was allowed upon a count (apparently on the case) for an in-

denied that Henry J. Geiger, who made the will under which plaintiffs claimed, had ever been seised of the land; and, for a second defense, alleged that he had purchased the land from the executor of the will of Henry J. Geiger, who was empowered to sell; that he had paid the purchase money and had been in the possession since 1863. As there was no proof of the second defense, it was held that it could not be considered. In this state of the case the court held: "This action was brought, as stated, expressly to recover the land in dispute, upon the ground that the plaintiffs had title to the same; and even if the old rule as to the necessity of proving title should now be held to be modified so as to allow a person deprived of the possession of

land, under proper allegations, to recover that possession without proof of title, it can have no application to this case. *Here prior possession* cannot stand for title, although it is an action in the form prescribed by the Code, and not technically trespass to try title under the statute. The plaintiffs staked themselves upon their title, and they must recover, if at all, upon the strength of this title." This is very far from holding that a person in possession cannot recover from one who disseises him or undertakes to assert ownership by cutting timber or otherwise invading the possession.

Heyward v. Farmers' Min. Co. 42 S. C. 138, 28 L.R.A. 42, 46 Am. St. Rep. 702, 19 S. E. 963, 20 S. E. 64, was an action for injunction to restrain trespass. The circuit

jury to the reversion. The opinion, however, does not refer to the Starr Case, and in view of the circumstances can hardly be regarded as overruling that case.

Some cases, however, have expressly denied any such exception to the rule, and have expressly held, in absence of statute to the contrary, that the owner may not maintain trespass *quare clausum fregit* where the premises are in possession of a tenant at will, even though there is an injury to the freehold. Campbell v. Arnold, 1 Johns. 511; Tobey v. Webster, 3 Johns. 468; Steltz v. Kretschmar, 24 Wis. 283; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62. (The rule appears to have been changed by statute in New York. See Wickham v. Freeman, 12 Johns. 183.)

It is to be observed that the point just discussed does not relate to the question whether the owner of the land is entitled to recover, in a proper form of action, from the wrongdoer for damage to the freehold,—as to that there is no question,—but merely to the question whether he may enforce such right in an action in form of trespass *quare clausum fregit*. Therefore cases like Hastings v. Livermore, 7 Gray, 194, and Gulf, C. & S. F. R. Co. v. Cusenberry, 86 Tex. 525, 26 S. W. 43, in which it does not appear that the action was in that form, or which at least make no point of the form of the action, are not relevant, though they sustain the right of the landlord to recover for an injury to the freehold while the premises are in actual possession of a tenant at will.

Constructive possession.

As implied in the statement of the general rule, however, actual possession is not in all cases necessary to enable one to sustain an action of trespass *quare clausum fregit*; but the constructive possession which the legal title draws to itself where the property is not in the actual possession of anyone or the person in actual possession is the mere agent or representative of the owner of the legal title, is sufficient to enable the owner to maintain the action. 30 L.R.A. (N.S.)

Gillespie v. Dew, 1 Stew. (Ala.) 229, 18 Am. Dec. 42; Shipman v. Baxter, 21 Ala. 456; Wilson v. Bushnell, 1 Ark. 465; Smith v. Yell, 8 Ark. 470; Ledbetter v. Fitzgerald, 1 Ark. 448; Shipman v. Baxter, 21 Ala. 456; Church v. Meeker, 34 Conn. 421; Terpenning v. Gallup, 3 Iowa, 74; McCloskey v. Doherty, 97 Ky. 300, 30 S. W. 649; Wood v. Mansell, 3 Blackf. 125; Broker v. Scobey, 56 Ind. 588; Halligan v. Chicago & R. I. R. Co. 15 Ill. 558; American Teleph. & Teleg. Co. v. Jones, 78 Ill. App. 668; Smith v. Wunderlich, 70 Ill. 426; Dean v. Comstock, 32 Ill. 173; St. Louis, V. & T. H. R. Co. v. Summit, 3 Ill. App. 155; Casey v. Mason, 8 Okla. 665, 59 Pac. 252; Holliday-Klotz Land & Lumber Co. v. Markham, 96 Mo. App. 51; Tustin v. Sammons, 23 Pa. Super. Ct. 175; Wilkinson v. Connell, 158 Pa. 126, 27 Atl. 870; Drake v. Howell, 133 N. C. 162, 45 S. E. 539; Patterson v. Bodenhammer, 33 N. C. (11 Ired. L.) 4; Cohoon v. Simmons, 29 N. C. (7 Ired. L.) 189; Dobbs v. Gullidge, 20 N. C. 197 (14 Dev. & B. L. 68); Tredwell v. Reddick, 23 N. C. (1 Ired. L.) 56; Mather v. Trinity Church, 3 Serg. & R. 509, 8 Am. Dec. 663, 14 Mor. Min. Rep. 472; Snider v. Myers, 3 W. Va. 195; Woll v. Voigt, 105 Minn. 371, 23 L.R.A. (N.S.) 270, 117 N. W. 608; Yorgensen v. Yorgensen, 6 Neb. 383; Rowland v. Rowland, 8 Ohio, 40; Tyson v. Shueey, 5 Md. 540; Ruggles v. Sands, 40 Mich. 559; Mitchell v. Bridgers, 113 N. C. 63, 18 S. E. 91; Concord v. McIntire, 6 N. H. 527; Warren v. Cochran, 30 N. H. 379; Holmes v. Seely, 19 Wend. 507; Van Rensselaer v. Radcliff, 10 Wend. 639, 25 Am. Dec. 582; Randall v. Sanders, 87 N. Y. 578; Wickham v. Freeman, supra; Hubbell v. Rochester, 8 Cow. 115; Miller v. Long Island R. Co. 71 N. Y. 380; Cowenhoven v. Brooklyn, 38 Barb. 9; Donovan v. Herbert, 4 Ont. Rep. 635.

"Everyone who has a title to land by deed," said the court in Amick v. Frazier, Dud. L. 340, "has a constructive possession, and can maintain this action (*quare clausum fregit*) for a casual trespass committed on the land after the title was acquired, without an actual entry. After an

judge in granting the injunction required the plaintiff to "institute on the law side of the court such action as he may be advised by his counsel for the purpose of determining the question as to title to the land described in the complaint." From this order there was no appeal. The action was brought under this order, and therefore the plaintiff, as the actor, was bound by the order to do what it required, namely, to assert and prove his title to the land. In addition to this, the state was a party defendant, entitled to stand upon its prima facie ownership of the soil. It was on these considerations that the court held that the plaintiff, though alleging his own possession and a trespass thereon, was obliged to prove

actual entry,—which is, going on the land and openly asserting a dominion over it,—he may maintain the same action against a trespasser who obtrudes himself into the actual possession of a part of the land. But when a defendant is in the actual and exclusive possession before and at the time the plaintiff acquires his title and makes his entry, the plaintiff cannot regard it as a trespass on his possession, so as to sustain an action of trespass *quare clausum fregit*; for it is a solecism in terms to say that he can have a constructive possession of that which is in the actual possession of another. This would be to make a concurrent and exclusive possession consistent."

So, in a case in which the plaintiff in trespass does not claim actual possession of the land from which timber was wrongfully cut, he must allege in his declaration and prove his title to the land and the constructive possession which the law attaches. *Holliday-Klotz Land & Lumber Co. v. Markham*, supra.

When the lands on which the alleged acts of trespass were committed are not in the actual possession of another, an averment in an action of trespass *quare clausum fregit* that the plaintiff owns the lands is sufficient. *Hammontree v. Huber*, 39 Mo. App. 326; *Bell v. Clark*, 30 Mo. App. 224; *Renshaw v. Lloyd*, 50 Mo. 368.

Merely proof of the plaintiff's title to the *locus in quo* draws after it a constructive possession sufficient to entitle him to maintain an action for a trespass thereon, in absence of evidence of any adverse possession thereof. *Broker v. Scobey*, supra; *Bartholomew v. Edwards*, 1 Houst. (Del.) 17.

The petition in *Renshaw v. Lloyd*, supra, alleged that on a certain date, "the defendants without leave, and wrongfully, entered on the northeast quarter of Sec. 18. Twp. 45, range 16, of which the plaintiff was then the owner, and then and there tore down the fences of plaintiff and scattered his rails, and left his fields open and exposed, by which acts and doings of the defendants the plaintiff was damaged" in a 30 L.R.A. (N.S.)

title. The case is obviously taken out of the general rule by its peculiar facts.

In *Loan & Exch. Bank v. Peterkin*, 52 S. C. 236, 68 Am. St. Rep. 900, 29 S. E. 546, the plaintiff brought an action to foreclose a mortgage, and the record does not indicate that there was any allegation of possession, either in the mortgagee or the mortgagor. The defendant set up paramount title and possession of a part of the land originating before the mortgage was given. The holding that on the legal issue of title the plaintiff had the burden of proof, therefore, does not affect the question now under consideration.

The case of *Love v. Turner*, 71 S. C. 322, 51 S. E. 101, was held to be not an action in the nature of trespass *quare clausum*

certain sum. On the trial the lower court refused to permit the plaintiff to give any evidence, because of his failure to allege that he was in possession of the premises described. In reversing the judgment the appellate court said: "In this state the owner of lands is presumed to be in the possession till the contrary appears. It has never been held here that there must be an actual possession to maintain trespass. When a party has the legal estate in fee in lands, he has the constructive possession when there is no actual possession in anyone else. The word 'owner,' as used in this petition, means that the plaintiff has the legal estate in the lands and is in the possession."

Actual possession, necessary to sustain an action of trespass, may be shown by evidence of fencing or cultivation, or other acts of exclusive control by an agent, without residence by anyone. *VanBuskirk v. Dunlap*, 2 Ohio Dec. Reprint, 233.

But the mere marking of trees around a tract of forest land is not of itself possession, either actual or constructive, so as to sustain an action of trespass *quare clausum fregit*. *Oatman v. Fowler*, 43 Vt. 462. In cases of trespass upon unseated or uncultivated lands, it is the settled law that the title thereto carries with it a sufficient right to sustain an action of trespass in entering upon the land. *Trexler v. Africa*, 33 Pa. Super. Ct. 395; *Enterprise Transit Co. v. Hazelwood Oil Co.* 20 Pa. Super. Ct. 127; *Wilkinson v. Connell*, supra; *Caldwell v. Walters*, 22 Pa. 378; *Miller v. Zufall*, 113 Pa. 317, 6 Atl. 350; *Irwin v. Patchen*, 164 Pa. 51, 30 Atl. 436; *Yahoola River & C. C. Hydraulic Hose Min. Co. v. Irby*, 40 Ga. 479, 14 Mor. Min. Rep. 460; *Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 558; *Miller v. Miller*, 41 Md. 623; *M'Graw v. Bookman*, 3 Hill, L. 265; *Cannon v. Hatcher*, 1 Hill, L. 260, 26 Am. Dec. 177; *Roy v. Cramer*, 12 U. C. Q. B. 165.

The court, in *Safford v. Basto*, 4 Mich. 406, said that "a party having the title to unoccupied lands is constructively in possession, and may maintain trespass against one who, without his license or authority,

fregit but an action to recover possession of real estate. There the complaint alleged: "That the said defendant continues to assert her claim of title against this plaintiff to said premises, to deny plaintiff's right therein and asserts her determination to prevent the use and enjoyment of said premises by plaintiff, or persons holding under plaintiff, and to continue to use and occupy it for her own benefit; rendering it necessary for plaintiff to apply to this court for relief and for the protection of his title." There was no allegation that the plaintiff was in possession, and that his possession had been invaded by acts of trespass. On the contrary, the plaintiff insisted that the action was to recover possession.

It is true that in *Shettlesworth v.*

having no color of title to the lands, and whose acts evince no intention to retain permanent possession, enters upon them, and cuts and carries away standing timber."

A warrant and survey for unimproved lands was held in *Baker v. King*, 18 Pa. 138, 14 Mor. Min. Rep. 404, to give to the owner of them a constructive possession of the land which will enable him to maintain trespass for digging ore against anyone having no actual possession of the *locus in quo*.

So, one having title to a mining claim, and who has in good faith complied with the requirements essential to a valid location, is entitled to the exclusive possession of the claim, and may maintain trespass against one entering thereon and removing timber, although he has not an actual *pedis possessio* thereof. *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076.

On the theory of constructive possession, the court in *Raub v. Heath*, 8 Blackf. 575, held that a purchaser of land at a sheriff's sale, which was vacant and unimproved at the time of the sale and when the deed was given, may maintain an action of trespass *quare clausum fregit*. In reaching this decision the court relied upon *Wood v. Mansell*, 3 Blackf. 125, which was a similar case.

And it was held in *Cressy v. Sawyer*, 18 N. H. 95, that the levy of an execution upon the land of a debtor with delivery of seisin and possession by the officer enables the judgment creditor to maintain an action of trespass *quare clausum fregit* against the judgment debtor, who was subsequently found to be in possession against the former's will. This is based on the theory, as stated in *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182, that a creditor, after a regular levy and delivery of possession, is regarded as being in the actual seisin and possession of the *locus in quo*, and that the judgment debtor was regarded only as a tenant at sufferance.

In *Carter v. Maryland & P. R. Co.* 112 Md. 599, 77 Atl. 301, the facts showed that 30 L.R.A. (N.S.)

Hughey, 9 Rich. L. 387; *Parker v. Leggett*, 12 Rich. L. 200, and *Sims v. Davis*, 70 S. C. 362, 49 S. E. 872, it was held that the verdict was decisive of the title in an action of damages for trespass brought by one in possession, when the title was put in issue. But in none of these cases is it held that on the trial of the issue the plaintiff in possession must assume the burden of proving his title against the world. As we have seen, possession not obtained by a tortious act is *prima facie* evidence of title, and upon this the plaintiff may rest until the defendant justifies his invasion of the possession by proving either title in himself, or a license to enter from the true owner.

We conclude, therefore, that if the plaintiff held possession of the land not acquired

a deed described the land in question, a part of which was uninclosed woodland; that the grantee had exercised acts of ownership over a certain tract as belonging to the farm conveyed by the deed; and that those who had known the land between forty and fifty years understood that the tract in question was a parcel of the farm conveyed. In an action of trespass *quare clausum fregit* the court held that this evidence was legally sufficient to show that the occupant had such possession as entitled him to maintain the action.

But a void patent to vacate lands will not confer constructive possession of the *locus in quo* so as to entitle the patentee to maintain an action of trespass, where the patentee has no actual possession. *Greer v. Bowling*, 21 Ky. L. Rep. 1648, 55 S. W. 1081.

An unrecorded deed of wild land is not, of itself, sufficient evidence of possession by the grantee to enable him to maintain trespass *quare clausum fregit* against another. *Estes v. Cook*, 22 Pick. 295.

Likewise, the holder of an invalid tax deed of vacant lands has, for want of legal title, no constructive possession of the *locus in quo* which will sustain an action of trespass. *Kraus v. Congdon*, 88 C. C. A. 182, 161 Fed. 18.

Proof of a grant from the state to plaintiff, made after the occurrence of the alleged acts of trespass, has been held to be insufficient to show constructive possession necessary to maintain an action of trespass *quare clausum fregit*. *Gordner v. Blades Lumber Co.* 144 N. C. 110, 56 S. E. 695.

Under the provisions of N. Y. Code Civ. Proc. § 960, proof by plaintiff, in an action for trespass upon unoccupied lands, of an unbroken chain of title in himself for the period of thirty years next preceding the commission of the act of trespass, will be presumptive evidence of his ownership of such lands, and entitle him to maintain the action. *Ridgway v. Hawkins*, 123 App. Div. 15, 107 N. Y. Supp. 416.

Legal title will not, however, draw after it actual possession of the *locus in quo*,

by the disseisin of the defendant, it was entitled to hold the land, and to recover of the defendant damages for invasion of its possession and for the cutting of timber, unless the defendant proved a title in himself, or a license from one proved to be the true owner, and that the court was in error in charging otherwise.

The court was also in error in charging that if the land in dispute was covered by defendant's chain of title, then the defendant had shown perfect title to the land, unless its title had been defeated by adverse possession. The defendant's chain through written instruments only extended back to 1867 and was not connected with a grant from the state. Hence it was not for the court to say that the chain of title was per-

fect; since the jury must necessarily determine whether there had been such possession as to presume a grant from the state, or such adverse possession as would complete its title.

The exception alleging error in the following instruction must also be sustained: "I charge you that if the written instrument introduced by plaintiff does not cover the land described in this complaint he cannot recover. If the written chain of title introduced here by plaintiff does not cover and embrace and convey the land described in the complaint he cannot recover, and if it is not covered by his written chain, written instruments here, that would be a failure on the part of the plaintiff to establish a written title or written chain of title to the

which is actually in the occupancy of another, so as to enable such owner to maintain an action of trespass *quare clausum fregit*. Wood v. Lafayette, 68 N. Y. 181; Percival v. Chase, 182 Mass. 371, 65 N. E. 800.

A plaintiff who has title to the *locus in quo*, but who has never entered or had possession, cannot maintain an action of trespass *quare clausum fregit* against another who has actual *pedis possessio* under claim of adverse title. Peareson v. Dansby, 2 Hill, L. 466; Pratt v. Battels, 28 Vt. 685.

An action of trespass *quare clausum fregit* for working a mining claim and removing gold from the ground cannot be maintained by one not in possession of the claim, against another in adverse possession of the same. Raffetto v. Fiori, 50 Cal. 363, 14 Mor. Min. Rep. 469.

A purchaser of land at a sheriff's sale who has not obtained actual possession of the *locus in quo* by ejectment is not entitled to maintain an action of trespass *quare clausum fregit* against one who entered and removed the crops. Beggs v. Thompson, 2 Ohio, 105, 15 Am. Dec. 539.

In Zorn v. Haake, 75 Hun, 235, 27 N. Y. Supp. 38, it appeared that owners in possession of adjoining lots constructed a fence on what they supposed to be the dividing line, but which subsequently proved to be entirely on the lot of the plaintiff. In an action of trespass *quare clausum fregit* upon the portion of the lot on defendant's side of the fence, the court held that the plaintiff, not being in possession of such strip of land, could not maintain the action.

In Bailey v. Massey, 2 Swan, 167, the court held that where two persons have deeds covering the same lands, but neither of whom had actual possession of the premises, the owner of the older title is entitled, on the theory of constructive possession, to maintain an action of trespass *quare clausum fregit* against the owner of the younger title before the latter has taken actual possession of the *locus in quo*. 30 L.R.A. (N.S.)

But the court also held that after the defendant had gone into actual possession of the premises claiming under an adverse title, the plaintiff could not, for want of actual possession in himself, maintain the action.

The occupancy of a person put in possession of land to prevent others from committing acts of trespass thereon is regarded as the possession of the owner, who is the one entitled to maintain an action of trespass *quare clausum fregit*, notwithstanding the fact that such agent or employee is permitted to cultivate a part of the land for himself; the portion so cultivated is not regarded as in his exclusive possession for the purposes of the action. The court distinguished this case from those where the land was in possession of a tenant. Davis v. Clancy, 3 M'Cord, L. 422.

The rule that actual possession of the *locus in quo* is essential to the maintenance of an action of trespass will not be extended or enlarged by construction, so as to authorize the plaintiff to maintain an action for trespass upon a portion of the tract not actually occupied. Thus, one proving possession under a patent of the south end of a certain tract of land, the construction of a house thereon, and the working of a mine, does not show constructive possession of the north end of the tract so as to enable him to maintain an action of trespass. Aikin v. Buck, 1 Wend. 466, 19 Am. Dec. 535.

And in Blackburn v. Baker, 7 Port. (Ala.) 284, it was held that the actual occupancy of one half of a quarter section of land does not draw to its occupant the possession of an adjoining quarter section of unimproved and unoccupied land over which he had exercised acts of ownership, as cutting logs, so as to authorize him to maintain an action of trespass *quare clausum fregit* against one who entered thereon and cut logs and who was in the occupancy of land as near to the *locus in quo* as that occupied by the plaintiff.

A person who enters upon land without title or color of title is deemed to be in

land." The plaintiff relied not only on written instruments, but on the claim of presumption of a grant from twenty years' possession, and on adverse possession. Even under the theory of the case adopted by the circuit judge, that the plaintiff could in no event recover without proof of perfect title, the jury might have found a perfect title in the plaintiff from the presumption of twenty years' possession, or from adverse possession for ten years.

The court excluded evidence of the declarations of Mr. Pritchard, one of the persons under whom the defendant claims, as to the

land lines and as to trespassing on the lands of the plaintiff. These declarations, if made while Mr. Pritchard was owner of the property, were competent. *Ellen v. Ellen*, 16 S. C. 132; *Levi v. Gardner*, 53 S. C. 24, 30 S. E. 617.

We have covered in the discussion a number of the exceptions not particularly mentioned. The remaining exceptions are hypercritical and unsubstantial.

It is the judgment of this court that the judgment of the Circuit Court be reversed and the cause be remanded to that court for a new trial.

possession of no more land than he actually occupies. *Moor v. Campbell*, 15 N. H. 208.

Sufficiency of possession.

Since possession of the *locus in quo*, either actual or constructive, is essential to sustain an action of trespass *quare clausum fregit*, questions frequently arise as to the sufficiency of the plaintiff's possession to entitle him to maintain the action.

The court in *First Parish v. Smith*, 14 Pick. 297, said that "it is a settled rule of law, that any actual possession of real estate is sufficient to enable the party in possession to maintain *quare clausum fregit* against a stranger; and everyone must be deemed a stranger who can show no title and no elder possession." A similar statement of the rule occurs in *Graham v. Peat*, 1 East, 244.

"It is sufficient, in an action of trespass," said the court in *McCormick v. Huse*, 66 Ill. 315, "that the plaintiff was in the possession of the property trespassed upon. It is not necessary that his possession should have been an exclusive one."

In an action of trespass *quare clausum fregit* for entering premises and taking away a horse, a charge in the declaration that the "defendant broke and entered plaintiff's close" was held in *Finch v. Alston*, 2 Stew. & P. (Ala.) 83, 23 Am. Dec. 299, to be a sufficient averment of possession of the *locus in quo* at the time of the alleged act of trespass to entitle the plaintiff to maintain the action.

An entry upon land, partially fencing and cultivating the same, cutting timber, and exercising continuous public acts of ownership, constitute actual possession thereof sufficient to sustain an action of trespass *quare clausum fregit* against another intruding without paramount title. *McLean v. Farden*, 61 Ill. 106.

And an entry upon a parcel of land with the view of taking possession of it under a claim of title, and marking the lines by spotting the trees around the tract, is regarded as a sufficient possession to sustain an action of trespass against one who is unable to show any right to enter upon the land. "It is not necessary," said the court, "to cultivate or to build a fence, in order to take possession of land. 30 L.R.A. (N.S.)

An actual *pedis possessio*, with a marking of the boundaries by definite and distinct monuments, is good against one who subsequently comes without any evidence of a right to enter, and will entitle the party who has thus taken actual possession to maintain an action of trespass." *Woods v. Banks*, 14 N. H. 101.

Evidence of the frequent cutting of wood and timber on a tract of woodland for more than twenty years, under a claim of title, will support an action of trespass *quare clausum fregit* against one who shows no title. *Kilborn v. Rewee*, 8 Gray, 415.

Uncontradicted proof which shows that plaintiff, eighteen years before the alleged trespass took place, took possession of the *locus in quo*, set out a row of fruit trees on its boundary, leveled and generally improved the ground, is sufficient to sustain plaintiff's right to maintain an action of trespass. *McGinnis v. Murphy*, 23 N. Y. Week. Dig. 215.

One who showed that he had been in possession of the *locus in quo* for more than thirty years before the alleged trespass was committed, under a written instrument purporting to convey the land included in the *locus in quo*, and that he had cleared and improved the land and actually occupied a portion thereof, has been held to have possession sufficient to enable him to maintain an action of trespass against an intruder. *Donohue v. Whitney*, 133 N. Y. 178, 30 N. E. 848.

Parties engaged in mining and using ditches in the prosecution of that business have sufficient possession of such ditches as will enable them to maintain an action of trespass against one having no right thereto. *Bileu v. Paisley*, 18 Or. 47, 4 L.R.A. 840, 21 Pac. 934.

A wife, during the absence of her husband, who owned the house, was held in *Ford v. Schliessman*, 107 Wis. 479, 83 N. W. 761, to be in possession sufficient to enable her to maintain an action of trespass against one who entered therein late in the evening and made indecent demonstrations to her. The court said that "in the case at bar we must hold that the plaintiff was at the time in the exclusive possession of the dwelling house and premises, as against the defendant; and upon the evidence in the record she has the right

to recover such damages as she has sustained by reason of such invasion of her possession and rights."

And in *Bieri v. Fonger*, 139 Wis. 150, 120 N. W. 862, the court held that a wife during the absence of her husband was in such exclusive possession of the house and premises as to entitle her to maintain an action of trespass against one who wrongfully entered the house for the purpose of soliciting carnal intercourse.

A similar decision was rendered in *Newell v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703. In this case it appeared that the plaintiff, who was a blind girl, gave music lesson to the defendant's daughters, and was in the habit of lodging in his house on the days when she gave lessons. On one occasion the defendant came to the room set apart for the plaintiff, about midnight, sat upon her bed, and made repeated solicitations for sexual intercourse, which she repelled. The court held that the plaintiff's right to her private sleeping room during the night was exclusive, and that she was entitled to maintain an action of trespass *quare clausum fregit* against the defendant.

And in *Lewis v. Ponsford*, 8 Car. & P. 687, there is a *dictum* to the effect that a female servant of the occupant of a house has such possession of her bedroom as will enable her to maintain action of trespass against a wrongdoer who forces himself into it while she is in bed.

A man who constructed a house upon the lands of his wife, in which he resided with his wife and family, having control of the house, and who owned the stock on the farm, which he operated in his own name, is entitled to maintain an action of trespass against one who violently broke into and entered such house. The court said that "the wife had the right to confer upon her husband the possession and control of the property; and if she did so, he was entitled to defend such possession and to maintain an action of trespass against a stranger who should unlawfully and forcibly disturb him in the enjoyment of it. In one sense, it is true his possession would be hers; that is to say, it would not be hostile to her title, and would inure to her benefit as that of a tenant inures to the benefit of his landlord; but, nevertheless, he would have the right to protect it against a trespasser." The court further said that the jury was justified by the facts in finding that the wife had put the husband into possession of the farm. *Alexander v. Hard*, 64 N. Y. 228.

The fact that the plaintiffs shortly before the alleged act of trespass was committed left the house unoccupied for a time is not sufficient to defeat their possessory title, where it appears that they had been in possession of the house and lot under a deed, that they locked up the building and placed it in charge of an agent to rent it. *Holman v. Herscher* (Tex.) 16 S. W. 984.

A trustee upon whom an estate is set-
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led by a decree of the chancery court for the benefit of a *feme covert*, who remained in possession of the premises, becomes, upon acceptance of the trust, in legal contemplation vested with the actual possession, and may maintain an action of trespass *quare clausum fregit* against a mere wrongdoer although the decree creating the trust may be technically defective. *Rogers v. White*, 1 Sneed, 68.

The possession of land by a guardian is regarded as possession by the ward so as to entitle the latter to maintain, by his next friend, an action of trespass for an act committed by the wrongful consent of the guardian. *Johnson v. Meyer*, 4 Ohio Dec. Reprint, 383.

A right to the possession of land by an administrator of a deceased owner who died while in actual possession is sufficient to enable him to maintain an action of trespass *quare clausum fregit*, although he never was in actual possession. *Carter v. Jackson*, 56 N. H. 364.

The occupancy by a widow of land of which she took possession upon the death of her husband, was held in *Byrne v. Van Hoesen*, 5 Johns. 66, to be sufficient to enable her to maintain an action of trespass *quare clausum fregit* for entering the close and cutting down trees, on the theory that she is entitled to possession by right as guardian in socage of her infant children.

The use of a church for divine worship by a religious society, the building being kept locked when not in use, is a sufficient possession to enable the trustee of the society to maintain an action of trespass *quare clausum fregit* against a person breaking into the building, although such trustee is not a regular or constant attendant at the services, since the possession of the congregation will be regarded as his possession. *Carrine v. Westerfield*, 3 A. K. Marsh. 331.

A person who contracted with the owner of a close for the purchase merely of a growing crop of grass thereon was held in *Stevens v. Adams*, 1 Thomp. & C. 587, to have such an exclusive possession of the close, though for a limited purpose, as to entitle him to maintain an action of trespass *quare clausum fregit* against any one entering the close and taking the grass, even with the assent of the owners of the soil.

A grant to one, his heirs, and assigns, of all of the trees standing and growing in a certain close forever, with a license to cut and carry them away, transfers an estate of inheritance in the trees with an exclusive interest in the soil so far as it may be necessary for the support and nourishment of the trees, and entitles the grantee to maintain an action of trespass *quare clausum fregit* against the owner of the soil for cutting down the trees. In reply to the defense that the plaintiff could not maintain trespass for breaking the close, the court said: "Upon looking into the cases, we are satisfied that the plaintiff, having an inheritance in the trees, and an

exclusive right in the soil of the close, as far as was necessary for their support and nourishment, may maintain trespass for breaking the close, as well as for cutting. It appears to be a principle of law well settled, that where a man has a separate interest in the soil for a particular use, although the right of the soil is not in him, if he be injured in the enjoyment of his particular use of the soil, he may maintain trespass *quare clausum fregit*; but not if his interest is in common with others." *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215.

In reaching a decision in *Clap v. Draper*, supra, the court applied the doctrine announced in *Wilson v. Mackreth*, 3 Burr. 1824. In this case it appeared that the plaintiff had and exercised an exclusive right of digging turf in a certain parcel of land in which he with other tenants had common pasturage, the right of the soil being in the lord of the manor. The defendant dug and removed peats from the place in question, and the court held that the plaintiff was entitled to maintain an action of trespass *quare clausum fregit* against him.

An action of trespass *quare clausum fregit* by one who, having the right to enter upon certain land, sold to another the pine trees thereon, with the right to enter to cut and carry them away, against the latter for his act in removing trees belonging to the former. The court said that "when the defendant, being in possession for the purpose of removing the pine timber, goes further and takes the cedar timber belonging to the plaintiff, and for the removal of which he is in possession, as the exceptions show, such act of the defendant is not only a violation of the plaintiff's right of property, but is a violation of his possession; and this cannot be affected by the fact that the defendant has the right to go to all parts of the premises where the pine timber is to be found to remove it. As it is only to that extent that he is to be regarded as in possession, when he goes beyond this, as he must in all cases where he attempts to take the other timber, he becomes a trespasser on the possession of the plaintiff; he goes where he has no right to go, and where he has no possession, his possession being limited by his right." *Haskin v. Record*, 32 Vt. 575.

In *Hull v. Sanctuary*, 68 Vt. 57, 33 Atl. 890, the facts showed that the defendant leased to the plaintiff the basement of an old mill to be used for creamery purposes, and agreed to furnish water to operate the same; the water by which power was furnished was conducted through a ditch and flume from a dam located about half of a mile from the mill. In an action of trespass *quare clausum fregit* for opening the dam and thereby preventing the use of the water by plaintiff, the court held that the lease did not give the plaintiff any title or interest in the dam so as to entitle him to maintain the action.

The facts in *First Parish v. Smith*, 14 30 L.R.A. (N.S.)

Pick, 297, showed that the proprietors of a township, by vote, appropriated a parcel of ground for the purpose of constructing a meetinghouse thereon. Some time after the erection of the building the town was incorporated and assumed entire charge of its parochial affairs. The land surrounding the meetinghouse was known as the "common" or "meetinghouse land," was always open, and was intersected by numerous ways; it was used as a site for horse sheds, as a training field, as a place for town meetings, and for all purposes incident to a house of worship. Many years after the erection of the building the proprietors voted to sell portions of the grounds, and at times had exercised other acts of ownership over the premises. In an action of trespass *quare clausum fregit* for plowing up a part of the grounds, the court held that the first parish, as successor of the town in its parochial capacity, might, having actual possession, maintain the action. The court said that the vote of the proprietors and the actual erection of the meetinghouse gave an actual possession of the land to the parish, sufficient to enable it to maintain the action.

In *Baltimore & O. R. Co. v. Boyd*, 63 Md. 325, it appeared that the city of Baltimore passed an ordinance opening a certain street on condition that the defendant railroad company which laid its tracks therein pay to the city all damages suffered by the property owners. Subsequently the damages were paid as directed, but the city failed to distribute the money among the various property owners. In an action of trespass *quare clausum fregit*, the court held that there was no such ouster or dis-eisin by the defendant, as will prevent the plaintiffs from maintaining their action.

In *Martin v. Tobin*, 123 Mass. 85, the court held that a lessee who had become the owner of an undivided portion of the premises was entitled to the right of possession as against all persons, except the one to whom he had mortgaged his portion and who had entered to foreclose, and therefore entitled to maintain an action of trespass *quare clausum fregit*.

Joint possession of the *locus in quo* with other persons is sufficient possession to enable the plaintiff to maintain an action of trespass *quare clausum fregit*. *Holly v. Brown*, 14 Conn. 255.

The possession of one of the proprietors of common lands is sufficient to avail the corporation, composed of such proprietors, of the right to maintain an action of trespass *quare clausum fregit* without showing his authority to act for the others. *Monumoi Great Beach v. Rogers*, 1 Mass. 150.

Evidence of the possession of one of two plaintiffs, involving a claim of the right of both, is admissible in an action of trespass *quare clausum fregit* as showing that the action was properly brought. *Kinney v. Service*, 91 Mich. 629, 52 N. W. 53.

Under an Arkansas statute it is held

that the payment of taxes on wild and unimproved lands, under color of title, constitutes such possession for each successive year in which payment is made as will enable the payor to protect the property against acts of trespass. *Towson v. Denison*, 74 Ark. 302, 86 S. W. 661; *Price v. Greer*, 76 Ark. 426, 88 S. W. 985.

But in absence of proof that the taxes were paid on such lands for the year during which the acts of trespass were alleged to have been committed, the plaintiff cannot maintain the action. *Price v. Greer*, supra.

An island, whether cultivated or not, is sufficiently inclosed if surrounded by navigable water, to support an action of trespass *quare clausum fregit*. In absence of analogous cases, the court in this instance applied the fence law, which provides that a deep, navigable stream is equivalent to a fence. *Fripp v. Hasell*, 1 Strobb. L. 173.

In *Cook v. Rider*, 16 Pick. 186, the court held that one who entered upon an uncultivated and unappropriated tract of land, drove in stakes with his initials on them to mark the extent of his possession and claim, and erected buildings thereon, was entitled to judgment in an action of trespass *quare clausum fregit* against another who entered upon a portion of the claim so staked out, if the jury find that the plaintiff entered with an intention to take possession, and if they find that the defendant knew or might by the use of ordinary care have found out that fact, and if such mode of inclosing lands of that character had been acquiesced in by the people of the town in which it was located, as giving a valid right of possession.

Possession of government lands by one who has filed his declaratory statement for the purpose of pre-empting the land, and to whom the government has issued the usual receipt, is sufficient to enable the occupant to maintain an action of trespass *quare clausum fregit*. *Courchaine v. Bullin*, Min. Co. 4 Nev. 309, 12 Mor. Min. Rep. 235.

In order to maintain an action of trespass *quare clausum fregit* upon public lands under the act of 1837, it is not necessary that the premises be inclosed by a fence, or that the plaintiff should settle on the same tract of land upon which the trespass was committed or one immediately adjoining it. *Gleason v. Edmunds*, 3 Ill. 448.

Prior possession of public lands will entitle the possessor to maintain an action of trespass *quare clausum fregit*. *Grover v. Hawley*, 5 Cal. 485.

A mere occupant of lands owned by the government may bring an action of trespass *quare clausum fregit* against anyone who wrongfully dispossesses him. The court said that the common-law rule that any possession is sufficient to sustain trespass against a wrongdoer was established as a legal protection to persons occupying land not their own, and to preserve peace 30 L.R.A. (N.S.)

and quiet. *Duncan v. Potts*, 5 Stew. & P. (Ala.) 82, 24 Am. Dec. 768.

But under Gen. Stat. § 90, providing that "any person settled upon any of the public lands belonging to the United States may maintain trespass *quare clausum fregit*," providing that his claim is "marked out so that the boundaries thereof may be readily traced and the extent of such claim readily known," and is in actual possession of the claim, or has made improvements thereon to the value of \$100, it was held in *Martin v. Pittman*, 3 Colo. App. 220, 32 Pac. 840, that a settler who has merely had his claim surveyed, put eight logs in the foundation for a cabin valued at \$10, worked upon the place about eleven days grubbing, which constituted all of the improvements made, and who had never resided upon the tract, cannot maintain an action of trespass against another who entered upon the land, cut wild hay growing thereon and "picketed" his horses on a portion of the claim.

In *International & G. N. R. Co. v. Timmermann*, 61 Tex. 680, the court held that a widow who for more than four years after the death of her husband had been in exclusive possession of the *locus in quo* as her homestead, in which possession her children acquiesced, is entitled to maintain an action of trespass.

A town which has only the care and superintendence of a national road the fee to which is in the state has no such possessory right in the road as will enable it to maintain an action of trespass *quare clausum fregit*. *St. Louis, V. & T. H. R. Co. v. Summit*, 3 Ill. App. 155.

A similar decision was rendered in *Conner v. New Albany*, 1 Blackf. 88, 12 Am. Dec. 207, in which it was held that the qualified possession which by law the president and trustees of an incorporated town have in the streets, is not sufficient to enable them to maintain an action of trespass *quare clausum fregit* for an injury thereto. The court said that "a street in a town is a public highway. It is a subject of common use, and not of exclusive possession, an incorporeal hereditament, in which all persons possess equal right,—the right of passing over it,—and is in its nature incapable of being reduced into possession. But it is a subject of government; and the government of it is, by the act regulating the incorporation of towns, placed in the hands of the corporation. They have the power to keep it in repair, to remove nuisances, etc.; but this power is no more than a supervisor possesses over a common highway, and is certainly of a very different nature from a possession, either absolute or qualified. Consequently, no possessory right exists in the corporation by which the action can be supported."

But in case in which the corporation owns the freehold or has the actual possession of the soil of a market place, it has been held that an action of trespass

will lie against one who placed stalls, tables, etc., thereon without permission. *Norwich v. Swann*, 2 W. Bl. 1116.

An action of trespass *quare clausum fregit* may be sustained upon a temporary interest in the plaintiff, but the settled rules require such interest to be entire or exclusive. Thus, in *Dorsey v. Eagle*, 7 Gill & J. 321, it was held that the right of ingress and egress given an outgoing tenant after the termination of his lease, for the only purpose of enabling him to gather and carry away the growing crops, is not sufficient to maintain an action of trespass *quare clausum fregit* against the succeeding tenant, to whom the lease gave the right to seed down the field on which such crop stands, before it was ready for the gathering. This decision was based on the theory that the incoming tenant only was entitled to the exclusive possession of the *locus in quo*.

An action of *quare clausum fregit* will lie at the instance of a mere licensee, against one who planted oysters within the range occupied by the former and who subsequently harvested the crop. *Paul v. Hazleton*, 37 N. J. L. 106.

The doctrine of the *Paul Case* was approved and followed in *Miller v. Greenwich Twp.* 62 N. J. L. 771, 42 Atl. 735, in which the court held that one who had a parol license to maintain a sewer from his own land across that of an adjoining owner may maintain an action of trespass *quare clausum fregit* against one who injured or destroyed the sewer while cutting down a public street.

And in *Crosby v. Wadsworth*, 6 East, 602, it was held that one who contracted with the owner of the close for the purchase of a growing crop of grass to be made into hay by the vendee had such an exclusive possession of the close, though for a limited purpose, that he could maintain trespass *quare clausum fregit* against one entering the close and removing the grass.

One having an irrevocable license consisting of a lease under seal granting him the sole and exclusive right to cut and carry away from a certain pond all of the ice cut for private use or as merchandise may maintain an action against another for breaking and entering upon the close known as a certain pond, and cutting and carrying away ice. The court said that "it is not necessary to discuss the somewhat nice questions whether the plaintiff had such an interest in the land that he could bring trespass *quare clausum*, or whether he had such property in the ice that he could maintain an action of trover against the defendants. He had an interest greater than a mere revocable license, and could bring an action against Daggett [the lessor] if he interfered with his rights under the lease; he had, as we have said, a valuable right, and, if a stranger unlawfully encroached upon this right, we can see no reason why he might not maintain a proper action there-
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for." *Richards v. Gauffret*, 145 Mass. 486, 14 N. E. 535.

One who had erected abutments to a milldam under a parol license from the owner of the land was held in *Wilson v. Chalfant*, 15 Ohio, 248, 45 Am. Dec. 574, to have such possession of the *locus in quo* as will enable him to maintain an action of trespass against another for tearing down the abutments.

A grantee of the right to convey water through the land of the grantor by means of a race to the former's mill may maintain an action of trespass *quare clausum fregit* for an injury to such right. *Baer v. Martin*, 8 Blackf. 317.

The owner of only the profits of the soil may maintain an action of trespass for breaking and entering his close. *Stevens v. Adams*, 1 Thomp. & C. 587. The land in this case was owned by the wife of the plaintiff.

A judgment in forcible detainer is sufficient to establish the right of one in whose favor it was rendered to immediate possession, and to enable him to maintain an action of trespass *quare clausum fregit*. *Western Book & Stationery Co. v. Jevne*, 78 Ill. App. 668.

Possession sufficient to enable one to maintain an action of trespass for breaking and entering a house is not shown by proof of the delivery to him by the owner of the house of a key thereof for the purpose of removing goods stored in the building. *Davis v. Wood*, 7 Mo. 162.

Facts showing possession sufficient to support an action of trespass *quare clausum fregit* were not presented in *United Copper Min. & Smelting Co. v. Franks*, 85 Me. 321, 27 Atl. 185. In this case it appeared that the plaintiff, which claimed under a sheriff's deed, defective for absence of a seal, worked the property for a year and then ceased operations. The superintendent of the plaintiff retained the keys, but the locks were afterwards taken from the buildings, some of the windows broken, the buildings allowed to become out of repair, and some of the machinery had been removed. The defendant went into possession under a tax deed void for irregularity, and removed certain machinery left on the premises. The court held that possession of the plaintiff was insufficient as against the defendant.

Proof in an action of trespass *quare clausum fregit* that the plaintiff, who had no title to the *locus in quo*, was inclosing the same when the alleged act of trespass was committed, one side being still open, is insufficient to show such actual possession as will entitle him to maintain the action. The court said that the doctrine of constructive possession can have no application to a case like this one, where the plaintiff has no title and relies upon his naked actual possession. *Nelson v. Carter County Justices*, 1 Coldw. 207.

The evidence in *Bailey v. McNeily*, 20 U. C. Q. B. 451, showed that the husband of the plaintiff lived close to the land in

question, had for many years cut fire wood and made sugar thereon, and that it had been assessed to him for some time. Others had made similar use of the land, but not to the same extent; it had never been inclosed, and the neighbors' cattle as well as his own had been accustomed to roam over it. A short while before the commencement of the action the plaintiff had put up a fence on the land, and defendants put up another within his fence. In an action of trespass, the court held that the plaintiff, who showed no title, had not such possession as would entitle her to maintain the action.

In *Greaves v. Hilliard*, 15 U. C. C. P. 326, the only evidence of possession was plaintiff's entry upon and his presence at the survey of the land in question which he claimed as his own, but to which he showed no title. The defendant also assisted in the survey, and did not object to plaintiff's claim of right of possession, but asserted his own right to do the acts complained of. The court held that the plaintiff presented no proof either of actual or constructive possession such as would entitle him to maintain an action of trespass.

The use, by the owner of land bounded on one side by a highway, of a strip of land between his own and the traveled portion of the highway, by moving a wall, planting trees, cutting brushwood, and digging up the soil for fifteen years, gives him no right of possession sufficient to sustain an action of trespass *quare clausum fregit*. The court said: "Having no fee in the soil under the deed, and having upon the evidence acquired none by adverse possession, her right in the premises was a right of way,—an easement. For the interruption of that easement this action of trespass *quare clausum* will not lie." *Smith v. Slocomb*, 11 Gray, 280.

Occasional use by a mechanic of land located near his shop, for purposes connected with his trade, depositing wood thereon, etc., is not evidence of possession sufficient to enable him to maintain an action of trespass *quare clausum fregit*, since there was nothing in his use of the land that excluded others from using it also, or of showing any intention on his part of excluding others. The court further held that evidence, in addition to the above, that he constructed the foundation of a building upon the land, showed an intention to assert occupation in an absolute and permanent sense which would entitle him to maintain the action. *Moore v. Hodgdon*, 18 N. H. 144.

One who entered into possession of land under an agreement to lease the same, but who afterwards refused to execute a written lease, never acquired any right to the possession of the land, and cannot, therefore, maintain an action of trespass. *Welsh v. Quaid*, 5 N. Y. Week. Dig. 471.

So, one in possession as a servant or employee of the owner has no interest in the land which will authorize him to maintain

an action against a trespasser. *Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570.

A schoolmaster, who has no interest in the school building beyond the mere liberty of occupying the same during the day for the purpose of teaching, has no such possession as will entitle him to maintain an action of trespass against another for breaking into and entering the building. *Monaghan v. Ferguson*, 3 U. C. Q. B. 484.

In reaching the decision in *Monaghan v. Ferguson*, supra, the court relied upon *Wildbor v. Rainforth*, 8 Barn. & C. 5, in which it appeared that a pauper, who had been allowed by the overseers of the poor to occupy a small tenement, went away leaving her children in the house; a few days thereafter the overseer took possession of the place, put a lock on the door and removed the children to the workhouse. In an action of trespass brought by the pauper, the court held that she could not sue in trespass, for she was not a tenant of the premises, but was merely allowed to occupy them by the parish officers, the possession being in fact theirs.

One in possession of a farm under an agreement with the owner to work the same on shares for a single crop has no such possession of the premises as will entitle him to maintain an action of trespass *quare clausum fregit* against another. *Decker v. Decker*, 17 Hun, 13; *Bradish v. Schenck*, 8 Johns. 151.

And one whom a tenant permits to put in a crop of rye upon shares cannot, not being in possession, maintain an action of trespass for cutting and carrying away the crop. *McKeeby v. Webster*, 170 Pa. 624, 32 Atl. 1096.

But one in exclusive possession of a parcel of land under an agreement to work the same on shares may maintain an action in the nature of trespass *quare clausum fregit* against an officer making an unlawful entry under a writ of attachment. *Darling v. Kelly*, 113 Mass. 29.

So, a lessee of land on shares who was given exclusive possession of the land, and entire charge and control of the crops, may maintain an action of trespass *quare clausum* against one who entered and removed a portion of the crops. The court said that "where . . . the owner parts with his entire possession of the land to his lessee or tenant, and is to receive his half by way of rent in kind, the relation of tenants in common [of the crops] does not exist; but it is that of lessor and lessee. The lessor has no right to disturb the lessee in his possession or to interfere with or take his half, for, the possession of the land being in the lessee, the property in the crop must necessarily follow the interest in the land until the time for division." *Warner v. Abbey*, 112 Mass. 355.

A tenant at sufferance has no right to maintain an action of trespass *quare clausum fregit* against the landlord, since as against the latter he has no legal right of possession on which to found the action.

Wilde v. Cantillon, 1 Johns. Cas. 123; Easty v. Baker, 50 Me. 325, 79 Am. Dec. 616.

The making of pole bridges over a ditch on one side of a public road for the purpose of driving cattle into a tract of swamp land, the ranging of the cattle on the swamp, and occasionally cutting a few trees, is not such a possession as will sustain an action of trespass. *Morris v. Hayes*, 47 N. C. (2 Jones, L.) 93.

Under the rule that a plaintiff in trespass must show actual possession or title to the land, evidence that plaintiff on several occasions rode along a highway which extended through the land and had paid taxes on the land a few times was held in *Powers v. Halter*, 152 Ala. 636, 44 So. 859, to be insufficient to show actual possession necessary to maintain an action of trespass *quare clausum fregit*.

The facts in *Gaster v. Welna*, 23 Neb. 564, 37 N. W. 456, showed that the defendant had possession for four years of a certain tract of land under a tax deed, and used the land as a pasture. The plaintiff, who had obtained a deed from the grantee, of the patentee, drove out the cattle of the defendant and constructed a fence around the tract. The court held that the plaintiff had no such possession as entitled him to maintain an action of trespass against the defendant, who broke down the fence and drove his cattle back.

A sale by a town of all the seaweed that may land upon the town's beaches for the ensuing year gives to the purchaser no such possession of the beach as will entitle him to maintain an action of trespass against one entering upon the beach and removing the seaweed therefrom. Speaking with reference to the purchaser's right of possession, the court said: "But he acquired no interest in the land. He acquired only a right to the manure that might be thrown thereon, and a license to enter for the purpose of securing it and taking it away. He needed no exclusive right in the land, nor any separate interest in it, in order to obtain the full benefit of his purchase. . . . The gist of this action is the breaking and entering of the plaintiff's close. As he failed to prove that the close was his, he cannot recover damages for the taking and carrying away of the manure, even on proof that it was his property." *Parsons v. Smith*, 5 Allen, 578.

In an action of trespass *quare clausum fregit* the circuit court charged the jury "that either the possession or the right of possession would authorize the maintenance of the action." On appeal this charge was held to be erroneous because the right of possession and the right of entry are synonymous terms, and authorize the bringing of an action of ejectment, but not of trespass. In commenting on the error of the trial judge, the court said: "It is possible that by the right of possession the court meant constructive possession, but they are very different in their significance, and this court cannot but think that by this charge the jury were misled, as 30 L.R.A.(N.S.)

there is no proof of an actual or constructive possession on the part of the plaintiff, and the court cannot see upon what principle this verdict was founded. . . .

The court should have charged the jury that a constructive possession would authorize the maintenance of this action against a casual trespasser, where there was no person in the adverse possession of the disputed premises. But that the action could not be supported under any other circumstances, unless the plaintiff were in the actual possession at the time when the injury was committed." *Polk v. Henderson*, 9 Yerg. 310.

"The pursuit of game, the occasional cutting of trees, or gathering of herbage or wild fruits, and the like," said the court in *Moore v. Hodgdon*, 18 N. H. 144, "furnish no presumption that the entry is made for the purpose of taking possession; in the first place, because they are not exclusive in their character, and may well consist with like enjoyment of the land by others; and, in the second place, because there is nothing in such proceedings that indicates the limits of the country embraced in the occupation. But it is otherwise where one enters under a deed, which defines his claim, or where one, by a fence, attempts to exclude others, or where, by the particular use which he makes of the land, he indicates with precision the extent to which he proposes to enjoy it to the exclusion of others."

When several plaintiffs seek to maintain an action of trespass *quare clausum fregit*, it is necessary for them to establish a joint possession. *Storer v. Hobbs*, 52 Me. 144.

And where two parties have a concurrent or mixed possession of land, but neither of whom has any title or exclusive priority of possession, one cannot maintain an action of trespass against the other. Thus in *Barnstable v. Thacher*, 3 Met. 239, it was held that a town which took possession of uninclosed land to which it had no title, and prohibited anyone from taking cranberries therefrom except upon compliance with certain conditions, cannot maintain an action of trespass against persons taking cranberries from such land under a license from one who claimed a right to the land before the town took possession, but who could not show any title thereto.

Possession without title or under defective title.

Since trespass *quare clausum fregit* involves an injury to the right of possession of the *locus in quo*, the question of title is not generally involved and therefore is immaterial unless the plaintiff relies upon constructive possession which attaches to the title when the property is not in actual possession of anyone. The authorities sustain the rule that actual possession of the *locus in quo* without title or with a defective title is sufficient to sustain an action of trespass *quare clausum fregit* against one having no superior right.

United States.—Edmondson v. Lovell, 1 Cranch, C. C. 103, Fed. Cas. No. 4,286; Gulf, C. & S. F. R. Co. v. Johnson, 4 C. C. A. 447, 10 U. S. App. 629, 54 Fed. 474.

Alabama.—Louisville & N. R. Co. v. Smith, 141 Ala. 335, 37 So. 490; Boswell v. Carlisle, 70 Ala. 244; Louisville & N. R. Co. v. Hall, 131 Ala. 161, 32 So. 603; W. K. Syson Timber Co. v. Dickens, 146 Ala. 471, 40 So. 753; Morris v. Robinson, 80 Ala. 291; Louisville & N. R. Co. v. Higginbotham, 153 Ala. 334, 44 So. 872; Lankford v. Green, 62 Ala. 314.

Arkansas.—Ledbetter v. Fitzgerald, 1 Ark. 448.

California.—McCarron v. O'Connell, 7 Cal. 152, 14 Mor. Min. Rep. 429; Golden Gate Mill & Min. Co. v. Joshua Hendy Mach. Works, 82 Cal. 184, 23 Pac. 45; Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep. 74, 46 Pac. 166.

Colorado.—Patrick v. Brown, 36 Colo. 298, 85 Pac. 325.

Connecticut.—Mallett v. White, 52 Conn. 50; Merwin v. Morris, 71 Conn. 555, 42 Atl. 855; Merwin v. Backer, 80 Conn. 338, 68 Atl. 373; Brown v. Wheeler, 17 Conn. 350, 44 Am. Dec. 550.

Delaware.—Inskip v. Shields, 4 Harr. (Del.) 345.

Florida.—Crawford v. Waterson, 5 Fla. 472.

Georgia.—Cartersville v. Lyon, 69 Ga. 577; Bass v. West, 110 Ga. 698, 36 S. E. 244; Southern R. Co. v. Horine, 121 Ga. 386, 104 Am. St. Rep. 151, 49 S. E. 285.

Illinois.—Morse v. Iman, 42 Ill. 150, 89 Am. Dec. 417; Shoup v. Shields, 116 Ill. 488, 6 N. E. 502.

Indiana.—Catterlin v. Douglass, 17 Ind. 213.

Kansas.—Douglass v. Dickson, 31 Kan. 310, 1 Pac. 541.

Kentucky.—Crate v. Strong, 24 Ky. L. Rep. 710, 69 S. W. 957, rehearing denied in 24 Ky. L. Rep. 1221, 71 S. W. 1.

Louisiana.—Mott v. Hopper, 116 La. 629, 40 So. 921.

Maine.—Davis v. Alexander, 99 Me. 40, 58 Atl. 55; Dolloff v. Hardy, 26 Me. 545; Moore v. Moore, 21 Me. 350; Hunt v. Rich, 38 Me. 195; Clancey v. Houdelette, 39 Me. 451; Look v. Norton, 55 Me. 103.

Maryland.—New Windsor v. Stocksedale, 95 Md. 196, 52 Atl. 596; Wilson v. Hinsley, 13 Md. 73; Stanton v. Lapp (Md.) 77 Atl. 672.

Massachusetts.—Kempton v. Cook, 4 Pick. 305; First Parish v. Smith, 14 Pick. 297; Barnstable v. Thacher, supra; Sweetland v. Stetson, 115 Mass. 49; Nickerson v. Thacher, 146 Mass. 609, 16 N. E. 581.

Michigan.—Newcombe v. Irwin, 55 Mich. 620, 22 N. W. 66.

Minnesota.—Olson v. Minnesota & N. W. R. Co., 89 Minn. 280, 94 N. W. 871; Witt v. St. Paul & N. P. R. Co. 38 Minn. 122, 35 N. W. 862.

Missouri.—Russell v. Thorn, 1 Mo. 390; Richardson v. Murrill, 7 Mo. 333; Hobart Lee Tie Co. v. Stone, 135 Mo. App. 438, 117 S. W. 604.

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Nebraska.—Yorgensen v. Yorgensen, 6 Neb. 383; Nelson v. Jenkins, 42 Neb. 133, 60 N. W. 311; Dold v. Knudsen, 70 Neb. 373, 97 N. W. 482.

Nevada.—Courchaine v. Bullion Min. Co. 4 Nev. 369, 12 Mor. Min. Rep. 235.

New Hampshire.—Moor v. Campbell, 15 N. H. 208; Albin v. Lord, 39 N. H. 196; Barstow v. Sprague, 40 N. H. 27; Colbath v. Anderson, 63 N. H. 617; Fowler v. Owen, 68 N. H. 270, 73 Am. St. Rep. 588, 39 Atl. 329; Knowles v. Dow, 20 N. H. 135.

New Jersey.—Phillips v. Kent, 23 N. J. L. 155; Todd v. Jackson, 26 N. J. L. 525.

New Mexico.—Probat v. Domestic Missions, 3 N. M. 373, 5 Pac. 702.

New York.—Stevens v. Adams, 1 Thomp. & C. 587; Althouse v. Rice, 4 E. D. Smith, 347.

North Carolina.—Myrick v. Bishop, 8 N. C. (1 Hawks) 485; Frisbee v. Marshall, 122 N. C. 760, 30 S. E. 21.

Pennsylvania.—Cheney v. Dallett, 1 Del. Co. Rep. 225; Vanderslice v. Donner, 2 Pa. Super. Ct. 319; Shenk v. Mundorf, 2 Browne (Pa.) 106.

Rhode Island.—Lavin v. Dodge, 30 R. I. 8, 73 Atl. 376.

South Carolina.—Johnson v. M'Ilwain, Rice, L. 368; M'Colman v. Wilkes, 3 Strobb. L. 465, 51 Am. Dec. 637.

Tennessee.—Large v. Dennis, 5 Sneed, 595; Deaderick v. State, 122 Tenn. 222, 122 S. W. 975.

Texas.—Linard v. Crossland, 10 Tex. 462, 60 Am. Dec. 213; Galveston, H. & S. R. Co. v. Rheiner (Tex. Civ. App.) 25 S. W. 971; Magerstadt v. Lambert, 39 Tex. Civ. App. 472, 87 S. W. 1068; Gulf, C. & S. F. R. Co. v. Cusenberry, 86 Tex. 525, 26 S. W. 43.

Utah.—Marks v. Sullivan, 8 Utah, 406, 20 L.R.A. 590, 32 Pac. 608.

Vermont.—Stratton v. Lyons, 53 Vt. 641, 10 Mor. Min. Rep. 314; Davenport v. Newton, 71 Vt. 11, 42 Atl. 1087; Rice v. Chase, 74 Vt. 362, 52 Atl. 967.

West Virginia.—Wilson v. Phoenix Powder Mfg. Co. 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035.

Wisconsin.—Newton v. Marshall, 62 Wis. 8, 21 N. W. 803; Stahl v. Grover, 80 Wis. 650, 50 N. W. 589; Reilly v. Howe, 101 Wis. 108, 76 N. W. 1114.

English.—Lambert v. Stroother, Wille's Rep. 221; Cary v. Holt, 2 Strange, 1238.

As was well said by the court in Myrick v. Bishop, supra, "it is consistent with first principles [that possession alone should be sufficient to maintain an action of trespass], and in fact would be strange if it were not so; for wretched would be the policy which required the title to be shown in every instance where the peaceable possession was disturbed by an intruder who had no right. It would tend to broils and quarrels, and the possessor would resort to force to defend his possession if the law afforded him no redress."

"No principle is more firmly established," said the court in Mallett v. White, supra, "than that mere possession of land, how-

ever recent, is a sufficient title to support an action of trespass against one who has not a better right. Indeed the person who is in peaceable possession is regarded as owner, except in a contest with one who shows a superior title." A similar statement was made in *Catteris v. Cowper*, 4 Taunt. 547.

In *Lankford v. Green*, 62 Ala. 314, the court said that "the action is trespass *quare clausum fregit*, and to maintain it, the plaintiff is not bound to show title. Possession, whether founded on a good or bad title, will support the action against a stranger or wrongdoer. Or, the possession may be tortious, and a wrongdoer cannot justify or excuse an invasion of and injury to it."

"A party peaceably in possession of lands," said the court in *Larue v. Russell*, 26 Ind. 386, "may maintain trespass for an injury to his possession, though the trespasser have a better title to the lands."

A plaintiff in possession of the *locus in quo* is entitled to a judgment in an action of trespass *quare clausum fregit*, as against one showing no superior right. *Jenkins v. Palmer*, 72 N. H. 592, 58 Atl. 42.

In an action of trespass *quare clausum fregit*, the court in *Sullivan v. Clements*, 1 Colo. 261, holds that if the plaintiff does not show title to the *locus in quo* he must show that he was in actual possession thereof at the time of the alleged act. A similar statement was made in *Heinrichs v. Terrell*, 65 Iowa, 25, 21 N. W. 171, and in *Oatman v. Fowler*, 43 Vt. 463.

Actual possession of land, though wrongful, is sufficient to support an action of trespass *quare clausum fregit* against a mere stranger or intruder. *Courchaine v. Bullion Min. Co.* supra.

One in possession of land under color of title, though the same is defective, may maintain an action of trespass against a wrongdoer. *Nelson v. Mather*, 5 Kan. 151; *Magowan v. Branham*, 95 Ky. 581, 26 S. W. 803; *Douglass v. Dickson*, 31 Kan. 310, 1 Pac. 541; *Boyington v. Squires*, 71 Wis. 276, 37 N. W. 227.

Possession of land without even a claim of title vests a sufficient right of property in the person having such possession, to enable him to hold the land against all of the world except the true owner; it is *prima facie* evidence of seisin in fee. *Gulf, C. & S. F. R. Co. v. Johnson*, supra.

In *McFarlane v. Ray*, 14 Mich. 465, the court said that proof of possession of land and claim of title thereto under a deed which purports to convey it is *prima facie* evidence of title in an action of trespass *quare clausum fregit* against one who shows no right in himself. A similar statement was made by the court in *Blaisdell v. Roberts*, 37 Me. 239.

A declaration in trespass for cutting and carrying away the trees of the plaintiff is good without an averment that the land on which the trees were growing belonged 30 L.R.A. (N.S.)

to the plaintiff. *Gronour v. Daniels*, 7 Blackf. 108.

Proof of title is not necessary to entitle a plaintiff to recover in an action of trespass for breaking and entering plaintiff's close, under a petition which alleged his title to and possession of the *locus in quo*, when the defendants did not deny the plaintiff's possession or set up any adverse claim thereto. *Printz v. Cheeney*, 11 Iowa, 469.

A party in possession of land without title or claim of title, and claiming no interest therein further than his mere possession thereof may maintain an action of trespass *quare clausum fregit* against one not having the slightest interest or claim to the land, for damage done by the latter's cattle. The court said that "trespass *quare clausum fregit* is a mere possessory action, and may be maintained against a mere wrongdoer by any person in the possession of the land upon which the trespass is committed, without any reference to who owns the land." *Hesley v. Baker*, 19 Kan. 9.

One owning a house adjoining an alley may maintain an action of trespass *quare clausum fregit* against a municipality for removing steps extending 30 inches into the alley, and a board walk and drain extending in the alley along the side of the house, where it appears that the municipal corporation is not the owner of the alley and has no authority by law to remove the structures as nuisances. *New Windsor v. Stocksedale*, 95 Md. 196, 52 Atl. 596.

A contractor in possession of a parcel of ground for the purpose of erecting a building thereon has actual possession, and is entitled to maintain an action of trespass *quare clausum fregit*. *Illinois & St. L. R. & Coal Co. v. Caldwell*, 17 Ill. App. 409.

One in possession of a tract of land, the owner in severalty of a portion of the tract not objecting thereto, may maintain an action of trespass *quare clausum fregit* against a mere stranger. *Preston v. Robinson*, 24 Vt. 583; *Hibbard v. Foster*, 24 Vt. 542.

A dowress in actual possession of land set off to her is entitled to maintain an action of trespass for breaking and entering the close and taking away sand, wood, trees, and cranberries, regardless of the validity of the proceedings by which the land was set off to her. *Nickerson v. Thacher*, 146 Mass. 609, 16 N. E. 581.

In *Sweetland v. Stetson*, 115 Mass. 49, it appeared that each party had as much land as the deed called for, and that the controversy was over a strip 1 foot wide on which the fence between the two lots stood. The court held that the plaintiff, being in possession of the disputed strip, was entitled to maintain an action against the other party for the tort in breaking and entering the close and pulling down the fence.

An action of trespass *quare clausum*

fregit may be maintained for cutting and carrying away timber from a piece of land in the possession of the plaintiff, who claims title under a patent issued to an incompetent Indian and a deed from such Indian, which had never been approved by the Secretary of the Interior. The court said that the plaintiff has color of title to the *locus in quo*, and, however defective such title may be, yet, for the purposes of this action, he must be deemed to be the real owner of the premises, and may recover for the disturbance of his possession. "It would be very bad policy," the court continued, "to allow a mere wrongdoer after he has committed a trespass, when he is sued for it, to interpose embarrassing and perplexing questions of ownership, to litigate nice and intricate questions of title, with the party in possession, who claims to be the owner, and who has color of title." *Nelson v. Mather*, supra.

Actual possession of land under an invalid tax collector's deed is sufficient to support an action of trespass *quare clausum fregit*. *Maxfield v. White River Lumber Co.* 74 N. H. 158, 65 Atl. 832.

"Even though the [tax] deed be shown to be in fact invalid," said the court in *Douglass v. Dickson*, supra, "yet, where possession is taken and held under it, either personally or by tenant, such possession, being under color and claim of title, is sufficient evidence of title to sustain a recovery of damages as against a mere trespasser."

Actual possession of land under claim and color of title of a tax deed was held in *Kunkel v. Utah Lumber Co.* 29 Utah, 13, 81 Pac. 897, 4 A. & E. Ann. Cas. 187, to be sufficient to maintain an action against one who, without title or right of possession, entered upon the land and removed a building therefrom.

One who takes possession under a grant from the government, of more land than his grant conveyed to him, may maintain an action of trespass against another entering upon the part not included within the grant, and removing trees therefrom. *Cutts v. Spring*, 15 Mass. 135.

In *Morse v. Iman*, 42 Ill. 150, 89 Am. Dec. 417, it appeared that two parties fenced off a piece of land which they did not own in fee for the purpose of using the grass thereon, and without a partition fence agreed that each should use a certain portion of the tract. After thus occupying the land for a period of three years, one of the parties gave a third person permission to enter upon the land and cut hay, and the latter cut the same from the other party's portion of the field. The court held that the plaintiff was in such actual possession of the part of the tract assigned to him as to maintain an action of trespass against the one so removing the grass from his part. In speaking of the rights of the occupant, the court said: "The law is well settled, that a person in possession of property may recover for

damages done to the property, as against all persons but the true owner, and may maintain any appropriate action for a recovery against any person but the true owner, precisely as if it were his own. By the agreement or understanding between appellant [plaintiff] and Larson [the other party in possession], each was entitled to hold and enjoy his portion, as they did, in severalty, subject only to the rights of the owner of the soil. Either might maintain an action against the other for any invasion of his possession. By their understanding each was in the exclusive possession of his several portion. This being so, neither had the right to license strangers to enter on the portion of the other. Appellee [defendant] therefore acquired no right to enter upon this land and cut and appropriate this hay by obtaining permission from Larson."

A minister of a parish settled for life or a term of years was held in *Cargill v. Sewall*, 19 Me. 288, to be entitled to maintain an action of trespass *quare clausum fregit*.

One in possession of another's land, to take care of the premises and to prevent others from doing injury to them, is entitled to maintain an action of trespass *quare clausum fregit*. *Russell v. Thorn*, 1 Mo. 390.

Likewise, the former owner of a house which had been sold to a municipal corporation may, on the ground that he is still in possession, maintain an action of trespass against a neighbor who entered and pulled down the house. *Glass v. Dobson*, 14 U. C. Q. B. 419.

And one who sold his land but remained in possession thereof by the permission of the grantee, which was a town-site company, has sufficient possession to maintain an action of trespass against a mere stranger, although the grantee had regularly laid out the land as a township site and had made and filed a survey. *Sell v. Graves*, 16 Mont. 342, 40 Pac. 788.

A defendant in an action to recover land, who gives a replevy bond which entitles him to the possession of the premises as against the plaintiff until the suit is decided or the writ of sequestration is quashed, is entitled to maintain an action of trespass *quare clausum fregit* against one entering under the authority of the plaintiff in the action to recover the land. *Linard v. Crossland*, 10 Tex. 462, 60 Am. Dec. 213.

The levy of an execution under the provisions of § 4, chap. 107, Mass. Stat. 1844, was held in *Wellington v. Geary*, 3 Allen, 508, to be prima facie sufficient proof of title to sustain an action of trespass in the nature of trespass *quare clausum fregit* against a mere wrongdoer, without showing that an action to recover possession of the land had been brought within a year from the return of the execution on which the levy was made, as required by such statute.

One in actual possession of land under

a deed thereof to commence *in futuro* may maintain an action of trespass against a stranger. *Allen v. Taft*, 6 Gray, 552.

It was held in *Ashley v. Landers*, 9 Allen, 250, that an entry under deeds of warranty upon land over which a way existed gives sufficient seisin and possession to sustain an action of trespass for breaking and entering plaintiff's close, removing a fence from the same, and cutting trees thereon, against one showing no title to justify his acts.

A grantee entering into possession of land belonging to infants under a deed given by their guardian may maintain an action of trespass *quare clausum fregit* against a third party, although the deed is ineffectual to transfer title. *Todd v. Jackson*, 26 N. J. L. 525.

A railroad corporation organized for the purpose of constructing, maintaining, and operating a railroad within the territory of New Mexico, acquires an interest in the location which has, in good faith, been surveyed, staked out, and adopted, sufficient to authorize it to maintain an action of trespass. *Arizona & C. R. Co. v. Denver & R. G. R. Co.* 13 N. M. 345, 84 Pac. 1018.

But a deed of special warranty from a person who does not appear to have had any title in himself, in absence of proof of an actual possession thereunder, will not authorize the grantee therein to maintain an action of trespass *quare clausum fregit*. *Dugan v. Ferguson*, 8 Ky. L. Rep. 342, 1 S. W. 539.

And certified transcripts of recorded deeds, one of which purports to convey a "portion" of the land described in the complaint but which fails to describe any particular portion, and another of which conveys a "further portion," and a third the "remaining portion," in absence of proof showing title in the grantors, or that the grantees under such deeds were in actual possession of the *locus in quo*, are insufficient proof of title to authorize the grantees to maintain an action of trespass. *Odd Fellows' Sav. Bank v. Turman* (Cal.) 30 Pac. 966.

Likewise, a deed of release and quitclaim from one who claimed to have purchased the *locus in quo* at a sale by a collector of taxes, in absence of proof of actual or constructive possession thereunder, is insufficient to enable the grantee to maintain an action of trespass *quare clausum fregit* for breaking and entering a certain lot and carrying away trees. *Marr v. Boothby*, 19 Me. 150.

And in *Savage v. Holyoke*, 50 Me. 345, it was held that evidence of a quitclaim deed from one who never had possession or title to the *locus in quo* and which was not recorded until after the commission of the alleged acts of trespass, without proof of any possession by the plaintiff under the same, is insufficient to sustain an action of trespass *quare clausum fregit*.

In *Benjamin v. Slaughter*, 151 Ala. 445, 44 So. 468, it appeared that a tenant in 30 L.R.A. (N.S.)

common sold its undivided interest to another, who died before obtaining the deed; thereafter, the tenant, cotenant, and administrator of the purchaser agreed upon a partition of the land. The tenant shortly thereafter deeded its undivided interest to the heirs of the purchaser, and the cotenant deeded to the administrator the portion of the land which had been set apart for him. It also appeared that the administrator was one of the heirs of such purchaser and had gone into possession. In an action of trespass for cutting and carrying away trees, the court held that the title of the administrator was good as against a stranger committing such acts, and that he was entitled to maintain the action.

One who had entered upon public lands and had obtained a certificate of entry is held to be the owner of such an estate therein as will enable him to maintain an action of trespass. *Gulf, C. & S. F. R. Co. v. Clark*, 41 C. C. A. 597, 101 Fed. 678.

A United States Land Office certificate showing an entry upon or purchase of government lands has been held to be competent evidence of title in the one to whom it was issued to authorize him to maintain an action for injury to the turpentine trees on such land. The Mississippi Code, § 1959, provides that such certificate "shall vest the full legal title to such land in the person to whom such certificate is granted; his heirs, or assigns, so far as to enable the holder thereof to maintain an action thereon, and the same shall be received in evidence as such, saving the paramount rights of other persons." *Johnson v. Davis*, 91 Miss. 708, 45 So. 979.

A report of government commissioners appointed to adjust claims of citizens to lands in the territory of Michigan, which report had been confirmed by an act of Congress, has been held to be equivalent to a grant, and therefore sufficient to authorize him in whose favor the report was rendered to maintain an action of trespass against persons who broke into and entered the land occupied by him for fishing purposes. *Solomon v. Grosbeck*, 65 Mich. 540, 36 N. W. 163.

One who obtained a special warrant of survey and procured a certificate of survey to be made and returned upon a tract of land which included a parcel of vacant land inclosed by a fence and held by another, and paid the composition money upon the certificate for the whole tract, and who subsequently obtained a patent of the land, may lawfully maintain an action of trespass *quare clausum fregit* against the one who held such parcel for a time, but which was abandoned before the patent was issued, for his act in carrying away a fence. *Chapline v. Harvey*, 3 Harr. & McH. 396.

And it was held in *Gilbert v. McDonald*, 94 Minn. 289, 110 Am. St. Rep. 368, 102 N. W. 712, that a patent to government lands will authorize the patentee to maintain an action of trespass for cutting and

removing timber, committed after the date of application for the patent but before confirmation thereof.

A statute granting to the owners of parcels of land along a certain river, and their heirs and assigns, the right to erect and maintain wharves extending to the channel of the river, gave the grantees a possessory title to the soil sufficient to enable them to maintain an action of trespass for entering upon the property and filling up a dock. *Hamlin v. Pairpoint Mfg. Co.* 141 Mass. 51, 6 N. E. 531.

A homestead entryman in actual possession of vacant government land may maintain an action of trespass against one who entered upon the land and took away a crop. *Matthews v. O'Brien*, 84 Minn. 505, 88 N. W. 12.

An entryman under the homestead laws of the United States, in actual possession and cultivation of the land, may maintain an action of trespass although final proof has not yet been made. *Wendel v. Spokane County*, 27 Wash. 121, 91 Am. St. Rep. 825, 67 Pac. 576.

A receipt from a receiver of the United States land office for the fees and commissions paid by an applicant for a homestead under the provisions of the homestead act of Congress, was held in *Gaither v. Lawson*, 31 Ark. 279, to be sufficient to authorize the holder in possession to maintain an action of trespass. A similar decision was rendered in *Pierce v. France*, 2 Wash. 81, 26 Pac. 192, 807.

—right of tenant.

On the theory that one in actual possession of the *locus in quo*, although without title thereto, may maintain an action of trespass *quare clausum fregit*, the following authorities sustain the right of a tenant in possession to maintain the action: *Haligan v. Chicago & R. I. R. Co.* 15 Ill. 558; *Walden v. Conn.* 84 Ky. 312, 4 Am. St. Rep. 204, 1 S. W. 537; *Rowland v. Rawland*, 8 Ohio, 40; *State v. Burns*, 123 Ind. 427, 24 N. E. 154; *Herr v. Slough*, 2 Browne (Pa.) 111; *Davis v. Clancy*, 3 M'Cord L. 422; *Roussin v. Benton*, 6 Mo. 592; *Lindenbower v. Bentley*, 86 Mo. 515; *Smith v. Fortiscue*, 48 N. C. (3 Jones, L.) 65; *Wentworth v. Portsmouth & D. R. Co.* 55 N. H. 540.

A lessee in possession was held in *Walker v. Wilson*, 8 Bosw. 586, to be entitled to maintain an action of trespass for an injury to his possession by a debtor who entered the former's premises with the malicious intent of provoking a quarrel with the lessee's clerk in case a small debt should not be paid.

A hunting club in possession of a hunting preserve as tenant may maintain an action of trespass for breaking and entering the close, without showing more than a *prima facie* ownership of the land in the lessor. *Kellogg v. King*, 114 Cal. 378, 55 Am. St. Rep. 74 46 Pac. 166. 30 L.R.A. (N.S.)

A tenant from year to year holding under a lease from the remainderman, to which the life tenant has given his consent, has sufficient title to maintain an action of trespass *quare clausum fregit* against a gas company for destruction of a potato crop. *Salimonia Min. & Gas Co. v. Wagner*, 2 Ind. App. 81, 28 N. E. 158.

One in possession of glebe land under a lease which is void under the act of 13 Eliz. chap. 20, for nonresidence of the rector of the parish, was permitted in *Graham v. Peat*, 1 East, 244, to maintain an action of trespass upon his possession by a wrongdoer. "Any possession," said the court, "is a legal possession against a wrongdoer." A similar statement occurs in *Harker v. Birkbeck*, 3 Burr. 1563, and in *Chambers v. Donaldson*, 11 East, 65.

Possession sufficient to sustain an action of trespass *quare clausum fregit* was shown in *Harper v. Charlesworth*, 4 Barn. & C. 574, in which it appeared that the plaintiff paid a nominal rent to the King for the use of a certain woodland, the wood thereon being reserved to the Crown, and that he exercised the privilege of shooting on the land and of removing the grass therefrom.

The possession of a tenant during the pendency of an appeal from a judgment rendered against him in an action of forcible detainer was held in *Tobin v. French*, 93 Ill. App. 18, to be sufficient to authorize him to maintain an action of trespass for the disturbance of his peaceable occupancy of the demised premises.

A tenant in possession may maintain an action of trespass *quare clausum fregit* against another for forcibly entering upon land and tearing down buildings thereon. *Uttendorffer v. Saegers*, 50 Cal. 496.

So, a tenant in possession may maintain an action of trespass for acts of another in breaking down the fences. *Foster v. Elliott*, 33 Iowa, 216.

A life tenant may maintain trespass *quare clausum fregit* for entering and removing standing timber from the property. *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 9 L.R.A. (N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858; *Perry v. Jefferies*, 61 S. C. 292, 39 S. E. 515.

Tenancy by the courtesy was held in *Clark v. Weeton*, 1 Root, 299, to entitle the occupant to maintain an action of trespass.

The lessee of a strip of land bordering on a stream, leased for the sole purpose of enabling the lessee to fish in the stream without asking permission to go upon the land, may maintain an action for trespass in entering upon the strip of land. *Beach v. Morgan*, 67 N. H. 529, 68 Am. St. Rep. 692, 41 Atl. 349.

In *Salimonia Min. & Gas Co. v. Wagner*, supra, it appeared that the plaintiff had leased a tract of land from the remaindermen, with the consent of the life tenant, and that the defendant had purchased the land in question subject to the lease of the plaintiff. In an action of trespass *quare clausum fregit* the court held that the

plaintiff had sufficient title to sustain the action.

In *Albin v. Lord*, 39 N. H. 196, the evidence showed that the farm in question was owned by the wife in her own right, and that she lived thereon with her husband and family; the husband managed and controlled it, taking the crops, rents, and profits of the land, and disposed of the wood, timber, and other products as though he were the absolute owner. In an action of trespass *quare clausum fregit*, the court held that the husband was presumed to have the rightful and beneficial possession of the farm as tenant of the wife under some satisfactory arrangement with her, and therefore entitled to maintain the action.

An oral agreement by which landowners gave another the exclusive right to enter on the land and remove ores therefrom for a certain rent payable in ores gives the lessee an interest in the land which will enable him to maintain an action of trespass. *Ganter v. Atkinson*, 35 Wis. 48, 9 Mor. Min. Rep. 13.

A tenant at will may defend his possession against a mere intruder. *Marden v. Jordan*, 65 Me. 9; *Brown v. Bates*, Brayton (Vt.) 230; *George v. Fisk*, 32 N. H. 32; *Bick v. Hill*, 27 Mo. App. 554.

Thus, in *Covert v. Morrison*, 49 Mich. 133, 13 N. W. 390, the court held that a widow whom the heirs at law permitted to continue in possession of the land which her husband had occupied as a homestead may maintain an action of trespass against one intruding thereon.

A tenant holding under a parol lease for the term of a year may, although a tenant at will, maintain an action of trespass against one unlawfully entering upon the premises. *Hillhouse v. Jennings*, 60 S. C. 392, 38 S. E. 596.

An action for trespass for entering upon land in possession of a tenant at will, treading down the grass, and throwing down a fence erected by the tenant for his own convenience, must be brought by the tenant in possession. *Little v. Palister*, 3 Me. 6. A similar decision was rendered in *Bartlett v. Perkins*, 13 Me. 87.

In *Catlin v. Hayden*, 1 Vt. 375, the court held that one who entered as a tenant at will, since the lease, which was for more than a year, was created by parol, but who, by continuing in possession, became a tenant entitled to six months' notice to quit, may maintain an action of trespass *quare clausum fregit*.

In *Dickinson v. Goodspeed*, 8 Cush. 119, the court said that a tenant at will, being entitled under the statute to notice to terminate his estate, is, until the expiration of such notice, entitled to the lawful and exclusive possession of the land, not only as against a stranger, but also against the lessor at will, and therefore may maintain an action of trespass against one who entered and carried off a pump.

As to right of landlord to maintain the 30 L.R.A. (N.S.)

action where the property is in possession of tenant at will, see *supra*.

—one in adverse possession.

One in adverse possession of land under claim of title may maintain an action of trespass *quare clausum fregit* against another having no superior right of possession. *Moore v. Cummings* (S. C.) 69 S. E. 154; *Baltimore & O. S. W. R. Co. v. Higgins*, 69 Ill. App. 412; *Bowley v. Walker*, 8 Allen, 21; *Percival v. Chase*, 182 Mass. 371, 65 N. E. 800; *Hart v. Doyle*, 128 Mich. 257, 87 N. W. 219; *Atchison, T. & S. F. R. Co. v. Jones*, 110 Ill. App. 626; *Meacham v. Fay*, 6 Vt. 208; *Pennington v. Lewis*, 4 Penn. (Del.) 447, 56 Atl. 378; *Pollock v. Maysville & B. S. R. Co.* 103 Ky. 84, 44 S. W. 359; *Shields v. Heard*, 21 Ky. L. Rep. 992, 53 S. W. 820; *Farmer v. Lyons*, 87 Ky. 421, 9 S. W. 248; *Magowan v. Branham*, 95 Ky. 581, 26 S. W. 803; *Woodward v. Robinson*, 67 Me. 565; *Dolloff v. Hardy*, 26 Me. 545; *Knowles v. Dow*, 20 N. H. 135; *McColman v. Wilkes*, 3 Strobb. L. 465, 51 Am. Dec. 637.

Possession of land under a claim of ownership being *prima facie* evidence of title in the occupant, upon proof of such possession and without showing complete title, he may maintain against a wrongdoer an action for a trespass upon the property committed while such possession existed. *Tolbert v. Rome*, 134 Ga. 136, 67 S. E. 540.

Adverse possession of land for a period of fifteen years before the commission of any acts of trespass will entitle the adverse claimant to a right of action of trespass in entering upon such lands and plowing up the same. *Coppage v. Griffith*, 19 Ky. L. Rep. 459, 40 S. W. 908.

In North Carolina it is held that one in exclusive possession of a tract of land under color of title may maintain an action of trespass *quare clausum fregit* against one wrongfully cutting timber, even before the maturity of the title by the expiration of the statutory period. *Simmons v. Defiance Box Co.* (N. C.) 69 S. E. 146.

One claiming title to land by adverse possession for a continuous term of fifteen years is held to be an "owner" within the meaning of Ky. Stat. § 2361, and entitled to maintain an action for trespass upon the land. *Scroggins v. Nave*, 133 Ky. 793, 119 S. W. 158.

So, one who has been in continuous adverse possession of land for a period of between twenty-five and thirty years may maintain an action of trespass against another who entered thereon and removed trees therefrom. *Taylor v. Burt & B. Lumber Co.* 33 Ky. L. Rep. 191, 109 S. W. 348.

But one who entered upon a tract of land which he claimed, but which is also occupied by others also claiming the same as their own, can acquire no title which will enable him to maintain an action of

trespass in cutting and removing trees. *Phillips v. Beattyville Mineral & Timber Co.* 28 Ky. L. Rep. 12, 88 S. W. 1058.

An adverse claimant to land cannot maintain an action of trespass where continuity of possession is absent. *Gordner v. Blades Lumber Co.* 144 N. C. 110, 56 S. E. 695; *Macauley v. Kamp*, 60 Ill. App. 31. Thus, one who used a piece of land to pasture stock in the summer and for hogs in the fall and winter when there was feed for them, during the statutory period, was held in *Ashcraft v. Courtney* (Ky.) 121 S. W. 625, not to have maintained a continuous possession required to give title by adverse possession, and therefore could not maintain an action of trespass for cutting timber on the land.

One in actual possession of a part of a tract of land under a duly recorded deed covering the entire tract, which is insufficient to pass title and is good only as color of title, has not until after the expiration of the statutory period of seven years such possession of the residue of the tract as will authorize him to maintain an action of trespass against a person who wrongfully entered thereon and cut a quantity of growing timber. *Ault v. Meager*, 112 Ga. 148, 37 S. E. 185.

The occupation of a portion of a public highway for a long period of time will not give the occupant any rights which will enable him to maintain trespass against the highway commissioners for their act in removing obstructions he has constructed therein. *Driggs v. Phillips*, 103 N. Y. 77, 8 N. E. 514.

But in *Restetsky v. Delmar Ave. & C. R. Co.* 106 Mo. App. 382, 84 S. W. 665, it was held that one who had been in adverse possession of a parcel of land adjoining a street, under color and claim of title for the statutory period, may maintain an action against a wrongdoer in excavating in the street, where the title to the parcel claimed extends to the center of the street.

J. S. R.

WASHINGTON SUPREME COURT.

CARL CARLSON, Resp.,

v.

WEYERHAEUSER TIMBER COMPANY,
Appt.

(50 Wash. 490, 97 Pac. 501.)

Master — unsafe device — human assistance.

1. The mere fact that a device for diverting sawed lumber from the live rolls, which bear it away from the saw to be ready for another machine, has become out of repair so that it may fail to operate, does not render the master liable for injury to the operator of the latter machine by the sticking of a plank and its being hit by a following one, if the master has stationed men in prop-

er places to aid the device in handling the lumber and to prevent the planks from interfering with each other, the performance of whose duties would have prevented the accident.

Same — servant's negligence.

2. The mere fact that a device furnished by a master may be insufficient of itself to perform a certain service does not render him liable to a servant injured by its failure to do so, if he furnishes another servant to assist the device, and such assistance makes the device perfectly safe, so that the injury is caused by the failure of the fellow servant to perform his duty.

(October 3, 1908.)

APPEAL by defendant from a judgment of the Superior Court for Snohomish County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. **Cooley & Horan**, for appellant:

Evidence which merely tends to show that the particular accident which caused the injury might not have happened if a particular precaution had been taken does not render the employer liable.

Northern C. R. Co. v. Husson, 101 Pa. 1, 47 Am. Rep. 690; *Glover v. Meinrath*, 133 Mo. 292, 34 S. W. 72; *Friel v. Citizens' R.*

Note. — Liability of master where machine which fails to perform the service for which it was designed is supplemented by the work of an employee.

The foregoing case suggests some extremely interesting questions. If a mechanical device attached to a machine for the performance of a part of the master's work, as it progresses becomes defective and fails to do the work which it was designed to accomplish, may the master supplement the machine by furnishing a human agency to accomplish the desired result? And if the master may so supplement the machine, is the employee so used a fellow servant of the employee who is operating the machine, so as to free the master from liability to the latter for injuries due to the former's negligence?

There are possibly other cases in which the facts would present similar questions, as, for example, where some part of the machine breaks and an employee is set at work temporarily perhaps to do the work formerly accomplished by the machine, and through his negligence another servant is injured. But it would appear that the decisions in such cases, if there are any, turn upon some other of the various questions of the law of master and servant, and consequently would not be authority upon the questions stated above.

And it is to be noted that these ques-

Co. 115 Mo. 503, 22 S. W. 498; Young v. Virginia & N. C. Constr. Co. 109 N. C. 618, 14 S. E. 58; Innes v. Milwaukee, 96 Wis. 170, 70 N. W. 1064; Chicago & G. W. R. Co. v. Armstrong, 62 Ill. App. 228; Chicago, R. I. & P. R. Co. v. Lonergan, 118 Ill. 41, 7 N. E. 55.

The risk to which an employer subjects his employee does not suffice to impose liability upon the former as being extraordinary in its character, merely because the injury in a particular case might possibly have been prevented by some different device.

Northern C. R. Co. v. Husson, *supra*.

The negligence of the coemployees of plaintiff, and not the condition of the skids, was the proximate cause of the accident.

Philadelphia Iron & Steel Co. v. Davis, 111 Pa. 597, 56 Am. Rep. 305, 4 Atl. 513; Barlow v. Standard Steel Casting Co. 154 Pa. 130, 26 Atl. 12; Pease v. Chicago & N. W. R. Co. 61 Wis. 163, 20 N. W. 908; Sullivan v. Wamsutta Mills, 155 Mass. 200, 29 N. E. 516; Norfolk & W. R. Co. v. Brown, 91 Va. 668, 22 S. E. 496; Williams v. Central R. Co. 43 Iowa, 396; Cooley, Torts, 2d ed. 73; Stevick v. Northern P. R. Co. 39 Wash. 501, 81 Pac. 999.

Messrs. F. E. Anderson and Coleman & Fogarty, for respondent:

The proximate cause of an injury may be made up of several elements.

Williams v. Ballard Lumber Co. 41 Wash. 338, 83 Pac. 323; Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64.

Where a defendant's negligence is shown to have contributed with that of a third person to produce the proximate cause of an injury to another, such defendant is chargeable as if solely responsible for the proximate cause.

Costa v. Pacific Coast Co. 26 Wash. 138, 66 Pac. 398; Howe v. West Seattle Land & Improv. Co. 21 Wash. 594, 59 Pac. 495; White v. Ballard, 19 Wash. 284, 53 Pac. 159; Gray v. Washington Water Power Co. 27 Wash. 713, 68 Pac. 360; Goe v. Northern P. R. Co. 30 Wash. 654, 71 Pac. 182; Eskildsen v. Seattle, *supra*; St. Louis Bridge Co. v. Miller, 138 Ill. 465, 28 N. E. 1091; Martin v. North Star Iron Works, 31

Minn. 407, 18 N. W. 109; Chicago, R. I. & P. R. Co. v. Sutton, 11 C. C. A. 251, 27 U. S. App. 310, 63 Fed. 394; Postal Teleg. Cable Co. v. Zopfi, 19 C. C. A. 605, 43 U. S. App. 141, 73 Fed. 609; McKenna v. Baessler, 86 Iowa, 197, 17 L.R.A. 310, 53 N. W. 103; Johnson v. Northwestern Teleph. Exch. Co. 48 Minn. 433, 51 N. W. 225; Liming v. Illinois C. R. Co. 81 Iowa, 246, 47 N. W. 66; Wilder v. Stanley, 65 Vt. 145, 20 L.R.A. 479, 26 Atl. 189.

Rudkin, J., delivered the opinion of the court:

The defendant owns and operates a saw-mill at the city of Everett in this state, in which the plaintiff was employed as edgerman at the time of receiving the injuries complained of in this action. A system of live rolls was installed and maintained in the mill for the purpose of conveying the sawed material from the main saw to the opposite end of the mill. The edger at which the plaintiff was employed was situated about 80 or 100 feet back from the main saw, and about 10 feet to the right of the live rolls. Lumber was diverted from the live rolls to the edger deck in the following manner: An appliance known as a "bumper," raised by means of a lever, would arrest the forward movement of the lumber along the live rolls. The weight of the lumber pressing down on a sheet-iron cover would cause a system of live skids to rise automatically, and live chains operating over the skids through grooves would then convey the lumber from the live rolls to the edger deck. While the plaintiff was employed about the edger on the morning of August 17, 1905, a plank 2 inches thick, 12 inches wide, and about 40 feet long, was sent down over the live rolls by the off-bearer. The bumper was raised for the purpose of diverting the plank from the live rolls to the edger deck. The end of the plank next to the edgerman was carried over by the live skids, but the opposite end caught or dragged on the covering between the live rolls. While the plank was in this position, a heavy piece of timber, sent down by the off-bearer, struck it, and drove it against the plaintiff's leg, causing

tions are not really determined in *CARLSON v. WEYERHAEUSER TIMBER CO.*, or rather the facts as determined in that case render it unnecessary for the court to pass squarely upon the questions suggested as purely questions of law. In the first place, it is held that the master was under no obligation to furnish the appliance complained of, but might have furnished a machine without it, and have employed manual labor to accomplish the same result, so that negligence could not be predicated of the mere failure to furnish a sufficient appliance. 30 L.R.A. (N.S.)

And, again, the court finds that the human agency supplied by the master was reasonably safe and sufficient to perform the work, so that negligence could not be predicated of the master's failure to furnish reasonably safe appliances or agencies. In short, under the circumstances, no ground is left upon which to base any negligence at all on the part of the master, so that the questions suggested, although before the court, were in reality eliminated by the court's rulings as to the facts.

W. M. G.

the injuries here complained of. The following is the allegation of negligence set forth in the complaint: "That at the time aforesaid the defendant operated, as a part of its said mill, live rollers to carry the lumber sawed away from the head saw in said mill; that in connection with said live rollers the defendant operated skids, on which said skids were live chains; that said skids and live chains were at said time, and for a long time prior thereto, designed and used to divert from the live rollers and carry to the edger deck all lumber to be run through said edger machine, and on said date the defendant negligently permitted said skids, live chains, and other machinery to be and remain in a defective, unsafe, and dangerous condition, in that said skids were too short and were situated too low with reference to said live rollers and said edger deck and the cover hereinafter mentioned, and were so worn and loose at the joints that, when said skids were operated for the purpose of diverting the lumber from said live rollers to said edger deck, as aforesaid, said skids failed to cause the lumber so to be diverted to leave the said live rollers and the cover of the gearing adjoining said live rollers and situated between the said live rollers and the said edger deck, but permitted the lumber, so to be diverted as aforesaid, to lie and remain in dangerous proximity to said live rollers." The answer denied the negligence charged in the complaint, and alleged contributory negligence, negligence of a fellow servant, and assumption of risk. The plaintiff had judgment below and the defendant appeals.

Error in denying a motion for nonsuit and motion for judgment at the close of all the testimony is the principal assignment upon which the appellant relies for a reversal. The testimony shows that the live skids to which we have referred were hinged on a shaft where they connected with the dead skids. Babbitting was placed around the shaft at these points for the purpose of taking the wear occasioned by the turning of the shaft. This babbitting would gradually wear away through the operations of the mill, and as it wore away, the live skids would naturally drop below the dead skids, to the extent of the wear. At the time of the accident complained of there was testimony tending to show that the two center skids (there being four in all) were almost an inch lower than the dead skids with which they were connected, although the testimony on the part of the appellant tended to show that the babbitting was only $\frac{1}{8}$ of an inch thick in the first instance, and that the drop in the skids could not exceed $\frac{1}{2}$ inch. The testimony further tended to show that this condition had existed for about a

month prior to the injury to the respondent; that by reason thereof the live skids had failed to convey the lumber to the edger deck as effectually as they had prior to that time; that up to about a month prior to the accident the live skids had never failed to convey lumber from the live rolls to the edger deck, unless the lumber caught on a place of bark, a knot, or some other obstruction, so as to prevent the live skids from taking hold; and that there was no such obstruction under the plank which caused the injury to the respondent. If the bare fact that the live skids were too low, and that this particular accident would not have happened had the skids been properly adjusted, is sufficient to fix liability upon the appellant, we are not prepared to say that the verdict is unsupported by the testimony, but even this is problematic. The appellant contends, however, that the live skids in question were merely a labor-saving device; that an employee was placed in charge of the live rolls, whose duty it was to see that one piece of lumber was not run down upon another; that it had stationed another employee at the slasher saw, about 40 feet back from the edger, provided with a picaroon, whose duty it was to pull the lumber from the live rolls when for any reason the live skids failed to perform their functions; and that these different agencies rendered the working place of the respondent perfectly safe, so long as the off-bearer and slash sawyer performed the duties assigned them. This contention must be sustained. Conceding that the live skids were too low and out of repair, they were not inherently dangerous. The only effect that could result from their condition was that they might fail to convey the lumber from the live rolls. But so long as the appellant had made provision for such a contingency, and had placed a man in charge of the live skids and slasher saw to aid these mechanical devices in removing lumber from the live rolls, it made the working place safe. In *Bajus v. Syracuse, B. & N. Y. R. Co.* 103 N. Y. 312, 57 Am. Rep. 723, 8 N. E. 529, it was contended that the accident was caused through the lessening of the power of a steam engine by a defect in the throttle valve. In answer to this contention the court said: "The defect in the throttle valve, therefore, had no relation whatever to this accident, and the plaintiff's sole reliance for the maintenance of his action must be upon the defective condition of the flues and of the main steam valve, the sole consequence of which was the diminished power of the engine. These defects may have diminished the power of the engine by several horse power, so that the engine, instead of being, for instance, 80-

horse power, was only 70. It matters not that this diminished power came from these defects, nor how the engine came to be of only 70-horse power. The responsibility for the defects is no greater than it would have been if the defendant had furnished a new engine of precisely the same power." And so here, if the appellant had supplied a mechanical device to transfer one end of the lumber to the edger deck, and had stationed an employee at the other end to accomplish the same result by manual labor, it could not be said that it failed in any duty it owed to the respondent, provided, the two agencies furnished were sufficient to accomplish the object in view. The mere use of a defective appliance, not in itself dangerous, is not negligence, so long as other safe agencies are employed to supply its deficiencies. Nor was the negligence which caused the injury in this case the joint or combined negligence of the appellant and a fellow servant of the respondent. If the agencies supplied by the appellant for transferring lumber from the live rolls to the edger deck were reasonably safe and sufficient for that purpose, and an accident resulted through the failure of a fellow servant to perform the duty assigned him, the negligence of the fellow servant, and not the defective condition of the skids, was the proximate cause of the injury. *Pease v. Chicago & N. W. R. Co.* 61 Wis. 163, 20 N. W. 908; *Sullivan v. Wamsutta Mills*, 155 Mass. 200, 29 N. E. 516; *Norfolk & W. R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Williams v. Central R. Co.* 43 Iowa, 396; *Cooley, Torts*, 2d ed. 73.

We are therefore of opinion that the working place provided by the appellant was reasonably safe, as a matter of law, and that the respondent was not injured by reason of any negligence charged in the complaint.

The judgment is reversed, with directions to dismiss the action.

Hadley, Ch. J., and Crow and Mount, JJ., concur.

Petition for rehearing denied.

WISCONSIN SUPREME COURT.

ALFRED A. FOSNES, Appt.,
v.

DULUTH STREET RAILWAY COMPANY,
Respt.

(140 Wis. 455, 122 N. W. 1054.)

Street railway — leaving moving car — foreigner.

That one injured by attempting to alight from a street car moving at the rate of 30 L.R.A. (N.S.)

6 miles an hour was a foreigner, recently arrived in this country, and that he did not understand English, and was inexperienced in street car travel, but had seen other passengers leave moving cars, does not relieve him from the charge of contributory negligence in making the attempt.

(October 26, 1909.)

Note. — Negligence of passenger in getting on or off moving street car.

This note supplements the note appended to *Jagger v. People's Street R. Co.* 38 L.R.A. 786, where the earlier cases are collected.

Negligence as matter of law.

Some courts seem to regard the attempt on the part of a passenger to board or alight from a moving street car as negligence *per se*; at least, except in rare cases. *Neff v. Harrisburg Traction Co.* 192 Pa. 501, 73 Am. St. Rep. 825, 43 Atl. 1020; *Hunterson v. Union Traction Co.* 205 Pa. 568, 55 Atl. 543; *Boulfrois v. United Traction Co.* 210 Pa. 263, 105 Am. St. Rep. 809, 59 Atl. 1007, 2 A. & E. Ann. Cas. 938; *Quinn v. Philadelphia Rapid Transit Co.* 224 Pa. 162, 73 Atl. 319; *Richmond Traction Co. v. Williams*, 102 Va. 253, 46 S. E. 292; *Johnson v. St. Joseph R. Light, Heat & P. Co.* 143 Mo. App. 376, 128 S. W. 243.

And though such conduct is not regarded as negligence *per se*, it may become negligence as a matter of law, because of the conditions under which the attempt is made, and it has been so held under the following circumstances:

— where plaintiff attempted to board an elevated car after the gate was closed and the car had started. *Lauterer v. Manhattan R. Co.* 63 C. C. A. 38, 128 Fed. 540;

— where plaintiff stepped off backward from a car going 5 or 6 miles per hour. *Birmingham R. Light & P. Co. v. Glover*, 142 Ala. 492, 38 So. 836;

— where a passenger was injured in stepping off a car as it was slowing down for a stop. *Cosgrove v. Consolidated R. Co.* 80 Conn. 717, 68 Atl. 249;

— where the car was moving rapidly. *Chicago City R. Co. v. Sullivan*, 76 Ill. App. 505;

— where a defect in the car, claimed to have been the cause of the injury, was dangerous only in view of the conduct of the plaintiff in alighting while it was moving. *Werbowsky v. Ft. Wayne & E. R. Co.* 86 Mich. 236, 24 Am. St. Rep. 120, 48 N. W. 1097;

— where a passenger attempted to alight after the car had started, though reasonable opportunity to alight had been afforded. *Shareman v. St. Louis Transit Co.* 103 Mo. App. 515, 78 S. W. 840;

— where the attempt to get off while the car was in rapid motion was voluntary. *Van Horn v. St. Louis Transit Co.* 198 Mo. 481, 95 S. W. 326;

APPPEAL by plaintiff from a judgment of the Superior Court for Douglas County, dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Victor Linley, for appellant:

The age, the sex, and the experience of the passenger are all to be taken into consideration in determining whether contributory negligence is to be imputed to one jumping from a moving train or street car.

3 Thomp. Neg. §§ 2878, 2879, 3594, 3595.

It is a gross violation of duty toward a passenger for the servants of the carrier to induce him to leave a train while it is in motion.

—where a female passenger attempted to alight from a rapidly moving car. *Scroggins v. Metropolitan Street R. Co.* 138 Mo. App. 215, 120 S. W. 731;

—where the car failed to stop on plaintiff's signal, and he attempted to board it, though it slowed down some, there being no evidence that it slowed down in response to his signal. *Reidy v. Metropolitan Street R. Co.* 27 Misc. 527, 58 N. Y. Supp. 326;

—where the car slowed down only for a crossing, and the plaintiff approached it from the rear, out of range of vision of the driver, and attempted to board it while it was moving. *Ebling v. Second Ave. R. Co.* 60 App. Div. 616, 69 N. Y. Supp. 1102;

—where plaintiff, after signalling for the car to stop, stepped off before the stop was made. *McNeece v. Brooklyn Heights R. Co.* 123 App. Div. 830, 108 N. Y. Supp. 317;

—where a passenger stepped off the car after it had started, without notifying the conductor of her intent, and after there had been a sufficient stop. *Lee v. Elizabeth, P. & C. J. R. Co.* 69 N. J. L. 607, 55 Atl. 106;

—where plaintiff went on the front platform with articles in his left hand, and stepped off facing the rear, while the car was slowing down for him to alight. *Dockham v. North Jersey Street R. Co.* (N. J. L.) 66 Atl. 961;

—where the car was moving slowly, and about to stop for plaintiff, and there was no necessity for her to alight before it stopped. *Armstrong v. Portland R. Co.* 52 Or. 437, 97 Pac. 715;

—where plaintiff ran after a car after it had started, and attempted to board it. *Lee v. Rhode Island Co.* (R. I.) 68 Atl. 475;

—where a passenger alighted before reaching his stop, there being no invitation to alight at that point. *Knoxville Traction Co. v. Carroll*, 113 Tenn. 514, 82 S. W. 313;

—where there was an obstruction in the street beside the track, near where the attempt to board was made, with which the passenger came in contact before reaching a place of safety within the car. *Joyce v. Metropolitan Street R. Co.* 219 Mo. 344, 118 S. W. 21; *Schmidt v. North Jersey Street R. Co.* 66 N. J. L. 424, 49 Atl. 438; 30 L.R.A. (N.S.)

3 Thomp. Neg. § 2879; *Atchison, T. & S. F. R. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919; *Gulf, C. & S. F. R. Co. v. Brown*, 4 Tex. Civ. App. 435, 23 S. W. 618.

Mr. Frank A. Ross, for respondent:

A passenger who undertakes to alight from a car while in motion, and is injured while so doing, has no claim against the street car company for any damages sustained.

Champagne v. La Crosse City R. Co. 121 Wis. 554, 99 N. W. 334.

Timlin, J., delivered the opinion of the court:

In this case an objection to the reception of any evidence under the complaint was sustained upon the ground that no cause

Berry v. Utica Belt Line Street R. Co. 181 N. Y. 198, 73 N. E. 970, reversing 87 App. Div. 620, 83 N. Y. Supp. 1102; *Cassio v. Brooklyn Heights R. Co.* 59 App. Div. 617, 69 N. Y. Supp. 208; *Kriedermacher v. Union R. Co.* 59 Misc. 410, 110 N. Y. Supp. 1113.

In *Berry v. Utica Belt Line Street R. Co.* 76 App. Div. 490, 78 N. Y. Supp. 542, affirmed without opinion in 87 App. Div. 620, 83 N. Y. Supp. 1102, however, where plaintiff boarded a car as it slowed down, but struck a barrier in the street before he had time to enter the car, because of a sudden acceleration of speed, the court held that the question of contributory negligence was for the jury.

Question for jury.

The overwhelming weight of authority, however, is to the effect that it is not negligence *per se* to board or alight from a street car while it is in motion, in the absence of circumstances making the attempt so obviously dangerous that it would not be made by a person of ordinary prudence, under the circumstances, or, as stated in *Newport News & O. P. R. & Electric Co. v. McCormick*, 106 Va. 517, 56 S. E. 281, "the criterion being that if, under all the circumstances, an ordinarily prudent person would have been warranted in attempting to alight from a moving car, negligence ought not to be imputed to a passenger who pursues that course." *Puget Sound Electric R. Co. v. Felt*, 181 Fed. 938; *Brown v. Washington & G. R. Co.* 11 App. D. C. 37; *Birmingham R. Light & P. Co. v. Lee*, 153 Ala. 79, 45 So. 292; *Birmingham R. Light & P. Co. v. Dickerson*, 154 Ala. 523, 45 So. 659; *Birmingham R. Light & P. Co. v. Harden*, 156 Ala. 244, 47 So. 327; *Birmingham R. Light & P. Co. v. Jung*, 161 Ala. 461, 49 So. 434; *Birmingham R. Light & P. Co. v. Girod*, 164 Ala. 10, 51 So. 242; *Finkeldey v. Omnibus Cable Co.* 114 Cal. 28, 45 Pac. 996; *Poston v. Denver Consol. Tramway Co.* 11 Colo. App. 187, 53 Pac. 391, second appeal, 20 Colo. App. 324, 78 Pac. 1067; *Betts v. Wilmington City R. Co.* 3 Penn. (Del.) 448,

of action was stated therein. The plaintiff did not ask leave to amend, and judgment was granted dismissing the complaint. No error is assigned for failure to grant leave to amend.

It appeared by the complaint that the plaintiff, a passenger upon a street railway car, requested the conductor to let him off at a designated street, and the conductor knew the wish of the passenger to get off at that street, but carelessly, negligently, and wantonly failed and neglected to stop the car at that street, without explanation to the passenger, and the passenger then attempted to get off the car at this street while the car was moving at the rate of 6 miles an hour, and in so doing was accidentally thrown to the ground and injured. This presents a case of negligence on the part of the defendant and contributory negligence on the part

of the plaintiff. Six miles per hour must be considered a considerable speed, and, indeed, a high rate of speed, for the purpose of alighting from a moving street car. The ordinary inference of contributory negligence from such attempt, recognized in *Champane v. La Crosse City R. Co.* 121 Wis. 554, 99 N. W. 334, and *Hardy v. Milwaukee Street R. Co.* 89 Wis. 183, 61 N. W. 771, is apparently sought to be overcome by the pleader by the following additional averments in the complaint: The passenger, recently arrived in the United States from Norway, did not speak the English language, was inexperienced in street railway travel, and had seen other passengers at other previous times alight from the cars of the defendant while such cars were in motion at street crossings, and concluded that he was required to get off the car while it

53 Atl. 358; *Rome R. & Light Co. v. Keel*, 3 Ga. App. 769, 60 S. E. 468; *West Chicago Street R. Co. v. Dudzik*, 67 Ill. App. 681; *West Chicago Street R. Co. v. Lups*, 74 Ill. App. 426; *Chicago City R. Co. v. Meehan*, 77 Ill. App. 215; *Canfield v. North Chicago Street R. Co.* 98 Ill. App. 1; *Bloomington & N. R. Co. v. Zimmerman*, 101 Ill. App. 184; *Pope v. Chicago City R. Co.* 113 Ill. App. 503; *Chicago & J. Electric R. Co. v. Lloyd*, 129 Ill. App. 156; *North Chicago Street R. Co. v. Wiswell*, 168 Ill. 613, 48 N. E. 407, affirming 68 Ill. App. 443; *Springfield Consol. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884, affirming 71 Ill. App. 162; *North Chicago Street R. Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849, affirming 85 Ill. App. 316; *South Chicago City R. Co. v. Dufresne*, 200 Ill. 456, 65 N. E. 1075; *Chicago Union Traction Co. v. Olsen*, 211 Ill. 255, 71 N. E. 985; *Chicago Union Traction Co. v. Lundahl*, 215 Ill. 289, 74 N. E. 155, affirming 117 Ill. App. 220; *Donnelly v. Chicago City R. Co.* 235 Ill. 35, 85 N. E. 233, affirming 136 Ill. App. 204; *Indianapolis Street R. Co. v. Hockett*, 159 Ind. 677, 66 N. E. 39; *Crump v. Davis*, 33 Ind. App. 88, 70 N. E. 886; *Root v. Des Moines City R. Co.* 113 Iowa, 675, 83 N. W. 904; *Ford v. Paducah City R. Co.* 29 Ky. L. Rep. 752, 96 S. W. 441; *Sandlin v. Lexington R. Co.* 33 Ky. L. Rep. 518, 110 S. W. 374; *Jones v. Canal & C. R. Co.* 109 La. 213, 33 So. 200; *United R. & Electric Co. v. Weir*, 102 Md. 286, 62 Atl. 588; *United R. & Electric Co. v. Rosik*, 107 Md. 138, 68 Atl. 511; *McDonough v. Metropolitan R. Co.* 137 Mass. 210; *Gordon v. West End Street R. Co.* 175 Mass. 181, 55 N. E. 990; *Block v. Worcester*, 186 Mass. 526, 72 N. E. 77; *Burke v. Bay City Traction & Electric Co.* 147 Mich. 172, 110 N. W. 524; *Posch v. Southern Electric R. Co.* 76 Mo. App. 601; *O'Mara v. St. Louis Transit Co.* 102 Mo. App. 202, 76 S. W. 680; *Dawson v. St. Louis Transit Co.* 102 Mo. App. 277, 76 S. W. 689; *Maguire v. St. Louis Transit Co.* 103 Mo. App. 459, 78 S. W. 838; *McKee v. St. Louis Transit Co.* 108 30 L.R.A. (N.S.)

Mo. App. 470, 83 S. W. 1013; *Schmitt v. St. Louis Transit Co.* 115 Mo. App. 445, 90 S. W. 421; *Green v. Metropolitan Street R. Co.* 122 Mo. App. 647, 99 S. W. 28; *New Jersey Traction Co. v. Gardner*, 60 N. J. L. 571, 38 Atl. 669; *Murphy v. North Jersey Street R. Co.* 71 N. J. L. 5, 58 Atl. 1018; *Wallace v. Third Ave. R. Co.* 36 App. Div. 57, 55 N. Y. Supp. 132; *Clinton v. Brooklyn Heights R. Co.* 91 App. Div. 374, 86 N. Y. Supp. 932; *Holmes v. Ashtabula Rapid Transit Co.* 10 Ohio C. D. 638; *Norton v. Columbia Electric Street R. Light & P. Co.* 83 S. C. 26, 64 S. E. 962; *El Paso Electric R. Co. v. Harry*, 37 Tex. Civ. App. 90, 83 S. W. 735; *Lewis v. Houston Electric Co.* 39 Tex. Civ. App. 625, 88 S. W. 489; *Barnes v. Dallas Consol. Electric Street R. Co.* (Tex.) 128 S. W. 367, reversing (Tex. Civ. App.) 119 S. W. 122; *Paul v. Salt Lake City R. Co.* 30 Utah, 41, 83 Pac. 563; *Brown v. Seattle City R. Co.* 16 Wash. 465, 47 Pac. 890.

In accordance with this rule, the question of plaintiff's negligence was submitted to the jury under the following circumstances:

—where the car was moving slowly, even though the party stepped in an opposite direction from that in which it was going. *Birmingham R. Light & P. Co. v. Dickerson*, supra;

—where the car was slowing up near a stop, and the passenger was encumbered with bundles. *Birmingham R. Light & P. Co. v. Girod*, supra;

—where acts of defendant's employees led a passenger to believe that the car had stopped, though it was in fact moving slowly when she stepped off. *Elwood v. Connecticut R. & Light Co.* 77 Conn. 145, 58 Atl. 751, 1 A. & E. Ann. Cas. 779;

—where plaintiff was encumbered with bundles and the car was going 3 miles per hour. *Hammond, W. & E. C. Electric R. Co. v. Antonia*, 41 Ind. App. 335, 83 N. E. 766;

—where the passenger lost his footing in boarding the car because of its starting suddenly, and held on and ran alongside it

was in motion, and supposed it was perfectly safe for him to get off the car, although it was moving at the rate of 6 miles an hour. Assuming, in support of the complaint, that the conductor understood the language of plaintiff, that plaintiff knew he was approaching his intended place of alighting, that this was a proper and useful place at which to stop the car, and that the "other previous times" when he had seen passengers alighting while the cars were in motion were sufficiently recent and sufficiently numerous to induce him to believe this was the American way, but not sufficiently numerous to remove his inexperience in street railway travel, still we must assume that there was no urgency beyond the risk of his being carried a square or thereabouts past his destination. Notwithstanding he did not possess the

felicity of having lived long in this country, or of speaking the English language, he must be considered a man of ordinary intelligence. *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 23 L.R.A. (N.S.) 296, 118 N. W. 350, 119 N. W. 289; *Johanson v. Webster Mfg. Co.* 139 Wis. 181, 120 N. W. 832. While it cannot be said as matter of law that, in all cases, alighting from a moving street car constitutes contributory negligence, yet this may justly be said in a case where the party alighting is a man of full age and ordinary intelligence, laboring under no fright or excitement, confronted with no exigency, and the car is, to his knowledge, moving at the rate of 6 miles an hour. It follows that the judgment of the superior court should be affirmed.

The judgment of the Superior Court is affirmed.

an attempt to board. *Burger v. Omaha & C. B. Street R. Co.* 139 Iowa, 645, 130 Am. St. Rep. 343, 117 N. W. 35;

—where the conductor announced a stop, and plaintiff followed him to the door, and stepped off from the car, which was running smoothly down grade at night, thinking the car had stopped. *Blue Grass Traction Co. v. Skillman*, 31 Ky. L. Rep. 480, 102 S. W. 809;

—where a woman encumbered with bundles attempted to board a car which was just starting and barely moving. *Payne v. Springfield Street R. Co.* 203 Mass. 425, 89 N. E. 536;

—though plaintiff was a man sixty-two years of age, weighing 200 pounds, and there was some evidence that the car was going 6 miles per hour, it appearing that the conductor knew of plaintiff's attempt to board the car, and signaled to go ahead. *Orth v. Saginaw Valley Traction Co.* (Mich.) 127 N. W. 330;

—where a passenger who attempted to board a slowly moving car was thrown by a sudden increase of its speed, and he held on too long in attempting to get a secure footing on the platform, when, by letting go promptly, he might have escaped injury. *Leu v. St. Louis Transit Co.* 110 Mo. App. 458, 85 S. W. 137, a former appeal of which is reported in 106 Mo. App. 329, 80 S. W. 273;

—where the motorman, on approaching a regular stop, applied the brake and shut off the power, thus leaving a person in waiting to regard it as an invitation to board, the speed not being such as to make the attempt obviously dangerous. *Spencer v. St. Louis Transit Co.* 111 Mo. App. 653, 86 S. W. 593;

—where the car slowed down at the destination of plaintiff, a boy twelve years of age, having practically no experience in riding on cars, and he alighted near the end of a high platform, over which he was precipitated because of the motion of the car, which was increased suddenly, the court saying that he could not be said to have had such experience and knowledge of the

laws of motion as to make him guilty of contributory negligence as matter of law. *Moeller v. United R. Co.* 133 Mo. App. 68, 112 S. W. 714;

—where the car slowed down on signal, and was practically at a stop when it started suddenly. *Harris v. Union R. Co.* 69 App. Div. 385, 74 N. Y. Supp. 1012;

—where a passenger attempted to get off when the car slowed up, without notice to the conductor of his intention. *Ashtabula Rapid Transit Co. v. Holmes*, 67 Ohio St. 153, 65 N. E. 877;

—where the evidence conflicted as to whether the injury was received while plaintiff was boarding the car when it had slowed nearly to a stop and started up suddenly, or while hanging on and running after the car in an effort to board it. *Christie v. Galveston City R. Co.* (Tex. Civ. App.) 39 S. W. 638;

—where the car was moving very slowly, only a few feet from a stop, an ordinance of the city making it an offense for a person to jump off a moving street car being excluded as immaterial. *Denison & S. R. Co. v. Johnson*, 36 Tex. Civ. App. 115, 81 S. W. 780;

—where the car was moving slowly. *Birmingham R. Light & P. Co. v. Willis*, 143 Ala. 220, 38 So. 1016; *Nilson v. Oakland Traction Co.* 10 Cal. App. 103, 101 Pac. 413; *Central P. R. Co. v. Rose*, 14 Ky. L. Rep. 204; *Pitard v. New Orleans R. & Light Co.* 120 La. 925, 45 So. 943; *Hansberger v. Sedalia Electric R. Light & P. Co.* 82 Mo. App. 566; *Sexton v. Metropolitan Street R. Co.* 40 App. Div. 26, 57 N. Y. Supp. 577;

—where an attempt to board was made when the car slowed down nearly to a stop, in response to a passenger's signal. *Powell v. United Traction Co.* 204 Pa. 474, 54 Atl. 282; *Conner v. Citizens' Street R. Co.* 105 Ind. 62, 55 Am. Rep. 177, 4 N. E. 441.

Distinction between street and steam railways.

While the rule above set forth is the

one generally applied to steam railroads (see *Hoylman v. Kanawha & M. R. Co.* 22 L.R.A. (N.S.) 741 and note), some cases recognize a distinction between railroad trains and street cars in this respect. Thus, in *Lobsenz v. Metropolitan Street R. Co.* 72 App. Div. 181, 76 N. Y. Supp. 411, where the lower court instructed the jury that the "usual invitation to us to get aboard of a public conveyance is that it stops, and in all ordinary cases to get aboard of a moving public vehicle is imprudent," the word "imprudent" was construed by the appellate court to be used as a synonym for negligent, and the instruction held to be erroneous, as it applied a proposition applicable in case of steam roads, but not in case of street railways.

And in *Conner v. Citizens' Street R. Co.* supra, and *Indianapolis Street R. Co. v. Hockett*, 159 Ind. 677, 66 N. E. 39, the court said that the rules as to steam cars were not applicable in all their rigor to street railways operated by horse power.

Failure or insufficiency of stop.

Attempting to board or alight from a moving car on its failure to make a stop for a passenger was held to be negligence precluding recovery in the following cases:

—*West Chicago Street R. Co. v. Torpe*, 187 Ill. 610, 58 N. E. 607, where the issue was as to whether the car was moving slowly or at full speed, the court holding that it was error to admit evidence that the defendant was accustomed to stop or slow down its cars at the place of the accident, for the purpose of taking on passengers;

—*South Chicago Street R. Co. v. Dufresne*, 200 Ill. 456, 65 N. E. 1075, affirming 102 Ill. App. 493, where the car failed to stop on signal by plaintiff, indicating his desire to board;

—*McDonald v. City Electric R. Co.* 137 Mich. 392, 100 N. W. 592, in which the court held that failure to stop does not justify a passenger in jumping;

—*Hogan v. Metropolitan Street R. Co.* 71 App. Div. 614, 75 N. Y. Supp. 845, where a strong preponderance of the evidence showed that the plaintiff attempted to alight while the car was moving, on its failure to stop at her street;

—*Grabenstein v. Metropolitan Street R. Co.* 84 N. Y. Supp. 261, where, by a fair preponderance of the evidence, it appeared that plaintiff attempted to alight without signal or notice to the conductor;

—*Howard v. Forty-second Street, M. & St. N. A. R. Co.* 125 App. Div. 776, 110 N. Y. Supp. 125, where a car slowed down, but did not stop at a crossing where plaintiff signaled it, and he ran after it and caught hold and was running along in an effort to get on, and was injured by a sudden acceleration of speed;

—and *Foran v. Union Traction Co.* 22 Pa. Super. Ct. 10, where a passenger attempted to step off a car on being unable to attract the conductor's attention when it reached her street.

However, in *Fuller v. Denison & S. R.* 30 L.R.A. (N.S.)

Co. 32 Tex. Civ. App. 399, 74 S. W. 940, judgment for defendant was reversed where the evidence showed that plaintiff signaled for a stop, but the motorman, who had sole charge of the car, did not stop, and because of former harsh treatment of plaintiff, a boy, by the motorman, he had reason to apprehend he would be carried a considerable distance past his destination unless he got off while the car was moving.

In *Indianapolis Street R. Co. v. Lawn*, 30 Ind. App. 515, 66 N. E. 508, the court said that if plaintiff was injured in an attempt to alight after an insufficient stop, it was for the jury to say if she exercised reasonable care, in continuing her attempt to alight.

In *Shanahan v. St. Louis Transit Co.* 109 Mo. App. 228, 83 S. W. 783, where plaintiff waited for a woman and child to board, and then attempted to get on after the car started, it was held that the question of his contributory negligence was for the jury.

In *Birmingham R. & Electric Co. v. James*, 121 Ala. 120, 25 So. 847, it was held that plaintiff would not be negligent as matter of law if, when carried past his destination, he attempted to alight on the car slowing down as if in invitation for him to do so, if a man of ordinary care would have acted as he did.

In *Lucas v. Marquette City & P. I. R. Co.* 136 Mich. 142, 98 N. W. 980, where plaintiff claimed the car started while he was on the step, in the act of alighting, the fact that he fell 75 feet from the stopping place was held not to be conclusive that he jumped from the car while it was in motion.

In *San Antonio Traction Co. v. Warren* (Tex. Civ. App.) 85 S. W. 26, recovery was permitted where the evidence showed that the car started suddenly when plaintiff was in the act of boarding it, after it had nearly stopped.

In *Kruger v. Omaha & C. B. Street R. Co.* 80 Neb. 490, 17 L.R.A. (N.S.) 101, 127 Am. St. Rep. 780, 114 N. W. 571, where a girl under fourteen years of age, unaccustomed to riding on street cars, became frightened on being negligently carried past her destination, and the conductor, by due care and diligence, could have known she was about to leave the car, and could have prevented her from doing so, it was held that the company would be liable for injuries received by her in making the attempt.

And in *Schmidt v. North Jersey Street R. Co.* (N. J. L.) 58 Atl. 72, where, after slowing down in response to plaintiff's signal, the car started suddenly, the court held plaintiff not guilty of contributory negligence, and said: "Although a person attempting to board a moving car takes the risk of injury resulting from its ordinary motion, he does not assume the risk of injury from sudden and negligent increase of the motion of the car."

Speed of car.

Whether or not it is negligence to at-

tempt to get on or off a car while it is in motion will depend largely upon the speed of the car. *Cody v. Duluth Street R. Co.* 94 Minn. 74, 102 N. W. 201, reversing 94 Minn. 77, 102 N. W. 397.

And the speed of the car was held not to be so great as to make the attempt contributory negligence as matter of law, under the following circumstances:

—where the car was slowed down for a crossing to about 3 miles per hour, at a place where plaintiff had notified the conductor to stop. *Watkins v. Birmingham R. & Electric Co.* 120 Ala. 152, 43 L. R. A. 297, 24 So. 392;

—where the car was moving at from 2 to 5 miles per hour, and deceased was encumbered with bundles. *Birmingham R. & Electric Co. v. Brannon*, 132 Ala. 431, 31 So. 523;

—where the car was moving 3 miles per hour, the court considering this to be "moving slowly." *Dawson v. St. Louis Transit Co.* 102 Mo. App. 277, 76 S. W. 689;

—where a man thirty-eight years of age, and ordinarily active, attempted to board a car moving 4 or 5 miles per hour, on a curve. *Eikenberry v. St. Louis Transit Co.* 103 Mo. App. 442, 80 S. W. 360;

—where a car was moving slower than a man could walk. *Kimber v. Metropolitan Street R. Co.* 69 App. Div. 353, 74 N. Y. Supp. 966;

—where a car was moving as fast as a man could go at a fast walk. *Spencer v. St. Louis Transit Co.* 111 Mo. App. 653, 86 S. W. 593;

—where there was some evidence that the car was running quite slowly, not more than 6 miles per hour. *Dallas Rapid Transit Co. v. Payne*, 98 Tex. 211, 82 S. W. 649, reversing (Tex. Civ. App.) 78 S. W. 1085.

In *Ohio v. Metropolitan Street R. Co.* 125 Mo. App. 710, 103 S. W. 142, the court said that moving slowly is a relative term, and that what amounts to such in case of a street car is a question for the jury.

And in *Coleman v. St. Louis Transit Co.* 117 Mo. App. 123, 93 S. W. 920, where there was a conflict in the evidence as to whether the car started suddenly after slowing to about 3 miles per hour, in response to the plaintiff's signal, or whether plaintiff attempted to board while the car was going 10 or 12 miles per hour, the court held that it was properly submitted to the jury.

However, in *Jagger v. People's Street R. Co.* 180 Pa. 436, 38 L.R.A. 786, 36 Atl. 867, it was held to be contributory negligence for a passenger to attempt to alight while a car was moving 4 or 5 miles per hour, between stops, though he was in the habit of getting off there, and those in charge of the car customarily slowed down for him on signal, the court saying that to justify a person in alighting from a moving car "the motion must be so inconsiderable that a person of reasonable prudence, exercising ordinary care, would not hesitate about the safety of the attempt to alight."

In *Smith v. Birmingham R. Light & P. Co.* 147 Ala. 702, 41 So. 307, plaintiff was 30 L.R.A. (N.S.)

held to be guilty of contributory negligence in alighting from a car moving at from 4 to 6 miles per hour, at night, when he was encumbered with bundles.

And in *Quinn v. Philadelphia Rapid Transit Co.* 224 Pa. 162, 73 Atl. 319, it was held to be negligence *per se* to alight from a car which was going faster than a man could walk.

To avoid impending danger.

That it does not constitute negligence *per se* to jump from a car while it is moving, to avoid real or reasonably apparent danger, is held in the following cases:

—*Right v. Metropolitan R. Co.* 21 App. D. C. 494 and *Chicago Union Traction Co. v. Newmiller*, 215 Ill. 383, 74 N. E. 410, affirming 116 Ill. App. 625, where, following an explosion of a fuse, there was a stampede, and a passenger was injured in jumping or being pushed from the car;

—*Louisville & S. I. Traction Co. v. Worrell*, 44 Ind. App. 480, 86 N. E. 78, and *Lord v. Manchester Street R. Co.* 74 N. H. 295, 67 Atl. 639, where a passenger jumped from a moving car under the impulse of fear, caused by an explosion of the controller;

—*Washington & G. R. Co. v. Hickey*, 5 App. D. C. 436, affirmed in 166 U. S. 521, 41 L. ed. 1101, 17 Sup. Ct. Rep. 661, where plaintiff jumped off a car during the commotion resulting from an impending collision;

—*Selma Street & Suburban R. Co. v. Owen*, 132 Ala. 420, 31 So. 598, where there was an apparent, though not actual, danger of collision with a locomotive;

—*Terre Haute Traction & Light Co. v. Payne* (Ind. App.) 89 N. E. 413, in which it was held that when a passenger is put in imminent jeopardy by servants of the railroad company, and is injured in attempting to escape, he is not necessarily precluded from recovery because he misjudged the danger, and whether he acts rashly in leaping from the car is for the jury to determine;

—*Eaton v. Wilmington City R. Co.* (Del.) 75 Atl. 369, holding that plaintiff could recover for injury in jumping from a car running rapidly down grade, beyond control of the motorman, if his act was that of a person of ordinary prudence and discretion under similar circumstances;

—*Georgia R. & Electric Co. v. Gilleland*, 133 Ga. 621, 66 S. E. 944, though plaintiff may have misjudged the danger;

—*Howell v. Lansing City Electric R. Co.* 136 Mich. 432, 99 N. W. 406, where danger of a collision was imminent;

—*McManus v. Metropolitan Street R. Co.* 116 Mo. App. 110, 92 S. W. 176, where a gripman failed to stop as soon as he might have done on approaching a wreck, which was partly concealed by fog, though it was in fact on another track, and did not actually endanger the car;

—*Williamson v. St. Louis Transit Co.* 202 Mo. 345, 100 S. W. 1072, where plain-

tiff, a woman, was riding on the front platform of a crowded car, and jumped when the controller exploded, the motorman having jumped first, the court saying: "It is just as culpable to negligently frighten a passenger and thereby cause him to jump from the car and injure himself as it is to injure him directly; and this is true although no injury would have resulted had no attempt to escape been made;"

—Poulsen v. Nassau Electric R. Co. 30 App. Div. 246, 51 N. Y. Supp. 933, where plaintiff leaped when an explosion occurred in the controller, and flames leaped out and enveloped the motorman, though others who remained on the car were uninjured;

—Robson v. Nassau Electric R. Co. 80 App. Div. 301, 80 N. Y. Supp. 693, where plaintiff jumped under fear of collision with an approaching railroad train, though no collision in fact occurred;

—Paine v. Geneva, W. S. F. & C. L. Traction Co. 115 App. Div. 729, 101 N. Y. Supp. 204, where a boy twelve years of age jumped upon the explosion and flaming of the controller, though passengers remaining on the car were uninjured;

—Willis v. Second Ave. Traction Co. 189 Pa. 430, 42 Atl. 1, when the car started forward, and was about to collide with a passing train;

—Palmer v. Warren Street R. Co. 206 Pa. 574, 63 L.R.A. 507, 56 Atl. 49, where the passenger acted under the impulse of a well-grounded fear of collision with a car which was approaching on the same track;

—Lehner v. Pittsburg R. Co. 223 Pa. 203, 132 Am. St. Rep. 729, 78 Atl. 525, 16 A. & E. Ann. Cas. 83, where the car started backward down a grade, and got beyond control of the crew;

—Wade v. Columbia Electric Street R. Light & P. Co. 51 S. C. 296, 64 Am. St. Rep. 676, 29 S. E. 233, where plaintiff jumped from a moving car under apprehension of danger from a collision, even though the conductor warned him not to jump, and that there was no danger, if a person of ordinary and reasonable sense and prudence would have jumped notwithstanding such warning;

—Wanzer v. Chippewa Valley Electric R. Co. 108 Wis. 319, 84 N. W. 423, where an explosion occurred from the sudden reversing of the current, and at the same time contact of the car with a wagon caused the glass of the car to break, though those remaining on the car were uninjured.

However, in Chretien v. New Orleans R. Co. 113 La. 761, 104 Am. St. Rep. 519, 37 So. 716, where there was a fall of a wire, and an explosion, and none on the car were injured or frightened but deceased, who jumped off while the car was going at high speed, a verdict for defendant was sustained, the court holding that, to permit recovery, deceased must have acted under a reasonable apprehension of injury, and in determining if he did so it was proper to consider the conduct of the other passengers and the speed of the car, 30 L.R.A. (N.S.)

Against warning.

If a passenger persists in his attempt to board or alight from a moving car after being warned by the conductor not to do so, he will be precluded from recovery, either because of his contributory negligence, or want of negligence on the part of the carrier. Koues v. Metropolitan Street R. Co. 86 App. Div. 611, 83 N. Y. Supp. 380; Graefe v. St. Louis Transit Co. 224 Mo. 232, 123 S. W. 835; Gallagher v. West End Street R. Co. 156 Mass. 157, 30 N. E. 480; Campbell v. Los Angeles R. Co. 135 Cal. 137, 67 Pac. 50.

But if he acts against the warning of the conductor under fear of impending danger, he may not be guilty of contributory negligence as matter of law. See Wade v. Columbia Electric Street R. Light & P. Co. *supra*.

In Little Rock Traction & Electric Co. v. Kimbro, 75 Ark. 211, 87 S. W. 121, 644, it was held that the conductor was not bound to take steps to prevent an injury to a passenger whom he saw about to alight from a moving car, if he had no reason to believe injury would result.

But in McHugh v. St. Louis Transit Co. 190 Mo. 85, 88 S. W. 853, an instruction requiring the conductor to exercise reasonable care to prevent plaintiff, a woman, from alighting from a moving car, was held not to be erroneous, as this was his duty under the common law as well as under a local ordinance.

Conflict as to whether car was moving or stationary.

Frequently the evidence is conflicting as to whether plaintiff attempted to board or alight from a stationary car, and was injured because of its being started prematurely, or whether the car was in motion when the attempt was made; and ordinarily this question, with that of plaintiff's contributory negligence, will be left for the jury to determine. Jacksonville Electric Co. v. Cabbage, 58 Fla. 287, 51 So. 139; Farrell v. Citizens' Light & R. Co. 137 Iowa, 309, 114 N. W. 1063; Paducah Street R. Co. v. Walsh, 22 Ky. L. Rep. 532, 58 S. W. 431; Lexington R. Co. v. Herring, 29 Ky. L. Rep. 794, 96 S. W. 558, rehearing denied in 30 Ky. L. Rep. 269, 97 S. W. 1127; South Covington & C. Street R. Co. v. Core, 29 Ky. L. Rep. 836, 96 S. W. 562; Scamell v. St. Louis Transit Co. 103 Mo. App. 504, 77 S. W. 1021; Barnett v. Metropolitan Street R. Co. 138 Mo. App. 192, 120 S. W. 730; Pohle v. Second Ave. R. Co. 161 N. Y. 666, 57 N. E. 1122, affirming without opinion 13 App. Div. 393, 42 N. Y. Supp. 1092; Willis v. Metropolitan Street R. Co. 63 App. Div. 333, 71 N. Y. Supp. 554; Slean v. Schuylkill Valley Traction Co. 32 Pa. Super. Ct. 558; Moran v. Versailles Traction Co. 188 Pa. 557, 41 Atl. 652; Thompson v. Norfolk & P. Traction Co. 109 Va. 733, 64 S. E. 953; Morien v. Norfolk & A. Terminal Co. 102 Va. 622, 46 S. E. 907; Champagne v. La

Crosse City R. Co. 121 Wis. 554, 99 N. W. 334.

But in the following cases, where it was shown by a strong preponderance of the evidence that the car was in motion when the attempt to board or alight was made, it was held that the judgment should be for defendant; *Joyce v. Los Angeles R. Co.* 147 Cal. 274, 82 Pac. 204; *Wyatt v. Pacific Electric R. Co.* 156 Cal. 170, 103 Pac. 892; *Wolf v. Metropolitan Street R. Co.* 82 App. Div. 629, 81 N. Y. Supp. 257; *Maloney v. Metropolitan Street R. Co.* 95 App. Div. 393, 88 N. Y. Supp. 638; *Koester v. Interurban Street R. Co.* 90 N. Y. Supp. 375; *Adams v. Metropolitan Street R. Co.* 99 App. Div. 621, 90 N. Y. Supp. 937; *Hanau v. Metropolitan Street R. Co.* 103 App. Div. 402, 92 N. Y. Supp. 1086.

—pleading.

In this connection there is an important line of cases holding that where plaintiff alleges as the sole act of negligence on the part of the carrier that the car was started suddenly from a stationary position, as he was about to board or alight, and the evidence is directed entirely to this issue, and it is shown by defendant that the car was in motion at the time, it is error to allow plaintiff to recover on the latter theory, by giving instructions for plaintiff or refusing instructions on behalf of defendant, so that the jury is allowed to consider that phase of the case. See on this question: *Alabama City, G. & A. R. Co. v. Bullard*, 157 Ala. 618, 47 So. 578; *Chicago City R. Co. v. Gates*, 135 Ill. App. 180; *Peck v. St. Louis Transit Co.* 178 Mo. 617, 77 S. W. 736; *Peterson v. Metropolitan Street R. Co.* 211 Mo. 498, 111 S. W. 37; *Graefe v. St. Louis Transit Co.* supra; *Patterson v. Westchester Electric R. Co.* 26 App. Div. 336, 49 N. Y. Supp. 796, affirmed without opinion in 44 App. Div. 629, 60 N. Y. Supp. 1144; *Kelly v. Third Ave. R. Co.* 25 App. Div. 603, 50 N. Y. Supp. 426; *Savage v. Third Ave. R. Co.* 29 App. Div. 556, 51 N. Y. Supp. 1066; *Kuhlman v. Metropolitan Street R. Co.* 30 Misc. 417, 62 N. Y. Supp. 466; *Cunningham v. Dry Dock, E. B. & B. R. Co.* 31 Misc. 471, 64 N. Y. Supp. 350; *Clancy v. Yonkers R. Co.* 88 App. Div. 612, 84 N. Y. Supp. 789, affirmed without opinion in 112 App. Div. 887, 97 N. Y. Supp. 1131; *Murphy v. North Jersey Street R. Co.* 71 N. J. L. 5, 58 Atl. 1018; *El Paso Electric R. Co. v. Ruckman*, 49 Tex. Civ. App. 25, 107 S. W. 1158; *El Paso Electric R. Co. v. Boer* (Tex. Civ. App.) 108, S. W. 199; *Haralson v. San Antonio Traction Co.* (Tex. Civ. App.) 115 S. W. 876.

And this, apparently, is the ground for the decision in *Kuhlman v. Metropolitan Street R. Co.* 30 Misc. 417, 62 N. Y. Supp. 526, reversing 29 Misc. 773, 60 N. Y. Supp. 989.

In *Anderson v. Third Ave. R. Co.* 36 App. Div. 309, 55 N. Y. Supp. 290, however, Judge Cullen points out that this rule would not be universally applicable, but 30 L.R.A. (N.S.)

only in cases where the testimony presented two irreconcilable theories as to the manner in which the accident occurred.

Instructions.

The following cases turn particularly upon instructions given or refused by the court. Thus, in *Birmingham R. & Electric Co. v. Brannon*, 132 Ala. 431, 31 So. 523, an instruction was held to be erroneous which in effect declared, as matter of law, that it was not negligence for a passenger to attempt to board a street car in slow motion.

In *Sweet v. Birmingham R. & Electric Co.* 145 Ala. 667, 39 So. 767, an instruction that an attempt to alight while a car was moving is contributory negligence if a reasonably prudent person, so situated, would not have attempted it, was approved.

In *Orth v. Saginaw Valley Traction Co.* (Mich.) 127 N. W. 330, the court approved an instruction to the effect that a passenger assumes the risk attending the boarding of a moving car, but not of the negligence of the company in suddenly accelerating the speed of the car, when they know the passenger is in the act of boarding it.

In *Maisels v. Dry Dock, E. B. & B. Street R. Co.* 16 App. Div. 391, 45 N. Y. Supp. 4, an instruction that "the omission of the driver to stop the car on the request of the plaintiff would not justify or excuse the act of the plaintiff in attempting to alight from the front platform of the car while the car was in motion and the horses on a trot, if you find from the evidence that was the fact," was held to be correct, and not open to the objection that it in effect instructed that if plaintiff got off while the car was in motion, he was guilty of contributory negligence as matter of law.

In *Monroe v. Metropolitan Street R. Co.* 79 App. Div. 587, 80 N. Y. Supp. 177, where the negligence claimed was in starting a car suddenly, as plaintiff was in the act of boarding it, when it had nearly stopped, it was held to be error to refuse to charge that the "slowing up of the car as it approached the street crossing was not an invitation to the plaintiff to board it before it stopped," as the motorman could not be charged with notice that plaintiff would attempt to board the car before it came to a full stop, and hence would not be negligent in starting it suddenly before it had done so, unless he actually saw plaintiff attempting to board.

In *Coles v. Interurban Street R. Co.* 49 Misc. 246, 97 N. Y. Supp. 289, the court says that while an instruction that "if this plaintiff attempted to board that car, and if the conductor, under all the circumstances thereof, knew, or had reason to know, that she intended to board, he should have given her reasonable opportunity to do so, and his failure so to do would have been a negligent act on his part, which would bind this defendant corporation," might be erroneous if standing alone, because of its failure to direct attention to

possible contributory negligence on the part of the plaintiff, it was cured by a further instruction that "if, however, after that car had started, no matter how slow it was going, the plaintiff attempted to board it, and then met with this accident, she cannot recover in this case."

In *San Antonio Traction Co. v. Parks* (Tex. Civ. App.) 93 S. W. 130, where there was a conflict of evidence as to whether plaintiff was injured by a sudden starting of the car, or in jumping from the car while it was in motion, an instruction that, "you are further instructed that if you believe from the evidence that plaintiff was guilty of negligence in alighting from the car at the time or manner or under the circumstances that you find from the evidence that plaintiff did alight from the car, and that such negligence, if any, proximately caused or contributed to plaintiff's injuries, if any, you are then instructed to return a verdict for the defendant," was held to be erroneous, because, if plaintiff was negligent in alighting, such negligence was *ipso facto* the proximate cause of the injury. But, on appeal, in 100 Tex. 222, 94 S. W. 331, this objection was held invalid, inasmuch as the instruction complained of did not expressly authorize a verdict in favor of plaintiff, though the jury should find that he was guilty of negligence in his manner of alighting. Reports of this case on other points are found in (Tex. Civ. App.) 97 S. W. 510, and 100 Tex. 227, 98 S. W. 1100.

In *Dallas Consol. Electric Street R. Co. v. Lasch* (Tex. Civ. App.) 99 S. W. 729, where the evidence was conflicting as to whether plaintiff was injured while alighting while the car was moving, or whether the car was started suddenly when he was in the act of alighting, the court said that defendant was entitled to have its theory presented affirmatively to the jury by an instruction that if they found that plaintiff got off the car while in motion, and that a person of ordinary care would not have so acted under the same or similar circumstances, they should find for defendant, in addition to a general charge on contributory negligence.

And in *Dallas Consol. Electric Street R. Co. v. Barnes* (Tex. Civ. App.) 119 S. W. 122, where there was some evidence that plaintiff stepped off facing the rear, and the pleading raised this issue, it was held to be error to refuse a special charge that, "if you should find and believe from the evidence that plaintiff herein attempted to alight from one of the defendant's cars while the same was moving, and that in alighting therefrom she did not follow the motion of the car, but stepped therefrom in a negligent manner, and that a person of ordinary care would not have so acted under the same or similar circumstances, then this would constitute contributory negligence on the part of the plaintiff, and you will return your verdict for the defendant."

R. L. S.

30 L.R.A. (N.S.)

ARKANSAS SUPREME COURT.

T. C. NEECE, Appt.,
v.
LEWIS JOSEPH, Exr., etc., of A. W.
Shirey, Deceased.

(— Ark. —, 129 S. W. 797.)

Contract — to procure evidence — validity.

A contract to secure evidence of a given state of facts, which will permit the winning of a lawsuit, is void as against public policy.

(June 6, 1910:)

Note. — Validity of contracts to procure testimony.

This note is supplemental to the note to *Goodrich v. Tenney*, 19 L.R.A. 371. Cases have been excluded which relate primarily to contracts to withhold evidence, ordinary rewards, competency of witnesses by reason of interest, and the matter of "turning state's evidence;" also cases holding simply that contracts to pay a witness extra compensation are without consideration. For the general subject of compensation to expert witnesses, see notes to *Flinn v. Prairie County*, 27 L.R.A. 669, and to *Phillier v. Waukesha County*, 25 L.R.A. (N.S.) 1040.

Speaking generally it may be said that while an agreement to disclose information is not necessarily invalid, contracts to furnish evidence to a particular effect are, as a rule, condemned by the courts.

Contracts for evidence to a particular effect.

A contract to furnish a person with evidence that will win a suit, or place him in such a position that he can force a favorable settlement, is void. *Hughes v. Mullins*, 36 Mont. 267, 92 Pac. 758, 13 A. & E. Ann. Cas. 209.

And a contract to furnish evidence to establish the claim of a party in a litigation to be commenced is void as against public policy. *Lyons v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281.

So, an agreement to furnish testimony favorable to a party to a suit, for a consideration dependent upon the result, is void (*Bowling v. Blum* [Tex. Civ. App.] 52 S. W. 97), where the court seemed to consider the contract invalid apart from the character of the compensation.

An agreement that if a person will secure and furnish evidence by means of which his employers can obtain judgment in a case to be brought against them by a third party, they will, contingent on the result, give him one fourth of the judgment, partakes of maintenance, and is void on account of its corrupt tendency, and because as inconsistent with public policy. *Getchell v. Welday*, 4 Ohio S. & C. P. Dec. 65, 113.

See also *Hutley v. Hutley*, L. R. 8 Q. B.

A PPEAL by plaintiff from a judgment of the Circuit Court for Lawrence County entered upon a directed verdict for defendant in an action brought to recover the amount alleged to be due upon a contract for personal services. Affirmed.

The facts are stated in the opinion.

Messrs. **Smith & Blackford, W. E. Beloate, and R. B. Maxey**, for appellant:

Where a contract is subject to two constructions, one of which is legal, and the other illegal, it is presumed to be legal until the contrary is shown.

15 Am. & Eng. Enc. Law, 2d ed. pp. 933, 934-1016.

And is construed against the party who prepares it.

McFarlane v. York, 90 Ark. 88, 117 S. W.

112, where a contract which included an undertaking to obtain evidence was declared void as champertous; see also, to similar effect, **Rees v. De Bernardy** [1896] 2 Ch. 437, where the contract involved the recovery of property by procuring evidence or similar means; and **Phelps v. Manecke**, 119 Mo. App. 139, 96 S. W. 221, where part of the services agreed upon was to "get up" the evidence.

In **Quirk v. Muller**, 14 Mont. 407, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077, where one was employed not only to make search and inquiry for witnesses, and to ascertain the names of persons acquainted with the facts and circumstances, but also to procure such other testimony as would entitle the employer to recover the possession of certain property, the compensation to be a percentage of the recovery, it was held that the contract was void as an agreement to procure testimony that would win a lawsuit. The court said: "We do not hold the contract void because it was an agreement to procure perjury, or because it did procure perjury, but the contract had the tendency, and opened the very strong temptation, to the procurement of perjury." And later in the opinion it is said: "We think that nothing here said can be interpreted as forbidding the offering of rewards for the detection of crime, or the employing of persons to search for material witnesses or important papers or documents or exhibits which have been lost."

But an agreement by a third person with one party to a litigation to procure from the other party a contract of such a character that it would itself constitute the evidence desired by the former, that the latter was selling machines upon terms which violated a contract, is not invalid. **J. I. Case Threshing Mach. Co. v. Fisher** (Iowa) 122 N. W. 575.

Agreements for disclosure of information.

Agreements for the disclosure of information have been upheld in some cases. Thus, in **Wood v. Casserleigh**, 30 Colo. 287, 97 Am. St. Rep. 138, 71 Pac. 360 (affirming 30 L.R.A.(N.S.)

773; **Gulf Compress Co. v. Harrington**, 90 Ark. 250, 23 L.R.A.(N.S.) 1205, 119 S. W. 249.

The agreement to pay for the collecting and procuring of testimony is valid.

15 Am. & Eng. Enc. Law, 2d ed. p. 979.

Messrs. **J. N. Beakley and McCaleb & Reeder**, for appellee:

The contract was against public policy and void.

Patterson v. Donner, 48 Cal. 379; **Lyon v. Hussey**, 82 Hun, 15, 31 N. Y. Supp. 281; **Gillett v. Logan County**, 67 Ill. 256; **Goodrich v. Tenney**, 144 Ill. 422, 19 L.R.A. 371, 36 Am. St. Rep. 459, 33 N. E. 44; **Hagan v. Wellington**, 7 Kan. App. 74, 52 Pac. 909; **Badger v. Williams**, 1 D. Chip. (Vt.) 137; **Dawkins v. Gill**, 10 Ala. 206; **Quirk v.**

14 Colo. App. 265, 59 Pac. 1024), it was held that an agreement was valid which provided that one person should furnish another certain information then in his possession as to the citizenship of the latter's deceased father, and should at his own cost proceed against third parties for the recovery or settlement of certain mining claims formerly of such father, in consideration of a percentage of what was recovered or received.

Yet in **Casserleigh v. Wood**, 56 C. C. A. 212, 119 Fed. 308, it was held that a similar contract would not be enforced in equity on account of its champertous character, although there was no statute against champerty in the state of the forum.

And a contract for the purchase of documentary evidence, which includes a purchase of the silence of the owner in regard to the matters to which the documents relate, is void. **Young v. Thomson**, 14 Colo. App. 294, 59 Pac. 1030.

Agreements for ascertaining facts.

Where part of the consideration for the assignment of a check was that the assignee should make a trip to another state for the purpose of securing witnesses for the assignor in a pending divorce suit against his wife, it was held that, in the absence of other evidence, it could not be concluded that the assignee was to secure false and suborned testimony, or do any other act that was corrupt and against the policy of the law. **Singer Mfg. Co. v. City Nat. Bank**, 145 N. C. 319, 59 S. E. 72.

In **Plating Co. v. Farquharson**, L. R. 17 Ch. Div. 49, it appeared that the defendants after judgment against them of infringement of the plaintiff's patent, and pending an appeal therefrom, inserted in a newspaper this advertisement: "Nickel plating—£100 reward to anyone who can produce documentary evidence that nickel plating was done previous to 1860." An application to commit the printers of the newspaper for contempt of court was denied, the court of appeal being of the opinion that neither the printers nor the de-

Muller, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077.

Hart, J., delivered the opinion of the court:

T. C. Neece brought this suit in the circuit court against A. W. Shirey to recover an amount alleged to be due him under the following contract:

Minturn, Arkansas, Feb. 27, 1906.

This is an agreement an a contract made bye Dr. T. C. Neece and John Bennett, bye the consent and bye the request of A. W. Shirey, of the town of Minturn, wherein the sed T. C. Neece do agree to go with John Bennett, and to find and furnish all the proofs that can be established bye the

doctors, wherein that the sed Bell Shirey, the wyfe of the sed A. W. Shirey, did give birth to one child, an oup on sed proofs furnished by the sed T. C. Neece, that Bell Shirey did live the state of Arkansas, and giv birth to sed child then an thare, his fees and truble for such would be \$500, wherein the sed John Bennett as A. W. Shirey agent, by consent of A. W. Shirey, do agree to pay the sed T. C. Neace the five 500 hundred dollars as fees time a truble and expenses.

Written and sind by John Bennett, agt. an employd by A. W. Shirey.

The plaintiff testified in his own behalf, and also introduced as a witness John Ben-

fendants had been guilty of any contempt. Jessel, M. R., said: "Advertisements of a similar nature are very common. You advertise for a lost deed or a lost will, or you advertise for a certificate of marriage or of baptism, to prove heirship or kinship. That is done as a matter of course. Generally, no doubt, the amount of the offer is not quite so large as £100, but sometimes it is; and I never heard it suggested that those advertisements were illegal, or were not a proper mode of obtaining evidence." And the court severely criticized the case of Pool v. Sacheverel, 1 P. Wms. 675.

In Pool v. Sacheverel, *supra*, it seems that a certain register entry of a marriage had been held to evidence the marriage of certain parties under assumed names, and, after judgment sustaining such marriage, a relative of the party defeated in the action inserted in a newspaper an advertisement offering £100 reward for discovery and legal proof that such register entry evidenced the marriage of parties whose names were correctly stated therein, wherefor he was committed for contempt of court, Parker, L. C., saying, *inter alia*: "This tends to the suborning of witnesses, is very dangerous, and not only greatly criminal, but is a contempt of the court," for he pointed out that a new trial might be granted upon affidavits secured by the advertisement.

Agreements to pay witnesses extra compensation.

"Where a witness who is not interested in the result of the controversy resides within this state, and is amenable to process therein, an agreement to compensate him in an amount in excess of the legal fees, for attending as a witness and testifying only as to facts within his knowledge, is contrary to public policy and void." Clifford v. Hughes, 124 N. Y. Supp. 478; see also, to the same effect, Ramschael's Estate, 24 Pa. Super. Ct. 262.

Thus, an agreement to pay a witness who knows a fact material to the issue, for his loss of time, a greater sum than the legal fees, is without consideration, against public policy. 30 L.R.A. (N.S.)

lic policy, and void. Wright v. Somers, 125 Ill. App. 256.

And an agreement that a person should receive pay for giving evidence in an action which it is agreed shall be brought "is repugnant to every instinct of propriety and justice." Cowles v. Rochester Folding Box Co. 81 App. Div. 414, 80 N. Y. Supp. 811, affirmed in 179 N. Y. 87, 71 N. E. 468.

In Dodge v. Stiles, 26 Conn. 463, the court, in holding that an agreement to pay a witness the ordinary value of his time besides his legal fees was without consideration, said, *inter alia*: "Were it otherwise, and witnesses might be allowed to make terms for testifying, there would be room for oppressive conduct and for corruption."

There may be a further consideration, in which case an executory promise for extra compensation will be upheld; as if the witness was about going abroad at the time he may be wanted to attend court, and agrees that he will remain and give up his journey, and is summoned; or living at a distance from the place of the court, more than 20 miles, so that his deposition could be taken, agrees that he will attend in person. In these and the like cases, the promise is one for indemnity."

Where a part of the consideration for a reward to a person for the production of evidence as to an embezzlement was that he should testify as a witness in an action pending or to be brought by the rewarder against the alleged embezzler, it was held that the contract was void as against public policy. Boelmer v. Foval, 55 Ill. App. 71.

Where the defendant in a criminal case after conviction placed certain notes in the hands of a third party, to be delivered to the prosecuting witness in case he was pardoned, or, if his conviction was reversed, in case of his final discharge, it was held that no honesty of intention would justify the adoption of "a rule which would allow persons charged with crime to practically buy up the witnesses for the state." Haines v. Lewis, 54 Iowa, 301, 37 Am. Rep. 202, 6 N. W. 495.

But an agreement for extra compensation to a witness does not necessarily avoid an

nett, who signed the instrument copied above. No evidence was offered by the defendant. The testimony of these witnesses is very voluminous, but its effect is to show that plaintiff knew that there was a divorce suit pending between defendant and his wife when the contract was made; that one of the contentions of defendant in that suit was that his wife had given birth to a child at some place unknown to him, and that he was not the father of it; that the testimony to be procured under the agreement was for use in that suit, and was so used.

The circuit court held that the agreement was contrary to public policy and void; and directed the jury to return a verdict in favor of the defendant, which was accordingly done. From the judgment rendered, the

otherwise valid contract of which it is a part. Thus, while an agreement by a creditor of the estate to give such true evidence as may be necessary to enable heirs to recover the estate, standing alone, may not be a sufficient consideration to support an executory contract, it is not immoral or illegal, and will not avoid a contract otherwise legal and binding, in which it is incorporated. *Smith v. Hartsell*, 150 N. C. 71, 22 L.R.A.(N.S.) 203, 63 S. E. 172.

It is to be observed at this point that the note does not purport to cover the question whether agreements contemplating the intermeddling with litigation by a third person, apart from an agreement to procure evidence, is bad for champerty or maintenance.

An agreement between the defendant and the plaintiff, a lawyer, that the latter would attend as a witness in the surrogate's court upon the trial of a proceeding for the probate of the will of the defendant's father, and that he would confer with defendant's attorneys relative to the testimony which he should give upon such proceeding, in consideration of which the defendant was to pay him a sum equal to that which an attorney at law would reasonably charge for his services, while it will not enable the plaintiff to recover more than the legal fees for his attendance as a witness and testifying, will, it seems, enable him to recover for his conferences with the defendant's attorneys. See *Clifford v. Hughes*, supra.

—agreements with expert witnesses.

Few of the cases in relation to the compensation of expert witnesses have arisen under express contracts to pay them extra compensation. Where the employment involves special work in preparation for the trial, there would seem to be nothing illegal in such contracts.

Where a suit is pending in St. Louis against the officers and agents of a mining company, for sending through the mails fraudulent statements as to the value of its properties in Colorado, it is not against public policy for the company to employ,

plaintiff has prosecuted an appeal to this court.

The defendant Shirey died testate during the pendency of the appeal, and the case has been duly revived in the name of the executor of his will.

The circuit court was right in holding that the contract was against public policy and void. The vice of the contract does not consist in the fact that the defendant employed the plaintiff to obtain evidence in his divorce suit; but the contract is, on its face, illegal because of the improper provision that the evidence to be procured should be of a given state of facts, of a tendency to enable defendant to win his suit. It will be observed that the contract did not provide for the payment of his services in pro-

at an agreed price, residents of Colorado to examine the properties, have assays made, and prepare themselves to testify as to what in truth was their value, and to go to St. Louis and testify as to such value; there is nothing in an objection that such an agreement tends to pervert or obstruct public justice, in the absence of evidence suggesting that the witnesses were employed to pervert the truth, or to obstruct the cause of justice. *Lincoln Mountain Gold Min. Co. v. Williams*, 37 Colo. 193, 85 Pac. 844.

An agreement to pay a certain sum to an expert for his services in a proceeding to condemn real estate belonging to the promisor, such services to consist, among other things, in investigation of values of the part of the land taken, and the effect of such taking upon what remained, consulting with counsel for appellant, examining plats, etc., as well as testifying in the case, will be presumed to be legal till the contrary appears; such services are not necessarily illegal or tending to corrupt practices. *Johnson v. Pietsch*, 94 Ill. App. 459.

Where an agreement to testify as an expert rests upon a sufficient consideration to support a promise to pay a reasonable compensation in addition to the statutory fees, and the jury find such promise or a mutual understanding to that effect upon sufficient evidence, a judgment for the amount of such compensation will not be disturbed. *Barrus v. Phaneuf*, 166 Mass. 123, 32 L.R.A. 619, 44 N. E. 141.

The validity of a contract for the extra compensation of an expert employed in a criminal case by the district attorney, involving special work by the expert in preparation for the trial, has been upheld in New York in the case of *People v. Montgomery*, 13 Abb. Pr. N. S. 207; and such contracts have been recognized as valid in *People ex rel. Tripp v. Cayuga County*, 22 Misc. 616, 50 N. Y. Supp. 16; *People ex rel. Bliss v. Cortland County*, 39 N. Y. S. R. 313, 15 N. Y. Supp. 748; *People ex rel. Hamilton v. Jefferson County*, 35 App. Div. 239, 54 N. Y. Supp. 782.

The attorney general of a state, desiring

curing for use such testimony as actually existed, but it contemplated the procurement of evidence tending to establish a given state of facts, regardless of any other consideration. With reference to such contracts, the supreme court of Montana held: "A contract is void as against public policy if by it one of the parties agrees to secure such testimony as will enable the other to win an existing or contemplated suit. It is not necessary that the contract should contemplate the production of perjured testimony. It is void because its tendency is to promote unlawful acts." *Quirk v. Muller*, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077.

to show that the estimate of value of the property of a certain corporation given by its expert in his testimony was materially too high, engaged an expert for that purpose, who stated that his terms would be a retainer of \$1,000 and \$50 a day while thus engaged; some days later such expert stated that he had examined the testimony of the corporation expert, and could make a materially lower appraisal, but his appraisal when made not being materially lower, he was not called as a witness; and it was held that he was entitled to the retainer, but not to any *per diem* compensation. *Hough v. State*, 68 Misc. 26, 124 N. Y. Supp. 878.

In *Philler v. Waukesha County*, 130 Wis. 211, 25 L.R.A. (N.S.) 1040, 131 Am. St. Rep. 1055, 120 N. W. 829, 17 A. & E. Ann. Cas. 712, the court was of the opinion that a contract to pay an expert for work done in preparation and qualification to enable him to testify would be valid.

But an agreement to pay an expert witness for his services a percentage of the amount that may be recovered or realized is illegal. *Laffin v. Billington*, 14 N. Y. Anno. Cas. 360, 86 N. Y. Supp. 267. See also *Johnson v. Pietsch*, *supra*, for a *dictum* to the same effect.

It has been held that a contract with an expert to pay him extra compensation where the subject of his testimony involved no special preparation was invalid.

Thus, in *Burnett v. Freeman*, 125 Mo. App. 683, 103 S. W. 121, s. c. subsequent appeal 134 Mo. App. 709, 115 S. W. 88, it was held that a contract to pay an expert for being a witness as to matters of fact or professional knowledge not acquired by him with a view to the particular case would be invalid as without consideration and against public policy.

In *Walker v. Cook*, 33 Ill. App. 561, it was held that a physician under subpoena could not recover on a promise to pay him as well for his attendance in court as if he was to attend to his patients, the matter on which he was to testify being as to the reasonable value of professional services rendered. While the court quoted and apparently followed the case of *Dodge v. Stiles*, *supra*, it is stated in the opinion that a different question would have been 30 L.R.A. (N.S.)

In the opinion of the court in that case is contained a quotation from the supreme court of Illinois in the case of *Gillett v. Logan County*, 67 Ill. 256, which is so clear a statement of the reasons for the rule, that we repeat it here. The facts were that the county supervisors desired to overthrow the result of an election in regard to whether the county should subscribe for certain railroad bonds. They made a contract with a person to procure evidence to show that certain votes cast at such election were illegal, and the contract had a scale of prices varying according to the number of votes that were proved to be illegal. The court said: "The evidence disproved the actual use

presented had the witness attended without service of a subpoena.

Miscellaneous.

A contract with a deputy sheriff to pay him a certain sum, in consideration of which he is to furnish evidence sufficient to convict the murderers of a relative of the contractors, is void as a contract to pay a public officer for doing a duty which the law requires him to do without such payment. *Kennedy v. Hodges*, 97 Ga. 753, 25 S. E. 493.

In *Langdon v. Conlin*, 67 Neb. 243, 60 L.R.A. 429, 108 Am. St. Rep. 643, 93 N. W. 389, 2 A. & E. Ann. Cas. 834, the decision holding void a contract between an attorney and a layman whereby the latter for a percentage was to procure the employment of the former by third persons for the prosecution of suits in courts of record, and also to assist "in looking after and securing proper and legitimate witnesses whose testimony was to be used in such cases,"—was mainly upon the ground that it was a cover to enable one not a member of bar to practise in the courts; but the provision quoted as to procuring witnesses was also apparently regarded as objectionable in itself. See also, to similar effect, *Holland v. Sheehan*, 108 Minn. 362, 23 L.R.A. (N.S.) 510, 122 N. W. 1, 17 A. & E. Ann. Cas. 687.

Where two persons entered into a fraudulent conspiracy to defraud the government with respect to certain land, and the evidence of such conspiracy, necessary to prove the claims of the rightful claimant, is in the sole possession and control of one of such conspirators, whose testimony cannot be secured by process, an agreement between such conspirator and such claimant, by which the former, for a valuable consideration, is to testify, and permit the use of the evidence showing such conspiracy, is void, and no recovery can be had upon it by such conspirator, as he cannot be permitted to profit by the information possessed by reason of his unlawful conspiracy. *Hagan v. Wellington*, 7 Kan. App. 74, 52 Pac. 909.

See also as illustrating an attempt to sell information of one's own rascality, *Young v. Thomson*, 14 Colo. App. 294, 59 Pac. 1030, which, however, was decided on another ground.

B. B. B.

by the committee of any corrupt means or any corrupt design, on their part, in the use of the money. But the contracts themselves are pernicious in their nature. They created a powerful, pecuniary inducement on the part of the agents so employed that the testimony should be given of certain facts, and that a particular result of the suit should be had. A strong temptation was held out to them to make use of improper means to procure the needful testimony, and to secure the desired result of the suit. The nature of the agreement was such as to encourage attempts to suborn witnesses, to tamper with jurors, and to make use of other 'base appliances' in order to secure the necessary results which were to bring to these agents their stipulated compensation. The tendency of such arrangement must be to taint with corruption the atmosphere of courts, and to pervert the course of justice. A pure administration of justice is of vital public concern. It tends to evil consequences that any such venal agency as is constituted by these contracts should have a part in the conduct of judicial proceedings, where the attainment of right and justice is the end. Should such contracts of this character receive countenance, we might, among the multiplying forms of agency of the time, have to witness the scandalous spectacle of a class of agents holding themselves out to the public as professional procurers of desired testimony for litigants in court, for pay contingent upon the success of their suits. In *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953, it was held that a contract or a contingent compensation for obtaining legislation was void by the policy of the law. With much greater reason, we think, should the contracts under consideration be held vicious. We cannot sanction them. On account of their corrupting tendency, we must hold them to be void, as inconsistent with public policy." See also *Patterson v. Donner*, 48 Cal. 379; *Lyon v. Hussey*, 82 Hun. 15, 31 N. Y. Supp. 281.

We agree with the reasoning of the court in the above-cited cases, that contracts like the one under consideration are void as against public policy, and as tending to impede the administration of justice. "Where the ground of a promise on one part, or the thing promised to be done on the other part, is unlawful, the courts will not enforce the contract for either party." *Mendel v. Davies*, 46 Ark. 420. See also *Tatum v. Kelley*, 25 Ark. 209, 94 Am. Dec. 717; *Ruddell v. Landers*, 25 Ark. 238, 94 Am. Dec. 719; *Hencke v. Standiford*, 66 Ark. 535, 52 S. W. 1.

The judgment will be affirmed.
30 L.R.A.(N.S.)

CALIFORNIA SUPREME COURT.

GREGORY PERKINS, Jr., Trustee, etc.,
of Golden Gate Laundry, Incorporated,
Bankrupt, Appt.,

v.

J. E. COWLES et al., Respts.

(157 Cal. 625, 108 Pac. 711.)

Corporation — transfer of stock — insolvency — liability of transferee.

1. One who purchases stock of a corporation which is not fully paid, from original subscribers, including the president, may be held liable to creditors for the unpaid balance, although the sellers represented that the stock was fully paid, and he had no actual knowledge to the contrary, where by law the transfer effects a substitution of the transferee for the original subscriber upon the subscription contract.

Bankruptcy — corporation — unpaid subscriptions — assets.

2. Unpaid subscriptions to the stock of a corporation constitute assets in the hands of its trustee in bankruptcy, even though the stock has been transferred from the possession of the original subscribers.

(April 18, 1910.)

Note. — Liability of transferee of corporate stock on unpaid subscription.

This note does not cover the question of the liability upon unpaid subscriptions of persons holding stock in the capacity of trustees or agents, or those holding stock as collateral security. The latter question is dealt with in the note to *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 139, and the supplemental note appended to the case of *Marshall Field & Co. v. Evans, J. S. Co.* 19 L.R.A.(N.S.) 249. The liability of transferees under statutes imposing double or added liability upon stockholders is also, of course, beyond the scope of this note.

In some cases transferees of stock have been held liable upon the ground of privity between the corporation and the transferee, without express reference to notice being made. *Bend v. Susquehanna Bridge & Bank Co.* 6 Harr. & J. 128, 14 Am. Dec. 261; *Hall v. United States Ins. Co.* 5 Gill, 484; *Brinkley v. Hambleton*, 67 Md. 169, 8 Atl. 904; *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384.

The court in *Brinkley v. Hambleton*, supra, said: "According to the ordinary well-settled rule upon the subject, the law implies a promise or duty by every holder of stock in a joint stock company, to pay the full par value of the stock as it may be called for; and it follows, as a matter of course, that an assignee of the stock, by coming into privity with the company, by having the stock transferred to him on its books, is equally liable as the former holder was before the transfer. The assignee takes the shares with all their rights

APPEAL by plaintiff from a judgment of the Superior Court for Los Angeles County in defendants' favor in an action brought to recover the balances alleged to be due on certain stock subscriptions. Reversed.

The facts are stated in the opinion.

Messrs. Lawler Allen, Van Dyke, & Jutten for appellant.

Mr. Lloyd W. Moultrie, for respondents:

If any presumption of fact arises from the face of a stock certificate in customary form, it is that the stock is fully paid for.

Johnson v. Lullman, 15 Mo. App. 55.

If a certificate of stock is silent on its face as to whether it is fully paid or not, a bona fide purchaser is protected in considering it fully paid stock.

West Nashville Planing-Mill Co. v. Nashville Sav. Bank, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340; DuPont v. Tilden, 42 Fed. 87; Berry v. Rood, 168 Mo. 316, 67

S. W. 644; Hubbell v. Meigs, 50 N. Y. 480; Rood v. Whorton, 87 Fed. 434.

Transferees who buy stock in good faith, believing it to have been fully paid, although they pay only a per cent of its value, are not liable to creditors for the balance.

Young v. Erie Iron Co. 65 Mich. 111, 31 N. W. 814; Sprague v. National Bank, 172 Ill. 149, 42 L.R.A. 606, 64 Am. St. Rep. 17, 50 N. E. 19; Berry v. Rood, supra; 3 Clark & M. Priv. Corp. § 564f, p. 1741; Helliwell, Stock & Stockholders, p. 911; Reid v. De Jarnette, 3 A. & E. Ann. Cas. 1120, note; Easton Nat. Bank v. American Brick & Tile Co. 69 N. J. Eq. 326, 60 Atl. 54; Rood v. Whorton, supra; Re Remington Automobile & Motor Co. 82 C. C. A. 421, 153 Fed. 345; Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220.

Lorigan, J., delivered the opinion of the court:

This case was submitted to the trial court

and liabilities, so that if a liability to a loss has been incurred by the company before he purchased the stock, he may be called upon to contribute thereto as soon as he has accepted a transfer of the shares and become a shareholder in the concern. The liability to pay the calls made upon the stock after the transfer is shifted from the outgoing to the incoming shareholder; the transfer of stock working a complete novation of the contract of membership, the transferee being substituted to the place of the transferor, with all the rights and liabilities incident to the holding of the shares."

While in the Maryland cases just cited, the effect of notice or lack of notice to the transferee is not expressly treated, in Brant v. Ehlen, 59 Md. 1, where the stock transferred appeared on its face to be fully paid, and a bona fide transferee was held not liable for unpaid subscriptions, the court said that in all of the cases relied upon as sustaining a different holding, it would be found that the certificates on their face showed that they were not fully paid, or the facts were such as to put the purchaser on inquiry.

In Merrimac Min. Co. v. Levy, 54 Pa. 227, 93 Am. Dec. 697, 13 Mor. Min. Rep. 467, a transferee of the original purchaser was held liable to the corporation for an unpaid balance on the stock, where he was accepted as a transferee by the corporation.

So, in Basting v. Northern Trust Co. 61 Minn. 307, 63 N. W. 721, a purchaser of stock on execution sale was held liable for a call for unpaid subscriptions, where he was recognized by the corporation as a stockholder, and a transfer was made on the books as soon as the transferor had paid a call previously made.

And it was held in Gordon v. Parker, 10 La. 56, that a purchaser of stock at auction, where there was no deception, was liable 30 L.R.A. (N.S.)

according to the charter for unpaid subscriptions.

Other cases without express reference to notice, have held transferees liable on the principle that they take subject to all immunities and liabilities, since stock is not in the nature of negotiable paper. Re People's Live Stock Ins. Co. 56 Minn. 180, 57 N. W. 468; Upton v. Hansbrough, 3 Biss. 417, Fed. Cas. No. 16,801; Wilbur v. Stockholders of Corporation, 13 Phila. 479, Fed. Cas. No. 17,636; Close v. Sherwood, 5 Misc. 550, 25 N. Y. Supp. 980.

And in Brown v. Hitchcock, 36 Ohio St. 667, under a statute providing that dues should be secured by individual liability, and that each stockholder should be liable for any amount unpaid, and also imposing a further liability, an assignee is held to stand in the shoes of his assignor, on the principle that such liability arises out of the nature of the property and the relations of the parties to it and to creditors, in connection with the equitable principle that he who derives the advantage ought to bear the burdens.

So, in Bonewitz v. Van Wert County Bank, 41 Ohio St. 78, it was held that if the stock in question had been sold by the corporation before the debt sought to be satisfied accrued, the subsequent transferees thereof would be liable for the statutory liability. What the statutory liability was does not appear.

Transferees with notice.

Whether or not the foregoing cases intend to go to the extent of holding transferees absolutely liable in all cases, regardless of notice, they are undoubtedly liable if they had notice that the stock was unpaid. People's Home Sav. Bank v. Sadler, 1 Cal. App. 189, 81 Pac. 1029; People's Home Sav. Bank v. Rauer, 2 Cal. App. 415, 84 Pac.

on an agreed statement of facts. It appears therefrom that the Golden Gate Laundry, Incorporated, was organized under the laws of this state in January, 1902, with a capital stock of \$33,000, represented by 330 shares of the par value of \$100 each. All the stock was subscribed for by the six original incorporators. Certain of these, being the owners of a business plant known as the Golden Gate Laundry, transferred it to the Golden Gate Laundry, Incorporated, at a valuation of \$5,500. It was accepted by the latter corporation at that figure, and 165 shares of the capital stock of the corporation subscribed for by said parties was credited thereby with a payment of 33½ cents on each dollar per share of the capital stock subscribed for by them. Subsequently the subscribers to the remaining 165 shares of the capital stock paid into the treasury of the corporation 33½ cents on the dollar per share of the stock subscribed for by them. Thereupon all the stock of the corporation

was issued to the original subscribers, the certificates being in the usual and ordinary form, reciting that the person named therein was the owner of a given number of shares of \$100 each of the capital stock of the corporation, transferable on its books on surrender of the certificate. Some months thereafter, these defendants purchased certain shares under the following circumstances: Three of the original subscribers,—Rogers, McCoy, and Hedderly,—being desirous of securing patronage for the business of the corporation and extending its influence, arranged with the defendants and others to purchase part of the shares held by them for 40 cents on the dollar per share. Hedderly was one of the original subscribers and president of the corporation. He and the others stated to the defendants, when soliciting a purchase of the stock by them, that the stock was fully paid up at its face or par value, and that there were no unpaid subscriptions thereon. In making this

329; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; *Trendley v. St. Louis & B. Rapid Transit Co.* 84 Ill. App. 109; *White v. Greene* (Iowa) 70 N. W. 182; *First Nat. Bank v. Hingham Mfg. Co.* 127 Mass. 563; *Wallace v. Carpenter Electric Heating Mfg. Co.* 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189; *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

And a transferee of stock who paid full value for it, and who was told by the original purchaser that it was fully paid, is liable where the facts within his knowledge are such as to charge him with knowledge that the stock was not paid up. *Wishard v. Hansen*, 99 Iowa, 307, 61 Am. St. Rep. 238, 68 N. W. 691.

So, in *Hartford & N. H. R. Co. v. Boorman*, 12 Conn. 530, a transferee was held liable where he received a new certificate declaring that only part payment had been made, and stating that the residue was payable as ordered.

And in *Boulton Carbon Co. v. Mills*, 78 Iowa, 460, 5 L.R.A. 649, 43 N. W. 200, an original incorporator was held liable for the unpaid amount of subscription on stock purchased by him as fully paid after its issuance.

And a transferee with knowledge that stock is not in fact fully paid is liable, although it is marked fully paid. *Foot v. Illinois Trust & Sav. Bank*, 194 Ill. 600, 62 N. E. 834; *Higgins v. Illinois Trust & Sav. Bank*, 193 Ill. 394, 61 N. E. 1024; *Florsheim v. Illinois Trust & Sav. Bank*, 192 Ill. 382, 61 N. E. 491; *Rogan v. Illinois Trust & Sav. Bank*, 93 Ill. App. 39.

And where transferees have notice that stock was issued in consideration of overvalued property, they may be held liable for the unpaid balance. *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494; *Douglass v. Ireland*, 73 N. Y. 100, 4 Mor. Min. Rep. 32; *Garden* 30 L.R.A. (N.S.)

City Sand Co. v. American Refuse Crematory Co. 205 Ill. 42, 68 N. E. 724; *Van Cleve v. Berkey*, 143 Mo. 109, 42 L.R.A. 593, 44 S. W. 743.

And in *Gillett v. Chicago Title & T. Co.* 230 Ill. 373, 82 N. E. 891, where it was sought to hold transferees liable, and it appeared that the original holder subscribed practically the entire stock of the corporation in consideration of rights in a play to be written by him, and certain unperfected inventions which could not have been transferred for anything of value, the court said: "The certificates for MacKaye's stock recited that the shares were 'fully paid and nonassessable'; and the law is, that where stock is so issued, and the holder thereafter sells or assigns the same, and the assignee acquires it in good faith, and without notice that it has not been fully paid, he cannot be made liable if, in fact, the stock is not fully paid. . . . Appellants insist that, even if this stock was wholly unpaid, they acquired it in good faith, without notice of that fact, and are therefore not liable. 'Notice,' in this connection, must be given the ordinary signification of that term, and means knowledge that the stock was unpaid, or knowledge of such facts as would have put an ordinarily prudent man upon inquiry, when the inquiry might reasonably be expected to have led him to knowledge that the stock was unpaid. . . . Many of the appellants knew precisely how MacKaye had paid for his stock, and all of the appellants acquired their stock, as they knew, within a few months after the organization of this corporation. They obtained it without giving any valuable consideration therefor, except in a few instances, where it is claimed that a small percentage of the face value of the stock was paid therefor by services rendered or by other methods, not including cash actually paid at the time of the transfer of the stock. The fact that the corpora-

statement Hedderly acted in good faith, believing that the stock was fully paid up by the transfer of the property to the corporation from the Golden Gate Laundry. The defendants had no notice to the contrary, believed the representations as made, and stated to Hedderly and those from whom they purchased that they would not buy the stock unless it was fully paid up. Under the assurances given, the defendants then purchased a large number of the shares of the stock, which were transferred to them by the original subscribers, and such transfers entered upon the books of the corporation. The defendants ever since said transfers have been, and now are, the owners and holders of said stock. In 1904, on an involuntary petition in bankruptcy filed

in the United States district court for the southern district of California, the corporation was adjudged a bankrupt and plaintiff was elected and duly qualified as its trustee. The bankrupt corporation, being without sufficient property to pay the debts of the corporation in full, on petition of plaintiff, as such trustee, the said United States district court, in September, 1904, ordered that a call be made of 50 per cent of all unpaid subscriptions or balance due on the capital stock. In January, 1906, a second call for a like amount of the balance of unpaid subscriptions was made, and the defendants having failed to make payment to the trustee of either of said calls, the plaintiff brought this action against them. The corporation itself never made any calls

tion had just been organized, and that its stock was being transferred without, or practically without, any valuable consideration, was, we think, sufficient to put a reasonably prudent man upon inquiry, and that inquiry would, in our judgment, have led to knowledge of the fact that the stock was wholly unpaid."

Bona fide purchasers without notice.

Where one purchases stock bona fide, and without notice that it is not fully paid, it has been held that he cannot be rendered liable for the amount remaining unpaid. *Brant v. Ehlen*, 59 Md. 1; *Young v. Erie Iron Co.* 65 Mich. 111, 31 N. W. 814; *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496; *Erskine v. Lowenstein*, 11 Mo. App. 595; *Easton Nat. Bank v. American Brick & Tile Co.* 69 N. J. Eq. 326, 60 Atl. 54; *Wintringham v. Rosenthal*, 25 Hun, 580; *Messersmith v. Sharon Sav. Bank*, 96 Pa. 440; *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340; *Albitztigui v. Quadalupe Y Caloo Min. Co.* 92 Tenn. 598, 22 S. W. 739; *Cleveland Rolling-Mill Co. v. Texas & St. L. R. Co.* 27 Fed. 250; *Re British Farmers' Pure Linseed Cake Co.* L. R. 7 Ch. Div. 533; *McCracken v. McIntyre*, 1 Can. S. C. 479.

And purchasers in the open market of stock purporting to be fully paid, who have no notice that such stock is in fact not fully paid, are not liable for the unpaid amount. *Rood v. Whorton*, 67 Fed. 434; *Hess v. Trumbo*, 27 Ky. L. Rep. 320, 84 S. W. 1153.

So, where stock marked fully paid is purchased in the open market by one who is informed by the corporation's manager that the stock is fully paid, the purchaser is not, upon the bankruptcy of the corporation, liable for the unpaid subscription. *Re Remington Automobile & Motor Co.* 82 C. C. 421, 153 Fed. 345.

And an assignee of nonassessable shares is not liable to a creditor, although the par value has not been paid to the corporation. 30 L.R.A. (N.S.)

Morgan v. Howland, 89 Me. 484, 36 Atl. 990; *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904.

In *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644, bona fide purchasers without notice that stock was not fully paid up were held not liable, although they purchased for less than the par value, stock being liable to fluctuation.

And transferees who have no knowledge that the stock was issued in consideration of overvalued property are not liable for the balance. *Sprague v. National Bank*, 172 Ill. 149, 42 L.R.A. 606, 64 Am. St. Rep. 17, 50 N. E. 19; *Foreman v. Bigelow*, 4 Cliff. 508, Fed. Cas. No. 4,934; *DuPont v. Tilden*, 42 Fed. 87.

And it was so held in *Paterson v. Arnold*, 45 Pa. 410, where stock was issued for property, in violation of a statute.

So, where stock has been paid for by the original subscriber by a transfer of property, according to agreement, and no fraud is alleged, his transferee, who purchased in good faith, is not liable to a subsequent creditor for the amount alleged to be unpaid. *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068, 12 Mor. Min. Rep. 41.

And where shares were issued to contractors of a railroad for construction work as fully paid, and the transaction was never questioned by other stockholders, transferees of the stock, who purchased in the public market, without notice, are not liable thereon as for unpaid stock. *Steady v. Little Rock & Ft. S. R. Co.* 5 Dill. 348, Fed. Cas. No. 13,329.

In *Mallinckrodt Chemical Works v. Belleville Glass Co.* 34 Ill. App. 405, transferees without notice, who paid the par value for stock, were held not liable, although the contracts assigned by the original holders did not equal the par value, the overvaluation appearing to have been made through a mistake, and not in bad faith.

So, in *Bruner v. Brown*, 139 Ind. 600, 38 N. E. 318, it was held that a transferee of stock was not liable for an amount alleged to be unpaid, where he received it as fully paid, and no fraud was proved in original-

on account of any unpaid subscriptions to its capital stock. The trial court rendered judgment in favor of defendants, adopting the agreed statement of facts as the findings of the court, and this appeal is taken by plaintiff from the judgment.

It will be readily observed under the agreed statement of facts that the main question presented on this appeal is whether a stockholder who has purchased the stock of a corporation in good faith and for a valuable consideration, from an original subscriber, who has not paid the full subscription price thereof, can be held liable for the unpaid subscription, of which non-payment he has no actual notice or knowledge; it in fact being represented to him by the president of the corporation, as well as

the other sellers of the stock, at the time of his purchase, that the stock was fully paid for, although, from the books of the corporation, it appears that the stock had not been fully paid. The trial court held that, under these circumstances, the defendants, as transferees of the stock, were not liable. But we cannot agree with that conclusion. As far as the question is affected by the representations of the president of the corporation that the stock was fully paid, that is a false quantity. We are not referred to any authority where it has been held that even a corporation itself, let alone its creditors, would be bound by any such statement of the president of the corporation. As a matter of fact, the stock had not been fully paid, and when the president

ly issuing the stock in consideration of the construction of a waterworks plant for the corporation.

In *Johnson v. Lullman*, 15 Mo. App. 55, affirmed in 88 Mo. 567, the rule that a bona fide purchaser is not liable for an unpaid balance on stock was approved; but the decision there was rested on the fact that the purchaser had surrendered his stock to the corporation prior to the contracting of the indebtedness sought to be satisfied.

In *Myers v. Seeley*, Fed. Cas. No. 9,094, however, it was held that although an assignee had relied upon the statements of the assignor and officers of the company, that it was fully paid, he would nevertheless be liable to creditors. The court said: "The assignee of shares can be in no better condition than the assignor. The transfer is not, so far as the right to make calls is concerned, dependent upon the good faith of assignor and assignee in their dealings between themselves. The question is simply whether the stock has been really paid in full to the corporation. The assignee may have paid for it to the assignor, and may have relied on the representations of the latter, and of officers of the company, that the shares bought were fully paid; yet creditors are not bound thereby, and if the stock was not fully paid, the holder is liable to creditors for the amount remaining unpaid." The case of *PERKINS v. COWLES* seems to be in accord with this case in holding a transferee liable regardless of notice.

And this position also seems to be supported by the broad ground upon which the liability of the transferees was predicated in the cases first cited in the note; but as notice to the transferees in those cases was not expressly negated, they are perhaps not to be taken as full authority for the position that the transferee is liable even though without notice.

Express statutory regulations.

The liability of transferees for unpaid stock is expressly regulated by statute in some cases.

30 L.R.A. (N.S.)

Under the Virginia statute providing that the assignee and the assignor shall each be liable for any instalments which may have accrued, or which may thereafter accrue, a lien is created which is not discharged in the hands of the assignee, but the company may sell the shares for arrearages. *Petersburg Sav. & Ins. Co. v. Lumsden*, 75 Va. 327.

And under this statute a transferee of stock was held liable in *Lewis v. Berryville Land & Improv. Co.* 90 Va. 693, 19 S. E. 781, for an assessment on stock, and it was also held that he could not set up as a defense fraudulent representations made to the original holder.

So, under this statute, an assignee who in turn has assigned unpaid stock is liable after the assignment. *Hamilton v. Glenn*, 85 Va. 901, 9 S. E. 129.

And in *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551, where the defendants were held to be original holders, and therefore liable, it appeared that there was a statute which made the assignor and assignee jointly liable for unpaid subscriptions.

So, a creditor of a corporation who receives stock, issued originally to a person acting as a mere dummy, in payment of his claim, is liable for unpaid subscriptions, where his claim was only one tenth the value of the stock, and a statute made stockholders and assignees liable to the extent of the unpaid subscriptions. *Moore v. United States One Stave Barrel Co.* 238 Ill. 544, 125 Am. St. Rep. 153, 87 N. E. 536.

And in *Pittsburgh & C. R. Co. v. Clarke*, 20 Pa. 146, where an action was brought against an assignor for unpaid subscriptions, a provision making an assignee liable "in the same manner as the original subscriber would have been" was held to fix the assignee's liability, and not to limit the assignor's.

And in *Morris v. Dunbar*, 100 C. C. A. 621, 177 Fed. 159, where the statute provided that an assignee of stock should take it subject to all payments due and to become due, and be subject to the same obligations as his assignor, it was held that the as-

stated that it was, he was not representing the corporation, and did not pretend to. Himself a stockholder by virtue of his original subscription, he was simply acting with Rogers and McCoy in an endeavor to make a sale of a portion of their stock to the defendants, in order to extend the influence and increase the patronage of the corporation by having the stock of the company distributed among a large number of stockholders. He was acting in his own behalf in an effort, with the others, to dispose of a portion of his and their stock. While it is true that he made the representations in good faith, and doubtless the others did also, it is equally true that he had no authority from the corporation to do so. At least, it does not appear that he

had any. He was not acting in behalf of the corporation in the sale of any stock belonging to it, but simply in the personal interest of himself and the others. His conduct could not have estopped the corporation in its right to require, if necessary, and while a going concern, the full payment of the subscription price, and certainly could not estop the receiver in bankruptcy, acting in behalf of the creditors, after the corporation had become insolvent, from making a call for such payment of it, if otherwise the transferees of the original subscribers were liable therefor. Neither is it of any moment that representations that the stock was fully paid (independent of those made by the president) were made by the other original subscribers when selling the stock to de-

signee, and not the assignor, was liable for unpaid subscriptions.

And in *Reid v. DeJarnette*, 123 Ga. 787, 51 S. E. 770, 3 A. & E. Ann. Cas. 1117, it was held that a special act of incorporation providing that each "stockholder" in said corporation should be individually liable for the debts of the corporation to the amount of the unpaid subscription, etc., did not include transferees of the original stockholders, where it appeared such was not the legislature's intention.

So, a transferee of stock issued to the original holder in payment of a claim, with no expectation that it should be further paid for, is not liable, notwithstanding a constitutional provision that the original subscriber should be liable for unpaid stock, and that the liability therefor should follow the stock. *Seaboard Nat. Bank v. Slater*, 105 Fed. 179.

No consent to transfer.

Where stock not fully paid up is transferred to one who does not consent to the transfer, he is not liable.

Thus, legatees and distributees who do not accept stock to which they are entitled are not liable for unpaid subscriptions thereon. *De Camp v. Levoy*, 10 Ohio C. D. 509 (legatee who had not accepted stock bequeathed); *Simmons v. Ellis*, 17 Mo. App. 470 (distributee of estate of deceased stockholder, where it was not distributed, and as representative he refused to inventory the stock, on the ground that it might become a liability); *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280 (distributee of stock of an insolvent corporation, where no attempt to have the stock transferred on the books of the corporation was made, and no entry was in fact made).

And in *Simmons v. Hill*, 96 Mo. 679, 2 L.R.A. 476, 10 S. W. 61, a judgment creditor of one who had transferred stock to pledgees was held not liable for unpaid subscriptions, where the pledgees, knowing of the insolvency of the corporation issuing the stock, transferred it on the books to his name, without his consent.

So, where a broker, acting for a customer, 30 L.R.A.(N.S.)

gives another broker an order for stock, and the latter causes the stock to be transferred in the former's name, without authority, no liability for unpaid subscriptions results, no ratification of the transfer having been made. *Glenn v. Garth*, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344.

In *Keyser v. Hitz*, 133 U. S. 138, 33 L. ed. 531, 10 Sup. Ct. Rep. 290, it was held that if the transferee had no knowledge of the transfer, he was not liable; but that, if he accepted dividends and ratified the transfer, he would be liable to the receiver for unpaid assessments.

And it was held in *Sigua Iron Co. v. Greene*, 31 C. C. A. 477, 59 U. S. App. 535, 88 Fed. 207, that if there is no ratification of an unauthorized entry of one's name on the books as a subscriber, he will not be liable for unpaid subscriptions; but that if the facts are such as to warrant the jury in finding a ratification, he will be liable.

Miscellaneous.

In *Palmer v. Ridge Min. Co.* 34 Pa. 288, and *Franks Oil Co. v. McCleary*, 63 Pa. 317, 13 Mor. Min. Rep. 477, it was held that a purchaser of stock is not liable to the corporation for future calls for unpaid subscriptions, where there is no provision in the corporation act, imposing such liability.

In *Fraser River Min. & Dredging Co. v. Gallagher*, 5 B. C. 82, where shares marked fully paid were issued to one in consideration of his securing a loan from another, the latter was held not liable for the unpaid subscription on a part of the shares which were transferred to him in consideration of the loan.

And persons who acquire unpaid stock through others, who hold it as collateral security in such a way as not to be liable, are not liable for the unpaid amount. *Sturtevant v. National Foundry & Pipe Works*, 32 C. C. A. 57, 60 U. S. App. 235, 88 Fed. 613.

For a note on the effect of transfer of shares of stock upon the liability of transferrers for unpaid subscriptions, see *Rochester & K. F. Land Co. v. Raymond*, 47 L.R.A. 246, J. T. W.,

defendants. There can be no question but that the original subscribers were liable to the corporation for the full subscription price, and, under the law of this state, when they transferred their stock to the defendants, and the latter caused the transfer to be entered on the books of the corporation, the former were released from liability for such payment, and the defendants in law, as transferees, assumed it, as far as any action by the corporation to compel its payment is concerned. No express promise on their part to assume or pay the balance of the subscription price was necessary. The corporation could, after the transfer of the stock to defendants, and entry thereof on its books, look only to the defendants as its recorded stockholders to compel payment of either calls for the original subscription to its stock or for assessments thereon. *Visalia & T. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10; *People's Home Sav. Bank v. Rickard*, 139 Cal. 285, 73 Pac. 858; *People's Home Sav. Bank v. Stadtmuller*, 150 Cal. 106, 88 Pac. 280; *O'Dea v. Hollywood Cemetery Asso.* 154 Cal. 53, 97 Pac. 1. In view of this exclusive legal liability to the corporation for the payment of the subscription price which the transferees of stock assume by having themselves entered on the corporate books as stockholders, it would seem to be but a waste of time to give serious consideration to the proposition that a representation by a stockholder, who is an original subscriber of corporate stock, when selling his stock, that it is fully paid, would absolve both of them—the original subscriber by transfer and the transferee by the representation—from all liability to the corporation or its creditors for payment of such subscription price. A mere statement of the proposition negatives its soundness. The only right which the defendants had, arising from the misrepresentation of the fact of payment, was a right of action against the parties making it, personally, for damages and for rescission of the sale of the stock.

So that the matter of representation, either by the president of the corporation, or by him and the other stockholders, being eliminated as obviously unimportant factors in the present controversy, we are brought to the broad proposition, and the one for which, in the end, respondents really contend; namely, that a purchaser of certificates of stock in the open market, in good faith and for value, without anything on the face of the certificates indicating that the stock has not been fully paid, takes them free from any liability for calls for unpaid subscription, either at the instance of the corporation or its credit-

ors, although the shares are in fact not fully paid for. Whatever may be the rule in sister jurisdictions, and we are referred to cases therefrom so holding, this is not the rule obtaining in this state. In *O'Dea v. Hollywood Cemetery Asso.* 154 Cal. 71, 97 Pac. 8, this same proposition was urged, and in answer to it this court said: "But, independent of this claim of representation, the broad proposition of appellants is that, because they purchased their certificates of stock in good faith and without notice, in the open market, such stock is to be deemed fully paid up, and they are protected as bona fide purchasers, even though upon the face of the certificates there was nothing to indicate that the stock had been fully paid. In effect, their claim is that certificates of stock are negotiable securities and subject to the same rules governing the transfer of such instruments. But this position, under the law of this state, is untenable. Whatever the rule may be in other jurisdictions (and some authorities therefrom are cited by appellants in support of their claim), it is well established in this state that certificates of stock are not negotiable instruments, either in the commercial sense or within the definition of the Civil Code; and that the stock represented by them is subject to assessment for subscription calls, no matter to whom it may be transferred. The rule in this state is that certificates of stock in a corporation are but mere evidences of the holder's right to a given share in the franchises and property of the corporation, and are not negotiable instruments." *Barstow v. Savage Min. Co.* 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Graves v. Mono Lake Hydraulic Min. Co.* 81 Cal. 304, 22 Pac. 665; *Craig v. Hesperia Land & Water Co.* 113 Cal. 7, 35 L.R.A. 306, 54 Am. St. Rep. 316, 45 Pac. 10. Such certificates of shares not being negotiable instruments, the rule analogous to other non-negotiable instruments applies, and a purchaser takes them subject to all equities in favor of the corporation. The transfer relieves him from no liability to the corporation which his transferor was under, so that, when one purchases stock and causes the transfer to be entered upon the books of the corporation, he thereafter holds his shares on the same conditions as did the stockholder from whom he purchased; he acquires under them all his rights, and is subject to all his liabilities and obligations respecting them. *Visalia & T. R. Co. v. Hyde*; *Craig v. Hesperia Land & Water Co.*; and *People's Home Sav. Bank v. Rickard*,—*supra*. Many authorities from other states might be cited to the same effect, but these from our own state declare the rule here." In that case we had occa-

sion to examine the authorities relied on as establishing the rule for which respondents contend. 1 Cook, Corp. § 50; Clark & M. Priv. Corp. p. 1741; Helliwell, Stock & Stockholders, p. 911. It will be noted, however, when these authorities are looked to and the cases they cite examined, that (with a few exceptions in the latter) the rule promulgated or declared proceeded upon the theory that certificates of stock are negotiable or quasi negotiable instruments, or at least should be so treated. In this state, however, as certificates of stock are not negotiable instruments, and the purchaser of stock is no more protected than the purchaser of any other non-negotiable instrument, the rule of the authorities cited, based on the negotiability or quasi negotiability of stock certificates, has no force here. In fact, in those jurisdictions, where the rule of non-negotiability of certificates of stock obtains, the rule as to the liability of transferees of stock is the same as in this state. Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Webster v. Upton, 91 U. S. 65, 23 L. ed. 384; Merrimac Min. Co. v. Levy, 54 Pa. 227, 93 Am. Dec. 697, 13 Mor. Min. Rep. 467. See note to Thompson v. Reno Sav. Bank, 3 Am. St. Rep. 829.

As far as it is insisted that the issuance of the certificates of stock without any statement that the stock had not been fully paid for was equivalent to a representation that it had been so paid, this point is fully discussed and decided adversely to the respondent in *O'Dea v. Hollywood Cemetery Asso.* heretofore quoted from. The certificates here involved, like the certificates involved in that case, were issued long before § 323 of the Civil Code was amended so as to require certificates issued prior to the payment of the full amount due to state the amount actually paid.

Some question is raised by respondents as to whether the unpaid subscription of the stock owned by defendants constitutes assets in bankruptcy. We think there can be no doubt about it. In *Burke v. Maze*, 10 Cal. App. 206, 101 Pac. 438, 440, the rule is correctly laid down as to the liability of the original subscribers. It is there said: "The amount due from the stockholders for the subscribed stock of the corporation is a trust fund for the creditors of the corporation, and such unpaid subscriptions to its stock are a part of its assets, and may be collected for its creditors. *Vermont Marble Co. v. Deelez Granite Co.* 135 Cal. 579, 56 L.R.A. 728, 87 Am. St. Rep. 143, 67 Pac. 1057; *Walter v. Merced Academy Asso.* 126 Cal. 583, 59 Pac. 136; *Visalia & T. R. Co. v. Hyde*, 110 Cal. 632, 52 Am. St. Rep. 136, 43 Pac. 10. Such liability arises by virtue of the stockholders' con-

tract of membership in the corporation, evidenced by the certificates of shares. *Morawetz, Priv. Corp.* 2d ed. § 128; *Union Sav. Bank v. Willard*, 4 Cal. App. 690, 88 Pac. 1098." But the same liability attaches to transferees on becoming stockholders of record on the books of the corporation as bound the transferrers as original subscribers. By purchasing from the original subscribers the transferees assumed, as a matter of law, all the liabilities that the transferrers of the stock to them were under, and took it subject to all their obligations. *Visalia & T. R. Co. v. Hyde and O'Dea v. Hollywood Cemetery Asso.* supra. Hence the defendants were liable to a call for payment of the unpaid subscriptions in the bankruptcy proceedings, and the trustee had the right to maintain this action to recover on the calls.

The judgment appealed from is reversed, with directions to the trial court to enter judgment in favor of plaintiff against each of the defendants for the amount due on the unpaid subscriptions to the capital stock of the corporation held by him when this action was commenced. The agreed statement of facts which has been adopted by the court as its finding in the case furnishes the data upon which the computation may be made and the judgment rendered.

We concur. Angellotti, J.; Sloss, J.; Henshaw, J.; Melvin, J.

Shaw, J., concurring:

I concur because the previous decisions of this court settle the question that in this state the issuance of a certificate of corporate stock which, upon its face, does not show that it is not full-paid stock, is not a representation by the corporation that it has received the par value of the stock. If it were a new proposition, I would hold the contrary.

Petition for rehearing denied May 18, 1910.

DELAWARE SUPREME COURT.

STATE OF DELAWARE EX REL. HOR-
ACE T. BRUMLEY, Plff. in Err.,
v.

JESSUP & MOORE PAPER COMPANY.

(— Del. —, 77 Atl. 16.)

Evidence — production of corporate books — located outside state.

1. A corporation may be compelled to produce its books for inspection in a suit against it in the courts of the state where it was organized, although they are in possession of its officers in another state.

Corporation — by-law — inspection of books — validity.

2. A by-law of a corporation making the right of a stockholder to inspect its books absolutely dependent upon the discretion of its directors, and denying all right to make extracts from them, is unreasonable and void.

Same — right of stockholder to inspect books.

3. A holder of corporate stock which has no market value, which he was forced to acquire for self-protection, and which he desires to sell, is entitled to inspect the books of the corporation for the purpose of ascertaining its value.

Mandamus — partial defense — quashing.

4. The court may quash part of the return to an alternative writ of mandamus,

and permit the rest to stand, where it contains allegations which are a defense to part of the relief demanded, but not to all. **Same — demand for excessive relief — effect.**

5. The issuance of a peremptory writ of mandamus is not prevented by the fact that relator demanded excessive relief.

(June 22, 1910.)

ERROR to the Superior Court for New Castle County to review an order refusing to quash the return to a petition for a writ of mandamus to compel the defendant to permit relator to inspect its corporate books. Modified.

The facts are stated in the opinion.

Note. — Right of stockholder to inspect books of the corporation.

This question is covered in the notes to *Weihenmayer v. Bitner*, 45 L.R.A. 446, and *Kuhback v. Irving Cut Glass Co.* 20 L.R.A. (N.S.) 185, and the present note only covers the subsequent cases. In the *Kuhback* Case the court reasoned that the stockholders of a corporation are the owners of its franchise and its assets, and hence have a right to be informed of its financial condition. Therefore, when a stockholder furnishes sufficient data to warrant a conclusion that there is a mismanagement, and that the affairs of the company are not conducted in a proper manner and in the interests of the stockholders, he is entitled to examine the books, records, and accounts of the corporation, so that he may protect his interests; and if denied this right, he is entitled, upon proper application, to a mandamus to enforce it. The mere fact that he is a stockholder in a competing company is of itself not sufficient justification for refusing his inspection of the books.

A stockholder of a corporation which has ceased actively to do business, it having leased its property to another corporation, is entitled to enforce by mandamus his common-law right to inspect the books of the company to ascertain its condition and the value of its stock. *Eldred v. Elliott*, 161 Mich. 262, 126 N. W. 219.

A stockholder has the right to examine the books of the corporation in order to ascertain who the stockholders are, at least where it does not affirmatively appear that his motive is an improper one. *State ex rel. Brandl v. Silver King Consol. Min. Co.* (Utah) 106 Pac. 520.

That a stockholder seeking by mandamus to compel a corporation to permit him to inspect the books intends to use the evidence so obtained in an action by him against the corporation is no ground for denying a mandamus to enforce his right to inspection. *State ex rel. Humphrey v. Monida & Y. Stage Co.* 110 Minn. 193, 124 N. W. 971, rehearing denied in 110 Minn. 203, 125 N. W. 676.

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An order of a court of equity in a proceeding by a stockholder of a corporation to appoint a receiver thereof, permitting him to examine the books of the company for evidence to be used in such proceeding, is not violative of the Federal constitutional guaranty against unreasonable searches. *McGeary v. Brown*, 23 S. W. 573, 122 N. W. 605.

The right of a stockholder to examine the books of a corporation is not affected by the number of shares of stock he may have. "A stockholder owning but a few of the shares of the corporation's capital stock is no more to be shut out by its officers from knowledge and information relating to the conduct of its business, than is one holding a majority of its stock." *Richmond v. Hill*, 148 Ill. App. 179.

But to entitle a stockholder of a corporation to examine the books of the corporation, he must be a bona fide stockholder; it is not sufficient that he is a nominal owner of stock, holding same for a company which cannot lawfully purchase and hold the stock in their own name. *Ibid*.

Although a temporary administrator of an estate owning stock in a corporation is not entitled to inspect the books of the corporation, an executor and sole legatee whose testator was a stockholder in the corporation is so entitled, and may enforce such right by mandamus. *Re Hastings*, 128 App. Div. 516, 112 N. Y. Supp. 800, affirmed without opinion in 194 N. Y. 546, 87 N. E. 1120.

Since a pledgee of stock retains the general ownership thereof, and the right to vote upon it, thus participating in the control of the corporation, he is entitled to the information which the law provides that the stockholders may demand through an inspection of the books of the corporation, and for the refusal to comply with his demand for an inspection of the books, the corporation becomes liable to him for the statutory penalty. *Booth v. Consolidated Fruit Jar Co.* 62 Misc. 252, 114 N. Y. Supp. 1000.

A statutory provision requiring that all the books and records of the corporation

Mr. Robert H. Richards, for plaintiff in error:

A corporation existing under the laws of this state is necessarily always within the jurisdiction of the courts of this state, and the corporation, as an entity, having the power to produce its books for inspection, or to permit inspection of its books, wherever the actual books may be in fact located, is necessarily bound to obey the command of the court directing such inspection.

State ex rel. de Julvecourt v. Pan American Co. 5 Penn. (Del.) 391, 61 Atl. 398; Bay State Gas Co. v. State, 4 Penn. (Del.) 497, 56 Atl. 1120; 6 Thomp. Corp. 1st ed. § 7831; 2 Clark & M. Priv. Corp. pp. 1653, 1654; Neubert v. Armstrong Water Co. 211 Pa. 582, 61 Atl. 123; Loraine v. Pittsburg, J. E. & E. R. Co. 205 Pa. 132, 61 L.R.A. 502, 54 Atl. 580; Jensen v. Philadelphia, M. & S. Street R. Co. 201 Pa. 603, 51 Atl. 311; Bailey v. Williamsport & N. B. R. Co. 174 Pa. 114, 34 Atl. 556.

A private corporation has not the power to enact a valid by-law which is in itself

shall at all times be open to the inspection of every stockholder has reference to corporations organized solely for profit, and does not include other corporations. Ohio Humane Soc. v. Biles, 11 Ohio C. C. N. S. 833.

Before bringing an action to recover a statutory penalty for the refusal by a corporation to permit an examination of the books by a stockholder, he must give the officers of the corporation a reasonable time to permit the examination or furnish the information he seeks to obtain thereby. Fuller v. O'Connor, 61 Misc. 279, 113 N. Y. Supp. 684.

The statutory right of a stockholder to inspect the books of a corporation is not an absolute one, and may be refused where the information is not sought in good faith. However, a petition for a writ of mandamus to require a corporation to permit a stockholder to examine the books of the corporation, which shows that he is a stockholder, and is unable to secure information as to the financial standing of the company and the method of conducting its business, is sufficient to make a prima facie case of good faith. State ex rel. Humphrey v. Monida & Y. Stage Co. supra, (citing notes in 20 L.R.A. (N.S.) 185, 45 L.R.A. 446).

In general, where a stockholder is given the right by statute to inspect the books of the corporation, the court will enforce the right by mandamus for a proper and legitimate purpose. Where, however, the answer of a corporation to a stockholder's petition for a mandamus to enforce his right to inspect the books of the corporation alleges that he seeks such information for an improper purpose, and to obtain information which will personally benefit him in other business, and which will injure the company, and the stockholders demur to the 50 L.R.A. (N.S.)

unreasonable, or which is contrary to the common law of the state, the statutes of the state, or the charter of the corporation.

1 Thomp. Corp. 1st ed. §§ 995, 1013; 4 Thomp. Corp. 1st ed. § 4417; 2 Clark & M. Priv. Corp. pp. 1652-1950.

It is the common-law right of a stockholder to inspect the books of a corporation at any proper time and for any proper purpose, which right is enforceable by mandamus.

State ex rel. de Julvecourt v. Pan American Co. supra; Swift v. State, 7 Houst. (Del.) 338, 40 Am. St. Rep. 127, 32 Atl. 143.

A by-law of a corporation, which provides that no stockholder or other person shall have the right to inspect the books without special authority from the board of directors, must be subordinated to the general fundamental law of the land.

Re Steinway, 159 N. Y. 251, 45 L.R.A. 461, 53 N. E. 1103, 31 App. Div. 70, 52 N. Y. Supp. 343; State ex rel. Burke v. Citi-

answer, thereby admitting its truth, it is error for the court to sustain the demurrer, and grant a writ of mandamus to enforce an inspection of the books. Wight v. Heublein, 111 Md. 649, 75 Atl. 507.

In Venner v. Chicago City R. Co. 246 Ill. 170, 92 N. E. 643, a distinction is made between the common-law right of a stockholder to inspect the books of the corporation, and a right given by statute in unlimited terms. As to the common-law right the question of motive is said to be material, while motive is said to be immaterial as affecting the right under a statute. On this point the court said: "There is a well-recognized distinction between the right of a stockholder to inspect the books and papers of a corporation under the common law, and an unlimited right given by statute. Under the former, the examination can only be compelled where the stockholder asks it in good faith and for reasons connected with his rights as a stockholder. . . . Where the right is conferred by statute in absolute terms, the purpose or motive of the stockholder in making the demand for an inspection is not material, and he cannot be required to state his reasons therefor. . . . The weight of American authority is to the effect that, where the right is statutory, the stockholder need not aver or show the object of his inspection, and it is no defense under a statute granting the absolute right to inspection, to allege improper purposes, or that the petitioner desires the information for the purpose of injuring the business of the corporation. A clear legal right given by a statute cannot be defeated by showing an improper motive. If this were so, the stockholder would be driven from a certain definite right given him by the statute, to the realm of uncertainty and speculation." A. G. S.

zens' Bank, 51 La. Ann. 426, 25 So. 318; People ex rel. Muir v. Throop, 12 Wend. 183; Hodgens v. United Copper Co. (N. J. L.) 67 Atl. 756; Seneca County Bank v. Lamb, 26 Barb. 595; Kennebec & P. R. Co. v. Kendall, 31 Me. 477; Victor G Bloede Co. v. Bloede, 84 Md. 129, 33 L.R.A.107, 57 Am. St. Rep. 373, 34 Atl. 1127; Framework-Knitters v. Green, 1 Ld. Raym. 113; Thomp. Corp. 1st ed. § 1034; London v. Salisbury, Comb. 221.

A stockholder is entitled to inspect for the purpose of obtaining facts which will enable him to determine the actual value of his stock.

State ex rel. de Julvecourt v. Pan American Co. 5 Penn. (Del.) 395, 61 Atl. 398; Neubert v. Armstrong Water Co. supra; Huylar v. Cragin Cattle Co. 40 N. J. Eq. 398, 2 Atl. 274.

Messrs. Saulsbury, Ponder, & Morris, for defendant in error:

As the books, accounts, papers, contracts, etc., were in the general office of the company in Philadelphia, in the custody of its officers there, who are residents of the state of Pennsylvania, the application should have been made there for any mandamus upon the *custos* of such books, papers, etc., as the writ should be directed properly to the person having the possession, custody, and control of the books, the inspection of which is desired by the relator, and not to the corporation.

10 Cyc. Law & Proc. p. 962; High, Extr. Legal Rem. § 311; Swift v. State, 7 Houst. (Del.) 338, 40 Am. St. Rep. 127, 32 Atl. 143, 6 Atl. 856; Bailey v. Strohecher, 38 Ga. 259, 95 Am. Dec. 388; St. Luke's Church v. Slack, 7 Cush. 226; People ex rel. Muir v. Throop, 12 Wend. 183; State ex rel. Bergenthal v. Bergenthal, 72 Wis. 314, 39 N. W. 566; R. v. Kendall, 1 Q. B. 366, 10 L. J. Q. B. N. S. 137.

The right of stockholders to inspect the corporate books may be regulated by a reasonable by-law.

10 Cyc. Law & Proc. p. 957; 4 Thomp. Corp. § 4417; Cockburn v. Union Bank, 13 La. Ann. 289; Wyoming Coal Min. Co. v. State, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337, 984.

A by-law may be valid in part and void in part, where the good and bad portions of it are so far disassociated that the good might be enacted without the bad.

10 Cyc. Law & Proc. p. 362; Shelton v. Mobile, 30 Ala. 540, 68 Am. Dec. 143; Amesbury v. Bowditch Mut. F. Ins. Co. 6 Gray, 603; Rogers v. Jones, 1 Wend. 280, 19 Am. Dec. 493; Cleve v. Financial Corp. L. R. 16 Eq. 363, 43 L. J. Ch. N. S. 54.

Demand and refusal, or conduct on the part of the defendant equivalent to a re-

fusal, is necessary before the court will issue a writ of mandamus.

Bay State Gas. Co. v. State, 4 Penn. (Del.) 238, 56 Atl. 1114; High, Extr. Legal Rem. § 310.

A shareholder must first exhaust his remedy within the corporation, before calling upon a court of law to aid him in securing his alleged rights.

Delaware Lodge, No. 1, I. O. O. F. v. Allmon, 1 Penn. (Del.) 160, 39 Atl. 1098; Black & White Smiths' Soc. v. Vandyke, 2 Whart. 309, 30 Am. Dec. 263.

Hastings, J., delivered the opinion of the court:

On the 1st day of July, A. D. 1908, the state of Delaware, upon the relation of Horace T. Brumley, the plaintiff below and also the plaintiff in error, filed a petition in the superior court of the state of Delaware in and for New Castle county, praying for a writ of peremptory mandamus directed to the Jessup & Moore Paper Company, the defendant. On the same day a rule was issued directed to said defendant to show cause why the prayer of the petitioner should not be granted. A motion was subsequently made by the defendant to quash said rule and dismiss said petition, and, this being refused by the court, on motion of the counsel for the plaintiff, a writ of alternative mandamus was issued. On the 16th day of January, A. D. 1909, a return to said alternative writ was filed by the defendant, and later a motion was made by the plaintiff to quash said return on the ground that it was uncertain, argumentative, ambiguous, evasive, inconsistent, immaterial, and insufficient in law. On the 4th day of June A. D. 1909, it was ordered by the court that this motion be refused.

The only assignment of error is the refusal of the court below to grant the motion to quash the said return.

The petitioner, Brumley, alleges in his petition that the defendant is a corporation of the state of Delaware, having an outstanding preferred stock of \$350,000, par value, and an outstanding common stock of \$1,000,000, par value; that he is the owner of common stock having a par value of \$68,000; that he was forced to acquire said stock for his own protection, he having been an accommodation indorser of a note, to secure which said stock was pledged, and which he as indorser was compelled to pay; that there is no market for said stock, and he is unable to ascertain from the said corporation sufficient facts necessary to enable him to determine its value; that he desires to sell it, and could sell it if he could give any assurance of its value; that he has received no dividend or income therefrom;

that the certificate representing said shares of stock contains a false statement upon its face, in that it states the amount of preferred stock to be \$100,000 less than that actually issued and outstanding at the time said certificate was issued; that he believed at the time he indorsed the note that the said statement on said certificate was correct; that the additional \$100,000 was unlawfully issued for less than par, but was issued as fully paid, and that the holders thereof received dividends on the par value thereof; that the said corporation is conducting its business under unlawful contracts in restraint of trade and contrary to the interests of stockholders; that he has requested and demanded of the said corporation such statements concerning its financial condition, and the right to inspect and take extracts from such of its books as might be necessary to enable him to determine the value of his stock, but this information and privilege has been refused him; that he has the right to examine the books as prayed for, and without such examination he cannot ascertain the accurate information he desires; that he desires to make the examination for the following purposes:

To obtain evidence as to the actual value of his stock.

To ascertain whether the said \$100,000 of preferred stock was unlawfully issued at less than par.

To determine under what unlawful contracts the said corporation is conducting its business.

To determine what are the assets and liabilities and earning powers of said corporation.

The petitioner further states that he does not desire to inspect the books of the corporation for mere idle curiosity, nor for speculative purposes, nor for any improper purpose, and asks for permission to inspect and make copies of:

"(a) The minute book or books containing the proceeding or proceedings of the directors of the said company from January 1, 1903, to the present time.

"(b) The books of account of said corporation which show the amount or amounts received from the sale of the preferred stock from January 1, 1903, to the present time, and the books of account of said corporation showing the disposition of funds received from the sale of preferred stock during the period last aforesaid.

"(c) The stockbook showing the dates when, the persons to whom, and the number of shares issued to each person respectively of the preferred stock of the said company.

"(d) The stockbook showing the dates when, the persons to whom, the number of

shares issued to each person respectively of the common stock of the said company.

"(e) The ledgers and other books showing the amount of business done by the company from the 1st day of August, 1906, up to the present time.

"(f) The statements submitted to the directors showing the business done by the company, its profits and losses, and assets and liabilities, during each period of six months from the said 1st day of August, A. D. 1905, until this time."

This petition is incorporated in the alternative writ, and it is important to note to what extent the allegations mentioned therein are denied by the return filed by the defendant, as it is upon material allegations not denied that the court must act.

The return denies that the \$100,000 of preferred stock was improperly and illegally issued, and states affirmatively that the failure to change the statement on the stock certificate of the amount of preferred stock outstanding was due to a mistake or oversight. It denies that the defendant has entered into unlawful contracts, and also denies that the petitioner is entitled to the information and inspection of books as prayed for, with the exception of the stock ledgers, which are tendered for examination. There are other denials in the return, relative to the request made by the petitioner for information, based upon the failure of the petitioner to comply with a certain by-law of the defendant company. The other allegations of the petition the defendant either specifically admits to be true, or alleges that it does not know whether they are true or false.

In addition to the denials and admissions contained in the petition, the return alleges a partial compliance with the alternative orders of the writ, and gives certain reasons for not fully complying therewith. The partial compliance, as contended by the defendant, consisted in giving an opportunity to the petitioner to inspect all of its books that relate to or concern the issuing of the last \$100,000 of the preferred stock of the defendant company; and as evidence of such compliance, there is attached to the return, and marked "Exhibit A," a copy of a letter which the defendant caused to be written and addressed to the petitioner and his counsel. Said letter is dated January 14, 1909, two days before said return was filed.

The reasons for not fully complying are stated to be that all the books, accounts, papers, etc., which are desired to be inspected by the petitioner, except the stock ledgers, are within the state of Pennsylvania, in the custody of the defendant's officers, who are residents of said state, and are not

within the jurisdiction of the courts of the state of Delaware, and, further, that the following by-law was, on the 20th day of March, 1908, duly adopted by the defendant company:

"Article VI. The books and accounts of the company shall be examined each year by an expert to be named by the president, and a report of the same made to the board.

"No information in regard to the business or operations of the company, and no copy of nor extract from any of the books or records of the company, shall be furnished to any person by any officer of the company, except by direction of the board.

"Stockholders shall have the right to inspect the books or records of the company only with the permission of the board.

"Stockholders desiring information in regard to the business or operations of the company, or desiring to make inspection of the books or records, shall make application in writing to a regular meeting of the board of directors, stating the specific purpose of the application, the particular information desired, and, if inspection is requested, the books and records required for that purpose.

"Such stockholder shall give assurance satisfactory to the board that he does not desire the information requested or to be obtained by such inspection, for the purpose of communicating the same to others not stockholders, and further that he will not directly or indirectly disclose the company's business or affairs to any person or persons whomsoever.

"Such examination, when permitted by the board, shall be made by the stockholder in person only, and no extract from the books or records of the company shall be made by any stockholder permitted to inspect the same.

"The decision of the board on such application shall be final."

The return alleges that the petitioner, prior to the filing of the petition, was advised of the existence of this by-law, but never gave such assurance to the board of directors, as therein required, as would entitle him to the information sought.

Allegations in the writ which are not denied must be taken as true. This is a well-settled principle of law. *Bay State Gas Co. v. State*, 4 Penn. (Del.) 251, 56 Atl. 1114.

Woolley on Delaware Practice, at § 1662, says: "The return to the alternative writ, if it does not show a compliance with the mandate of the writ, must set forth either a positive denial of the truth of the allegations contained in the writ, or state other facts sufficient in law to defeat the relator's right. . . . In the state of

Delaware the common-law rule prevails that the return of the alternative writ is conclusive, and is to be taken as true for the purpose of the case."

Bearing in mind these well-known principles of law, and the facts in this case as above set forth, it is necessary for us to determine the following questions:

(1) Whether the court below could compel the production of books of the defendant company that were in the possession of its officers in the state of Pennsylvania.

(2) Whether the by-law above quoted is unreasonable, and therefore illegal.

(3) Whether there remain such undenied averments in the alternative writ as will entitle the plaintiff to the relief prayed for.

It is not necessary for us to pass upon the sufficiency of what the defendant contends was a partial compliance with the orders of the alternative writ, inasmuch as that refers only to the issue of the last \$100,000 of preferred stock. The plaintiff alleges this issue was unlawful, but this allegation the defendant positively denies, and as the return is conclusive, and must be taken as true for the purpose of this case, such denial on the part of the defendant is a sufficient excuse or reason for not complying with that part of the mandate of the alternative writ.

First. Can the court compel the production of the books of the defendant which are in the possession of its officers outside the state?

Upon this point the court below said: "The averment of the respondent that certain books and papers, the inspection of which is asked for, are now in Philadelphia, would not avail. If their inspection was necessary, the court would order their production." This conclusion is undoubtedly correct. It has often been decided that the officer of the corporation having the actual possession of the books desired to be inspected was a proper party defendant; but it does not follow that he is the only proper defendant, or that he must necessarily be made a defendant. A corporation existing under the laws of this state is within the jurisdiction of its courts, and if there is a legal duty resting upon it to do a certain thing, it cannot escape liability by showing that that duty is primarily upon certain officers who reside outside the state. In the case of *State ex rel. de Julvecourt v. Pan American Co.* 5 Penn. (Del.) 391, 61 Atl. 398, where objection was made to the writ issuing against a resident director who had been made a defendant with the corporation, the court said: "He has not expressly denied his power to perform the duty prayed for, and it does not seem impossible that, if the peremptory writ should

be issued, he would then be able to comply with its requirements." So, in this case, there is no denial that because the books and papers are in possession of the officers of the defendant in the city of Philadelphia, the defendant could not have complied with the mandate of the alternative writ. But, as counsel for the defendant frankly admit, the case of *Bay State Gas Co. v. State*, 4 Penn. (Del.) 497, 56 Atl. 1120, decided in this court, is an authority sustaining the decision of the court below upon this point, and is controlling in this case.

Second. We will next consider whether the by-law quoted above was illegal and void.

The court below said upon this point: "The by-law set up as a defense, which absolutely vests in the discretion of the directors the right of a stockholder to inspect or examine the books of the company, and which makes the decision of the directors final is both unreasonable and unlawful, and would be so regarded by this court."

The charter of the company gives the directors power to make by-laws for its government and the regulation and management of its business and concerns, and also power to repeal, modify, and amend such by-laws at pleasure. It is not contended by counsel for the defendant that this provision of the charter permits the directors to make a by-law that is unreasonable or contrary to law; but it is insisted that this by-law is reasonable, and not unlawful. It may be well to here notice certain of its provisions. One is that a stockholder, before he can examine the books of the company, must "give assurance satisfactory to the board," etc. Another is that "such examination, when permitted by the board, shall be made by the stockholder in person only, and no extract from the books or records of the company shall be made by any stockholder permitted to inspect the same;" and, lastly, that "the decision of the board on such application shall be final."

The principle of law has long been established in this state that a stockholder of a corporation has a right to inspect and make extracts from the books of the corporation at a proper time and for proper purposes. In the case of *Swift v. State*, 7 *Houst. (Del.)* 338, 40 *Am. St. Rep.* 127, 32 *Atl.* 143, the court said the authorities are uniform upon the point that "a corporator may have a mandamus to compel the *custos* of corporate documents to allow him an inspection and copies of them, at proper times and on proper occasions; he showing clearly a right on his part to such inspection and copies, and refusal on the part of the *custos* to allow it." To the same effect

is the case of *State ex rel. de Julvecourt v. Pan American Co.* 5 *Penn. (Del.)* 391, 61 *Atl.* 398, 63 *Atl.* 1118.

It was also said in the case of *Swift v. State*, above referred to, that "the right to make copies, and to make abstracts and memoranda of documents, books, and papers, by a stockholder in an incorporated company, is as full and complete as the right of inspection thereof." Upon these authorities it must be admitted that under certain circumstances a stockholder has a right to inspect and make extracts from the books of the corporation. This by-law undertakes to take from the stockholder the right to have the court pass upon the question whether he is entitled to the inspection. It forces him to make his first and final appeal to the board of directors. In other words, the stockholders' legal right is delegated to the discretion of the board. This applies to the inspection only. With respect to the right to make extracts, that is taken away entirely by the following words: "No extract from the books or records of the company shall be made by any stockholder permitted to inspect the same."

There may be other provisions of this by-law which are objectionable, such as that portion which provides that no inspection shall be made except by the stockholder in person; but it is not necessary for us to consider this question further. No authority is cited, and we can find none, which would sustain this by-law. Our conclusion is that the court below was correct when it said this by-law was unreasonable and unlawful, and should be so regarded by the court.

Third. We now come to the last, the most important, and the most difficult, question in this case, namely, whether there remain such undenied averments in the alternative writ as will entitle the plaintiff to the relief sought.

From the facts which we have heretofore stated, it will be observed that there remain in the alternative writ undenied allegations to the effect that the defendant is a corporation of Delaware, with capital stock outstanding of \$1,350,000; that the plaintiff is the owner of stock, the par value of which is \$68,000, which he was forced to acquire, which he desires to sell, and could sell if he could give any assurance of its value; that he is unable to ascertain from the defendant sufficient facts to enable him to determine its value; that he has requested that he be given such facts, and has demanded the right to inspect the books and take extracts therefrom for such purpose,—all of which has been refused him; that he does not desire to inspect the books and make extracts for mere idle curiosity, nor

for speculative purposes, nor for any improper purpose. The question then before us, briefly stated, is whether the owner of about one twentieth of the outstanding capital stock of a corporation, which has no market value, and which the owner was forced to acquire for his own protection, and which he desires to sell, is entitled to inspect and make extracts of the books of the corporation for the purpose of ascertaining its value, the corporation having refused to give him the information or permit him to examine the books.

That the stockholder has the right to inspect the books of the corporation at a proper time, for proper purposes, is not disputed; and, as we have heretofore stated in this opinion, it is a principle of law long ago recognized in this state. In some states this right is governed by statutes; in others, such as our own, it is recognized as a common-law right. Whether this application is for a "proper purpose," within the legal and proper contemplation of that term, is the new and heretofore undecided question in the courts of this state. The nearest case decided in our courts to the one we are now considering is that of *State ex rel. de Julvecourt v. Pan American Co.* 5 Penn. (Del.) 395, 61 Atl. 400, in which the court said: "It seemed to us that upon the face of the record the relator had made out a case that entitled him to the issuance of the peremptory writ; his declared purpose being, among other things, to ascertain the value of the stock of the company of which he was such a large holder, to learn whether the defendant company in fact owned or controlled the valuable asphalt properties it claimed to own, whether the stock issued had ever actually been paid for or not, and whether the various representations made to the petitioner by the president of the company, and by reason of which the relator was induced to part with his property, were true or false."

One of the declared purposes in that case was "to ascertain the value of the stock of the company of which he was such a large holder." It is true there were other "purposes" alleged in that case, and how much influence they had on the court we do not know; but it is certain that the most important, if not the controlling, purpose alleged, was to ascertain the value of his stock.

In the case of *Neubert v. Armstrong Water Co.* 211 Pa. 592, 61 Atl. 123, decided by the supreme court of Pennsylvania in 1905, the court said: "In the opinion of the learned court below, refusing a new trial, it is stated: 'The testimony on the trial, shows, *inter alia*, that James D. Stocker, Charles H. Welles, and William Walker, in 30 L.R.A.(N.S.)

June, 1902, bought about six sevenths of the stock of the Armstrong Water Company, and that the remaining one seventh of said stock was held and owned by the plaintiffs; that Stocker, Welles, and Walker were endeavoring to purchase the plaintiffs' stock, and had made them an offer of \$70 per share for the same; that the plaintiffs declined to sell until they were afforded an opportunity to examine the books and papers of the company for the purpose of ascertaining and determining the value of their stock; that there had been no statements issued by the defendant company regarding its financial condition, or other information furnished the plaintiffs, whereby they could determine the value of their stock; and that an inspection of the books and papers of the company was necessary for this purpose.' Certainly, under these facts, which we must accept as established, the plaintiffs have shown a definite and proper purpose which justified a demand for an inspection of the books and papers of the corporation, which, when refused, can be compelled by mandamus."

In the case of *Garcin v. Trenton Rubber Mfg. Co.* 60 Atl. 1098, decided by the supreme court of New Jersey in 1905, where the relator could not get from the company any definite information as to the assets and liabilities of the corporation, the court said: "In September, 1904, the relator applied to the president in writing for permission to examine the books of the company, and this was refused. The relator states that he desires to dispose of his stock, and has offered to sell it to the present holders of the stock of the company, but without success, and he seeks the information which he now desires, to ascertain its value in order to enable him to offer it for sale. This application appears to be made in good faith, and for the purpose of obtaining information to which the relator seems to be entitled."

The court then cited the case of *Bruning v. Hoboken Printing & Pub. Co.* 67 N. J. L. 119, 50 Atl. 906.

One of the latest cases on this point is that of *Varney v. Baker*, 194 Mass. 239, 80 N. E. 524, 10 A. & E. Ann. Cas. 989, decided in 1907. The court in its opinion said: "The single justice who heard the case found that the petitioner honestly believes that the company is being mismanaged, and desires in good faith, for the protection of his interest in the corporation, to examine the books and records of the company for the purpose of ascertaining its condition and the value of its stock, and of determining what to do with his stock, and whether there has been mismanagement of the corporation, and if so, what effect it has

had upon the assets and business of the corporation, in order that he may be enabled to bring a bill in equity for the appointment of a receiver, or to take other proper proceedings for the benefit of the corporation and of his interest therein. . . . It was not proved to the satisfaction of the justice that there was any mismanagement in fact, or any incapacity on the part of the managing officers. . . .

"The stockholders of a corporation are the equitable owners of its assets, and the officers act in a fiduciary relation as agents of the corporation and of the stockholders. They should be ready to account to the stockholders for their doings at all reasonable times, and the stockholders have a right to inspect their records and accounts, and to ascertain whether they are faithful, honest, and intelligent in the performance of their duties. There is no good reason why the stockholders, acting in good faith for the purpose of advancing the interest of the corporation and protecting their rights as owners, should not be permitted to examine the corporate property, including the books and accounts. . . .

"According to the general rule in this country, it is not necessary that there should be any particular dispute to entitle the stockholder to exercise this right. Nothing more is required than that, acting in good faith for the protection of the interests of the corporation and his own interests, he desires to ascertain the condition of the company's business. . . .

"Of course, the right at common law is not absolute, so that it can be exercised for mere curiosity, or for merely speculative purposes, or vexatiously. . . . There is nothing in our statutes which enlarges or diminishes this right as it exists at common law."

A question very similar to the one we are now considering has been passed upon by the Supreme Court of the United States. It was the case of *Guthrie v. Harkness*, 199 U. S. 148, 50 L. ed. 130, 26 Sup. Ct. Rep. 4, 4 A. & E. Ann. Cas. 433, being on error to the supreme court of the state of Utah, in which Mr. Justice Day, delivering the opinion of the court, said: "There can be no question that the decisive weight of American authority recognizes the common-law right of the shareholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member. . . . In many of the states this right has been recognized in statutes which are generally held to be merely in affirmance of the common law. . . .

"It is suggested in argument that if the shareholder has this right, it may be
30 L.R.A.(N.S.)

abused, in that he may make an improper use of the knowledge thus gained. There is nothing in this record, however, to suggest, by way of argument or testimony, that the shareholder desired the information which the books would give for other than a lawful purpose. On the other hand, there is a distinct finding that the inspection was desired for the purpose of ascertaining the true financial condition of the bank, and for the purpose of enabling the complainant to find out the value of his stock, and whether its business was being conducted according to law. There is no suggestion that the complainant was acting in bad faith or from improper motives, or that he was seeking in any way to misuse the information which the books would afford him. We need not hold that there may not be circumstances which would justify the courts in withholding relief to a stockholder seeking an examination of the books and accounts of the bank. In the case before use no reason is shown for denying to the stockholder the right to know how his agents are conducting the affairs of a concern of which he is part owner. Many legal rights may be the subjects of abuse, but cannot be denied for that reason. A director, who has the right to an examination of the books, may abuse the confidence reposed in him. Certainly this possibility will not be held to justify a denial of legal right, if such right exists in the shareholder."

The justice in his opinion quotes from the case of *Huyler v. Cragin Cattle Co.* 40 N. J. Eq. 392, 2 Atl. 274, as follows: "Stockholders are entitled to inspect the books of the company for proper purposes at proper times. . . . And they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection. To say they have the right, but that it can be enforced only when they have ascertained in some way, without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders."

We have quoted very fully from these opinions in well-considered and recently decided cases. Many more could be cited on the general proposition, but we have only referred to those that we consider throw some light upon the particular question before use. No authorities are cited upon

this point by the defendant, except the case of *Bevier v. United States Wood Preserving Co.* (N. J. L.) 69 Atl. 1008, in which the following language was used by the court: "An examination of their testimony leads us to believe that the applicant does not desire the examination of the books of account, papers, and documents of the defendant corporation in good faith, but rather for the purpose of aiding a competitor." Of course, in any case where the court comes to such a conclusion as this, the plaintiff is not entitled to examine the books of the corporation.

In the case before us, counsel for the defendant in their brief filed based their contention largely upon the fact, as they contend, that the plaintiff is not acting in good faith. This is a suggestion of counsel, however, and not a part of the record. This plaintiff alleges that he does not want to examine the books for speculative purposes, out of idle curiosity, or for any improper purpose. Not a single one of these allegations is denied by the defendant. The only suggestion made by the defendant that even intimates that the purpose is an improper one is that the plaintiff is a brother-in-law of a person engaged in a like business, but even this is not made a part of the return, and therefore is no part of the record. The defendant in its return does use this language: "That the concerted action of several stockholders of this company, applying at practically the same time to obtain information regarding its affairs, convinces the management of the defendant company that it is most desirable to prevent any information concerning its internal management, financial or other affairs, and business, from being obtained by persons who may communicate it to others whose hostility to the defendant company might cause them to take advantage of such information to injure this company and bring loss upon it."

But this language is too uncertain and argumentative to have any value in pleading, and we cannot assume that it denies, or intends to deny, any of the material allegations in the alternative writ. The plaintiff is the owner of stock, the par value of which is \$68,000, which was not acquired by him for speculative purposes; indeed, it is stock which he did not buy at all, but which he was compelled to take for his own protection. There is no market for the stock, and he has requested the directors to give him such information concerning its financial condition as would enable him to tell its value. They have refused to do this, or permit him to examine the books for that purpose. It would seem upon principle, as well as authority, that the

plaintiff is entitled to such information. We cannot assume that he wants it for an improper purpose, when everything in the record shows the contrary; nor can the right be denied him because he might use it in a way that would injure the defendant. The business of the defendant is a part of his business, and it is not to be assumed that he would do a thing which would be an injury to his own affairs.

We might say that we have announced no new doctrine in this opinion. That a stockholder is not entitled to inspect the books of a corporation for speculative purposes, idle curiosity, or any improper purpose, is a principle in nowise affected by what we have here said.

In the case of *Bruning v. Hoboken Printing & Pub. Co.* 67 N. J. L. 119, 50 Atl. 906, the court said: "The rule of the common law as to the right of inspection by stockholders of the book of a trading company exists here, and such right may be enforced by this court by mandamus. . . .

"The right is not to be given to gratify curiosity or for speculative purposes, but only when its exercise is sought in good faith and for a specific purpose. Such purpose must appear by the proofs on the application, or the writ will be denied. . . .

"The allowance of the writ is within the discretion of the court, upon the facts presented in each particular case.

"In the application now before the court, there is no evidence indicating the purpose of the relator in seeking the right to inspect the cashbook and other books of the company, and in that condition of the proof the writ must be denied."

As was said in that case, the allowance of the writ is within the discretion of the court, upon the facts presented in each particular case. But from the facts presented to us in this particular case, we are satisfied that the plaintiff's purpose is a proper one, and that he is entitled to at least certain of the information which he seeks.

It follows, therefore, that the return of the defendant is insufficient, in that it fails to show either a compliance with all the mandates of the alternative writ, or a legal excuse for not complying therewith. The return is good, however, and, until proven false, is an absolute bar to some of the demands made by the plaintiff. Is there any good reason, therefore, for quashing the whole of a return in mandamus, when part of it is good, and makes a complete answer to a part of the alternative writ, for the only reason that it is not a sufficient answer in all respects? This question was not argued before us, and we have not been able to find much help in the text-books or the reported decisions. There is a decision

in our own state, however, in which it was said it was within the discretion of the court to quash a part of a return, and to allow the rest to remain. It is the case of *McCoy v. State*, decided in the court of errors and appeals in 1897, and reported in 2 Marv. (Del.) 543, 36 Atl. 81. In that case the court reviews the general principles and rules of pleading and practice prevailing in cases of mandamus, and stated *inter alia* that "it is generally competent for the respondent to set forth in his return several distinct and separate defenses, at his option, and if he prevails in either of them, the peremptory writ will be refused. But if they be inconsistent or repugnant, the court may quash the entire return; yet it is within the discretion of the court to quash such portion of the return as it may deem insufficient, and to allow the rest to remain."

This same principle is laid down in *High's Extraordinary Legal Remedies* at § 463. In the case of *R. v. Cambridge*, 2 T. R. 456, the court said: "The court may undoubtedly quash the whole return if they choose; then it follows that we may quash a part of it if we think it right."

In jurisdictions such as our own, where the ancient practice prevails of ascertaining the facts from the petition and return, this rule would seem to be the safe and better one. In this case the plaintiff seeks to inspect the books of the defendant for the purpose of ascertaining whether a certain amount of stock was properly and legally issued, whether unlawful contracts had been entered into, and, lastly, to ascertain the value of his stock. The defendant in its return denies that the stock was improperly or unlawfully issued, and also denies that it has entered into unlawful contracts. These denials form a complete and sufficient answer to this much of the alternative writ. But according to our view, the defendant's return is not sufficient as to the other point, namely, the plaintiff's right to examine the books to ascertain the value of his stock. Is there any good reason, therefore, why the court should not hold the return sufficient as to the first two purposes mentioned, and insufficient as to the last one? We think not. If, as an illustration, the defendant had submitted certain books for examination, as commanded in the alternative writ, but refused to submit others on the ground that the plaintiff had no legal right to see them, and, upon motion to quash the return, the

court concluded that the defendant was bound to submit those which he had refused to submit, it would seem absurd to say that a peremptory writ should not be confined to those things which the defendant had refused to do.

This brings us to the consideration of the practice relative to the peremptory writ. It has been decided in some jurisdictions that the peremptory writ must follow in exact terms the alternative writ. This in many instances is in obedience to a statute. But practically all the text-writers agree, and the great weight of the modern decisions is, that a demand on the part of the relator for excessive relief does not preclude the granting of the relief to which the relator is entitled under the facts stated. We think it hardly necessary to cite authorities, or discuss this point. See, however, *People ex rel. Central P. R. Co. v. San Francisco*, 27 Cal. 655; *Highway Comrs. v. Jackson*, 165 Ill. 17, 45 N. E. 1000; *Satterwhite v. State*, 142 Ind. 1, 40 N. E. 654, 1087.

We are of opinion that the court below erred in finding the defendant's return wholly sufficient, and in refusing to quash that portion of it which disclosed on the defendant's part a noncompliance with the mandate of the alternative writ to suffer and permit the relator to inspect its books for the purpose of ascertaining the value of his stock, and which, in the alternative, presented no sufficient reason or excuse for failing so to do. Therefore, in this respect and to this extent we reverse the action of the court below, and hold that, in invoking the right to inspect and make copies of the books, papers, accounts, etc., of the corporation of which he is a stockholder, the relator has shown that he seeks the information that would thereby be disclosed to him for a proper purpose, and is therefore entitled to the peremptory writ of mandamus of the court to which this case is remanded, to be issued by that court under such reasonable regulations as to time and place as it may direct, commanding the defendant to suffer and permit the relator, or his duly constituted attorney, to inspect and make copies of such of the books, papers, accounts, and writings of the defendant mentioned in his petition, and only of such of them that, under the direction of the said court, are found essential and sufficient to furnish the information whereby the relator may determine the value of the stock.

DISTRICT OF COLUMBIA COURT OF APPEALS.

CLYDE L. WILLIAMSON, Appt.,
v.

MABEL WILLIAMSON.

(34 App. D. C. 536.)

Marriage — annulment — misrepresentation of disposition.

Misrepresentation by one of the parties as to disposition is not such fraud as will justify an annulment of a marriage contract.

(March 1, 1910.)

APPEAL by complainant from a decree of the Supreme Court dismissing a bill filed to annul a marriage on the ground of fraud. Affirmed.

The facts are stated in the opinion.

Mr. Clayton E. Emlg, for appellant:

A fraudulent concealment or misrepresen-

Note. — Misrepresentation as to disposition or general character as ground for annulment of marriage.

It was said in 2 Kent, Com. 77, that it was well understood that error and even disingenuous representations in respect to the qualities of one of the contracting parties, as his condition, rank, fortune, manners, and character, are insufficient to destroy a marriage, and render the contract void.

So, in Schouler, on Domestic Relations, § 23, it was said: "As to fraud, in order to vitiate a marriage, it should go to the very essence of the contract. . . . Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament cannot, therefore, vitiate the contract. *Caveat emptor* is the harsh, but necessary, maxim of the law."

As was said in 1 Bishop on Marriage & Divorce, 5th ed. § 167: "In that contract of marriage which forms the gateway to the status of marriage, the parties take each other for better, for worse, for richer, for poorer, to cherish each other in sickness and in health; consequently, a mistake, whether resulting from accident, or, indeed, generally from fraudulent practices in respect to the character, fortune, health, or the like, does not render void what is done. To this conclusion the authorities all conduct us, but different modes of stating the reason for it have been adopted. Thus, the qualities just mentioned are sometimes said to be accidental, not going to the essentials of the relation; and Lord Stowell, after remarking that error about the family or fortune of an individual, though produced by disingenuous representations, does not affect the validity of the marriage, adds: 'A man who means to act upon such representations should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happi-

ness for life is so materially involved, that it makes no provision for the relief of a blind credulity, however it may have been produced.'"

Keyes v. Keyes, 6 Misc. 355, 26 N. Y. Supp. 910; Bishop, Marr. & Div. § 404; Baker v. Baker, 13 Cal. 102; Reynolds v. Reynolds, 3 Allen, 605; Morris v. Morris, Wright (Ohio) 630; Ritter v. Ritter, 5 Blackf. 81; Carris v. Carris, 24 N. J. Eq. 516; Sissung v. Sissung, 65 Mich. 172, 31 N. W. 770; Wharton v. Lewis, 1 Car. & P. 529; Stewart, Marr. & Div. p. 28, § 38; Bierer's Appeal, 92 Pa. 265; 20 Cyc. Law. & Proc. p. 34; Picard v. McCormick, 11 Mich. 68.

Fraud or falsehood going to the essentials or fundamentals of the marriage relation will deprive the contract of that intelligent consent necessary to its validity, and hence will render the marriage voidable at the instance of the injured party.

Orchardson v. Cofield, 171 Ill. 14, 40 L.R.A. 256, 63 Am. St. Rep. 211, 49 N. E. 197; Keyes v. Keyes, 22 N. H. 553; Keyes v.

ness for life is so materially involved, that it makes no provision for the relief of a blind credulity, however it may have been produced."

A case very similar to WILLIAMSON v. WILLIAMSON is Beckley v. Beckley, 115 Ill. App. 27, where it was held that misrepresentations by a woman to one who had gotten her name through a matrimonial bureau, that she was of good character, a lady, belonging to the Methodist church, and a teacher and worker in the Sunday school, were insufficient to avoid the marriage induced thereby.

That concealment or deception by one of the parties in respect to traits or defects of character, habits, temper, and the like, is not sufficient ground for avoiding the marriage, is also recognized in Lewis v. Lewis, 44 Minn. 124, 9 L.R.A. 505, 20 Am. St. Rep. 559, 46 N. W. 323; Klein v. Wolfsohn, 1 Abb. N. C. 134; 19 Am. & Eng. Enc. Law, 2d ed. p. 1184

And see Reynolds v. Reynolds, 3 Allen, 605, sufficiently set out in the WILLIAMSON CASE.

In Wier v. Still, 31 Iowa, 107, it was held that representations by a man to a widow that he was of good character and good standing in society, and that he had many respectable relations and connections, when in fact it was found afterwards that he was a convict of the penitentiary, and had served several terms, did not constitute such fraud as to avoid a marriage induced thereby.

However, in Keyes v. Keyes, 6 Misc. 355, 26 N. Y. Supp. 910, it was held that, under a statute providing that a marriage may be annulled when the consent of one of the parties was obtained by force, duress, or fraud, misrepresentations by one that he was an honest and industrious man, when in fact he was a professional thief whose picture was in the rogue's gallery, af-

Keyes, 6 Misc. 355, 26 N. Y. Supp. 910; Tomppert v. Tomppert, 13 Bush, 326, 26 Am. Rep. 197; Smith v. Smith, 171 Mass. 404, 41 L.R.A. 800, 68 Am. St. Rep. 440, 50 N. E. 933; Harrison v. Harrison, 94 Mich. 559, 34 Am. St. Rep. 364, 54 N. W. 275.

Mr. Charles A. Barnard, for appellee:

Persons who act on representations or belief in regard to character, health, fortune, or temper should bear the consequences which flow from contracts into which they have voluntarily entered, since after they have been executed, the law affords no relief for the results of a blind credulity, however it may have been produced.

Ewing v. Wheatley, 2 Hagg. Consist. Rep. 183; Wakefield v. Mackay, 1 Phillim. Eccl. Rep. 137, note; 1 Fraser, Dom. Rel. 230; Bishop, Marr. & Div. §§ 100, 101.

Fraud which vitiates the marriage contract is cause for its annulment. But the fraud or falsehood must be one which goes to the very fundamentals or essentials of the marital relation,—deceit, concealment, or misrepresentation concerning the party's health, character, wealth, social position, previous history or habits, is not sufficient for this purpose.

26 Cyc. Law. & Proc. p. 905, § 8; Wier v. Still, 31 Iowa, 107; Carris v. Carris, 24 N. J. Eq. 516; Meyer v. Meyer, 7 Ohio Dec.

Reprint, 627; Kraus v. Kraus, 9 Ohio S. & C. P. Dec. 515; Ewing v. Wheatley, supra; Lewis v. Lewis, 44 Minn. 124, 9 L.R.A. 505, 20 Am. St. Rep. 559, 46 N. W. 323.

Van Orsdel, J., delivered the opinion of the court:

This is an action brought by appellant, Clyde L. Williamson, in the supreme court of the District of Columbia against his wife, Mabel Williamson, for the annulment of the marriage contract on the ground of fraud. It appears that appellant became acquainted with appellee through a correspondence started by appellant's answering an advertisement in a paper issued by a matrimonial bureau, wherein it was represented that appellee desired the acquaintance of a young man matrimonially inclined. The correspondence from the start appears to have been conducted with remarkable ardor and activity, since, according to the record, about one hundred letters passed between April and November, 1906. As a sequel to this romantic adventure, an engagement followed, and appellant urged appellee to come to Washington to marry him, accompanying the request with the sum of \$21. Appellee failed to appear at the appointed time, but wrote to appellant explaining her delay. It is alleged she gave as an excuse "that she had used part of

forfeited sufficient ground to enable his wife, who had been induced thereby to marry him, to obtain a decree of annulment, especially where it appeared that since the marriage he was again under state surveillance in its penitentiary. In this case it was especially recognized that if the misrepresentations had been as to the defendant's social position, rank, fortune, manners, or the like, they would have furnished no ground for declaring the marriage void. The court continued: "Fabrications and exaggerations of this kind, while not commendable, are so common as to be tolerated by the law on grounds of public policy. Persons intending to act upon such representations must verify them at their peril, for, though they enter into the inducements to marriage, they are not considered as going to the essentials of the relations, on the theory that the parties take each other for better or worse. Indeed, in some cases, marriage likens itself to the veritable mouse trap, which is 'easier to get in than out.'"

So, in King v. Brewer, 8 Misc. 587, 29 N. Y. Supp. 1114, under the same statute as in the Keyes Case, a young wife was granted a decree of annulment of the marriage because her husband had concealed from her that, previous to the marriage, he had run a pool room, which was an offense punishable both by imprisonment and fine. In this case it appeared that since the marriage the husband had been arrested for 30 L.R.A. (N.S.)

obtaining money under false pretenses, and had been into trouble for running a Pontiac bank. The court also took cognizance of the fact that, as in the Keyes Case, there would be no children to suffer by reason of the annulment of the marriage.

A case of interest in this note, although not strictly in point, is Kraus v. Kraus, 6 Ohio N. P. 248, where it was held that the concealment by a woman before marriage of the fact that she wore a glass eye is not such a fraud as will annul the marriage. The court said: "If a glass eye purposely concealed before marriage be fraudulent representation and a ground for divorce, why are not false teeth, false hair, or any other false article peculiar to the fair sex also a ground for divorce?"

For cases on antenuptial pregnancy or unchastity as a ground of divorce or annulment of marriage, see note to Franke v. Franke, 18 L.R.A. 375.

The cases dealing with misrepresentations or concealment as to one's physical or mental condition as ground for annulment of marriage are gathered in a note to Lyon v. Lyon, 13 L.R.A. (N.S.) 996.

A note to Sims v. Sims, 40 L.R.A. 737, discusses the general question of marriage of persons when insane, and, of course, contains a discussion of annulment of marriage for antenuptial insanity when concealed by misrepresentations or fraud from the innocent spouse.

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said fund to assist her sister in a runaway from her father's house." Appellant, doubtless regarded this incident as conclusive proof of appellee's qualifications to become a loving and affectionate wife, and especially suited to preside over a peaceable and happy home, forwarded the further sum of \$20, accompanying it with an urgent appeal for haste. This time she came. On the day of her arrival they were married. This was the first meeting of the parties. Appellee insisted that the ceremony be deferred until they could have an opportunity of becoming better acquainted, but appellant, regarding the suggestion as a most unreasonable one, was insistent upon an immediate union, and in two hours from the arrival of appellee, the parson in the meantime having been engaged, the ceremony was performed. Notwithstanding these precautions, appellant claims that he soon discovered his mistake, and he is now seeking the aid of the courts to relieve him from what he seems to regard as a bad bargain. His sole complaint is based upon what he denominates the "unbearable disposition" of appellee. It appears from his story that she does not possess that mild temper and amiable disposition which he expected to find in a helpmate selected from the bargain counter of a matrimonial bureau. He even goes so far as to claim that in some of her letters she falsely and fraudulently represented that she was possessed of a most amiable and lovable disposition, stating in his petition "that the defendant represented herself, among other things, to possess a most congenial and loving disposition, desiring the society of a loving husband, and to preside over a happy home; that her disposition was of a loving nature, her aim to make her companion for life a loving, useful helpmate." In this unbiased expression of opinion upon a subject with which it cannot be assumed that appellee was wholly unfamiliar, appellant insists she was mistaken, and herein consists the fraud upon which this court is asked to declare a marriage contract void. Other minor details, such as the illness of appellee shortly after their marriage, and the customary misunderstanding with her mother-in-law, are incidentally referred to, but the contract is assailed chiefly upon the above ground of fraud.

It is well settled that mere misrepresentations as to social position, rank, fortune, manners, and disposition furnished no ground for declaring a marriage contract void. Misrepresentations of this kind are tolerated on the ground of public policy. The rule which has been adopted generally by the courts and text writers was well stated by Chief Justice Bigelow in *Reynolds* 30 L.R.A. (N.S.)

v. Reynolds, 3 Allen, 605, as follows: "In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore, no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of a marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities which do not constitute the essential and material elements on which the marriage relation rests. . . . The law therefore wisely requires that persons who act on representations or belief in regard to such matters should bear the consequences which flow from contracts into which they have voluntarily entered, after they have been executed, and affords no relief for the results of 'a blind credulity, however it may have been produced.'"

In the present case there is no claim of the concealment of any material fact that would, in law, vitiate a marriage contract. In fact, the evidence tends strongly to disprove the specific allegation upon which the charge of fraud is based. We find no reason for an abrupt termination of this romantic venture.

The decree of the court below dismissing the bill is affirmed, with costs, and it is so ordered.

ILLINOIS SUPREME COURT.

ELIZABETH GRAVES et al., Pliffs. in Error,

v.

JAMES ROSE et al.

(246 Ill. 76, 92 N. E. 601.)

Evidence — explaining will — supplying description.

1. Parol evidence is admissible to supply the township, county, range, and state in case a devise of lands is described merely as parts of certain sections.

Same — transferring description.

2. Proof that testator did not own the land described in his will as certain subdivisions of a section will not make admissible parol evidence to transfer the description to the land he did own, by changing the letters used to indicate such subdivisions.

(Dunn, Carter, and Cooke, JJ., dissent.)

(June 29, 1910.)

Note. — See note to *Lomax v. Lomax*, 6 L.R.A. (N.S.) 942, on correction of misdescription of land in will.

ERROR to the Circuit Court for Will County to review a decree in defendants' favor in a suit to partition certain real estate. Reversed.

The facts are stated in the opinion.

Mr. F. M. Fahey for plaintiffs in error.

Messrs. Barr, Barr, & Barr, for defendants in error James Rose et al.:

A mistake in the description of the realty devised will never render the devise void, if the description used in the will, as applied to the facts and circumstances existing at the time of making the will, will identify the land devised. The law allows a court interpreting a will the same light which the testator enjoyed.

Woman's Union Missionary Soc. v. Mead, 131 Ill. 338, 23 N. E. 603; Wigram, Wills, p. 56.

The omission of township, county, and state from the description will not invalidate the devise, as it is but an incomplete description, and extrinsic evidence will be received to complete it.

Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447.

Whenever it appears that the description of the land devised is incomplete or in part false, extrinsic evidence will be heard for the purpose of showing exactly what real estate the testator owned, and if he owned any land, the description of which corresponds in part to the description in the will, the court will reject the incorrect part of the description, and will pass the realty by its correct description.

Collins v. Capps, 235 Ill. 560, 126 Am. St. Rep. 232, 85 N. E. 934.

However many errors there may be in a description, either of a devisee or the subject of a devise, the devise will not be avoided if enough remains, after rejecting the errors, to show with certainty what was intended, when considered from the position of the testator.

Gano v. Gano, 239 Ill. 539, 22 L.R.A. (N.S.) 450, 88 N. E. 146.

Mr. C. W. Brown for defendant in error Harriet S. Kriegh.

Cartwright, J., delivered the opinion of the court:

The plaintiffs in error, Elizabeth Graves and William H. Rose, with Harriet S. Kriegh, three of the heirs at law of Joseph Rose, deceased, filed their bill in the circuit court of Will county for partition of the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 9 and the N. E. $\frac{1}{4}$ of section 12, in township 33 N., range 11 E. of the third principal meridian, in said county, against the defendants in error, James Rose, Charles Rose, Mary J. MacKender, and Robert Henry Rose (who was called Robert Rose Holmes), the other heirs 30 L.R.A. (N.S.)

at law of said Joseph Rose, deceased, alleging that said Joseph Rose died intestate as to said lands, and that the same had descended to his heirs at law. The administrator with the will annexed was also made a defendant to the bill. The defendants James Rose, Charles Rose, and Mary J. MacKender by their answers admitted that said Joseph Rose was the owner of the lands sought to be partitioned at the time of his death, but alleged: That he intended to devise the same to them by his last will and testament, but in said last will and testament misdescribed the same. That the said will contained the following devises: "I give, devise, and bequeath to my son Charles Rose all of west $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 12, and to my daughter Mary J. MacKender east $\frac{1}{4}$ of N. W. $\frac{1}{4}$ section twelve and to my son James Rose all of the east half of the northwest $\frac{1}{4}$ of section nine (9)." That the testator did not own the lands described in the will, and intended to devise the lands which he actually owned. That the letter "W" in "N. W. $\frac{1}{4}$ " in the devises to Charles Rose and Mary J. MacKender was used by mistake instead of the letter "E," and the word "north" in the description "northwest $\frac{1}{4}$ " in the devise to James Rose was used by mistake instead of the word "south." The answers alleged that the defendants were severally in possession of the tracts of land intended to be devised to them, respectively, under promises of the testator to convey the same to them, and each defendant prayed for a specific performance of the promise alleged by the said defendant. They also filed cross bills, alleging the same facts, and praying for specific performance of the alleged promises. The chancellor sustained exceptions to the prayers of the answers for relief, and sustained demurrers to the cross bills, but granted leave to amend the cross bills. The defendants did not avail themselves of the leave so given, and no amendment was made. The cause was heard upon the original bill, answers, and replications, and evidence, oral and documentary, heard by the chancellor, and it was proved that the testator did not own the lands described in the will, but did own the lands sought to be partitioned. A decree was entered finding that both of the letters "N" and "W" contained in the devises to Charles Rose and Mary J. MacKender should be stricken out as surplusage, and that the word "northwest" contained in the devise to James Rose should also be stricken out, and that said letters and words were incorrect and false. It was ordered, adjudged, and decreed that the will devised in fee simple to Charles Rose the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 12, township 33 N., range 11 E.

of the third principal meridian; to Mary J. MacKender the E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 12; and to James Rose the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 9, in said township 33, in Will county, and partition of the premises was denied. The record has been brought into this court as a return to a writ of error.

Our statute requires all last wills and testaments to be in writing and properly witnessed, and extrinsic evidence is never admissible to alter, detract from, or add to the terms of a will. While the object of construction is to ascertain the intention of the testator, it must be an intention expressed in the will, and it must be determined from the language used. A will cannot be reformed to conform to any intention of the testator not expressed in it, no matter how clearly a different intention may be proved by evidence of extrinsic facts. If that were not so, all wills would be subject to proof of mistake and of a different intention from that expressed, so that, in fact, property would pass without a will in writing which the law declares shall not pass except by a written will. In *Starkweather v. American Bible Soc.* 72 Ill. 50, 22 Am. Rep. 133, it was said: "The courts are so strict that they will not permit the terms of a will to be altered even when the deviser has by mistake misdescribed land in a devise, by substituting that which could be clearly proved to have been intended;" and in *Bishop v. Morgan*, 82 Ill. 351, 25 Am. Rep. 327, it was held that a mistake in description could not be corrected by extrinsic evidence, and that reference to the number of acres could not control the plain words of a will. The rule has been clearly stated in numerous decisions. *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Bingel v. Volz*, 142 Ill. 214, 16 L.R.A. 321, 34 Am. St. Rep. 64, 31 N. E. 13; *Williams v. Williams*, 189 Ill. 500, 59 N. E. 966; *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345.

The testator described the lands devised as certain parts of sections 9 and 12, without township, county, range, or state, and the chancellor permitted these matters of description to be supplied by extrinsic evidence. There was no error in this, for the reason that parol evidence is admissible in explanation of a latent ambiguity, which is an ambiguity that arises where the writing upon its face appears clear and unambiguous, but the meaning is rendered uncertain by extrinsic evidence, and where the uncertainty is created by such evidence, it may be removed in like manner. This is not regarded as a violation of the rule that a writing shall not be contradicted or explained by oral evidence. A common

instance of a latent ambiguity is such as appears in this case, where there are descriptions which are not ambiguous, but which may be applied to two different subjects. Illustrations have been given of a devise of the testator's manor of Dale, and at his death it is found that he has two manors of that name,—South Dale and North Dale; and upon proof of that fact it may be shown which one is intended; or where a deed purports to convey Black acre, and it is shown that there are two tracts of land bearing that name. 3 Phillips, Ev. 750. A latent ambiguity raised in that way can be explained by any evidence which shows the actual subject of the devise or conveyance. That principle was stated in *Dougherty v. Purdy*, 18 Ill. 206, where there was a conveyance of an undivided half of the N. W. $\frac{1}{4}$ of section 1, in township 1 N., in range 1 W., in the state of Illinois, and the deed did not show whether the land was east or west of the fourth or any other meridian. The court, by merely looking at the deed, could not say that it did not describe the premises accurately, but by looking outside of the deed, at the acts of Congress and the public surveys, it was found that there were meridians in such surveys, and more than one lot of land to which the description would apply. It was decided that the latent ambiguity raised by such knowledge could be explained by evidence. One familiar with government surveys might naturally say that a description of land without township, county, range, or state would be void as describing nothing, but as a rule of law it is immaterial whether the extrinsic facts are such as must be proved by testimony, or are so generally known that the court will take judicial notice of them, which is only a question of the method of ascertaining the facts. The same doctrine was applied in *Clark v. Powers*, 45 Ill. 283, where a deed described a tract as the E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 14, in Liberty township, 1 west of the fourth principal meridian, in the county of Mercer. There was no township called Liberty in Mercer county, and there were three sections No. 14 in range 1 west. The ambiguity was shown by the evidence of these facts, and it was held susceptible of explanation by showing which one of the several pieces the grantor claimed. In *Billings v. Kankakee Coal Co.* 67 Ill. 489, a tax deed did not show in what county, state, or east of what meridian, the lands lay. It was held that the deed was not void for uncertainty, there being several meridians to which the description could equally apply, and that the ambiguity, being latent, could be explained by evidence of facts and circumstances. In *Halli-*

day v. Hess, 147 Ill. 588, 35 N. E. 380, a deed described land as being in section 8, but did not give any township. There were several sections numbered 8 in the county to which the description might apply, and it was considered proper to explain the latent ambiguity by parol. Here it was proved that Joseph Rose, the testator, owned lands in sections 9 and 12, in township 33 N., range 11 E. of the third principal meridian, in Will county, which was a proper explanation of the ambiguity concerning the location of those sections. That rule, by which a latent ambiguity raised by extrinsic evidence may be removed by the same kind of evidence, has no application, in principle or by authority, to a description which is free from ambiguity, and can only apply to one certain and definite thing, and therefore it does not apply to the definite and certain descriptions contained in the will in this case. There is neither doubt, uncertainty, insufficiency, or ambiguity in the descriptions of the subdivisions of sections 12 and 9, contained in the will, and neither of them could be applied to more than one subject of a devise.

There is another condition which has frequently arisen in the construction of wills where the description of the property intended to be devised is true in part, but not true in every particular, and it is not a violation of the rule that a will cannot be reformed or a mistake in description corrected to reject that part of the description which is shown to be false. When that is done, the devise will be held valid if enough remains to identify the subject of the devise in accordance with facts and circumstances existing when the will was made, but the rule that nothing can be added to the description is inflexible, and forbids the insertion of anything else in place of that stricken out. In all of the decisions it has been emphatically declared that no word or words can be supplied. In Kurtz v. Hibner, supra, the testator devised two tracts of land in Will county,—one in section 32 and the other in section 31. It was held that the words of description being unambiguous and the thing devised certain and specific, no extrinsic evidence was admissible to show that the testator intended to devise different lands, and that to make the change insisted upon would be to make a new and different will. In Bingel v. Volz, supra, the testator devised to his daughter, 70 acres off of the south side of the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 16, which he did not own, but he did own the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of the same section. It was insisted that the intention was to devise the south 70 acres of the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$

$\frac{1}{4}$, and such was the fact; but the court said that, if a portion of the description were rejected, what was left would not correctly describe the land intended, and that the change involved more than construction and required reformation. In Williams v. Williams, supra, there was a devise of "40 acres of land, the same being the northeast 40 of section 22." The testator did not own any land in the N. E. $\frac{1}{4}$ of section 22, nor any tract of 40 acres which could be located by striking out a part of the description, but he did own three tracts aggregating about 41 acres, one of which was situated in the N. W. $\frac{1}{4}$ and the other two in the S. W. $\frac{1}{4}$ of that section. If the word "northeast" should be stricken out, there was no 40-acre tract owned by the testator, and it would be necessary to put three descriptions together to give effect to the intent of the testator, which it was held could not be done. The court said to permit evidence the effect of which would be to take from the will plain and unambiguous language, and insert other language in lieu thereof, would violate the established rule of law. In Lomax v. Lomax, 218 Ill. 629, 6 L.R.A.(N.S.) 942, 75 N. E. 1076, the testator owned land in section 14, but did not own the southwest fractional quarter of section 24, which he devised. It was held that parol evidence could not be admitted to show a mistake in the section; that the language described a tract of land capable of being readily identified; and that, if the word and figures "section 24" or the figures "24" were rejected, nothing would remain to indicate in what section the land was located, and it would be necessary to import something into the will by substituting the figures "14."

There is another class of cases where the court has given effect to the intention of the testator by striking out words of false description, where it was not considered necessary to substitute anything or to add to the language of the will. In the case of Decker v. Decker, 121 Ill. 341, 12 N. E. 750, there was a devise of 20 acres off the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 33. The testator never owned the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, but did own the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$. The court struck out the words "of the northeast quarter" where they occurred the first time, as being false, leaving the description "20 acres of the northeast quarter." The land was then described by quantity and its location as being in the N. E. $\frac{1}{4}$, and the evidence showed that the testator owned only 20 acres in that quarter, which was identified as the land devised. The court said there was nothing added to the terms of the will; that courts are without the power of substi-

tuting for the written words of the testator other and different words not used by him; and that the only effect of the decision was to make the devise effective of the 20 acres which the testator owned.

Where the subject of a devise is described by quantity, it may be identified by extrinsic proof, and there have been several other cases of that kind where the property could not otherwise have been identified without adding to the will. In *Whitcomb v. Rodman*, 156 Ill. 116, 28 L.R.A. 149, 47 Am. St. Rep. 181, 40 N. E. 553, the devise was of 100 acres of land to the testator's son Joseph—60 acres off of the west side of the S. E. $\frac{1}{4}$ of section 22, and 40 acres being the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of said section. The testator did not own the 40 acres as described, but did own a 40-acre tract known as the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the same section. The court said that, while words could not be added to a will, so much as was false in the description might be stricken out if enough remained to identify the land. The court therefore struck out the words "northwest" and "southeast," which left 40 acres, it being a quarter of a quarter of section 22, and the testator owned two 40-acre tracts in the N. E. $\frac{1}{4}$. He also devised to his son Edward 40 acres, in which there was a like false description, and it was treated in the same way. The circuit court had held that the two 40-acre tracts were devised severally to the sons, but this court said that the two sons took the two tracts undivided, since the separate 40's could not be identified without adding to the will, but the error did not affect the plaintiffs in error. The court was enabled to do that on account of the designation of the lands by quantity. In *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570, there was a devise, by quantity, of 62 $\frac{1}{2}$ acres off of the east side of the N. E. $\frac{1}{4}$ of section 20. The testator owned 62 $\frac{1}{2}$ acres in the quarter section, but not off of the east side. A devise of 62 $\frac{1}{2}$ acres in a certain government subdivision is sufficient by identifying the portion intended, and the court struck out the words "off of the east side." As the quantity of land was mentioned, the remaining description was sufficiently definite without any addition. In *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170, the testator devised to his widow a life estate in the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 27, containing 80 acres, more or less. He did not own the whole of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, but did own the E. $\frac{1}{2}$ of the quarter section. The court said that the purpose of the testator being to devise land "containing 80 acres," the devise would be given effect by striking out the word "north." In *Collins v. Capps*, 235 Ill. 560, 30 L.R.A.(N.S.)

126 Am. St. Rep. 232, 85 N. E. 934, the devise was of the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 10, containing about 76 acres. The court held that by striking out the word "west," which was false, there remained a devise of the half of the N. E. $\frac{1}{4}$, and, as the testator only owned in the quarter section 76 acres and the description applied to it, the devise was valid. In *Gano v. Gano*, 239 Ill. 539, 22 L.R.A.(N.S.) 450, 88 N. E. 146, certain words were stricken out of the devise, and it was thought that sufficient then remained to identify the property intended to be devised, and the decision was in accordance with that conclusion.

In some cases there has been a designation of the subject of the devise which was sufficient in itself, but followed by a misdescription which could be rejected and leave a valid devise. *Emmert v. Hays*, 89 Ill. 11, is an example, where the property devised was described as "being what is known as the Hays farm," but misdescribed as to the section. The added description was rejected as surplusage and the correct description allowed to stand. Also in *Morrall v. Morrall*, 236 Ill. 640, 86 N. E. 578, there was a devise of "the homestead," followed by an imperfect description, which was rejected. Inasmuch as the devise of the homestead would have been good, it was considered proper to determine the correct description of it. Whatever difference of opinion may have existed in any of these cases related to the application of the rule forbidding reformation of a will, and not to the rule itself, which the court always asserted.

In this case the devisees, who were defendants, by their answers alleged mistakes of the testator, and proposed that the letter "W" after the letter "N." in the first two devises, and the word "north" before the word "west" in the third devise should be stricken out. If that had been done and nothing substituted, there would have remained no description of the lands which they alleged the testator intended to devise to them, respectively. Evidence that the testator did not own the lands devised did not tend to show a latent ambiguity or affect the accuracy of the certain and definite description of the will, which described lands in existence. It only tended to show mistakes of the testator in making the will, and a mistake is not a latent ambiguity. The mistakes, inaccuracies, or deficiencies of a will cannot be corrected by extrinsic evidence, and parol evidence cannot be adduced either to add to, contradict, or explain the contents of a will. "No principle connected with the law of wills is more firmly established or

more familiar in its application than this." 1 Jarman, Wills, 6th ed. 412. The chancellor by the decree struck out the letters "N. W." in the first two devises, and the word "northwest" in the third devise, and, when that had been done, there was no remaining description of any tract of land, by number of acres or otherwise. To complete either description so as to definitely describe lands owned by the testator and which it was alleged he intended to devise, it became necessary not only to strike out letters and words, but to insert others in their places, and this the chancellor did. Not only were the letters "N. W." in the first two devises struck out, but the letters "N. E." were inserted in their place, and, when the word "northwest" was struck out in the third devise, the word "southwest" was inserted in lieu thereof, which were the same changes, in effect, as were proposed by the answers. This was nothing but reformation for the purpose of correcting mistakes of the testator, and making the will correspond with his intention, based on the fact that he did not own the lands devised. That such a change in a deed, contract, or instrument other than a will, to make it conform to the intention of the maker, would be a reformation, has never been questioned, and we do not see how it can be called anything different in case of a will. The changes made to correct mistakes of the testator in describing his lands had the effect to make lands pass to the devisees without a will in writing, which the law says can only pass by a will in writing, executed and witnessed in the manner prescribed by the statute.

The decree is reversed and the cause is remanded to the Circuit Court, with directions to proceed in accordance with the views herein expressed,

Dunn, Carter, and Cooke, JJ., dissent:

The decree directed to be entered defeats the manifest intention of the testator, takes from his children whom he intended to benefit the provision intended for them, and awards the greater part of it to others.

The opinion ignores the application of rules of testamentary construction made in numerous decisions of this court in the most recent cases. It concedes what, of course, cannot be reasonably disputed—that the ambiguity arising from the description of the subjects of the devises by section numbers alone, without indicating the township, range, county, or state, may be explained by extrinsic evidence, and that it is explained by evidence that the testator owned the farm lands described in the bill, and no other. This conclusion is reached by the application of the presumption that the

testator intended by his will to dispose of his own property, and that he did not attempt to dispose of property which he did not own. Though the only words descriptive of the location of the property were "section 12" and "section 9," and those words were entirely indefinite, because applicable to a very large number of tracts, yet by reason of the presumption just mentioned there was inherent in the description the idea of ownership by the testator. Since the tracts described in the bill were the only tracts possessing that attribute of ownership, the will necessarily referred to them. The devise includes two particulars of description, *viz.*, ownership by the testator and section number. When the tract is ascertained to which, alone, these two particulars attach, the devise acts upon that tract.

The question of the location of the tracts within the section is somewhat different. The testator owned a quarter of section 12 and a half of a quarter of section 9. Had he devised "the east half of the quarter of section 12, the west half of the quarter of section 12, and the half quarter of section 9," probably no question could arise as to the sufficiency of the description, for the court, having ascertained, as the majority opinion does, what sections 12 and 9 were intended, by ascertaining in what sections 12 and 9 the testator owned land, could also ascertain what quarter of section 12 and what half quarter of section 9 were intended by ascertaining what quarter and half quarter of the respective sections the testator owned. Parol evidence is admissible of all the circumstances surrounding the testator, and the state and description of his property, for the purpose of applying the language used to the conditions existing, and a devise will not be avoided for any errors in the description of the devisee or the subject of the devise if enough remains, after rejecting the errors, to show with certainty what was intended when considered from the position of the testator. It is a recognized rule of construction of written instruments that a false particular in the description of the subject-matter shall not vitiate the instrument, and we have quoted and approved the rule laid down in Page on Wills (§ 819, p. 376), that, if the testator "owns any real estate which corresponds, in part, to the description in the will, the court will reject the incorrect part of the description, and will pass the realty conveyed by the correct description." *Collins v. Capps*, 235 Ill. 560, 126 Am. St. Rep. 232, 85 N. E. 934.

The principle has been applied in a great variety of cases. In *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750, the will contained a

devise of "20 acres off the west half of the northeast quarter of the northeast quarter of section 33." The testator never owned the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the section, but did own the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$. There was no other evidence affecting this question, and the court construed the will by rejecting the words "of the northeast quarter" where they first occurred in the description as a false circumstance of the description, applied the description to the property actually owned by the testator, and held that the devise was of the W. $\frac{1}{4}$ of the testator's land in the N. E. $\frac{1}{4}$ of the section, which was situated in the N. W. $\frac{1}{4}$ of that quarter section, instead of the N. E. $\frac{1}{4}$, as stated in the will.

In *Whitcomb v. Rodman*, 156 Ill. 116, 28 L. R. A. 149, 47 Am. St. Rep. 181, 40 N. E. 553, there was a controversy over two devises, one of 40 acres, being the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 22, to the testator's son Joseph, the other of 40 acres, being the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the same section, to his son Edward. The testator owned no part of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and only the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, which tract was itself devised by another description. The testator owned the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 22, which was not described in the will, and no other 40-acre tract in section 22. The devises were construed by rejecting the words "northwest," "southwest," "northeast," and "southeast" as words of false description, and each devise was read as "40 acres, being the . . . quarter of the . . . quarter of section 22." The testator having two, and only two, tracts answering the description, it was held that he devised one of the tracts to each son, and that they took and held the tracts undivided. A like conclusion was arrived at in the very similar case of *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581, where two devises of lots 1 and 2 in block 187, which the testator did not own, were held to apply to lots 3 and 4 in block 187, which he did own; the numbers "1" and "2" being rejected as false description.

In *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570, the devise was of 62 $\frac{1}{2}$ acres off of the east side of the N. E. $\frac{1}{4}$ of section 20. This was a definite and certain description of a particular tract of land, but the testator did not own it. He did, however, own 62 $\frac{1}{2}$ acres off the north end of the E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 20, and no other lands in that quarter section. The words "off of the east side" were rejected as a false description, leaving "62 $\frac{1}{2}$ acres of the northeast quarter of section 20," which words alone described no land, but, in connection

with the fact that the testator owned that precise quantity of land in the section, were held sufficiently definite to convey the land the testator owned.

In *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345, a devise was made as follows: "Fifteen acres to David J. Garrett, 15 acres to Douglas Garrett, and 50 acres to Martha A. Vestal of the undivided southwest three fourths of the south half of the southwest quarter and the west half of the southeast quarter of section 33," etc. This description, in itself, is meaningless, and no lands can be located from it. The testator, however, owned the undivided one third of the S. W. $\frac{1}{4}$ and of the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 33. The false words of description, "southwest three fourths of the," were rejected, and the devises held to convey 80 acres of the undivided S. W. $\frac{1}{4}$ and W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 33, being the quantity of land which the testator owned in said tracts.

In *Douglas v. Bolinger*, 228 Ill. 23, 119 Am. St. Rep. 409, 81 N. E. 787, the devise was of the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 12, one half of which the testator did not own, and it was held to pass the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ which he did own, and which was the only part of the quarter section he did own. In *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170, a devise of the N. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 27, which the testator did not own, was held to pass the E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, which he did own. In *Collins v. Capps*, 235 Ill. 560, 126 Am. St. Rep. 232, 85 N. E. 934, a devise of the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the section was held to pass the N. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$. In *Gano v. Gano*, 239 Ill. 539, 22 L.R.A.(N.S.) 450, 88 N. E. 146, the devise was of "the southeast quarter of the northeast quarter and the northeast quarter of the northwest quarter of section 14," etc. The words "quarter of the northeast quarter" being stricken out, there remained "the southeast and the northeast quarter of the northwest quarter of section 14," which tracts the testator owned, and which were held to pass by the devise. So in *Iowa* a devise of the S. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ was held in *Stewart v. Stewart*, 96 Iowa, 620, 65 N. W. 976, to convey the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and a devise of the S. E. $\frac{1}{4}$ was held to pass the S. W. $\frac{1}{4}$ in *Eckford v. Eckford*, 91 Iowa, 54, 26 L.R.A. 370, 58 N. W. 1093. In *Ohio* the E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ was held to convey the E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ in *Merrick v. Merrick*, 37 Ohio St. 126, 41 Am. Rep. 493. In *Pate v. Bushong*, 161 Ind. 533, 63 L.R.A. 593, 100 Am. St. Rep. 287, 69 N. E. 291, a devise of the N. W. $\frac{1}{4}$ of section 29 was held to convey the N. W. $\frac{1}{4}$ of section 28, and a devise

of the E. $\frac{1}{2}$ of the S. $\frac{1}{2}$ to convey the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$.

In *Vestal v. Garrett* it is stated that, "if the words of the testator as to the donee and subject of the gift are unambiguous, such words cannot be varied by evidence of extraneous facts, however clearly a different intention may appear;" and *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Bishop v. Morgan*, 82 Ill. 351, 25 Am. Rep. 327, *Bingel v. Volz*, 142 Ill. 214, 16 L.R.A. 321, 34 Am. St. Rep. 64, 31 N. E. 13, and *Williams v. Williams*, 189 Ill. 500, 59 N. E. 966, are cited in support of that proposition. In those cases, as well as in *Lomax v. Lomax*, 218 Ill. 629, 6 L.R.A. (N.S.) 942, 75 N. E. 1076, this rule was applied, but in each of the cases cited supra (*Decker v. Decker*, *Whitcomb v. Rodman*, *Huffman v. Young*, *Douglas v. Bolinger*, *Felkel v. O'Brien*, *Collins v. Capps*, and *Gano v. Gano*), as well as in the cases cited from other states, the words of the testator as to the subject of the devise were unambiguous, yet evidence of the state and description of the testator's property was received in each case for the purpose of identifying the subject of the devise by enabling the court to read the language of the will from the position of the testator. The cases in which the rule contained in the language quoted from *Vestal v. Garrett*, supra, has been disregarded by this court are more numerous than those in which it has been followed, and in that case the cases of *Decker v. Decker*; *Whitcomb v. Rodman*; and *Huffman v. Young*,—supra, in which that rule was disregarded, are cited and not disapproved. It is stated in *Vestal v. Garrett* that when "there is a latent ambiguity in the description of the object or subject of the gift, and such ambiguity can be removed by rejecting false words, leaving a complete, intelligible description, it is the duty of courts to do so, as where there are two descriptions, one good and the other bad; the authorities are uniform to the effect that the latter may be rejected." It is only by an application of the presumption that the testator intended to dispose of property which he owned that the court was enabled to apply the unambiguous words descriptive of the subject-matter of the respective devises contained in the seven cases above cited from the decisions of this court, and in numerous cases in other courts, to the property actually intended to be disposed of. It is by the application of that presumption that the court, in the majority opinion, ascertains the section intended by the ambiguous description in the will, not by adding to the terms of the will, but by placing itself in the situation of the testator. The presumption mentioned

prevails, and is given effect in that opinion. It must prevail in every case of construction of a will. The existence of such legal presumption necessarily gives rise to a latent ambiguity in every case where the testator does not own the property described in the devise. In such case there are always at least two circumstances descriptive of the thing; viz., ownership by the testator and location or other descriptive fact mentioned in the devise. The fact that the two do not agree can only be made to appear by extrinsic evidence. The ambiguity is therefore latent, and may be removed by extrinsic evidence. "It is settled doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will either when it names a person as the object of a gift or a thing as the subject of it and there are two persons or things that answer such name or description; or, secondly, it may arise when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator. The first kind of ambiguity, when there are two persons or things equally answering the description, may be removed by any evidence that will have that effect,—either circumstances, or declarations of the testator. 1 Jarman, Wills, 370; *Hawkins*, Wills, 9, 10. Where it consists of a misdescription, as before stated, if the misdescription can be struck out and enough remain in the will to identify the person or thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected." *Patch v. White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710.

The cases in which the rule has been applied by this court, not only in equity, but also at law, and not only in cases of wills, but also of deeds, that a false particular in the description of the subject-matter shall not vitiate the instrument, are of great frequency. Among them are *Miller v. Beeler*, 25 Ill. 163, *Myers v. Ladd*, 26 Ill. 415, *Swift v. Lee*, 65 Ill. 336, *Emmert v. Hays*, 89 Ill. 11, as well as cases cited in the principal opinion.

The devises are: To Charles, "all of west $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 12;" to Mary J. MacKender, "east $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 12;" to James, "all of the east half of the north-west $\frac{1}{4}$ of section 9." These devises must all be held to refer to property which the testator owned. If the letters "N. W.," which constitute the false description, are stricken out of the first two devises, and the word "northwest" out of the third, they

will read, "all of the west half of $\frac{1}{4}$ of section 12," all of east half of $\frac{1}{4}$ of section "12," and "all of east half of $\frac{1}{4}$ of section 9." The testator owned " $\frac{1}{4}$ of section 12," and only one. He owned "east half of $\frac{1}{4}$ of section 9," and only one. When he devised property that he owned, using that language, no doubt can exist as to his intention or his expression of it. Effect should be given to the intention so expressed. If the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ is held to convey the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, as in *Douglas v. Bolinger*, supra, why should not the W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ be held here, under precisely similar circumstances, to convey the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$? Why, under exactly the same conditions, should the N. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ be held in *Felkel v. O'Brien*, supra, to convey the E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, but the E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ be not held here to convey the E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$? And if the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ is construed in *Collins v. Capps*, supra, as conveying the N. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, what is the reason that the same rule of construction does not apply here, and require the E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ to be construed as conveying the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$? There can be no certainty in the law unless the same rule is applied to the same facts, under the same circumstances.

Petition for rehearing denied October 12, 1910.

KENTUCKY COURT OF APPEALS.

JOHN HENDRICKSON, Appt.,
v.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(137 Ky. 562, 126 S. W. 117.)

Master — act of servant — authority — employing minor.

1. The act of a conductor in employing a minor as brakeman on a train without the consent of his father is, as between the railroad company and the father, the act of the railroad company, although the train has a full complement of hands without the minor, so that his employment is not necessary, and no express authority has been given the conductor to make the contract.

Parent — injury to child — right to recover.

2. A father may recover damages for injury to his minor son because of his employment without his knowledge as brakeman by a railroad company which knows of his minority, and the fact that the son assumes the risk of his employment, so that 30 L.R.A. (N.S.)

he could not recover for his own injury, is immaterial.

(March 11, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Bell County dismissing an action brought to recover damages for personal injuries to plaintiff's son alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. O. V. Riley, for appellant:

Knowingly permitting and directing the plaintiff's minor son to ride on the train as one of the crew, and to render hazardous service, was a wrongful interference with the right of the father to control his son.

Louisville & N. R. Co. v. Willis, 83 Ky. 58, 4 Am. St. Rep. 124; *Newport News & M. Valley Co. v. Carroll*, 17 Ky. L. Rep. 374, 31 S. W. 132.

Mr. W. T. Davis also for appellant.

Messrs. Benjamin D. Warfield, Charles W. Metcalfe, and J. W. Alcorn for appellee.

Hobson, J., delivered the opinion of the court:

John Hendrickson brought this suit against the Louisville & Nashville Railway

Note. — Right of parent to recover for injury to minor servant employed without his consent.

This note is confined to cases where a minor servant, while in the employment of the defendant without his parent's consent, is injured under such circumstances that the minor himself would have no cause of action against the defendant; as where the defendant was not negligent, or where, if he had been negligent, there would be a good defense thereto, such as the minor's contributory negligence or assumption of risk.

Where the action is brought under a statute giving an action for the death of a person in cases only where the deceased, if living, could have recovered for the injury, this question could not, of course, arise.

In many cases the absence of the parent's consent is mentioned where the right of recovery is predicated for reasons which are independent of this element. Cases of this kind have not been included in this note.

It is a general rule that an employer putting a minor servant, without his parent's consent, to do work by which the child is injured, commits an actionable wrong, which will authorize the parent to recover for whatever loss of services may result from the injury.

In such a case the employer is liable although there was no negligence upon his part.

Marbury Lumber Co. v. Westbrook, 121 Ala. 179, 25 So. 914; *Woodward Iron Co. v.*

Company. He alleged in his petition that he has a son, James E. Hendrickson, who is under twenty-one years of age; that the servants of the defendant in charge of one of its trains, knowing that his son was not of age, allowed and directed his son to render services on the train as a brakeman; that the service was hazardous, and that all this was done without his knowledge or consent; that while his son was acting in the capacity of a brakeman on the train, he was thrown from the train and injured; that by reason of his injury, his son had been confined to his bed, requiring constant care, nursing, and medical attention; that he had thus been put to great care and expense in taking care of his son, to the amount of \$754, and had lost the ser-

vices of his son, which were reasonably of the value of \$250. The defendant filed an answer, the first paragraph of which was a traverse of the allegations of the petition. The second paragraph was in these words: "For further defense it alleges that there was a full complement of men in charge of the train, and there was no necessity for the employment or acceptance of the services or rendition of the service of the plaintiff's said son; that the conductor in charge of the train had no right or authority from this defendant to allow or suffer or permit or employ or accept the service of the plaintiff's said son, to get aboard said train or ride therein at the time or times mentioned in the petition, or at any time. Wherefore, defendant

Curl, 153 Ala. 205, 44 So. 974; Braswell v. Garfield Cotton Oil Mill Co. 7 Ga. App. 167, 66 S. E. 539; Ft. Wayne, C. & L. R. Co. v. Beyerle, 110 Ind. 100, 11 N. E. 6; Toledo, St. L. & K. C. R. Co. v. Trimble, 8 Ind. App. 333, 35 N. E. 716; Gulf, C. & S. F. R. Co. v. Redeker, 67 Tex. 190, 60 Am. Rep. 20, 2 S. W. 527, second appeal, 75 Tex. 310, 16 Am. St. Rep. 887, 12 S. W. 855; Taylor v. Chesapeake & O. R. Co. 41 W. Va. 704, 24 S. E. 631.

So the doctrine of assumption of risk will not prevent a recovery.

Braswell v. Garfield Cotton Oil Mill Co. supra; Louisville & N. R. Co. v. Willis, 83 Ky. 57, 4 Am. St. Rep. 124; Texas & P. R. Co. v. Brick, 83 Tex. 526, 29 Am. St. Rep. 675, 18 S. W. 947.

Nor is the minor servant's contributory negligence a defense to such an action.

Marbury Lumber Co. v. Westbrook; Braswell v. Garfield Cotton Oil Mill Co.; Ft. Wayne, C. & L. R. Co. v. Beyerle; and Louisville & N. R. Co. v. Willis,—supra; Union News Co. v. Morrow, 20 Ky. L. Rep. 302, 46 S. W. 6; Illinois C. R. Co. v. Henon, 24 Ky. L. Rep. 298, 68 S. W. 456; Texas & P. R. Co. v. Brick, supra.

And the fellow-servant doctrine is not applicable.

Grand Rapids & I. R. Co. v. Showers, 71 Ind. 451; Texas & P. R. Co. v. Brick, supra; Texas & P. R. Co. v. Hervey (Tex. Civ. App.) 89 S. W. 1095.

Thus in Marbury Lumber Co. v. Westbrook, supra, the court said: "The gravamen of the action obviously is the alleged wrong of the defendant in putting the plaintiff's minor son to work at a dangerous place or upon dangerous work without her consent. This is the charge; and it manifestly involves no issue of negligence."

So, if one knowingly hire a minor, and require him to perform dangerous service in opposition to the parent's will, he will be liable to the parent if injury befall such minor while engaged in such service. In such a case it is not a question of negligence that gives rise to the liability, but the wrong consists in opposing the will of the 30 L.R.A. (N.S.)

parent. Toledo, St. L. & K. C. R. Co. v. Trimble, supra.

And where the defendant's agent received and used a minor, knowing from his appearance that he was under age, it was an exercise of dominion and illegal control over him at war with the father's rights. Louisville & N. R. Co. v. Willis, supra.

Even in a case where the maxim, *Volenti non fit injuria*, would bar the minor himself from recovering, the defense under the maxim cannot be set up against the father, for the reason that his consent to the risk had not been given. Braswell v. Garfield Cotton Oil Mill Co. supra.

And as a contract of the employment with a minor was made without the consent of the father, and the latter is a stranger to it, he is not bound by it, so as to be held to take the risk directly incident to the employment, or that which may result from the negligence of the fellow servants. Texas & P. R. Co. v. Brick, supra.

A father is entitled to recover for any loss resulting from injuries to his minor servant employed without his consent, without reference to the question whether the son has contributed to such injury or not. Ibid.

And in Soldanels v. Missouri P. R. Co. 23 Mo. App. 516, the court said: "In such action I much question whether the want of due care and judgment on the part of the minor, such as would preclude him from recovering for the personal injury, should apply against the parent."

The contributory negligence of a slave is not a defense to an action by the master for injuries to him, against one who had set the slave at work without the master's consent. Louis v. McAfee, 32 Ga. 469.

Where the gist of the complaint is that a railroad company knowingly hired the minor son of the plaintiff against the latter's will, it is not error to deny the defendant a new trial merely because the defense may show that the injury to the minor resulted from the negligence of a fellow servant. Grand Rapids & I. R. Co. v. Showers, 71 Ind. 451.

prays to be hence dismissed with its costs." The plaintiff demurred to the second paragraph of the answer. His demurrer was overruled. The plaintiff stood by his demurrer, and, his petition having been dismissed, he appeals.

It is insisted for the defendant that the petition is insufficient, that the court should have carried the demurrer back to the petition, and that, therefore, the plaintiff cannot complain that the demurrer to the answer was overruled. It is said that the petition does not sufficiently charge that the conductor of the train knew that the son was not of age; but, if there was any defect in the petition on this subject, it was cured by the first paragraph of the defendant's answer. The averments of the

petition are sufficient to show that the conductor had the son on the train acting as a brakeman. Whether or not the defendant is liable if the conductor had no authority to employ additional help when he had a full complement of men, and there was no emergency calling for the employment of others, is a question raised by the demurrer to the answer. These matters were set out in the answer, and, if they constituted a defense to the action, the demurrer to it was properly overruled. The defendant relies on the case of *Clarke v. Louisville & N. R. Co.* 33 Ky. L. Rep. 797, 111 S. W. 344. That was a suit by Clarke himself for his own injury, where he had been hurt on a train while assisting the train crew by their direction; and it was

In *Pecos & N. T. R. Co. v. Blasengame*, 42 Tex. Civ. App. 66, 93 S. W. 187, it was said that in an action of this character, the charge was subject to the criticism that it authorized a recovery irrespective of the child's contributory negligence, but there may be some question whether the court considered that it was dealing squarely with a situation in which the minor servant was employed without the consent of the parent, as the decision did not turn upon this point.

The only case which states the contrary view of the question is *Williams v. Southern R. Co.* 121 N. C. 512, 28 S. E. 367, in which the court held that, as the loss of the services caused by the injury of the child employed without the parent's consent was caused by an injury which was not the fault of the defendant, it could not be held liable for such loss. The opinion is very short, and there is no further discussion of the question.

Where the contrary is not averred, it will be presumed that the parent expressly or impliedly assented to the employment. *Woodward Iron Co. v. Cook*, 124 Ala. 349, 27 So. 455; *Reaves v. Anniston Knitting Mills*, 154 Ala. 565, 45 So. 702.

It is not necessary that the minor should have been employed for wages when the injury was received, in order that the father may recover; it is sufficient if he was then rendering service for the defendant by the request or direction of the defendant or its general agent. *Louisville & N. R. Co. v. Willis*, supra.

In most of the cases there is no distinction made between an employment without the consent of the parent, and employment against the will of the parent. But in *Tolledo, St. L. & K. C. R. Co. v. Trimble*, 8 Ind. App. 333, 35 N. E. 716, the court said: "There is a difference between the want of consent and active opposition to the parent's will. In the last instance, the injury proximately results from opposing the parent's will, while in the other instance the employment itself may not be wrongful, and if injury befall the minor, it cannot be said that the injury proximately results from

the employment. . . . The want of consent may give rise to the presumption that the employment was against the will of the parent, but such presumption is not conclusive, nor is it an ultimate fact upon which the right of recovery rests. Something more must concur to make the employer liable."

Consent to employment at one kind of work, and minor placed at more dangerous work.

The consent of the parent that the minor be employed at one kind of work is not consent that he be placed at another and more dangerous work.

Thus, a consent to carry "stacker sticks" in a sawmill is not necessarily a consent to work on the log carrier. *Marbury Lumber Co. v. Westbrook*, 121 Ala. 179, 25 So. 914.

So, consent to employment in the work of shoveling sand in a pipe manufacturing plant is not consent to employment in the work of wheeling sand around the works. *Dimmick Pipe Works v. Wood*, 139 Ala. 282, 35 So. 885.

And consent to employment in sacking cotton seeds in a cotton oil mill is not consent to employment in oiling machinery. *Braswell v. Garfield Cotton Oil Mill Co.* 7 Ga. App. 167, 66 S. E. 539.

So, the fact that a parent was willing that her son should perform the duties of "doffer" boy did not authorize the defendant to change his employment, and put him to work without her consent at a more dangerous machine. *Hillsboro Cotton Mills v. King* (Tex. Civ. App.) 112 S. W. 132.

The case of one who engages from a parent a minor child for the purpose of a particular service is so similar in basal consideration to the case of one who hires a slave, a horse, a chattel, or any other thing of value from another for one purpose, and then employs it for another, as to make the general principle applicable in the familiar class of cases last mentioned, likewise applicable to the case of the father, when injury has resulted to him from the fact that the son's services were diverted from what the original intention of the contracting

held that he had voluntarily assumed the service, and that he could not recover unless there was negligence on the part of the train crew. But this action is not brought by the son. It is brought by the father to recover for the injury done to him by the crippling of his son when his son was used as a brakeman on the train, without his knowledge or consent, and with the knowledge on the part of the conductor that he was under twenty-one years of age. The court in *Cincinnati, N. O. & T. P. R. Co. v. Finnell*, 108 Ky. 135, 57 L.R.A. 266, 55 S. W. 902, and *Thornton v. Louisville & N. R. Co.* 24 Ky. L. Rep. 854, 70 S. W. 53, decided as in the *Clarke Case*, these cases being suits by the infant to recover for his own injury. But in *Louisville & N. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124, which was a suit by the father to recover for the wrongful interference with his infant son, a recovery was allowed. The court stating the basis of the ruling said: "The conductor knew from his appearance that he was under age, and he received and used him. This was an exercise of dominion and illegal control over

him by the general agent of the appellant at war with the father's rights. The appellant cannot shelter under the claim that it did not know that the appellee objected to the son rendering the service, since it was its duty to know that the appellee was willing to it before it took control of him. The duty of the father to educate and maintain the son entitled the former to the son's services, and placed him in the attitude of a master to him, or created the relation of master and servant; and any interference with the master's right to control the servant by another renders the latter liable at least for any injury that was likely to result from such illegal conduct." It is true that in that case there was only one brakeman on the train, but the opinion was not rested on this fact in any way. It was rested on the broader ground that there had been a wrongful interference with the father's rights. The same rule was applied in *Newport News & M. Valley Co. v. Carroll*, 17 Ky. L. Rep. 374, 31 S. W. 132. These decisions follow the common-law rule, which has long been recognized. See 29 Cyc. Law & Proc. pp.

parties was that they should be *Braswell v. Garfield Cotton Oil Mill Co.* supra.

Acquiescence of parent.

Although the parent may not at first know or consent to the employment of the child, if he thereafter, with knowledge of the fact, acquiesces in such employment, he will be barred from recovering for any injury to the child merely because of the employment.

Warrior Mfg. Co. v. Jones, 155 Ala. 379, 46 So. 456; *Tennessee Coal, Iron & R. Co. v. Crotwell*, 156 Ala. 304, 47 So. 64; *Louisville & N. R. Co. v. Davis*, 32 Ky L. Rep. 308, 105 S. W. 455.

Thus, in *Warrior Mfg. Co. v. Jones*, supra, the court said: "Where the doing of a thing is continuous in its nature, as, for instance, under an employment of a minor for continuous work, it is immaterial that consent of the parent is wanting at the commencement, if such consent be subsequently given during the performance of the employment, and before any injury to the minor occurs."

Knowledge of the employer.

The action is not maintainable if the master is not aware that the servant is in fact a minor.

Illinois C. R. Co. v. Henon, 24 Ky. L. Rep. 298, 68 S. W. 456; *Cutting v. Seabury*, 1 Sprague, 522, Fed. Cas. No. 3,521.

Where the father sues for damages resulting to him from the employment of his son in a dangerous business without his consent, the rule seems to be clearly established that he must aver and prove that the defendant knew of the minority. *Gulf, C. & S. F. R. Co.* 30 L.R.A. (N.S.)

Co. v. Redeker, 67 Tex. 190, 60 Am. Rep. 20, 2 S. W. 527.

But, the defendant cannot shelter itself under the claim that it did not know that the parent objected to the son's rendering the service, since it was its duty to know that the parent was willing. *Louisville & N. R. Co. v. Willis*, 83 Ky. 57, 4 Am. St. Rep. 124.

Consent of mother to employment.

After the father's death, it is unlawful to employ a minor without the consent of the mother. *Union News Co. v. Morrow*, 20 Ky. L. Rep. 302, 46 S. W. 6.

In the following cases, it was apparently assumed that after the death of the father, the mother's consent must be obtained, for the action was instituted by the mother, and no question was raised as to her right to maintain such an action: *Tennessee Coal, Iron & R. Co. v. Crotwell*; *Marbury Lumber Co. v. Westbrook*; and *Pecos & N. T. R. Co. v. Blasengame*,—supra.

But if the plaintiff is a married woman, she cannot sue for injuries to her minor child employed without her consent, without joining her husband with her. *Hillsboro Cotton Mills v. King*, supra.

If the parents are living together, the mother's consent alone will not relieve the employer of the minor from liability to the father for employing the son in a dangerous employment. *Gulf, C. & S. F. R. Co. v. Redeker*, 75 Tex. 310, 16 Am. St. Rep. 887, 12 S. W. 855.

Of course, the general question under what circumstances a mother may bring an action for injuries to the child is not within the scope of this note. W. M. G.

1637, 1638, and cases cited. The conductor is the managing agent in charge of the train. While thus in charge of the train and having authority to control it, his act in taking and using the plaintiff's son upon the train, as between the plaintiff and the railway company, was the act of the railway company. The service of brakeman is peculiarly hazardous. The knowledge on the part of the conductor that the son was on the train and rendering service as brakeman was the knowledge of the defendant. The defendant could not, with knowledge of the father's rights, thus expose the son knowingly to the dangers of such a hazardous business without his consent. While the son took the risk of the work in which he voluntarily engaged, the father, who did not consent to it, was not affected by this. The conductor, knowing he was acting as brakeman and was an infant, knew there was an interference with the father's rights, for the business was intrinsically hazardous; and when, with this knowledge, he kept him in the dangerous business, the case is essentially the same as it would be if, seeing the boy setting a brake and knowing the danger of his undertaking the work, he had signaled the engine to back up for the coupling, as in the Carrol Case. When the managing agent of the defendant wrongfully takes charge of the servant of another, and, knowing his danger, permits him to be hurt, it cannot escape liability to the master, because under its rules its agent was without authority to hire more men when he had a full crew. The parent's rights do not depend on whether the conductor had a full crew or not. They rest on the ground that the conductor, who had charge of the train, knew of the wrong to the father's rights and the danger in which the son was placed, and that his knowledge was the knowledge of the defendant.

The plaintiff need not show that the conductor knew that he objected to his son rendering the service. It is sufficient if it was done without the plaintiff's consent. He must show that the conductor knew the son was under twenty-one years of age. But this he may show by circumstantial evidence or by direct evidence, as knowledge of a fact may ordinarily be shown by proof of facts sufficient to put a man of ordinary prudence on notice of it. Cutting v. Seabury, 1 Sprague, 522, Fed. Cas. No. 3,521; Butterfield v. Ashley, 6 Cush. 250; Butterfield v. Ashley, 2 Gray 254.

Judgment reversed and cause remanded for further proceedings consistent herewith.

30 L.R.A. (N.S.)

LOUISIANA SUPREME COURT.

BENEDETTO MORASCA, Appt.,
v.

ITEM COMPANY, Limited.

(126 La. 426, 52 So. 565.)

Libel — publication of police report — malice.

1. The publication by a newspaper of a report made by the police in the regular course of police administration, to the effect that persons had been poisoned by sugar purchased at the store of the plaintiff, will not of itself support an allegation of malice on the part of the defendant.

In order to support the allegation of malice, there must be evidence of an act showing a wanton inclination to mischief, an intention to injure or wrong, or a depraved inclination to disregard the rights of others.

Same — comment — actual damages.

2. Facts exciting public comment, regarding public health or safety, may be published by a newspaper; and comment, if made and published fairly and in good faith, is not a libel, and will not give rise to an action for punitive damages.

If deductions are made from the facts of a case, and published by a newspaper, it will be liable for damages only where actual damages are shown, when the publication was not inspired by malice.

Same — failure to show — effect.

3. Under the circumstances, it was incumbent upon plaintiff to show actual damages in order to recover, and he has failed to do so.

(Monroe, J., dissents.)

(May 9, 1910.)

Headnotes by BREAU, Ch. J.

Note. — Reports of police officers as privileged communications.

The few reported cases upon this subject are not entirely harmonious.

Thus, in Billet v. Times-Democrat Pub. Co. 107 La. 751, 58 L.R.A. 62, 32 So. 17, it was held that reports made by police and detective officers to their superiors, and inscribed in books kept for that purpose, are not judicial proceedings, and no privilege protects their publication; nor does any privilege protect the publication of the opinions, suspicions, or deductions of such officers otherwise imparted, whether to their superiors or to other persons.

So, reports made by detectives are not privileged, under the law relating to the publication of judicial proceedings. Fullerton v. Berthiaume, Rap. Jud. Quebec, 6 C. S. 342.

A contrary view was taken in McClure v. Review Pub. Co. 38 Wash. 160, 80 Pac. 303, where it was held that articles in a newspaper containing no statement on the part of the newspaper as to whether or not

A PPEAL by plaintiff from a judgment of the Civil District Court for the Parish of Orleans in defendant's favor in an action brought to recover damages for the publication of an alleged libel. Affirmed.

The facts are stated in the opinion.

Messrs. T. M. Miller and J. D. Miller, for appellant:

A report of a police officer to his superior officers furnishes no privilege for a newspaper in commenting and amplifying on the same, or printing anything beyond the fact that such a report had been filed. If such amplifications and comments are false and damaging, the publishers of the newspaper are responsible.

Cass v. New Orleans Times, 27 La. Ann. 214.

A newspaper is no more privileged to libel a citizen than is an individual.

Luzenberg v. O'Malley, 116 La. 699, 41 So. 41.

Slandorous words may be actionable, even though they do not consist of an unequivocal or positive assertion concerning another.

Covington v. Roberson, 111 La. 326, 35 So. 586.

One has no right to publish a libel of another, unless he knows it to be true; and if he acts on information or belief, he acts at his peril.

State v. Bienvenu, 36 La. Ann. 383.

Special proof of the pecuniary amount suffered was not necessary to support a recovery.

Tresca v. Maddox, 11 La. Ann. 206, 66 Am. Dec. 198.

Messrs. Saunders, Dufour, & Dufour and Henry Mooney, for appellee:

The police reports were privileged communications.

18 Am. & Eng. Enc. Law, pp. 1039, 1046; Usher v. Severance, 20 Me. 9, 37 Am. Dec. 33; Newell, Defamation, 2d ed. pp. 549, 591; Meteye v. Times-Democrat Pub. Co. 47 La. Ann. 824, 17 So. 314; Ackerman v. Jones, 5 Jones & S. 42; Sheppard v. Lloyd, Daily Chron. March 11, 1882.

Breaux, Ch. J., delivered the opinion of the court:

Benedetto Morasca was the owner of a

grocery store in the city of New Orleans. He sued the defendant for \$5,000 damages. Plaintiff charges the "New Orleans Item," a daily, with having published a false and libelous report which reflects upon him and his business, which has occasioned damages in the sum before stated.

The police authorities were investigating a case of reported poisoning of three persons. The newspaper stated at the time, in one of its columns, under the heading, in capital letters, that it was believed that the negroes had been poisoned from sugar contained in tea, for which they were under medical treatment. Their names were given in the printed report, which stated that the sugar was bought from a "grocery store at Sixth and Rampart." The negro child died.

The day following that publication just mentioned, the defendant published on the fourth page that the "Poison Was Being Investigated" (heading of the report), and the article stated that the coroner thought that the child died from tartar emetic poisoning; that the chemist had the examination of the stomach, kidneys, and liver in charge; and that he also had samples of the sugar and tea procured from the grocery store of Benedetto Morasca, where the occupants of the house who were poisoned made their purchase which was believed to have caused the child's death.

The article read: "It is the opinion of Coroner O'Hara that the child died from tartar emetic poisoning. He thinks that some of this substance, which is used in the composition of ant poison, may have accidentally gotten in the sugar at the grocery."

The first complaint of plaintiff is that his name was stated,—his grocery,—and that, in connection with the statement, the persons named were further referred to as "the poison patients," poisoned by sugar bought from his grocery; and the second complaint of plaintiff is that it was given as the opinion of the coroner that the sugar sold in plaintiff's store contained poison. The articles were pleaded in the words of the publication.

The defendant admitted the publication, denied malice, pleaded privilege, and al-

the plaintiff was guilty of the crime with which she was charged, but only purporting to be a statement of the acts and theories and representations of the officers of the law, were qualifiedly privileged, and in the absence of express malice are not actionable.

Of course, if the report of the police officer is published in the paper with the paper's own comments added thereto, in which the plaintiff is accused of the crime mentioned in the report, an entirely differ-

ent question is presented, and cases of this kind are not included within this note.

As to privileged character of complaint by member of the public to public officers against subordinate, see note to Jozsa v. Moroney, 27 L.R.A.(N.S.) 1041.

Upon the general subject of official report by executive or administrative officer as privileged communication, see note to De Arnaud v. Ainsworth, 5 L.R.A.(N.S.) 163.

W. M. G.

leged the articles were printed as ordinary news taken from the public records, and were given no more prominence or space than is usually given to similar articles. The defendant offered the report of the police sergeant commanding the sixth precinct police,—a report made in accordance with the rule of the police department, and filed with the inspector.

In the report, the sergeant stated that he had instructed the patrolmen to investigate the suspicious cases of poison, and that he found a colored woman "named Sylvester Heims, aged seventy years, John B. Powell, Jr., aged two years and seven months, and Nathaniel Burns, aged sixteen, all colored, residing in the same house, apparently sick, and claiming that they were attended by Dr. Debofie and Dr. Dejole, who stated that the sickness was caused by the sugar put in the tea Saturday evening. The officer procured a sample of the sugar from the grocery of Benedetto Morasca, . . . where the sugar was bought by the sick family."

One of the doctors afterward informed the policemen that the patients had taken something that caused irritation of the stomach, causing them to throw up; that he had administered medicine; and that they were all doing well. The coroner the same day went to the house, made an investigation, and said that he could find no trace of poisoning; they were doing well; in his opinion they were ailing from a disease prevalent in the city at the time. At the autopsy held by the coroner and jury over the body of the dead child, they arrived at the conclusion that death was due to antimony et potassi tartaris.

The Item published three days after the casualty, that Benedetto Morasca denied that sugar purchased at his store can in any way be responsible for the death of the two-year old negro, and that paper stated that it was the opinion of Dr. O'Hara that the child died from tartar emetic poisoning, that proper examination by the city chemist was under way, and samples were taken from plaintiff's grocery to see whether any poison used for roaches, ants, or other vermin had by accident gotten into the grocery.

That plaintiff said: "The only sample taken from our store was some sugar. I have here the signed names of persons who bought sugar from the same barrel, and were not hurt by it. In fact, we never used any poisons about the store to kill vermin, and it is not possible that any of our groceries could contain injurious matters of any kind. To prevent ants from getting into the sugar barrel, we used nothing but a rag soaked in coal oil, tied on the

outside at the bottom of the barrel." That the report did them an injustice and subjected them to loss.

Morasca, the plaintiff, is the owner of the grocery that is conducted by his daughter. He has very little to do with it, as he is a musician, and his time is taken up in teaching music. As a witness, he sought to prove the extent of his loss by the failure of those who had bought to continue in buying from him. Pressed to answer as to the extent of his loss, he was not at all exact in his answers, nor did he succeed in proving the extent of his loss.

Discussion and judgment: The result shows that the report that there was poison in plaintiff's barrel of sugar was entirely untrue. It originated among the negroes who had bought sugar from the grocery. They insisted—particularly the mother of the dead child—that the sugar she bought from the grocery was the cause of death. To such an extent this report spread that the police authorities very properly undertook to investigate and see for themselves if there was any truth in the report. It was during that time, and while proper report was forwarded to the central office, that the police reporter of the newspaper wrote the two articles—one on one day and the other on the next day—of which plaintiff earnestly complains.

As to malice, it is not charged *eo nomine*, although the charge may be inferred from the fact that plaintiff charged it was "false," "misleading," "libelous," and "defamatory in the highest degree, and calculated to injure plaintiff." All of which, to an extent, is true; but we have not found that there was express malice on the part of defendant as a fact. The publication does not appear in the light of a publication made with actual knowledge of the charge as false. We can only say that it is not sufficient to show actual malice.

"Legal malice" is defined as an act growing out of the "wicked or mischievous intention of the mind; an act showing a wanton inclination to mischief, an intention to injure or wrong, and a depraved inclination to disregard the rights of others." We are unable to say that such was the intention of the defendant, for in our opinion it was not. The most that can be said is that there was indifference. There was no negligence imputed to the plaintiff, nor the least wrong charged. There was no intimation that one person had attempted to poison others.

In the second publication, which followed the first in date, it was stated that the coroner thought that the child died from tartar emetic poisoning. "He (the paper

stated) thinks that some of this substance, which is used in the composition of ant poison, may have accidentally gotten into the sugar at the grocery." Taking the whole statement, nothing was said that may not occur in nearly all groceries, without its being possible to attach the least blame to anyone.

The child died of poison; to that point the facts were correctly stated. It was not bought from plaintiff. He was not defamed, for his name was not connected with any wrongful act; besides, he was not in charge of the grocery. There was reason for inquiry and probable cause for some concern. It became proper for the police department to act as it did. The defendant, through its police reporter, took up the report and made it known, not by large and sensational headlines, as stated by plaintiff. It mentioned that there was an investigation on foot. It sought to set forth the facts. There does not appear to have been ill-will or malice on its part.

There was extravagant talk among the negroes, many of whom bought groceries at plaintiff's store. The mother of the dead child talked excessively, and altogether there were rumors that prompted an investigation. It does not seem that it went too far under the circumstances. Reference by the newspaper to the steps taken was not actionable. Whenever poison is mentioned as having been taken, it always attracts attention among all persons. It will be talked of and even published. If done, as in this case, to report the facts, there is no ground of action for punitive damages at any rate. In other words, the fact invites attention and excites comment, which, if fairly published or made in good faith, is not libel or slander. Furthermore, questions relating to life, health, and welfare may be commented upon, and, if erroneous deductions be made, it does not give cause for damages unless special damage can be shown; that is, when persons taking part in the inquiry are not prompted by malice. Newell, Defamation, 2d ed. p. 591.

As to an arrest, the following has the sanction of a well-considered opinion: While comments should not be made, the arrest of a person, and the charge against him, may be published. *Tresca v. Maddox*, 11 La. Ann. 208, 66 Am. Dec. 198. The defendant did not go further than sanctioned by the foregoing.

The case of *Billet v. Times-Democrat Pub. Co.* 107 La. 751, 58 L.R.A. 62, 32 So. 17, is not pertinent, as the publication in the case before us for decision—different from the cited case—did not assume that the plaintiff was guilty of the lesser offense 30 L.R.A. (N.S.)

or impropriety. Besides, the defendant in the cited case undertook to justify by proving the truth of the fact stated. In the present case there was no refusal to retract; on the contrary, without request, the defendant, within four or five days after the first publication, published an explanatory account relieving the plaintiff of blame.

The plaintiff, in support of his claim, confidently cites *Cass v. New Orleans Times*, 27 La. Ann. 215. The facts of the cited case are different; the charge constituting libel was untrue and defamatory. The affidavit made the basis of the report published by the *Times* was false and malicious. There was a direct attempt made to humiliate and degrade the plaintiff. Here, there is nothing of the kind.

The question of privilege *vel non* does not arise in the case at hand, as there was no libel committed at any time nor by anyone. In the other decisions cited, a libel had been published without the least necessity or the most remote justification. There is unquestionably no ground upon which to allow punitive damages. A claim for punitive damages finds no support in any of the authorities we have read. There is better ground, of course, upon which to claim actual damages. But as to these, the attempt of plaintiff to prove that he had suffered losses in his business has failed. The allegation in this respect is not sustained; the nature or the extent of the loss are not sufficiently evident to have a judgment thereon for damages. The testimony fixes no amount of loss.

For reasons stated, the judgment is affirmed.

Monroe, J.: I dissent.

Provosty, J., takes no part, not having heard the argument.

Petition for rehearing denied June 6, 1910.

MICHIGAN SUPREME COURT.

RE ESTATE OF EDWARD G. GIES, Deceased.

SYLVIA M. GIES, Admrx., etc., of Edward G. Gies, Deceased,
v.

BAUSCHER BROTHERS, Limited, Plff. in Err.

(190 Mich. 502, 125 N. W. 420.)

Statute of frauds — contract to decorate dishes.

A contract by a manufacturer of dishes

to fill an order for a certain number, bearing the monogram of the purchaser, constitutes a contract for work and labor, not within the statute of frauds, where the value of the undecorated dish is a small part of the final cost, although compliance with the contract will result in a sale of the dishes.

(March 19, 1910.)

ERROR to the Circuit Court for Wayne County to review a judgment reversing an order of the commissioners, allowing a certain claim against the estate of Edward G. Gies, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Choate & Webster, for plaintiff in error:

Note.—*Statute of frauds: distinction between sales of personality and agreements for work and labor.*

This action is supplemental to the note appended to Flynn v. Dougherty, 14 L.R.A. 230, in which the earlier cases discussing this question will be found.

The variant rules on the subject are succinctly stated in Hientz v. Burkhard, 29 Or. 55, 31 L.R.A. 508, 54 Am. St. Rep. 777, 43 Pac. 860, as follows: "There appear to be substantially three distinct views upon the statute, which, for convenience, are generally designated as the English, the New York, and the Massachusetts rules, as represented by the decisions of their respective courts. In England, after a long series of cases in which various tests have been suggested, the rule seems to have been settled in Lee v. Griffin, 1 Best & S. 272, 23 Eng. Rul. Cas. 191, that 'if the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered.' . . . In New York the rule prevails that a contract concerning personal property not existing *in solido* at the time of the contract, but which the vendor is to manufacture or put in condition for delivery, such as the woodwork for a wagon, or wheat not yet threshed, or nails to be made from iron belonging to the manufacturer, and the like, is not within the statute. . . . By the Massachusetts rule the test is not the existence or nonexistence of the commodity at the time of the contract, as in New York, or whether the contract will ultimately result in the transfer of title of a chattel from the vendor to the vendee, as in England, but whether the article is such as the manufacturer ordinarily produces in the course of business and for the trade, or as the result of a special order and for special purposes. If the former, it is regarded as a contract of sale, and within the statute; if the latter, it is 30 L.R.A. (N.S.)

A contract for the sale of articles which are to be manufactured specially for the purchaser, and upon his special order, and not for the general market, is not within the statute of frauds.

Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 112; Baker, Sales, § 96; 2 Schouler, Pers. Prop. § 443; Browne, Stat. Fr. § 308; 8 Am. & Eng. Enc. Law, p. 707; Flynn v. Dougherty, 91 Cal. 669, 14 L.R.A. 230, 27 Pac. 1080; Meincke v. Falk, 55 Wis. 427, 42 Am. Rep. 722, 13 N. W. 545; Finney v. Apgar, 31 N. J. L. 266; Phipps v. McFarlane, 3 Minn. 109, Gil. 61, 74 Am. Dec. 743; Hight v. Ripley, 19 Me. 137; Cason v. Cheely, 6 Ga. 554; Abbott v. Gilchrist, 38 Me. 260; 20 Cyc. Law & Proc. p. 242; 29 Am. & Eng. Enc. Law, pp. 961, 964; Mechem,

held to be essentially a contract for labor and material, and therefore not within the statute."

The court added that the Massachusetts rule is the one most widely adopted in the United States; that to the latter part of the rule, relating to goods made on special orders, there is little if any conflict in the American cases.

The majority of the St. Louis court of appeals in Burrell v. Highleyman, 33 Mo. App. 183 (Thompson, J., dissenting), after a thorough discussion of the subject, expressed their approval of the English rule as declared in Lee v. Griffin. The court, however, recognized that the contract actually before it could have been brought within the statute on much narrower grounds, as its subject-matter was certain articles of furniture already in existence, and requiring but an inconsiderable amount of finishing work.

The English rule was also, upon principle, at least, approved by the Missouri supreme court in Pratt v. Miller, 109 Mo. 78, 32 Am. St. Rep. 656, 18 S. W. 965, which commended the reasoning of the majority opinion in the Burrell Case. As in the latter case, however, the contract in the Pratt Case, even according to a much narrower criterion, fell within the statute; and the court said that within the general scope of the American authorities, the rule determinative of the case at hand might be formulated thus: "Where the contract is for articles coming under the general denomination of goods, wares, and merchandise, the vendor being at the same time a manufacturer and a dealer in them, as a merchant, or, so dealing, has them manufactured for his trade by others; and the vendee being also a merchant, dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware; the quantity required, the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures or has manufactured for his general trade as a merchant, requiring the bestowal of no peculiar care or personal skill, or the use of material or a plan of construc-

Sales, § 309; Hientz v. Burkhard, 29 Or. 55, 31 L.R.A. 508, 54 Am. St. Rep. 777, 43 Pac. 866; Moore v. Camden Marble & Granite Works, 80 Ark. 274, 117 Am. St. Rep. 87, 96 S. W. 1063, 10 A. & E. Ann. Cas. 308; Turner v. Mason, 65 Mich. 662, 32 N. W. 846; Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256; Brown & H. Co. v. Wunder, 64 Minn. 450, 32 L.R.A. 593, 67 N. W. 357; Parker v. Schenck, 28 Barb. 38; Higgins v. Murray, 73 N. Y. 252; Donnell v. Hearn, 12 Daly, 230; Abbott v. Gilchrist, 38 Me. 260; Mead v. Case, 33 Barb. 202; Mattison v. Westcott, 13 Vt. 258; Allen v. Jarvis, 20 Conn. 38; Yoe v. Newcomb, 33 Ind. App. 615, 71 N. E. 256; Bagby v. Walker, 78 Md. 239, 27 Atl. 1033; Gerlie v. Louis Metzger & Co. 51 Misc. 46, 99 N. Y. Supp.

858; Roubicek v. Haddad, 67 N. J. L. 522, 51 Atl. 938; Passaic Mfg. Co. v. Hoffman, 3 Daly, 495; Hinds v. Kellogg, 37 N. Y. S. R. 356, 13 N. Y. Supp. 922 (affirmed in 133 N. Y. 536, 30 N. E. 1148); Pelletreau v. United States Electric Light & P. Co. 13 Misc. 237, 34 N. Y. Supp. 125; Finney v. Appgar, 31 N. J. L. 266; Gross v. Heckert, 120 Wis. 314, 97 N. W. 952.

Messrs. Graves, Hatch, & Wasey, for defendant in error:

The contract was within the statute of frauds, and an acceptance in writing by the claimant was necessary.

Lee v. Griffin, 1 Best & S. 272, 23 Eng. Rul. Cas. 191; Cooke v. Millard, 65 N. Y. 352, 22 Am. Rep. 619; 1 Mechem, Sales, § 326; Millar v. Fitzgibbons, 9 Daly, 505;

tion different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade, the contract is one of sale, and within the statute of frauds, although the goods are not *in solido* at the time of the contract, but are to be thereafter made and delivered."

From the fact that the court took the pains to formulate this narrower rule, it might perhaps be inferred that it did not intend to commit itself finally to the English rule.

Upon the authority of that case, however, the court of appeals in Schmidt v. Rozier and Tower Grove Planing Mill Co. v. McCormack, *infra*, held that the English rule had been adopted in Missouri.

Special orders.

It is apparent that, either under the English rule or the Massachusetts rule, the case next cited was correctly decided, though a different result would be required by a strict adherence to the New York rule.

A contract whereby a manufacturer agrees to make and deliver, for the usual price, shoes habitually made by him in the ordinary course of his business, is one for the sale of goods. Yoe v. Newcomb, 33 Ind. App. 615, 71 N. E. 256. The court emphasized the point that there was nothing to indicate but that the goods, when manufactured, would be salable in the general market.

So, where a merchant orally orders shoes of a traveling salesman for future delivery, which are of a kind usually sold by the house, and the contract does not specifically provide for the manufacture thereof, it is a contract to sell, and not to manufacture. Williams-Hayward Shoe Co. v. Brooks, 9 Wyo. 424, 64 Pac. 342. The court refers with approval to the narrower rule stated in Pratt v. Miller, *supra*.

And a contract with manufacturers for a mechanical boiler-cleaning appliance, a patented article, designed to be attached to boilers for the purpose of cleaning them, is a sale within the statute of frauds. Me-30 L.R.A.(N.S.)

chanical Boiler Cleaner Co. v. Kellner, 62 N. J. L. 544, 43 Atl. 599. It is stated in the opinion that the attachment of the appliance to the boiler was comparatively inexpensive, and that it could readily be detached and set aside. The court said in effect that the thing contracted for was a patented article, in the manufacture of which the plaintiff was engaged, and that it must be inferred from the testimony that the appliances attached were either part of the stock of plaintiff, on hand at the time, or were to be manufactured by the plaintiff in the regular course of its business; and that the transaction was clearly a contract of sale within the English rule, and especially within the rule adopted in New Jersey, as deduced from Finney v. Appgar, 31 N. J. L. 266 and Pawelski v. Hargreaves, 47 N. J. L. 337, 54 Am. Rep. 162 (substantially the Massachusetts rule). The opinion contains an extended and valuable discussion of the conflicting rules.

In Smalley v. Hamblin, 170 Mass. 381, 49 N. E. 626, where the plaintiff, who was a dealer in, and not a manufacturer of, bottles, upon receiving an order from the defendant, ordered the bottles from a manufacturing company, according to models which had been made by that company two years before, under the direction of plaintiff, and submitted to defendant for approval, the transaction was held to amount to a sale within the statute of frauds, it not appearing that it was a part of the contract that the bottles should be manufactured by that particular company, although the kind of glass used was made only by it, and it did not appear that the company made bottles of that kind for anybody else, it not appearing but that it would have furnished the same to anyone who had ordered them.

In Schloss v. Josephs, 98 Minn. 442, 108 N. W. 474, the question whether an order for a specified number of suits of clothing to be made to order, according to material and style selected from samples and models exhibited by agents, sizes and prices being specified, was within the statute of frauds, was made to turn upon the question, which was held to have been properly submitted

Joy v. Schloss, 12 Daly, 533; Parsons v. Loucks, 48 N. Y. 20, 8 Am. Rep. 517; Hight v. Ripley, 19 Me. 137; Edwards v. Grand Trunk R. Co. 48 Me. 379; Ellison v. Brigham, 38 Vt. 64; Williams-Hayward Shoe Co. v. Brooks, 9 Wyo. 424, 64 Pac. 342; Browne, Stat. Fr. 5th ed. §§ 307, 308, 308a; Downs v. Ross, 23 Wend. 270; Fickett v. Swift, 41 Me. 65, 66 Am. Dec. 214; Prescott v. Locke, 51 N. H. 94, 12 Am. Rep. 55; Turner v. Mason, 65 Mich. 662, 32 N. W. 846.

Stone, J., delivered the opinion of the court:

The claimant and plaintiff in error is a German corporation, engaged in the manufacture and importation of crockery and

china ware. Edward G. Gies, whose estate it is sought to charge herein, in his lifetime conducted a saloon and restaurant in connection therewith in the city of Detroit. On June 8, 1907, one Albert Debicke, an agent for Bauscher Brothers, Limited, saw and obtained from Edward G. Gies, his written order for dishes bearing his signature. The order provided that the dishes were to be in Detroit on or before September 25, 1907. This written order was sent on to Bauscher Brothers, Limited, and the dishes were manufactured, and plaintiff in error claims according to the terms of the order. On July 18, 1907, Debicke addressed a registered letter to Edward G. Gies, asking for shipping instructions for the dishes in question. Mr. Gies died July 12, 1907.

to the jury, whether the order was for clothing such as is ordinarily made by manufacturers and wholesale houses, and purchased and dealt in by retail dealers, or whether it was for clothing of such peculiar pattern and material as would not, in the general course of trade, have been otherwise manufactured. The judgment in favor of plaintiff was upheld as against the objection based upon the statute of frauds, though reversed on a question of damages.

The decision in *Helmert v. Nagel*, 112 Mo. App. 202, 87 S. W. 61, that an order given to a manufacturer for certain kinds of shoes, to be manufactured according to samples exhibited by the salesmen, was a sale within the statute of frauds, might be accounted for by the narrower rule formulated in *Pratt v. Miller*, without invoking the broader English rule.

But the decisions in *Schmidt v. Rozier*, 121 Mo. App. 306, 98 S. W. 791, holding that an order to a merchant tailor for a coat and vest of a peculiar and unusual style was a contract of sale, and thus within the statute, was expressly referred to the English rule; and the same is true of *Tower Grove Planing Mill Co. v. McCormack*, 127 Mo. App. 349, 106 S. W. 113, holding that a contract for doors and windows to be manufactured according to certain plans and specifications was a contract of sale, and within the statute, notwithstanding that the doors and windows called for were peculiar in size and character, and could not be used in any other building.

The following contracts, which were held to be not contracts of sale, but contracts for work and labor, and therefore not within the statute, would clearly be outside the statute, according to any rule except the English rule:

—a contract to manufacture and furnish stationery for the special, exclusive, and peculiar use of another, the chief cost and value of which are derived from the labor and skill bestowed upon it, and not from the materials of which it is made. *Beck & P. Lithographing Co. v. Colorado Mill & Elevator Co.* 3 C. C. A. 248, 10 U. S. App. 465, 52 Fed. 700. 30 L.R.A. (N.S.)

—a contract for the manufacture of articles of special and peculiar design, not suitable for general trade. *Brown & H. Co. v. Wunder*, 64 Minn. 450, 32 L.R.A. 593, 67 N. W. 357.

—an agreement to manufacture dishes for one, with his monogram thereon, though the transaction is to result in a sale thereof to him. *RE GIES*.

—a contract for the manufacture of boxes on special order and for a special purpose. *Courtney v. Bridal Veil Box Factory (Or.)* 105 Pac. 896. The court, in adopting the Massachusetts rule, states that this rule affords a better and fairer test of the applicability of the statute, in the great majority of instances, than either the English rule or the New York rule.

—a contract for matting, which contemplates that the vendor shall first manufacture it by the use of labor and capital. *Gross v. Heckert*, 120 Wis. 314, 97 N. W. 952. There are general statements in the opinion that might seem to indicate that the court applied the strict New York rule; but it appears from the findings of fact that the matting was not salable to any other person at any price. Upon that assumption, the contract would be outside the statute, even according to the Massachusetts rule.

—a contract for lithographing letter heads designed exclusively for use in the business of the company giving the order, and which are not adaptable to any other purpose. *Pelletreau v. United States Electric Light & P. Co.* 13 Misc. 237, 34 N. Y. Supp. 125.

—an agreement to manufacture circulars to be used in the business of the person giving the order, designed exclusively for the latter's business, and not adapted to any other purpose. *Hinds v. Kellogg*, 37 N. Y. S. R. 356, 13 N. Y. Supp. 922 (affirmed in 133 N. Y. 536, 30 N. E. 1148).

—a contract to deliver and set up, at an agreed price, a monument of a certain size. *Fox v. Utter*, 6 Wash. 299, 33 Pac. 354.

—a contract to furnish a granite monument of a special design for a particular

The letter came into the hands of Sylvia M. Gies, widow and executrix of the will of Edward G. Gies, and was receipted for by her and taken to her attorney. Claimant was notified not to ship the dishes. It was admitted at the trial in the circuit court that the goods called for by the order were in existence, and were, on the terms of the contract, sought to be delivered to the executrix, who declined to accept delivery. It appears that about the middle of May, 1908, the dishes were shipped by claimant to New York, where they were stored and insured, and were and are there still, held subject to the order of the estate. The claim was proved before the commissioners on claims of the estate, and allowed. The estate appealed to the circuit court, and the

matter came on for trial before a jury. The order in question was introduced in evidence. The circuit judge, after ruling against the appellee upon the questions of the measure of damages, and the acceptance of the order by the claimant, directed a verdict in favor of the estate, upon the ground that the contract was within the statute of frauds (3 Comp. Laws, § 9516).

The appellee assigned error upon the charge, and the case is here for review. It is claimed by plaintiff in error that there were upwards of 6,000 pieces of the dishes. One of the dishes was produced at the argument in this court. There was evidence showing that the dishes were made of china plate. The clay is found in Germany and France. A few of the dishes were in stock,

purpose. *Forsyth v. Mann Bros.* 68 Vt. 116, 32 L.R.A. 788, 34 Atl. 481. The court expressed its preference for the Massachusetts rule, as distinguished, upon the one side, from the English rule, and upon the other, from the New York rule.

—a contract by one operating a marble yard to construct a tombstone according to pattern and design in a catalogue, the inscription being of the other party's selection. *Moore v. Camden Marble & Granite Works*, 80 Ark. 274, 117 Am. St. Rep. 87, 96 S. W. 1063, 10 A. & E. Ann. Cas. 308. The court approves the Massachusetts rule.

—a contract for the manufacture of a pumping plant which is of special value to the person for whom it was manufactured, and is not a marketable commodity, although the manufacturer purchased most of the component parts. *Puget Sound Mach. Depot v. Rigby*, 13 Wash. 264, 43 Pac. 39. The court said: "It may, however, be fairly deduced from the authorities, that a contract for the manufacture and delivery of an article will not be within the statute of frauds as to sales of such property, if the completed article will not be one which would, under the circumstances of the case, be a marketable commodity. If the article when so completed is one of special value to the one for whom it was manufactured, and would be of comparatively little value as an article of merchandise to be held for sale, the contract will be construed to be one for manufacture, and not of sale."

—a contract for a cameragraph not in existence, but to be wholly or largely manufactured, so that the amount of work to be done on it is an important item. *Wallace v. Dowling* (S. C.) 68 S. E. 571. The court, in affirming the decision of the circuit court, states that the ruling of that court is sustained by *Bird v. Muhlinbrink*, 1 Rich. L. 199, 44 Am. Dec. 247, in which it was held that if the contract is for the sale of goods in future, which are not in existence at the time, and for work and labor to be bestowed upon them by the vendor, or procured at his expense, so as to make the work and labor the essential consideration of the contract, it is not within the statute of frauds.

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—a contract to manufacture and furnish ironwork for a brick building, according to special designs and measurements, suitable only for use in that particular building. *Hientz v. Burkhard*, 29 Or. 55, 31 L.R.A. 508, 54 Am. St. Rep. 777, 43 Pac. 866, supra. The court said in effect that the contract would be excluded from the operation of the statute by either the New York rule or the Massachusetts rule; and that, in the absence of a statute substantially the same as Lord Tenterden's act, it was unwilling to go as far as *Lee v. Griffin*.

—an agreement to install and connect with machinery belonging to defendant, stokers to be furnished by plaintiff, and which, when connected, will become part of the fixtures already on defendant's premises. *Underfeed Stoker Co. v. Detroit Salt Co.* 135 Mich. 431, 97 N. W. 959.

—a contract to furnish and install a steam heating and drying apparatus in defendant's factory, at an agreed price. *Putnam Foundry & Mach. Co. v. Canfield*, 25 R. I. 548, 56 Atl. 1033, 1 A. & E. Ann. Cas. 726.

Some of the following contracts, which, under the New York rule, were held to be for work and labor, and therefore not within the statute, would probably have been held to be contracts for sale under the Massachusetts rule, and therefore within the statute; and would certainly have been so held under the English rule.

—a contract for the sale and delivery of patented roofing materials to be thereafter manufactured and delivered. *Warren Chemical & Mfg. Co. v. Holbrook*, 118 N. Y. 586, 16 Am. St. Rep. 788, 23 N. E. 908.

—a contract to manufacture out of raw silk an article known as "tussah," the conversion of the raw silk into "tussah" requiring winding, doubling, and twisting. *Gerli v. Louis Metzger & Co.* 51 Misc. 46, 99 N. Y. Supp. 858.

—orders by a retailer from importers and manufacturers for an assortment of watch cases and cologne articles, to be thereafter manufactured in Europe, and specially designed for the special use of the former's trade. *Roubicek v. Haddad*, 67 N. J.

and the others were manufactured on the order. The order called for decoration, and black and luster lines with monogram "E. G. G." in black upon each dish. That part of the order called for work to be done to suit Mr. Gies's particular purpose and use. The plaintiff in error claims, and we think that the evidence fairly supports the claim: "(1) That the decoration with black and luster lines and the monogram is done by a good artist; (2) that this decoration and monogram are to be upon each and every dish; (3) that the design varies in size with the size and kind of the dish, and that there are as many designs as there are sizes and kinds of dishes; (4) that the design is worked out in an exact and artistic manner; (5) that after the design has been

put on the dish, it is again burned with 1,200 degrees of heat to turn the design in and through the glazing; (6) that the cost of putting on the monogram alone is 40 per cent of the price of the dish. In other words, the cost of putting on the monogram and lines is more than 60 per cent of the price of the dish on the other side. An illustration will make this plain. If the price of the dish on the other side of the Atlantic was \$1,—the duty is 60 per cent of the import price,—this would make the price of the dish in New York \$1.60. The cost of putting on the monogram and lines is 40 per cent of the price of the dish here, which would be 40 per cent of \$1.60, or 64 cents. The duty being 60 per cent of the import price, or \$1, is 60 cents

L. 522, 51 Atl. 938. (It is to be observed that the contract in this case was a New York contract, governed by the law of New York; and the court merely assumed to follow the New York decisions on the point, though the result would perhaps have been the same under the Massachusetts rule, which obtains in New Jersey.)

So, in *Rutty v. Consolidated Fruit Jar Co.* 58 Hun, 611, 36 N. Y. S. R. 121, 13 N. Y. Supp. 331, acts of the parties showing that they intended that the glove clasps called for by the contract were to be manufactured by the vendor were regarded sufficient in themselves to take the contract out of the statute of frauds.

And the court in *Meyer Bros. Drug Co. v. McKinney*, 137 App. Div. 541, 121 N. Y. Supp. 845, declares generally that an agreement to manufacture and sell an article is not a contract of sale, but a contract to perform work. The question in this case was not as to the statute of frauds, but as to the measure of damages. Both cases cite and rely on *Parsons v. Loucks*, 48 N. Y. 17, 8 Am. Rep. 517.

But even in New York a contract whereby vendees agree to buy, and vendors, who are not manufacturers, agree to sell, a number of yards of sheeting, is held not a contract to manufacture but to sell cloth, notwithstanding the provision that if the production of the mill for whose account the above contract is sold be curtailed by strikes or by any unavoidable accident, the deliveries shall be proportioned to the production. *Juilliard v. Trokie*, 139 App. Div. 530, 124 N. Y. Supp. 121.

A contract for needles then in existence, to be delivered in envelopes which were in stock, and nothing remaining but to print the purchaser's business style thereon, is for a sale of goods. *Shrimpton & Sons v. Dworsky*, 2 Misc. 123, 21 N. Y. Supp. 461.

As to contracts like the last, to furnish articles already in existence, see cases cited at page 233 of the note in 14 L.R.A.

For crops or grain.

A contract by which one party is to raise
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a crop, and the other is to purchase it at a certain price, is not a contract, of sale. *Talmadge v. Lane*, 17 Misc. 731, 41 N. Y. Supp. 413.

A sale of growing grain, to be delivered in a marketable condition, harvested and threshed, is not taken out of the statute of frauds by an exception as to personal property on which "labor, skill, or money are necessarily to be expended in producing or procuring the same," if no special skill, labor, or workmanship is necessary, but only such as a good husbandman would be compelled to expend in fitting the grain for the market. *Mighell v. Dougherty*, 86 Iowa, 480, 17 L.R.A. 755, 41 Am. St. Rep. 511, 53 N. W. 402.

In *Lewis v. Evans*, 108 Iowa, 296, 79 N. W. 81, the court went a step farther and while conceding that a contract for the sale of a specified number of bushels of corn, to be shelled from a crib selected by the purchaser, corn unfit for shelling to be thrown out, was not within the doctrine of the last case, since unshelled corn is marketable, nevertheless held that the contract was within the statute, and not within the exception, upon the ground that the work to be done was not of a kind to change either the form or character of the thing sold, and therefore did not pertain to its production, but consisted of the rejection of that of poorer quality, and the removal of the corn from the cobs.

So, the fact that corn, the subject of the contract, is to be sorted and sewed in bags, does not take the contract out of the statute, nor bring it within the exception. *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389.

And a contract for the sale of ear corn on the stalk, standing on a certain tract of land, was held in *Johnson v. Holland*, 124 Iowa, 157, 99 N. W. 708, to be within the statute of frauds, in the absence of proof that vendor was not the owner, and thus within the exception.

That work and labor have to be performed in preparing trees for delivery does not bring the case within the section of the Code providing that an agreement to manu-

added to the 64 cents, makes \$1.24. This subtracted from the total of \$1.60, leaves 36 cents cost of the dish in plain white, 64 cents the cost of the work and labor to put on the monogram and lines, and 60 cents the duty. This bears out the statement of the court below, and the circuit judge understood this, for he says in his opinion: 'Of the purchase price involved in this case, a substantial amount is represented by the duty paid by the vendor upon bringing the goods in question into the United States. Even a larger amount is made up of the cost of the orange and black bands and the monogram; the value of the dishes themselves, before being decorated or imported, representing considerably less than half the total purchase price represented by the order.' It also appeared that the monogram could not be removed without showing a scorch underneath, and impairing the value of the dish.

It is the claim of the defendant in error that the judgment of the court below is correct, even if the statute of frauds does not control the case, and it is urged that upon the question of acceptance, the plaintiff in error had no standing in court. The circuit judge, in his opinion upon the motion for a new trial, disposed of that question as follows: "It is stated that there is no evidence of an acceptance of the order on behalf of the claimant. The fact that the order was filled, and nothing re-

mained to be done except deliver the goods, and delivery was prevented through the executrix, completely disposes of that proposition. There can be no question but that there was an acceptance of this order, but there can also be no question, nor is it controverted, that this acceptance was never in writing." We think that the order signed by Mr. Geis may be held to have been a continuing order to the time of his death. It may be well said that the claimant acted on the faith of the order, and that the conduct of the claimant was such that it may be said to be evidence of an acceptance of the order. *Goodspeed v. Wiard Plow Co.* 45 Mich. 322, 7 N. W. 902. Ordinarily, the question of acceptance is one of fact for the jury. It at least would have been a proper question of fact for the jury, resting, as it did, upon the conduct of the parties. If this order by acceptance became a binding contract, it was binding on the estate of Mr. Geis.

The circuit judge disposed of the case upon the statute of frauds, and held that it was a sale of goods and chattels, and within the terms of the statute. The opinion of the circuit judge and the briefs of counsel for the respective parties abound with much learning and many authorities upon the subject. We cannot discuss all of the authorities cited. It is the claim of the plaintiff in error that the statute of frauds does not apply in this case. The interpretation of the

facture a thing from materials furnished by the manufacturer or by another is not within the provisions of the section which embodies the statute of frauds in relation to sales of personal property, since the former section is intended to cover cases where the main thing contracted for is labor, and the material is the incident; not cases where labor is the mere incident to the property sold. *Jones v. Pettigrew* (S. D.) 127 N. W. 538.

For timber products.

A contract to furnish lumber, which, before delivery, has to be cut by the party who agrees to furnish the same, is not a sale. *Bagby v. Walker*, 78 Md. 239, 27 Atl. 1033.

A contract to transport logs, saw some into lumber, and sell same for the party, is not a contract for sale. *Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co.* 132 Wis. 1, 111 N. W. 237.

But an agreement to deliver so many ties, of fixed dimensions and of certain description, at a named price, is a sale. *Ellis v. Denver, L. & G. R. Co.* 7 Colo. App. 350, 43 Pac. 457. The court said that, assuming that it was within the contemplation of the parties that the ties should be prepared from standing timber, or from logs which had been cut, the work to be done was in no sense the personal labor of the contracting party, and so far as it was controlled by the terms of the contract, the

agreement could as well have been fulfilled by the purchase and delivery of the ties specified as by their preparation from logs, or the reduction of standing trees to the form of ties.

Miscellaneous.

A contract for the improvement of realty is not within the statute of frauds, although it involves the furnishing by the contractor of materials in excess of the sum of \$50. *Campbell & Co. v. Mion Bros.* 6 Ga. App. 134, 64 S. E. 571. (The question whether such a contract is within the provisions of the statute of frauds as to contracts in relation to realty is, of course, not within the scope of this note.)

A contract to take down a building standing upon one party's land, and re-erect the frame upon land of another, is not a sale. *Scales v. Wiley*, 68 Vt. 39, 33 Atl. 771.

A contract for the mere removal of earth for a certain money consideration is not within the statute of frauds. But such a contract is within the statute where the main consideration is to get the earth to be removed, to be resold or used in executing other contracts for filling lots, so that the substance of the contract is the earth itself. *Welever v. I. H. Detwiler Co.* 15 Ohio C. C. 680.

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statutory words "contract for the sale of goods," etc., has led to the adoption of various rules in different jurisdictions whereby to distinguish contracts for sale from contracts for manufacture. By what may be termed the Massachusetts rule, an agreement by one to construct an article, especially for or according to the plans of another, whether at an agreed price or not, although the transaction is to result in a sale of the article, is a contract for work and labor, and not within the statute. The prevailing view throughout the United States accords substantially with the Massachusetts rule. According to what may be termed the New York rule, where the substance of the contract is work and labor to be done in converting raw materials into a new and totally different article, although the transaction is to result in a sale, the contract is not within the statute; but if, at the time of the agreement, the article sold substantially exists in its ultimate form, or is to be procured in substantially its ultimate form from others, even though acts remain to be done in finishing it, the agreement is a contract for sale, and within the statute. Certain states have construed the statute by reference to the English cases, or by adopting portions of the Massachusetts or New York rules, without adhering exclusively to either. Among such states are Alabama, Minnesota, New Jersey, Oregon, and Wisconsin. Some jurisdictions adopt the rule that, where the contract primarily contemplates work and labor to be done upon the goods to be sold, so as to make work and labor the essential consideration, the contract is not within the statute. Of these states are Missouri, New Hampshire, South Carolina, Washington, and Wyoming. 20 Cyc. Law & Proc. pp. 241 et seq., and cases cited.

A leading case in Massachusetts is that of *Goddard v. Binney*, 115 Mass. 450, 15 Am. Rep. 112. In that case A agreed to build a buggy for B, and to deliver it at a certain time. B gave directions as to the style and finish of the buggy, and it was built in compliance with his directions, and marked with his monogram. Before the buggy was finished, B called to see it, and in response to an inquiry of A, asking if he might sell the buggy, replied that he would keep it; when the buggy was finished, A notified B, and sent him a bill for it. B returned the bill, and promised "to see" A "about it." The buggy was afterwards destroyed by fire while in A's possession. Held, in a suit by A for the price, that the agreement was not a contract of sale within the statute. We quote at length from that opinion: "Whether an agreement like that described in this report should be con-

sidered as a contract for the sale of goods within the meaning of the statute of frauds, or a contract for labor, services, and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. *Crookshank v. Burrell*, 18 Johns. 58, 9 Am. Dec. 187; *Sewall v. Fitch*, 8 Cow. 215; *Robertson v. Vaughn*, 5 Sandf. 1; *Downs v. Ross*, 23 Wend. 270; *Eichelberger v. M'Cauley*, 5 Harr. & J. 213, 9 Am. Dec. 514. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind, intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in *Lee v. Griffin*, 1 Best. & S. 272, 23 Eng. Rul. Cas. 191, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See *Maberly v. Sheppard*, 10 Bing. 99; *Howe v. Palmer*, 3 Barn. & Ald. 321; *Baldey v. Parker*, 2 Barn. & C. 37; *Atkinson v. Bell*, 8 Barn. & C. 277. In this commonwealth a rule avoiding both of these extremes was established in *Mixer v. Howarth*, 21 Pick. 205, 32 Am. Dec. 256, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely: That a contract for the sale of articles then existing, or such as the vendor, in the ordinary course of his business, manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. *Spencer v. Cone*, 1 Met. 283. 'The distinction,' says Chief Justice Shaw, in *Lamb v. Crafts*, 12 Met. 353, 'we believe is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement.' In *Gardner v. Joy*, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said

he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are *Waterman v. Meigs*, 4 Cush. 497, and *Clark v. Nichols*, 107 Mass. 547. It is true that in 'the infinitely various shades of different contracts' there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Stat [1860] chap. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject-matter. It is proper to say also that the present case is a much stronger one than *Mixer v. Howarth*. In this case the carriage was not built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action."

An instructive case is *Roubicek v. Hadad*, 67 N. J. L. 522, 51 Atl. 938. The contract was a New York contract, and the rule in that state was applied. A defendant, who was doing a retail trade in Atlantic City, New Jersey, ordered from the plaintiffs, who were importers and manufacturers of Bohemian glass novelties, etc., in New York City, an assortment of watch cases and cologne articles, to be thereafter manufactured in Europe, with the words "Atlantic City" thereon, for the special use of defendant's trade; and it was held, following the decisions of the state of New York, that this was not a contract of sale, but for work, labor, and materials, and hence not a contract within the statute. After stating the New York rule, the court said: "It should be stated, however, that the courts of the state of New York have more recently shown a disposition to qualify the rule thus stated to some extent, and to make it conform more closely to the rule as adopted in the later English and American cases. Thus, in *Passaic Mfg. Co. v. Hoffman*, 3 Daly, 495, it is held that if the article to be manufactured to fill the order under the contract was one that was manufactured and supplied to the trade generally, it would be a sale within the statute; but, if it was one specially manufactured for the trade of the person ordering it, then the contract would be one for work and labor, and not within the statute." 30 L.R.A. (N.S.)

ute. So in *Donnell v. Hearn*, 12 Daly, 230, it was held that an agreement to manufacture lamps which are not usually kept in stock, nor usually manufactured for purposes of sale, is not within the statute."

Meincke v. Falk, 55 Wis. 427, 42 Am. Rep. 722, 13 N. W. 545, is an able case, and reviews the authorities, both English and American. It was an action to recover the cost of a certain carriage manufactured by the plaintiff, and alleged to have been ordered by the defendant. It was claimed that the skill, labor, and workmanship of the plaintiff was the special inducement for giving the order. The case holds that while an executory contract for the sale of an article for the price of \$50 or more may be within the statute of frauds, notwithstanding such article does not at the time exist *in solido*, yet, where such contract is to furnish materials and manufacture the article according to specifications furnished, or a model selected, and where without the special contract the thing would never have been manufactured in the particular manner, shape, or condition it was, then the contract is essentially for special skill, labor, or workmanship, and is not within the statute. This case is cited with approval in the late case of *Gross v. Heckert*, 120 Wis. 314, 97 N. W. 952. A recent case in Arkansas is *Moore v. Camden Marble & Granite Works*, 80 Ark. 274, 117 Am. St. Rep. 87, 96 S. W. 1063, 10 A. & E. Ann. Cas. 308. It was there held that a contract by the plaintiff, who operated a marble yard, to make a tombstone according to a design selected by the buyer from the seller's catalogue, and to place a suitable inscription on the tombstone, is not within the statute of frauds, as it is not a contract for the sale of goods, wares, or merchandise, but is one for work and labor to be done, and material to be furnished, though the transaction is to result in a sale of the completed article. *Mead v. Case*, 33 Barb. 202. As we have already shown, the Massachusetts rule has been adopted by a majority of the American courts. We understand that rule, in substance, to be that an agreement by one to construct an article especially for, or according to the plans of, another, whether at an agreed price or not, although the transaction is to result in a sale of the article, is a contract for work and labor, and not within the statute; but, if the article to be made and delivered is of a kind which the producer usually has for sale in the course of his business, it is a contract for sale, and must be in writing.

It must be conceded, we think, that the

articles in this case,—the dishes,—when made according to the order, would not be fit for the general market, but were intended to suit the special use of Mr. Gies in his particular trade. They were not, in their finished condition, suitable to be kept in stock by the claimant, and were plainly unsuitable for the general traffic. The goods would never have been manufactured in the particular manner, shape, style, or condition but for the order. These are some of the considerations which induce us to hold that, under any of the American rules, and especially under the Massachusetts rule, which we are inclined to follow, the learned circuit judge erred in directing a verdict and judgment against the claimant.

The only case decided in this court which is directly in point is that of *Turner v. Mason*, 65 Mich. 662, 32 N. W. 846. It involved a contract for the painting of a portrait, and is an extreme case. In *Underfeef Stoker Co. v. Detroit Salt Co.* 135 Mich. 431, 97 N. W. 959, it was held that an agreement to furnish and install stokers, and connect them with machinery belonging to defendant, and which, when connected, would become a part of the fixtures already on defendant's premises, is not a sale of goods within the statute of frauds, and *Benjamin on Sales*, 7th ed. 109, is quoted. The test as to whether the value of the work exceeds that of the materials used in the execution of the contract is no longer accepted either in English or American jurisdictions. *Lee v. Griffin*, 1 Best & S. 272, 23 Eng. Rul. Cas. 191; *Mead v. Case*, supra.

Plaintiff in error claims, and with some force, that the circuit judge should have left it to the jury to decide whether the contract was essentially a contract for work and labor, or a contract for the sale of chattels, and whether or not the goods existed *in solido* at the time the order was given; that these were clearly questions of fact, to be determined from the evidence by the jury, under proper instructions from the court,—citing 29 Am. & Eng. Enc. Law, 2d ed. p. 967; *Pitkin v. Noyes*, 48 N. H. 294, 97 Am. Dec. 615, 2 Am. Rep. 218; *Puget Sound Machinery Depot v. Rigby*, 13 Wash. 264, 43 Pac. 39; *Schloss v. Josephs*, 98 Minn. 442, 108 N. W. 474. It may be doubted whether the facts were enough in dispute to have required this course.

For the error pointed out, the judgment below is reversed, and a new trial ordered.

Montgomery, Ch. J., and Ostrander, Hooker, and Blair, JJ., concur.

Petition for rehearing denied.
30 L.R.A. (N.S.)

MICHIGAN SUPREME COURT.

W. H. HILL COMPANY, Appt.,
v.
GRAY & WORCESTER.

(— Mich. —, 127 N. W. 803.)

Monopoly — controlling price — proprietary medicine.

A system of contracts by which a manufacturer of medicine under a secret formula, which he puts upon the market under a tradename and in a trade dress, undertakes to control the retail price by fixing the price at which it shall be sold, and the dealers who may secure it, is void as in restraint of trade.

(September 28, 1910.)

APPEAL by complainant from a decree of the Circuit Court for Wayne County in defendant's favor in a suit to restrain the selling by defendant of certain proprietary medicines at less than a stipulated price, to restrain it from mutilating the boxes in which such medicines are put up, and to enjoin it from fraudulently inducing wholesalers thereof to breach their contracts with plaintiff. Affirmed.

The facts are stated in the opinion.

Messrs. Keena, Lightner, & Oxtoby, for appellant:

Complainant's contracts and system of conducting its business are not void as being in restraint of trade at common law.

Grogan v. Chaffee, 156 Cal. 611, 27 L.R.A. (N.S.) 395, 105 Pac. 745; *Bitterman v. Louisville & N. R. Co.* 207 U. S. 205, 52 L. ed. 171, 28 Sup. Ct. Rep. 91, 12 A. & E. Ann. Cas. 693; *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.* [1908] 1 Ch. 335.

Under common-law principles, the owner of property may, in connection with the sale thereof, attach reasonable conditions and limitations as to the use thereof by the vendee, and such limitations connected with the sale of the article do not render the contract void as being in restraint of trade.

Jayne v. Loder, 7 L.R.A. (N.S.) 984, 78 C. C. A. 653, 149 Fed. 21, 9 A. & E. Ann. Cas. 294; *Elliman Sons & Co. v. Carrington & Son* [1901] 2 Ch. 275; *Board of Trade v. Christie, Grain & Stock Co.* 198 U. S. 236,

Note. — As to validity of contract provision seeking to control price at which an article shall be resold, see note to *Grogan v. Chaffee*, 27 L.R.A. (N.S.) 395.

As to legality of combinations or agreements restricting class of persons to whom commodities shall be sold, or from whom they shall be bought, see note to *Cleland v. Anderson*, 5 L.R.A. (N.S.) 136.

49 L. ed. 1031, 25 Sup. Ct. Rep. 637; National Phonograph Co. v. Edison-Bell Consol. Phonograph Co. supra; Re Greene, 52 Fed. 104; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Authors' & Newspapers' Asso. v. O'Gorman Co. 147 Fed. 616; Grogan v. Chaffee, supra; Locker v. American Tobacco Co. 195 N. Y. 565, 88 N. E. 289; Clark v. Frank, 17 Mo. App. 602; Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 62 L.R.A. 922, 66 Am. St. Rep. 296, 51 N. E. 811; Roller v. Ott, 14 Kan. 609; Dunlap's Cable News Co. v. Stone, 27 Abb. N. C. 28, 15 N. Y. Supp. 2; Matthews v. Associated Press, 61 Hun, 199, 15 N. Y. Supp. 887; Brown v. Rounsavell, 78 Ill. 589; Clark v. Crosby, 37 Vt. 188; Olmstead v. Distilling & Cattle-Feeding Co. 77 Fed. 265; Central Shade Roller Co. v. Cushman, 143 Mass. 353, 9 N. E. 629; Blauher v. Williams Co. 36 Misc. 173, 73 N. Y. Supp. 165; Over v. Byram Foundry Co. 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302; Carter-Crume Co. v. Peurrung, 30 C. C. A. 174, 58 U. S. App. 388, 86 Fed. 439.

As the remedy is manufactured by a secret process, it is by its nature a monopoly, and the complainant may fix such terms and conditions upon the sale thereof as it desires.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Gloucester Isinglass & Glue Co. v. Russia Cement Co. 154 Mass. 92, 12 L.R.A. 563, 26 Am. St. Rep. 214, 27 N. E. 1005; Good v. Daland, 121 N. Y. 1, 24 N. E. 15; National Phonograph Co. v. Schlegel, 64 C. C. A. 594, 128 Fed. 733; Murphy v. Christian Press Asso. Pub. Co. 38 App. Div. 426, 56 N. Y. Supp. 597; O. & W. Thum Co. v. Tloczynski, 114 Mich. 149, 38 L.R.A. 200, 68 Am. St. Rep. 469, 72 N. W. 140; Sanitas Nut Food Co. v. Cemer, 134 Mich. 370, 96 N. W. 454; Stewart v. Hook, 118 Ga. 445, 63 L.R.A. 255, 45 S. E. 369; Tabor v. Hoffman, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. 12; Eastman Co. v. Reichenbach, 47 N. Y. S. R. 435, 20 N. Y. Supp. 110; Simmons Hardware Co. v. Wai-bel, 1 S. D. 488, 11 L.R.A. 267, 36 Am. St. Rep. 755, 47 N. W. 814; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; Board of Trade v. Christie Grain & Stock Co. supra; Hunt v. New York Cotton Exchange, 205 U. S. 322, 51 L. ed. 821, 27 Sup. Ct. Rep. 529; Bitterman v. Louisville & N. R. Co. and National Phonograph Co. v. Edison-Bell Consol. Phonograph Co. supra; Quinn v. Leathem [1901] A. C. 495; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Garst v. Charles, 187 Mass. 144, 72 N. 30 L.R.A. (N.S.)

E. 839; Kinner v. Lake Shore & M. S. R. Co. 69 Ohio St. 339, 69 N. E. 614; Schu-bach v. McDonald, 179 Mo. 163, 65 L.R.A. 136, 78 S. W. 1020; American Law Book Co. v. Edward Thompson Co. 41 Misc. 396, 84 N. Y. Supp. 225; Sperry & H. Co. v. Mechanics' Clothing Co. 128 Fed. 800; Sperry & H. Co. v. Brady, 134 Fed. 691; National Teleg. News Co. v. Western Union Teleg. Co. 60 L.R.A. 805, 56 C. C. A. 198, 119 Fed. 294; Sperry & H. Co. v. Temple, 137 Fed. 992; Flaccus v. Smith, 199 Pa. 128, 54 L.R.A. 640, 85 Am. St. Rep. 779, 48 Atl. 894; Wells & R. Co. v. Abraham, 146 Fed. 190, affirmed in 79 C. C. A. 228, 149 Fed. 408; Fonotipia Limited v. Bradley, 171 Fed. 951; Dr. Miles Medical Co. v. Jaynes Drug Co. 149 Fed. 838; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Jayne v. Loder, 7 L.R.A. (N.S.) 984, 78 C. C. A. 653, 149 Fed. 21, 9 A. & E. Ann. Cas. 294; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136.

Complainant's contracts, whereby it desires to secure uniformity in the sale of its preparation, were not adopted for the purpose of restraining trade, but as a means of protecting complainant's property, which consists of its secret formula and the good will which the remedy has acquired with the public. Complainant has only adopted a reasonable means of protecting its property rights.

Hubbard v. Miller, 27 Mich. 15, 15 Am. Rep. 153; Buck v. Coward, 122 Mich. 530, 81 N. W. 328; Fowle v. Park, 131 U. S. 88, 33 L. ed. 67, 9 Sup. Ct. Rep. 658; Re Greene, 52 Fed. 104; National Phonograph Co. v. Edison-Bell Consol. Phonograph Co. supra; Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co. 75 S. C. 378, 9 L.R.A. (N.S.) 501, 55 S. E. 973, 9 A. & E. Ann. Cas. 902; Bancroft v. Union Embossing Co. 72 N. H. 402, 64 L.R.A. 298, 57 Atl. 97; Brett v. Ebel, 29 App. Div. 256, 51 N. Y. Supp. 573; Wood v. Whitehead Bros. 165 N. Y. 545, 59 N. E. 357; Meyer v. Estes, 164 Mass. 457, 32 L.R.A. 283, 41 N. E. 683; Crystal Ice Mfg. Co. v. San Antonio Brewing Asso. 8 Tex. Civ. App. 1, 27 S. W. 210; State v. Central R. Co. 109 Ga. 716, 48 L.R.A. 351, 35 S. E. 37.

Complainant's contracts are not void on the ground that they violate any statute.

E. Bement & Sons v. National Harrow Co. and Murphy v. Christian Press Asso. Pub. Co. supra; Bigelow v. Calumet & H. Min. Co. 167 Fed. 704; Board of Trade v. Christie Grain & Stock Co. 198 U. S. 236, 49 L. ed. 1031, 25 Sup. Ct. Rep. 637; Whitwell v. Continental Tobacco Co. 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; Fonoti-

pia Limited v. Bradley, supra; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91; *Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.* supra; *Southern Fire Brick & Clay Co. v. Garden City Sand Co.* (Lanyon v. Garden City Sand Co.) 223 Ill. 616, 9 L.R.A. (N.S.) 446, 79 N. E. 313, 7 A. & E. Ann. Cas. 50; *Heimbuecher v. Goff*, 119 Ill. App. 373; *Weiboldt v. Standard Fashion Co.* 80 Ill. App. 67; *Over v. Byram Foundry Co.* 37 Ind. App. 452, 117 Am. St. Rep. 327, 77 N. E. 302; *Com. v. Grinstead*, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; *Houck v. Wright*, 77 Miss. 476, 27 So. 616; *Yazoo & M. Valley R. Co. v. Searles*, 85 Miss. 520, 68 L.R.A. 715, 37 So. 939; *Phillips v. Iola Portland Cement Co.* 61 C. C. A. 19, 125 Fed. 593; *Re Greene*, 52 Fed. 104; *Bancroft v. Union Embossing Co.* supra.

Messrs. Chamberlain, May, Denby & Webster, for appellee:

Complainant's contracts are void at common law.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *John D. Park & Sons Co. v. Hartman*, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 90 C. C. A. 579, 164 Fed. 803.

The common law does not grant any monopoly to a patentee or to a discoverer. This right arises solely from an act of Congress.

John D. Park & Sons Co. v. Hartman and *United States v. Addyston Pipe & Steel Co.* supra.

Complainant's contracts are void under the Michigan statutes.

Bingham v. Brands, 119 Mich. 255, 77 N. W. 940; *Hunt v. Riverside Co-op. Club*, 140 Mich. 538, 112 Am. St. Rep. 420, 104 N. W. 40.

Defendant purchased the articles and obtained the whole title. A free right of alienation is an incident to the general right of property in articles which pass from hand to hand in the commerce of the world.

Co. Litt. § 360; *Garst v. Hall & L. Co.* 179 Mass. 588, 55 L.R.A. 631, 61 N. E. 219; *John D. Park & Sons Co. v. Hartman*, supra; *Elliman Sons & Co. v. Carrington & Son* [1901] 2 Ch. 275.

Complainant's system of contracts deals with the manufactured product of its secret process, and not the secret process itself. Hence, the system of contracts, being a restraint upon free competition, falls within the common-law prohibition of restraints of trade.

John D. Park & Sons Co. v. Hartman 30 L.R.A. (N.S.)

and *Dr. Miles Medical Co. v. John D. Park & Sons Co.* supra.

Stone, J., delivered the opinion of the court:

The complainant corporation for some years past has been engaged in the manufacture and sale of proprietary medicines, including specially Hill's Cascara Bromide Quinine, a cold cure in tablet form. It is claimed that this preparation has acquired a reputation with the public as being an efficient remedy, and that the good will of complainant therein is a property right of great value. The tablets are, and since the year 1900 continuously have been, put up by complainant in a distinctive package and dress. These tablets are made under and in pursuance of a secret formula which is the sole property of complainant, and it has the exclusive right to the formula under which the tablets are made, and also to the name of the preparation, and to the peculiar or distinctive dress in which it has been marketed by complainant. It is also claimed that the demand for this article has been created with the consuming public by its merits, and by extensive advertising on the part of complainant. There are upon the market available to the public quantities of other preparations in tablet form, for similar purposes, and many druggists throughout the country put up and sell similar preparations on their own account. The price of complainant's said preparation to the consumer is 25 cents for a small box, and complainant has at all times sold its preparation at fixed prices. The policy of the complainant has been to refuse to sell its preparation to any dealer upon more favorable terms than to others, to discourage the giving of secret rebates upon its goods by the jobber to the retail druggist, and to require the sale of its preparation at the equal price aforesaid to the consuming public. The bill states that, since the spring of 1905, said preparation has been sold only upon what is known as the direct contract plan. Each carton or dozen boxes of said preparation is marked with a distinctive serial number, and each box contained in each carton is similarly identified, and in each carton there is placed a record card which, under said direct contract plan, is returned to complainant by the wholesale druggist upon a sale of said preparation, showing to whom said preparation has been sold. That, as a part of said direct contract plan, complainant enters into a direct retail agency contract with any and all retail druggists who are desirous of selling its preparations. That no discrimination is made by complainant, and that all

druggists are given full opportunity of signing said contract, and of obtaining complainant's preparation at fixed and uniform prices. That, under a contract with the wholesale druggist, said preparation can be sold and delivered only to druggists who have entered into a contract with complainant. Said retail agency contract contains the following provisions: "In consideration whereof said retail dealer hereby agrees not to sell or furnish at any price the said proprietary medicines to wholesale or retail dealers not accredited agents of said company; nor to any other person, firm, or corporation at less than the retail price fixed by the said W. H. Hill Company and printed upon each package." The retail price of Hill's Cascara Bromide Quinine is fixed by said contract at 25 cents a box. The said wholesale agency contract contains the following clause: "In consideration whereof said wholesale dealer covenants and agrees not to furnish or sell any of the proprietary remedies manufactured by the said W. H. Hill Company to any persons, firms, or corporations, to whom said W. H. Hill Company may, at any time, notify said wholesale dealer not to sell any of its medicines."

The bill further states that contracts had been signed by complainant with more than 1,500 retail druggists in the state of Michigan, and that the purpose of said method of selling complainant's preparation was to prevent secret rebates in prices and discrimination on the part of wholesale druggists and others in favor of or against particular retail druggists, and to prevent cutting of prices and demoralization of trade, and the injury which would result therefrom to the reputation and good will of complainant's business, and especially to its said preparation. That the said plan of sale of said preparation has been generally adopted, and, with few exceptions, said wholesale druggists and retail druggists have observed the terms of said contract, and especially that said preparation has been sold at the uniform price of 25 cents a box. That on or about March 1, 1906, the defendant executed with complainant one of said retail agency contracts, and in pursuance thereof defendant secured in the usual course of business, through the wholesale dealer, such quantities of said preparation as it desired, and, as far as complainant was advised, defendant observed the terms of said contract until November, 1907, or thereabouts. That in the month of December, 1907, said defendant notified complainant that it desired to cancel said contract of March 1, 1906, and it was thereupon surrendered by defendant. That on or about January 10, 1908, defend-

ant began advertising in the Detroit papers that it was selling Hill's Cascara Bromide Quinine at 20 cents a box. That defendant did sell complainant's preparation at this price, and in all such sales, before the filing of the bill of complaint, as far as appears, the serial number printed on the side of the small boxes was obliterated.

It is claimed that the defendant, after canceling its contract with complainant, knowing that it could not secure complainant's goods from wholesale dealers who were advised of the cancellation of the contract, did not buy its goods in Detroit, but obtained them in Boston and in New York from wholesale jobbers who undoubtedly sold to it under the impression that it was still under contract with complainant; that the defendant, well knowing the situation and desiring to cover up its fraud in thus securing the goods, obliterated the numbers, as above stated. The complainant asked the court to enjoin defendant from selling its said preparation at a price less than 25 cents a box; also from securing for sale complainant's preparation, by inducing a breach of contract on the part of the wholesale dealers or others under contract relations with complainant; and also from mutilating the boxes containing said preparation. In its answer the defendant denied that the purpose of the method of selling complainant's preparation was as set forth in the bill, but avers that the purpose was to keep the selling price of the article—then an article of common use in the state,—at a fixed and graduated figure in order to create a monopoly, and secure the profits of that monopoly; that the purpose and effect of said method of selling complainant's preparation, and the contracts incident to said method, formed, among the wholesale and retail dealers entering into said contract, a combination or trust to carry out a restriction in trade or commerce, and control the price of said commodity, and prevent free competition among and between said wholesale and retail dealers so combining, and free competition between such wholesale and retail dealers and other independent dealers who may be desirous of competing; and that complainant's method of selling its preparation had in fact resulted in practically a complete monopoly of the trade and commerce in said preparation, and that each of said contracts set forth in complainant's bill was, and the combination of said contracts forming complainant's so-called method was also, illegal and fraudulent as a restraint of trade and commerce, both at common law and under the laws of the state of Michigan, and especially in violation of the provisions of act No. 255, Pub.

Acts 1899, Michigan, and are absolutely void, and not enforceable either in law or equity. The defendant denied all fraudulent conduct, combination, and collusion as alleged by complainant, and averred that, after the cancelation of said contract, it purchased said preparation in the regular and ordinary course of business in the open market. The complainant offered evidence tending to support its bill. Defendant offered no evidence.

The secretary of the complainant testified, among other things, that it had altogether about 25,000 contracts with retail dealers throughout the United States. That was only an estimate.

On cross-examination he testified as follows:

The primary purpose of the contract plan evidenced by the exhibits is to fix the price of Hill's Cascara Bromide Quinine at 25 cents to the consumer, and to fix the price to the wholesaler at the figure fixed in the wholesale contract. If the contract is lived up to, there will be no competition in the sale of Hill's Cascara Bromide Quinine, as far as the price is concerned.

Q. What other competition could there be?

A. Well, the competition of two jobbers in one town getting the business.

Q. How could they get the business? It is the same commodity that they are trying to sell?

A. Yes, sir.

Q. They are not allowed to cut the price?

A. Not at all.

Q. Then how would they get the business without cutting the price?

A. By personal solicitation.

Q. For the same article?

A. For the same article.

Q. At the same price?

A. Yes, sir.

Q. And that is the only competition that you can think of?

A. Yes sir.

Q. As I understand it, the real purpose of this contract system is to keep up the price of Hill's Cascara Bromide Quinine to 25 cents to the consumer?

A. That is the main object.

Q. Under any and all circumstances?

A. Yes. We have about 1,800 of these contracts in the state of Michigan at the present time, and at the time the bill of complaint was filed, we had something over 1,800. This includes not only the druggists, but also, in the smaller communities, general stores, which handle a great many proprietary articles. There are about 1,700 druggists in the state of Michigan, and I would say of that number 1,500 are bound 30 L.R.A.(N.S.)

by the terms of our contract. That insures the company as far as the price goes a practical monopoly on the article.

Q. And the W. H. Hill Company does, as a result of these contracts, have a monopoly in the state of Michigan?

A. If you care to term it so, yes.

Q. Well, what do you term it? Can you tell us any other term to use in connection with it, rather than monopoly?

A. Why, naturally, the Hill Company would have a monopoly of their own goods.

Q. Well, then, that term applies to the situation?

A. Oh, yes. The contract which Gray & Worcester had with our company was canceled by mutual consent on the 4th of December, and, from that time until the present, Gray & Worcester had no contract relations with the company.

Upon the hearing the learned circuit judge held that complainant's contracts were void as being in restraint of trade, and a final decree was entered dismissing the bill of complaint. The complainant has appealed.

In a lengthy brief, and in an able oral argument, complainant's counsel claim that its said contracts are valid and enforceable, and that they are not in restraint of trade at common law, and are not in violation of any statute. Our attention has been called to two recent cases decided by the United States circuit court of appeals for the sixth circuit. The opinions were written by Mr. Justice Lurton, and were concurred in by the other members of the court. *John D. Park & Sons Co. v. Hartman*, 12 L.R.A.(N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 90 C. C. A. 579, 164 Fed. 803. In the first case, Hartman was the manufacturer of the well-known proprietary medicine called "Peruna." This he put upon the market through a system of contracts intended to maintain prices. The system there adopted was so nearly like the one we are here considering that it need not be here described. In fact, complainant's counsel admit that, if said opinions of Mr. Justice Lurton are right, they expect this court to follow them as decisive of the case. An examination of the cases above referred to, and of the cases there cited and reviewed, has been made. The opinion in the Hartman Case deals with every phase of this case. It cites many authorities and covers more than twenty pages, and its length prevents a full quotation. There the bill of complaint was demurred to. The doctrine of the case may be briefly stated as follows:

The exemption from the common-law rule against monopoly and restraint of trade, and the provisions, of the Federal anti-trust act of July 2, 1890, chap. 647, 26 Stat. at L. 209 (U. S. Comp. Stat. 1901, p. 3200), which has been extended to contracts affecting the sale and resale, the use, or the price of articles made under a patent, or productions covered by a copyright, does not extend also to articles made under a secret process or medicine compounded under a private formula. While the owner of the patent or copyright is protected in his exclusive right by the statute which gives him a monopoly, there is no statute which protects one who makes or vends an article which is made by a secret process or private formula, nor, so long as he keeps his process secret, can he bring himself within the principle of the statute which grants a temporary monopoly in consideration of the full publication of the invention or work. The owner of a secret process or formula is not protected by law in his secret, but he may protect himself by contract against its disclosure by one to whom it is communicated in confidence, or restrict its use by such person, and such contracts are not in restraint of trade, because of the character of the property right in the secret, which would be destroyed by its disclosure, and because it is not in itself an article of commerce; but such considerations do not apply to contracts for the sale of the manufactured product, which do not involve a disclosure of the secret, and such contracts are within the rules against restraint of trade. The trading stamp and railroad ticket cases, such as *Sperry & H. Co. v. Mechanics' Clothing Co.* (C. C.) 135 Fed. 833, and *Nashville, C. & St. L. R. Co. v. McConnell* (C. C.) 82 Fed. 65, rest upon the peculiar character of the property rights involved. Neither concerns the buying and selling of articles of general commerce, and both relate to things in the nature of contracts personal in character, and not to things which can ever become the subject of general trade and traffic.

It does not follow because a secret process or formula for a medicine will be protected against betrayal by employees, or those to whom it has been communicated in confidence, that a system of contracts for the control of all sales and subsales of the medicine when once made will be outside of the rules in restraint of trade, simply because it is the product of such secret formula or process. The preparation when ready for the market and the formula are two separate and distinct things. Freedom of traffic in that is consistent with its 30 L.R.A. (N.S.)

value, and does not involve exposure of the formula. None of the reasons which apply to patented articles, copyrighted productions, or to restricted disclosure of the secret formula itself, apply to the product of the formula. The cases directly in point opposed to this view are *nisi prius* decisions, except one in the circuit court of appeals for the third circuit. The fact that an article of commerce is sold under a tradename or in trade dress affords it no exemption from the common-law or statutory rules against restraint of trade.

Where the sole manufacturer of a medicine made in accordance with a secret formula, but unpatented, sold the same only under a system of contracts between himself and wholesalers dealers to whom alone he sold at uniform prices, by which they bound themselves to sell at a certain price, and only to retail dealers designated by him, and between him and such retail dealers, by which, in consideration of being so designated, they bound themselves to sell to consumers only and at a certain price, and such contracts had been entered into, as the manufacturer alleged, by a large majority of the wholesale and retail druggists in the United States, it was held that such system of contracts was *prima facie* illegal, both at common law, as in unreasonable restraint of trade, and under the Federal anti-trust act, as aforesaid, where it affected interstate sales, its purpose and effect being to prevent competition between purchasers of the medicine, both wholesale and retail, and that, in the absence of allegation of facts showing it to be necessary for the protection of the manufacturer's business, a court of equity would not aid in the enforcement of the contracts by granting an injunction to prevent a defendant who was not a party thereto, from buying the medicine from purchasers who were, and reselling the same at any price it might see fit. A single contract, although it be such as, taken alone, may not be within the rule at common law against contracts in restraint of trade, which is one of a great number of identical contracts made between the producer of an unpatented article of commerce and dealers therein, forming a "system" of contracts, which, taken as a whole, materially affects the public interests by stifling competition and trade in said article, is an unreasonable restraint, and within the rule at common law against contracts in restraint of trade, if, from an examination of the workings of the whole system, it appears that the restraint is actually, though not ostensibly, the main result and object of the system of con-

tracts, and not merely ancillary or incidental to another and legitimate object.

In view of the evidence in this case showing the number and scope of the contracts, and the establishment of a "system," the following excerpt from the opinion in the Hartman Case is pertinent: "Assuming that these contracts operate only as a partial, and not a general, restraint,—a question which we do not concede,—and that they are properly to be considered as covenants ancillary to a principal contract, are the restraints thereby imposed necessary to protect the complainant in his retained business, or to protect him from an unjust use of the articles by the purchaser? In the first place, we are to consider that we are not dealing with a single contract. The complainant has made a multitude of them in identical terms, and the opposite parties comprehend, according to his bill, a large majority of the wholesale and retail druggists in the United States. The reasons which might uphold covenants restricting the liberty of a single buyer might prove quite inadequate when there are a multitude of identical agreements. The single covenant might in no way affect the public interest, when a large number might. So, also, the question as to whether the restraint was necessary to the retained business, and therefore ancillary to the principal purpose of the agreement, or whether the restraining covenants were not the principal, rather than the ancillary, matter, would largely depend upon the general sweep and result of a multiplication of identical contracts. The general purpose of each separate contract is the regulation of the prices and sales of the line of preparations made by complainant. A common purpose unites each covenantee to every other, and the 'system' is to be construed as 'one piece,' in which the complainant and every assenting dealer, whether wholesaler or retailer, is a party, and the agreement of each such covenantee to sell only at the prices dictated by the manufacturer constitutes one general scheme. The question here is therefore, one of a totally different character from that which would arise if the question was the more simple one presented by a breach by a single covenantee. In *Continental Wall Paper Co. v. Lewis Voight & Sons Co.* 19 L.R.A.(N.S.) 143, 78 C. C. A. 567, 148 Fed. 939, where was involved a combination in restraint of trade, and where each wholesaler and retailer in the business had executed separate, but identical, contracts with the corporation representing the combined manufacturers, we held that each such separate covenantee was a party to the general scheme for enhancing prices. This was 30 L.R.A.(N.S.)

rested upon the holding that the several agreements constituted one whole. See also observations of Judge Taft in *United States v. Addyston Pipe Co.* 46 L.R.A. 122, 29 C. C. A. 141, 85 Fed. 275, and of Justice Peckham in *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 45, 46, 48 L. ed. 608, 611, 612, 24 Sup. Ct. Rep. 307. The plain effect of the 'system of contracts,' the purposed relation of each to every other being confessed by the very description of the method of carrying on business stated in the bill, is first, to destroy all competition between jobbers or wholesale dealers in selling complainant's preparations. Complainant restrains himself by agreeing to sell at only one price, and to only such persons as will sign one of his system of contracts. The contracting wholesalers and jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again, unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus, all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus, a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about."

Referring to the claim that defendant knew complainant's plan, and that, in selling to defendant, each dealer thereby breached his contract, the following extract from said opinion is appropriate here: "That Park & Sons Company knew complainant's plan of business, and that, in selling to them, every such vendor thereby breached his agreement, is also charged, and, for the purpose of the demurrer, admitted. What is the result? Did the defendants by so purchasing, with knowledge of the restrictions imposed upon sales, thereby enter into contractual relations with complainant? Manifestly not. Did they obtain the absolute title, notwithstanding their knowledge that the sale was in breach of restrictions imposed upon the seller? Undoubtedly. The restrictions imposed by complainant upon sales and resales, if valid at all, are only so because

they constitute personal contracts, upon which an action will lie only against the contracting party. *Garst v. Hall & L. Co.* 179 Mass. 588, 55 L.R.A. 631, 61 N. E. 219. A prime objection to the enforceability of such a system of restraint upon sales and prices is that they offend against the ordinary and usual freedom of traffic in chattels or articles which pass by mere delivery. The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in *Coke on Littleton*, § 300, 'be possessed of a house or any other chattel, real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man.' It is also a general rule of the common law that a contract restricting the use or controlling subsales cannot be annexed to a chattel, so as to follow the article, and obligate the subpurchaser by operation of notice."

The opinion in the *Hartman Case* was written in March, 1907. A writ of certiorari was issued by the Supreme Court of the United States to review the decision. But the writ was dismissed on December 21, 1908, upon motion of petitioner. After the decision of the *Hartman Case*, the drug company sought to evade that decision by means of a consignment contract so called, and that case was before the same court in September, 1908. *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 90 C. C. A. 579, 164 Fed. 803. In this last case, after disposing of the consignment contract, Justice Lurton said: "This case must, after all, turn upon whether there is such identity of character between the statutory monopoly of articles made under valid patent or copyright and articles made according to some private formula, as to exempt them from the principles which apply to contracts which tend to create a monopoly or restrain trade, when the subject is an article not made under a patent or copyright or secret formula. . . . 30 L.R.A. (N.S.)

There are decisions by most respectable courts which hold that articles, such as proprietary medicines, are outside of all rules and statutes which forbid contracts in restraint of trade, because they are made under a secret formula. Some, if not most, of these decisions have been made in cases in which the *Dr. Miles Medical Company* has been a party. They are cited and commented upon by this court in the case of *John D. Park & Sons Co. v. Hartman*, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24. They go upon the conceded fact that a trade secret or medical formula is a monopoly until discovered by fair means, and will be protected against abuse, by one who learns it under a contract limiting its use, or in the confidence of an employment. They do not observe any distinction between the necessary monopoly of the secret itself and the unnecessary monopoly of the articles made according to the secret process, and offered for sale and resale to the consuming public. Neither do those decisions recognize any distinction between the statutory monopoly accorded to articles protected by a patent or copyright and those made under such private formula. . . . In the case referred to, we reached, with unanimity, the conclusion that no legal, economic, or moral reason existed for regarding contracts in respect to the vast and ever-increasing commerce in proprietary medicines, as either outside of the mischief intended to be remedied by the Federal statute against monopolies, or the rules of the common law, or within the statutory protection afforded by the patent and copyright statutes. Any other conclusion would be to sanction a monopoly in that class of goods vastly more far-reaching than the monopoly extended upon high grounds of public policy to the inventor. The statutory monopoly has a limitation of a few years. To obtain it, the inventor must put on record his invention. At the end of the term, the public will be free to employ the discovery without the burden theretofore imposed as a compensation to the inventor. Not so with the monopoly asked for by those who control the enormous proprietary trade of this country. Their monopoly will go on forever, and, if there be merit in their formula, they may not only preserve it through all time, but continue to restrain prices and prevent competition in the sale of the product. It is said that the proprietor of such a secret remedy need never communicate his formula. Concede this. To say that he need never compound his medicine, and that, if he does, he need not sell it unless

he chooses, is undoubtedly true. But as much may be said about any article which the producer may choose to make or not to make, sell or not sell, as he wills. So much pertains inherently to the natural freedom of man in respect to his own actions. But if he elects to make and sell a product according to his formula, a public interest is affected if he be permitted to restrain freedom of trade in the article, when it has once passed under the dominion of a buyer. . . . The mere fact that one article or class of articles is made under an unknown and private formula, and another class is not, is an undeniable fact which may serve for some purposes to differentiate them. But that single fact does not afford an economic reason, and still less a legal reason, for saying that it operates to exempt such articles from rules against unlawful restraints of trade. We need not repeat the argument by which we reached the conclusion that the system of contracts which Hartman sought to enforce through the injunctive power of a court of equity was obnoxious not only to the statute of Congress against restraints and monopolies in respect of interstate trade, but inimical also to the reasonable restraints which at common law may be imposed as ancillary to a principal contract."

In our opinion the arguments and reasoning of the able court that decided these cases meet and answer every position advanced by complainant's counsel in this case. We are content with the reasoning, the citation, and review of authorities, and the conclusion reached by that court, and we think that they are decisive and controlling of every question here involved. We note in passing that there is no evidence in this record showing that the defendant purchased any goods from any person or firm that had been notified not to sell to it. Crittenden & Company, the Eastern Drug Company, and all other dealers in contract relation with complainant, had a right to sell to defendant, whose name was listed, unless notified not to do so, in any view of the case. But we place our decision upon the ground that complainant's system of contracts deals with the manufactured product of its secret process, and not with the process itself, and that the system of contracts, being a restraint upon free competition, falls within the common-law prohibition of restraints of trade, and is void.

Having reached this conclusion, it is unnecessary to decide whether or not such contracts are illegal and void under the statute of this state.

The decree below will be affirmed, with costs.

30 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Resp.,
v.

D. W. CHAMBERLAIN, Appt.

(— Minn. —, 127 N. W. 444.)

Sunday law — "shows" — picture show.

Under the rule of *ejusdem generis*, the term "shows," in § 4981, Rev. Laws 1905, which prohibits certain sports on the Sabbath Day, refers to out-of-door amusements, and a moving picture exhibition, designed to illustrate moral subjects, for the entertainment of the public, when conducted in an orderly and proper manner within a building, is not within the provisions of the statute.

(Brown and O'Brien, JJ., dissent.)

(July 29, 1910.)

APPEAL by defendant from a judgment of the Municipal Court of Mankato, convicting him of Sabbath breaking. Reversed.

The facts are stated in the opinion.

Mr. Charles J. Traxler, for appellant:

The statute prohibits serious interruption of religious observances only.

Holden v. O'Brien, 86 Minn. 297, 90 N. W. 531; Ward v. Ward, 75 Minn. 273, 77 N. W. 965.

It was not the purpose of the law to enforce religious observances.

State v. Petit, 74 Minn. 376, 77 N. W. 225; State ex rel. Hoffman v. Justus, 91 Minn. 447, 64 L.R.A. 510, 103 Am. St. Rep. 521, 98 N. W. 325, 1 A. & E. Ann. Cas. 91.

The statute relates to outdoor sports and things in the open only.

People v. Hemleb, 127 App. Div. 356, 111 N. Y. Supp. 690; People ex rel. Valensi v. Lynch, 108 N. Y. Supp. 209; People ex rel. Valensi v. Flynn, 108 N. Y. Supp. 208; Keith & Proctor Amusement Co. v. Bingham, 108 N. Y. Supp. 205; Eden Musee American Co. v. Bingham, 58 Misc. 644, 108 N. Y. Supp. 200; People v. Finn, 57 Misc. 659, 110 N. Y. Supp. 22; William Fox Amusement Co. v. McClellan, 62 Misc. 100, 114 N. Y. Supp. 594.

Mr. C. E. Phillips also for appellant.

Messrs. George T. Simpson, Attorney General, and Walter A. Plymat, for the State:

The term "shows" must be construed to include exhibitions of the kind in suit.

Headnote by LEWIS, J.

Note. — As to amusements prohibited by Sunday law, see note to Ex parte Hull, post, 465.

People v. Hemleb, 127 App. Div. 356, 111 N. Y. Supp. 690; Edwards v. McClellan, 118 N. Y. Supp. 181; Economopoulos v. Bingham, 109 N. Y. Supp. 728; Moore v. Owen, 58 Misc. 332, 109 N. Y. Supp. 585.

Lewis, J., delivered the opinion of the court:

A criminal complaint was made against appellant in the municipal court in the city of Mankato, charging him with the crime of Sabbath breaking, committed as follows: "That at the city of Mankato, Blue Earth county, Minnesota, on the 20th day of February, 1910, the same being the first day of the week, Sunday, D. W. Chamberlain did run and operate a public show for hire, and did admit the public thereto generally for an admission fee of 10 cents each, against the peace and dignity of the state of Minnesota, and contrary to the statute in such case made and provided." It was shown by the uncontradicted evidence at the trial that appellant was the manager of the Unique Theater, located and facing on one of the streets of the city; that from 7 until 10 o'clock Sunday evening, February 20, 1910, appellant conducted a moving picture show in the theater by means of a canvas or screen erected upon the stage and visible to the audience. On the occasion in question there were from 150 to 200 people present. The exhibition was accompanied with piano music, and consisted of a series of pictures, representing different subjects. The pictures were entirely moral, and the people attending were thoroughly respectable and orderly. The theater entrance was on the street, but there were no signs visible except the name over the door, "Unique Theater." Tickets were sold in the theater vestibule, but there was no calling out or announcing the show or the sale of tickets.

The trial court charged the jury as follows: "If you find, from all the evidence in the case, fairly and carefully considered by you, that on the 20th day of February, 1910, the defendant conducted a public exhibition by operating a moving picture show within a building on the public street, in the city of Mankato, by means of pictures thrown and exhibited upon a canvas or curtain, and that the public generally were invited and admitted without discrimination to such exhibition, and that an admission fee was charged therefor, and if you so find as to each and all of these things beyond a reasonable doubt, as the court has charged you, you will then find the defendant guilty, as charged in the complaint. If you do not so find beyond a reasonable doubt, as the court has charged you, you will then find the defendant not guilty."

30 L.R.A. (N.S.)

The single question here submitted is whether the moving picture show, as conducted by appellant, was prohibited by the provisions of §§ 4980 and 4981, Rev. Laws 1905. The present statute is a condensation of the several sections on the same subject found in Gen. Stat. 1894. Section 4980 reads: "The law prohibits the doing on the first day of the week of the certain acts in § 4981 specified, which are serious interruptions of the repose and religious liberty of the community, and the doing of any of said acts on that day shall constitute Sabbath breaking. . . ." That part of § 4981 necessary to set out here reads: "All hunting, shooting, fishing, playing, horse racing, gaming, and other public sports, exercises, and shows."

Does the word "shows," as used in § 4981, include a moving picture show, or similar entertainment, when conducted in a building where the only feature of publicity consists in the fact that the public is invited to attend and enter the building by means of an entrance opening on a public street? Hunting, shooting, fishing, playing, horse racing, and gaming undoubtedly refer to outdoor life. The words, "other public sports, exercises, and shows," by reason of their association with what precedes them, refer to the same character of sports or exercises; viz., those conducted out of doors. This is the proper application of the rule *ejusdem generis*: General words, following an enumeration of particulars, are limited by reference to the preceding particular enumeration, and are to be construed as including only all other like things. This part of the statute was taken from the New York Code, and the appellate division of the supreme court of that state has held that the term "shows" applies only to out-of-doors sports. People v. Hemleb, 127 App. Div. 356, 111 N. Y. Supp. 690. To the same effect: Edwards v. McClellan (Sup.) 118 N. Y. Supp. 181; William Fox Amusement Co. v. McClellan, 62 Misc. 100, 114 N. Y. Supp. 594; People v. Finn, 57 Misc. 659, 110 N. Y. Supp. 22; Keith & Proctor Amusement Co. v. Bingham (Sup.) 108 N. Y. Supp. 205; Eden Musee American Co. v. Bingham, 53 Misc. 644, 108 N. Y. Supp. 200.

It has never been the legislative policy in this state to strictly enforce the cessation of all kinds of works and amusements on the Sabbath Day. The leading principle all through the different enactments upon the subject is to prevent any serious interruption of the repose and religious liberty of the community. This means that it has not been the intention to interfere with the freedom of the public in the pursuit of amusement and relaxation on the Sabbath Day, when it does not seriously interfere

with the rights of other members of the community, who desire a quiet and uninterrupted observance of the day. The policy of the legislature is referred to in the case of *Ward v. Ward*, 75 Minn. 269, 77 N. Y. 965, when that section of the statute was under consideration which prohibits all manner of public selling on Sunday, and it was held that it was the intention to prevent only public selling, and not a private or casual sale, such as did not tend to produce a violation of public order and the solemnity of the day. To the same effect, see *Holden v. O'Brien*, 86 Minn. 297, 90 N. W. 531, where, for the same reason, it was held that the statute did not prohibit the casual execution and delivery of promissory notes or contracts on the Sabbath Day. We have reached the conclusion that the exhibition, as conducted by appellant, is not within the provisions of the statute.

But it should be understood that our decision is based on the evidence of this particular case, and it should not be understood that moving picture shows and similar entertainments may not be abated under other provisions of the law, when unwholesome in character or when improperly conducted.

Reversed.

Brown, J., dissenting:

I dissent. The decision in this case opens the door to all Sunday theaters, on condition that their exhibitions and performances be of a moral nature and orderly conducted. The statutes do not so read. They contain no such reservation, but, on the contrary, expressly prohibit on the Sabbath Day, without qualification, all public shows and exhibitions, regardless of their character or the manner in which they are conducted. Authorities cited from New York are not in point. In that state there are two statutes upon the subject,—one applying to outdoor sports, shows, and exhibitions, and the other to indoor theatrical performances of a certain character, which are expressly enumerated in the statute. A moving picture show is not among the enumerated indoor shows, and the courts of that state have held, and properly so, that the statutes prohibiting outdoor shows do not apply to a show or exhibition of that kind. So that in New York there is no statute prohibiting a moving picture show. In this state we have but one statute on the subject, which, in my judgment, properly construed, applies both to indoor and outdoor shows. It is absurd to impute to the legislature a solemn purpose to prohibit Sunday outdoor exercises, and to protect and sanction the cheap indoor shows which are always, whatever their character or tone, de-

moralizing to the youth who attend them. The conclusion reached by the court in this case seems a severe strain upon the rules of statutory construction.

O'Brien, J., concurs with Brown, J.

NEBRASKA SUPREME COURT.

CHARLES B. SELDOMRIDGE

v.

FARMERS' & MERCHANTS' BANK et al., Appts.

(— Neb. —, 127 N. W. 871.)

Sale — title — renunciation by vendee.

1. If a vendor, after selling a quantity of corn so as to pass title thereto without actual delivery, resells it to another person, and executes to each vendee a bill of sale for one half of the grain, the first vendee, by accepting the bill of sale and waiving his right to one half of the grain first sold to him, does not renounce his title to the other half thereof.

Same — grain from mass — necessity for separation.

2. Where a specified quantity of grain, identical in kind and uniform in value, is sold from a mass, a separation is not necessary to vest title, where the intention of the parties that title shall pass is clearly manifested.

Same — without delivery — title — findings — conclusiveness.

3. Whether title to personal property sold, but not actually delivered, passes to the vendee, depends upon the intent of the parties to the transaction, and the question of intent is rather one of fact than of law, so that the finding of the trial court upon that issue in an action at law will not be set aside by this court, unless against the clear weight of the evidence.

Same — rescission — stopping payment on check for purchase price.

4. An order given by a vendee to his banker not to pay a check, drawn and delivered by the former in payment for chattels sold to him, will not in itself work a rescission of the contract of sale.

(September 26, 1910.)

APPEAL by defendants from a judgment of the District Court for Kearney County in plaintiff's favor in an action of

Headnotes by ROOT, J.

Note.—See note to *Barber v. Andrews*, 26 L.R.A.(N.S.) 1, as to sufficiency of selection or designation of goods sold out of a larger lot; and particularly pages 57 et seq., as to necessity of dividing bulk consisting of indistinguishable units and homogeneous masses.

replevin to recover possession of certain corn. Affirmed.

The facts are stated in the opinion.

Mr. C. A. Chappell, with Mr. J. L. McPheely, for appellants:

The contract of sale between Merryman and the plaintiff was executory, and the title to the corn did not pass to the latter until the delivery of the same; more especially in view of the fact that, prior to the time of the levy, the plaintiff had refused to pay for same, and still refused at the time the levy was made, and therefore repudiated and rescinded the contract.

9 Cyc. Law & Proc. p. 244; 21 Am. & Eng. Enc. Law, pp. 476, 478, 481; Bloyd v. Pollock, 27 W. Va. 75; Fry v. Lucas, 29 Pa. 356; Taylor v. Cole, 111 Mass. 363; Odell v. Boston & M. R. Co. 109 Mass. 50.

Where the contract is executory, that is, where the property in the goods has not been transferred to the buyer, the breach of the contract by the latter may consist of a refusal to accept or a refusal to pay.

21 Am. & Eng. Enc. Law, p. 576.

Messrs. Adams & Adams for appellee.

Root, J., delivered the opinion of the court:

This is an action in replevin to recover a quantity of corn held by the defendant sheriff by virtue of a levy of a writ of attachment. The plaintiff prevailed, and the defendants appeal.

The evidence is meager, but the record discloses that February 28, 1908, Clyde Merryman owned 2,000 bushels of shelled corn, contained in several bins in his granary. Upon that date Merryman sold to the plaintiff 2,000 bushels of corn, received a check for approximately one half of the purchase price, and agreed to deliver the grain at the plaintiff's elevator in Axtell. The same day Merryman sold in like manner 2,000 bushels of corn to the Hayes-Eames Elevator Company, and received a check for half of the purchase price. Merryman then prepared two bills of sale, purporting to convey to each of his vendees "one thousand and bushels of shelled corn now located in the N. W. $\frac{1}{4}$ of section number 28, township 7, range number 16, Kearney county, Nebraska." These documents were given by Merryman to his brother-in-law, a Mr. Wells, with directions to deliver the corn to the respective vendees. Merryman negotiated the checks, paid Wells for delivering the corn, and then absconded. In the forenoon of March 2d, Wells filed the bills of sale with the county clerk, informed the vendees of the transaction, and delivered 348 bushels of the corn to the plaintiff. The corn was accepted, but the plaintiff directed his banker not to pay said check. Subse-

quently, but before the check was presented, the order was rescinded, and the check thereafter paid upon presentation. At 7 o'clock P. M. on March 2d, the Farmers' & Merchants' Bank of Axtell caused an attachment to be levied on all of the undelivered corn. The parties waived a jury and tried the case to the district court. The litigants agree that, if title to the 652 bushels of corn vested in the plaintiff before the levy, the judgment of the district court should be affirmed. The litigants stipulated in open court during the trial of the case "that the corn attached is the same corn that had been purchased, except 348 bushels that had been delivered prior to the attachment." This stipulation removes from the case any question concerning the appropriation of the corn to the contract. If Merryman sold this corn to the plaintiff, and received his pay therefor, the sale was perfect, and title vested in the plaintiff. Manual delivery is not always a condition precedent to the transfer of title to personal property bargained and sold. Baker v. McDonald, 74 Neb. 595, 598, 1 L.R.A. (N.S.) 474, 104 N. W. 923. The chattels should be identified, and, if they form part of a larger mass, should generally be segregated therefrom. In the case at bar, the plaintiff purchased all of Merryman's corn, so that segregation was not necessary for the purposes of identification or appropriation. The fact that Merryman twice sold the identical corn is no concern of the attaching creditor. By acquiescing in Merryman's resale of one half of that corn, the plaintiff did not relinquish his title to the remaining fraction, but from thence forward the vendees became tenants in common of the mass of grain. If it is conceded that Merryman's conduct precludes a finding that he intended to transfer to either vendee title to the 2,000 bushels of grain, it becomes material to ascertain whether the parties intended that title to 1,000 bushels of corn should vest in each vendee. If the acts and declarations of a vendor and a vendee clearly evince an intention to make an immediate transfer of title to a quantity of grain sold from a larger mass of like quality and kind, the title will pass, although there may have been no separation of the quantity sold. Kimberly v. Patchin, 19 N. Y. 330, 75 Am. Dec. 334; Hurff v. Hires, 40 N. J. L. 581, 29 Am. Rep. 282; Horr v. Barker, 11 Cal. 393, 70 Am. Dec. 791; Winslow v. Leonard, 24 Pa. 14, 62 Am. Dec. 354.

Since the intent of the parties must control in determining whether a present vested title to the corn passed to the vendee, the trier of fact, in passing upon that issue, must examine the conduct of the parties in

the light of the surrounding circumstances. In the instant case, the corn, so far as we are advised, was of uniform quality and value. It is plain that Merryman did not intend to retain title to the grain, because he twice sold it, then executed a bill of sale to the plaintiff for one half of the corn, applied the plaintiff's money to the payment of the thousand bushels, and finally absconded. Since Merryman did not intend to retain title to any of this corn, but did everything possible short of delivering actual possession thereof to the plaintiff to vest that title in his vendee, we are of opinion that the court was justified in finding the title did in fact pass to the plaintiff. That finding should not be ignored unless it is clearly against the weight of the evidence. *Kneeland v. Renner*, 2 Kan. App. 451, 43 Pac. 95; *Graff v. Fitch*, 58 Ill. 373, 11 Am. Rep. 85; *Towne v. Davis*, 66 N. H. 396, 22 Atl. 450. Upon the entire record we are of opinion that the evidence sustains the finding of the trial court.

The defendants argue, however, that the plaintiff, by stopping payment of his check, rescinded his contract; but we are of opinion that no such consequences followed his order. The check was accepted by Merryman in payment for the grain. If the check had not been honored, doubtless the vendor could have rescinded the contract, but it was paid, and Merryman makes no complaint that, intermediate its execution and payment, the plaintiff stopped payment thereof.

Upon the entire record, we find no error prejudicial to the defendants, and the judgment of the District Court is affirmed.

ARKANSAS SUPREME COURT.

TRIGGER BREWER, Appt.,

v.

STATE OF ARKANSAS.

(93 Ark. 479, 125 S. W. 127.)

Larceny — lost property — concealment by finder.

A finder is not guilty of larceny because he knows or ascertains who the owner of the property is, and either denies having it or fails voluntarily to return it.

(January 31, 1910.)

A PPEAL by defendant from a judgment of the Circuit Court for Independence County convicting him of larceny. Reversed.

The facts are stated in the opinion.

Mr. S. A. Moore for appellant.

Messrs. Hal L. Norwood, Attorney General, and William H. Rector for the State. 30 L.R.A. (N.S.)

McCulloch, Ch. J., delivered the opinion of the court:

The grand jury of Jackson county returned an indictment against defendant, Trigger Brewer, upon two counts, one charging him with the crime of grand larceny in stealing \$40 in money, the property of J. B. Pritchard, and the other charging him with the crime of receiving stolen property. On a change of venue to Independence county, he was tried and convicted of the crime of grand larceny, and appeals to this court.

The prosecuting witness testified, in substance, that he was a traveling salesman, and that one evening about 6:30 o'clock, at Newport, in Jackson county, he entered the coach of a waiting railroad train standing at the station, after having purchased a ticket which he placed in a pocketbook he calls his "credential book," and which also contained his money, and that the book was in the hip pocket of his trousers; that he sat down beside a woman and conversed with her awhile, when defendant came in and talked to the woman a few minutes, and then walked out of the train; that he saw a credential book in the defendant's

Note. — Larceny of property found.

This question was treated in the note to *State v. Hayes*, 37 L.R.A. 116, to which the present note is supplementary.

A narrow, but distinctive, phase of this question, is involved in *People v. Hoban*, 22 L.R.A. (N.S.) 1132, and the note thereto appended, on the question of larceny by appropriation of articles of value concealed in goods purchased or in waste matter.

On the question of larceny of money or property delivered by mistake, see the note in 52 L.R.A. 136.

One who has taken, and is in possession of, a stray animal, has such a property interest in it that the taking of it from him may be larceny. So, ownership may be laid in him in an indictment against another for the theft thereof. *Maxwell v. Territory*, 10 Ariz. 1, 85 Pac. 116.

One with whose wife money is left by the finder, on her suggestion that it may be his, is guilty of larceny if he wrongfully retains it under the claim that he is the true owner. *Williams v. State*, 165 Ind. 472, 2 L.R.A. (N.S.) 248, 75 N. E. 875.

It was held in *State v. Levine*, 79 Conn. 714, 10 L.R.A. (N.S.) 286, 66 Atl. 529, that one to whom a lost check was handed for information as to the owner, and who, after learning the owner's name, by means of false representations, procured the instrument to be left with him, and subsequently appropriated it, was guilty of larceny. On another theory of the case, it was held that if the defendant accepted the custody of the check to deliver it to its true owner, and subsequently appropriated it to his own use with felonious intent, he was guilty of

hand as the latter left the train, but thought nothing of it until he missed his own book a few minutes later; that, after discovering the loss of his book, he went out to look for defendant, but did not find him until he came back in the coach; that he then walked up to defendant and demanded the book; that the latter denied having it, and that he then put his hand in defendant's pocket and drew out the book, with the money still in it. The book contained \$40 in money. There was other evidence corroborating the testimony of this witness in each material feature.

Appellant testified that he was to some extent intoxicated that day, and found the pocketbook on the ground near the train, and went into the coach with it in his hand,

and so held it while he was talking to Pritchard and the woman, and that, after he left the train, he kept the book in his hand while he made a trip over to a restaurant. He testified that when he went back into the coach, he had the pocketbook in his vest pocket, and when Pritchard took it out of his pocket, said said, "This is mine," he replied, "If it is, you could have had it before now if you had said anything about it." Other witnesses testified that they saw defendant pick up the pocketbook off the ground as he started to get on the train, and that he spoke of it at the time. One witness said he remarked, "Someone has lost this book," and another that he said, "Look here, what I have found," and another that

larceny. The court said that the taking of the check by the defendant in the first instance was a lawful and innocent act, but that the felonious intent came when, having been informed of the name of the payee, and thus having notice of a fact which might naturally lead to the discovery of the owner, he changed his attitude in such a way as to amount to a new taking, and appropriated it to his own use.

For another case of larceny of property taken from the finder, see, *infra*, *State v. Dredgen*, 6 Penn. (Del.) 446, 73 Atl. 1042. See also the following cases, *infra*, under "Estrays:" *Baxter v. State*, *Landreth v. State*, and *Palmer v. State*.

By finder.

—generally.

Mere possession of lost property is not *prima evidence* of guilt; but guilt may be inferred from the possession if no reasonable explanation is given, and it is for the jury to determine, under all the circumstances, whether such inference should be drawn. *State v. Hoshaw*, 89 Minn. 307, 94 N. W. 873; *Palmer v. State*, 70 Neb. 130, 97 N. W. 235.

But the finder of lost property does not commit larceny by the simple act of finding and taking it into his possession. *State v. Stevens*, 2 Penn. (Del.) 486, 49 Atl. 174, 14 Am. Crim. Rep. 401.

The mere fact that a person converts to his own use goods found by him does not, as a matter of law, make him guilty of theft. The question of guilt must be determined by the jury from the attending circumstances, such as the description of goods found, the place of finding, the time elapsing between the finding and the conversion, the probability of the owner being discovered, the manner of dealing with the goods, and the effort or want of effort to discover the owner. *R. v. Slavin*, 35 N. B. 388.

The foregoing statements, it seems, are applicable where the alleged conversion is effected by the pledge of the found articles for a temporary loan. *Ibid*. 30 L.R.A. (N.S.)

To constitute the offense, the accused must have had a felonious intent at the time of the finding. *State v. Stevens*, *supra*; *State v. Briscoe*, 3 Penn. (Del.) 7, 50 Atl. 271.

A purse accidentally left in a carriage returned to a livery stable by the hirer is not lost, so as to require the application of the foregoing rule in a prosecution for theft against one who found the purse upon taking immediate charge of the carriage upon its return. *Moxie v. State*, 54 Tex. Crim. Rep. 529, 114 S. W. 375.

In the opinion in *State v. Hinton* (Or.) 109 Pac. 24, involving a stolen check, there is an undercurrent leading to the nice distinction between the actual finding in the first instance, when the article is taken up, it may be through curiosity, and the taking of custody when the nature of the article has been ascertained. This is met by the nice declaration that the fraudulent intent must have been formed when the finder took possession.

But if the intent to steal does not exist at the time of taking possession, no subsequent formation of such an intent will render the original taking theft. *Key v. State*, 37 Tex. Crim. Rep. 511, 40 S. W. 296; *Warren v. State* (Tex. Crim. Rep.) 106 S. W. 382; *Crouch v. State*, 52 Tex. Crim. Rep. 460, 107 S. W. 859; *Worthington v. State*, 53 Tex. Crim. Rep. 178, 109 S. W. 187; *Rochell v. State*, 55 Tex. Crim. Rep. 152, 115 S. W. 583.

So, it is error to charge the jury that if the owner of a lost pocketbook gave a truthful description thereof to the finder, and the latter refused to give it to her, at that moment his previous rightful possession became larceny. *People v. Hendrickson*, 18 App. Div. 404, 46 N. Y. Supp. 402.

One renting a store and finding two barber bottles in a quantity of rubbish therein, which he washed and placed on a shelf and left there for several months, did not, by thereafter selling them, although he subsequently denied the sale, commit the misdemeanor of theft, to constitute which the statute required that the accused must have intended fraudulently to apply them

he said, "I have found a book. Do you know who it belongs to?"

The court gave the following, among other, instructions, over defendant's objections: "(2) If you believe from the evidence that the defendant found the pocketbook, and either knew or found out to whom it belonged, and on demand of the owner denied having it, or did not voluntarily return it to him, he would be guilty of larceny, and you should so find." Defendant asked the following instruction, which the court, over his objection, modified by adding the words in italics: "(8) If you believe from the evidence that the defendant found the pocketbook and contents, and within reasonable time thereafter made inquiry as to the ownership thereof, you should find the defendant not guilty as charged, *unless you further find that he knew or soon learned who the owner was, and denied having it.*" Mr. Bishop, in discussing the offense of larceny in the finding and misappropriation of lost property, says: "Unless, therefore,

there is a larceny in the original taking, there can be none committed afterward. . . . The law gives to the finder a title in lost goods, but not full and unconditional; and so, if he takes them with the intent to steal them, he commits a larceny, unless this consequence is prevented by the operation of the principles now to be mentioned. A man, knowing the owner of goods, cannot lawfully pick them up without returning them to him; but a man, not knowing the owner, can. The doctrine, therefore, is that if, when one takes goods into his hands, he sees about them any marks, or otherwise learns any facts, by which he knows who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny; otherwise, not. Some of the cases say if he knows who the owner is, or has the means of ascertaining; but the better form of the doctrine is as just set down, because every man by advertising and inquiring can find the owner if he is to be found, while the guilt of a defendant

to his own use at the time they came into his possession. *Siemers v. State* (Tex. Crim. Rep.) 55 S. W. 334.

So, a conviction for the theft of a halter rein is not supported by proof that the finder thereof sold it to a third person, saying that he had found it, and would refund the money paid if anyone should claim it, which he subsequently did. *Whitsel v. State*, 49 Tex. Crim. Rep. 42, 90 S. W. 505.

The Minnesota statute makes one guilty of larceny, who finds property under circumstances which give him knowledge or means of inquiry as to the true owner, if he appropriates it to his own use without having first made every reasonable effort to find the true owner. In disposing of a case in which this statute was invoked, the Minnesota court held that both the belief that the owner could be found and the intent to deprive him of his property at the time of the finding must exist to constitute the offense. *State v. Hoshaw*, supra.

If the finder, from any marks upon the article, knows who the owner is, or if, from the circumstances surrounding the transaction, the owner can be reasonably ascertained, then the fraudulent conversion to the finder's use is sufficient evidence to justify the jury in finding a felonious intent. *State v. Stevens*, and *State v. Briscoe*, supra.

And the same rule was invoked where the defendant caused his son, the actual finder of the money, to deliver it into his own custody. *State v. Dredde*, 6 Penn. (Del.) 446, 73 Atl. 1042.

That a check bears the name of the payee would seem to show that the finder thereof knew, or had reasonable means of knowing, the owner. *State v. Hinton*, supra.

Where the evidence was uncontradicted that the accused found the property, that 30 L.R.A. (N.S.)

he knew it to be the property of the rightful owner, and that he retained it with the expressed purpose of converting it to his own use, the court refused to set aside his conviction on the charge of simple larceny. *Flemister v. State*, 121 Ga. 146, 48 S. E. 910.

The omission to use the ordinary and well-known means of discovering the owner of goods lost raises a presumption of fraudulent intention more or less strong, against the finder. *State v. Briscoe*, supra.

A conviction for the theft of a watch was upheld in *Rochell v. State*, 55 Tex. Crim. Rep. 152, 115 S. W. 583, where it appeared that the accused found it, but made no effort to ascertain the owner; that he wore it concealed until he moved to another town, where he wore it in the ordinary way; that when its return was demanded by the sheriff, the accused refused to surrender it, but stated that he would hold it for the owner, although persons who were his relatives testified that he stated on the day he came into possession that he had found it.

—of estrays.

It seems that an unbranded animal over one year of age, running at large, was not, at one time at least, the subject of larceny in Indian territory. *Dansby v. United States*, 2 Ind. Terr. 456, 51 S. W. 1083.

But so far as the necessity for a contemporaneous felonious intent is concerned, the rule regarding the theft of estrays seems to be the same as that relative to the finding of other kinds of property.

It was held in *Gosler v. State* (Tex. Crim. Rep.) 56 S. W. 51, that to constitute theft of an estray, the accused must have had the fraudulent intent at the time he took up the animal.

must attach at the moment, if ever, without depending on an if." 2 Bishop, New Crim. Law, § 882. Prof. Wharton states the law on the subject thus: "When goods are lost,—i. e., when the owner has no trace of them, and they show no trace of the owner,—the finder has such a special property in them that, according to the now prevalent view, as will presently be more fully seen, even though he feloniously intends to appropriate them when he finds them, it is not larceny. In other words, the mere subjective side is insufficient without the objective. To constitute larceny, there must be not only the intent to steal, but the thing taken must give on its face grounds from which it may be reasonably believed that the owner can be found. If there be no indications of ownership, then the owner may be inferred to have abandoned the goods, and consequently to consent to the finder taking them. In this way we can reconcile the position now before us with the position that when felonious intent and trespass are united in taking a thing, there is larceny. There is not trespass in taking a thing abandoned." 1 Wharton, Crim. Law, 10th ed. § 901. In the note to § 909, the author states the rule to be, as in other larceny cases, that there must be a felonious intent at the time of finding, and cites many cases in support. The supreme judicial court of Massachusetts, in an opinion by Judge Gray, then chief justice, said: "The finder of lost goods may lawfully take them into his possession, and, if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. But if, at the time of first taking them into his possession, he has a felonious intent to

appropriate them to his own use, and to deprive the owner of them, and then knows, or has the reasonable means of knowing or ascertaining, by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny." Com. v. Titus, 116 Mass. 42, 17 Am. Rep. 138, 1 Am. Crim. Rep. 416.

An interesting and instructive discussion on this subject may be found in the case of *Griggs v. State*, 58 Ala. 425, 29 Am. Rep. 762, where all the authorities are reviewed. Mr. Rapalje, in his work on Larceny and Kindred Offenses (§ 52), adopts the language of the Massachusetts court quoted above, with an addition which reaches to the precise point in the present case: "The finder of lost goods may lawfully take them into his possession, and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. Larceny cannot be of lost goods by their finder if his original taking was without a felonious intent, though followed by a felonious asportation; and a charge to the jury that if the defendant, when he found the property, knew or had the means of knowing the owner, and did not restore it to him, but converted it to his own use, he was guilty of larceny, is error, for the reason that if defendant, when he found the property, meant to act honestly with regard to it, no subsequent felonious intention could make him guilty of larceny." So, the rule clearly deducible from the authorities is that if the finder of lost articles neither knows nor has any immediate means of ascertaining the owner, and appropriates them to his own use, he is not guilty of larceny, whatever may be

So, one who finds an estray running with his cattle is guilty of larceny if he takes it, knowing that it is not his own, with the present intent of wrongfully converting it to his own use; but if he finds it and cares for it without the present intent wrongfully to convert it to his own use, he is not guilty of larceny, although he afterwards converts it to his own use with intent to deprive the owner thereof. *Crockford v. State*, 73 Neb. 1, 119 Am. St. Rep. 876, 102 N. W. 70.

The contemporaneous intent necessary to support a charge of theft against one who took up an estray is not shown by proof that he claimed to have bought it; but that for a time after he took it up he used it openly, claiming it as an estray; and that he took it with him when he moved to another country, and subsequently returned with it. *Gosler v. State*, supra.

One who appropriates an estray after taking, in bad faith, a simulated bill of sale from one who, he knows, is not the owner, 30 L.R.A. (N.S.)

is guilty of theft. *Baxter v. State* (Tex. Crim. Rep.) 43 S. W. 87.

The *corpus delicti* of theft has been held to be sufficiently established by proof that the accused took up an estray, stating that he did so upon the authority of one who asserted that it belonged to a relative of his who was abroad, that the accused subsequently stated that he had bought it, and that he thereafter took it to another country and traded it. *Landreth v. State*, 41 Tex. Crim. Rep. 239, 70 S. W. 758.

An estray running with cattle belonging to the lessee of a range is in the lessee's possession, and not that of the lessor; and the latter is guilty of larceny if he takes the animal with intent to convert it. *Palmer v. State*, 70 Neb. 136, 97 N. W. 235.

As a defense to theft by the taking of an estray, it cannot be urged that the accused subsequently purchased the animal from someone. *Landreth v. State*, supra.

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his intent at the time. If he does know, or has the immediate means of ascertaining, who the owner is, there must be a felonious intent to steal at the time of the taking in order to constitute larceny; and a subsequently formed intent is not sufficient. The instructions hereinbefore quoted, given by the court, do not square with this rule, for they undoubtedly conveyed to the minds of the jury the idea that if the defendant either knew or afterwards ascertained who the owner was, and denied having the pocketbook, or failed to voluntarily return it, this made him guilty of larceny.

The eighth instruction requested by defendant was incorrect in failing to embrace the idea of good faith in making inquiry for the owner, or of the absence of a felonious intent at the time of the original taking, and the court might well have refused the instruction altogether. But the modification was incorrect, and rendered the whole instruction prejudicial to defendant, by telling the jury in effect that, notwithstanding he had made inquiry for the owner, if he afterwards learned who the owner was, and denied having the pocketbook, he would be guilty of larceny.

There was evidence to warrant a submission to the jury of the questions covered by these instructions, and the error of the court was prejudicial. The court gave other correct instructions on this subject, but they were in conflict with those quoted above, and were therefore calculated to mislead the jury.

Reversed and remanded for new trial.

KANSAS SUPREME COURT.

JULIUS C. WILLIAMS, Appt.,

v.

J. W. BRICKER et al.

(— Kan. —, 109 Pac. 998.)

Vendor and purchaser — unmarketable title — what constitutes.

1. A title need not in fact be bad in order to make it unmarketable or nonmerchable. The question is whether a reasonably prudent man, familiar with the facts and apprised of the question of law involved, would accept the title in the ordinary course of business; nor is it enough, even, that the court on the whole consider it good. If there be doubt or uncertainty sufficient to form the basis of litigation, the title is unmarketable.

Headnotes by PORTER, J.

Note. — See note to *Howe v. Coates*, 4 L.R.A.(N.S.) 1170, as to the criterion or test of a marketable title.
30 L.R.A.(N.S.)

Same — facts — conclusion.

2. In an action to recover back purchase money for the failure of the vendor to comply with an agreement to furnish a marketable title, where the parties whose possible claims may affect the title are not before the court, the question of law upon which the title turns will not be determined, but the title will be deemed unmarketable if the question is one upon which it is apparent that other courts might entertain a different opinion.

(July 9, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Cowley County in defendants' favor in an action brought to recover back the purchase price paid for certain lands, as to which it was alleged defendants had failed to furnish a marketable title. Reversed.

The facts are stated in the opinion.

Mr. J. E. Torrance, for appellant:

A good title means not merely a title valid in fact, but a marketable title, which can again be sold to a reasonable purchaser, or mortgaged to a person of reasonable prudence.

Moore v. Williams, 115 N. Y. 586, 5 L.R.A. 654, 12 Am. St. Rep. 841, 22 N. E. 233; *Carter v. Morris Bldg. & Land Improv. Asso.* 108 La. 143, 32 So. 473; *Hollingsworth v. Colthurst*, 78 Kan. 455, 18 L.R.A.(N.S.) 741, 130 Am. St. Rep. 382, 96 Pac. 851; *Swayne v. Lyon*, 67 Pa. 436; *Dobbs v. Norcross*, 24 N. J. Eq. 327; *Methodist Episcopal Church Home v. Thompson*, 20 Jones & S. 321; *Howe v. Coates*, 97 Minn. 385, 4 L.R.A.(N.S.) 1170, 114 Am. St. Rep. 723, 107 N. W. 397.

A title which is open to judicial doubt is not a marketable title.

Shriver v. Shriver, 86 N. Y. 584; *Vought v. Williams*, 46 Hun, 638, 12 N. Y. S. R. 733.

A vendee will not be required to accept a title upon the court's assurance that it is good and marketable, and assume the risk of contesting the question in another action, wherein the issues of law and fact may be differently determined by the same or some other court.

Townshend v. Goodfellow, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056; *Heller v. Cohen*, 15 Misc. 378, 36 N. Y. Supp. 668; *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905; *Brokaw v. Duffy*, 165 N. Y. 391, 59 N. E. 196; *Mathews v. Lightner*, 85 Minn. 333, 89 Am. St. Rep. 558, 88 N. W. 992; *Ladd v. Weiskopf*, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 99; *Moore v. Williams*, supra; *Sugden, Vendors*, chap. 10, § 3; *Street v. French*, 147 Ill. 342, 35 N. E. 814; *Vreeland v. Blauvelt*, 23 N. J. Eq. 483.

A marketable title means a title free from reasonable doubt.

Staplyton v. Scott, 16 Ves. Jr. 272; *Austin v. Barnum*, 52 Minn. 136, 53 N. W. 1132; *Hedderly v. Johnson*, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; *Richmond v. Koenig*, 43 Minn. 480, 45 N. W. 1093; *Fleming v. Burnham*, supra; *Kilpatrick v. Barron*, 125 N. Y. 751, 26 N. E. 925; *Holmes v. Woods*, 168 Pa. 530, 32 Atl. 54; *Morrison v. Waggy*, 43 W. Va. 405, 27 S. E. 314; *Downey v. Seib*, 102 App. Div. 317, 92 N. Y. Supp. 431; *Muller v. Palmer*, 144 Cal. 305, 77 Pac. 954; *Jeffries v. Jeffries*, 117 Mass. 184; *Collard v. Sampson*, 1 Eq. Rep. 262; *Wilde v. Fort*, 4 Taunt. 334; *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432, 70 N. W. 1038.

Every title is doubtful which invites or exposes the party holding it to litigation. If there be color of outstanding title which may prove substantial, though there is not enough evidence to enable the court to say so, a purchaser will not be held to take it, and encounter the hazard of litigation.

Herman v. Somers, 158 Pa. 424, 38 Am. St. Rep. 851, 27 Atl. 1050; *Corbett v. McGregor* (Tex. Civ. App.) 84 S. W. 278; *Frazier v. Boggs*, 37 Fla. 307, 20 So. 245; *Sharp Street Station v. Rother*, 83 Md. 289, 34 Atl. 843; *Daniell v. Shaw*, 166 Mass. 582, 44 N. E. 991; *Swayne v. Lyon*, supra; *Speakman v. Forepaugh*, 44 Pa. 371.

A marketable title means a title which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and anxious to perform his contract, would, in the exercise of that prudence which business men ordinarily bring to bear on such transactions, be willing to accept and ought to accept.

Todd v. Union Dime Sav. Inst. 128 N. Y. 636, 28 N. E. 504; *Hunting v. Damon*, 160 Mass. 441, 35 N. E. 1064; *Paulmier v. Howland*, 49 N. J. Eq. 364, 24 Atl. 268.

A title should be reasonably free from any doubt which would interfere with its market value.

McPherson v. Schade, 149 N. Y. 16, 43 N. E. 527; *Turner v. McDonald*, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; *Clouse's Appeal*, 192 Pa. 108, 43 Atl. 413; *Harding v. Olson*, 177 Ill. 298, 52 N. E. 482; *Heller v. Cohen*, 154 N. Y. 306, 48 N. E. 527; *Irving v. Campbell*, 121 N. Y. 353, 8 L.R.A. 620, 24 N. E. 821; *Griffith v. Maxfield*, 63 Ark. 548, 39 S. W. 852; *Magennis v. Fallon*, 2 Molloy, 578; *Jordan v. Poillon*, 77 N. Y. 521.

The title tendered need not in fact be bad, but it must either be defective in fact, or so clouded by apparent defects, either in the record or by the proof outside of the 30 L.R.A. (N.S.)

record, that prudent men, knowing the facts, would hesitate to take it.

Greenblatt v. Hermann, 144 N. Y. 13, 38 N. E. 966; *Townshend v. Goodfellow*, supra.

A doubt as to the title may be raised upon a question of law or upon a question of fact, or upon both law and fact.

Hedderly v. Johnson, 42 Minn. 443, 18 Am. St. Rep. 521, 44 N. W. 527; *McNutt v. Nellans*, 82 Kan. 424, 108 Pac. 834; *Maupin, Marketable Title to Real Estate*, 2d ed. chap. 31; *Herman v. Somers*, 158 Pa. 424, 38 Am. St. Rep. 851, 27 Atl. 1050; *Fleming v. Burnham*, supra; *Vought v. Williams*, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 195.

Messrs. Jackson & Noble for appellees.

Porter, J., delivered the opinion of the court:

The plaintiff and defendant *J. W. Bricker* entered into a written agreement for the purchase and sale of a farm in Cowley county. The consideration was \$35,200. The plaintiff deposited in the bank \$1,000, which was to be paid to the defendant provided the defendant, within a specified time, should deliver to the plaintiff a warranty deed for the real estate, "with a good, merchantable abstract of title to the same," when plaintiff was to pay the balance of the purchase money. Alleging that defendant had failed to furnish such title, plaintiff brought this action against Bricker and the bank to recover the \$1,000. Bricker answered with a general denial and a cross petition, alleging that he had fully complied with the terms of the contract, that the land thereafter depreciated in market value \$10 an acre, and asked damages in the sum of \$3,200 against the plaintiff for breach of the contract. There was a trial to the court and a finding that the title tendered was a good, merchantable one, that the averments in the cross petition were true, that the plaintiff had forfeited the \$1,000 paid; and the court rendered a judgment against him for \$3,200 damages and for costs. For obvious reasons the plaintiff was dissatisfied with the result of the litigation, and brings the case here for review. The only question we have to determine is whether the defendant tendered to the plaintiff a merchantable title.

The land originally belonged to *Charles Louis Wiltberger*. He died, leaving a will, which was duly probated, by the terms of which he devised to his wife, *Emorette A. Wiltberger*, a life estate in all his property, and provided that after her death the property should be equally divided among his four children, *Walter, Ella, Frank L., and*

Dora A. Wiltberger. The will then directed as follows: "If any of my children shall die before my wife, Emorette A. Wiltberger, then it is my will that the share which would go to my deceased child or children, if living, shall be divided among his or her children in equal parts; and if any of said children shall die without issue, prior to the death of my said wife, then it is my will that his or her share shall be divided equally among my children then living, or if any of them be dead, then his or her share equally among her children." After the death of Charles Louis Wiltberger, his widow and the four children named in the will conveyed the lands in question by warranty deed to the defendant Bricker, and his title rests upon the will and this conveyance. The widow is still living. Subsequent to the execution of the deed, Frank L. Wiltberger died, leaving surviving him two minor children, and the doubt or menace to the title, if any exists, arises by reason of the possible claim that these children, at the death of their father before that of the widow, took the title which would have vested in him if he had survived the widow, and also the possibility of similar claims in the future by the children of Walter, Ella, and Dora Wiltberger, in the event the latter die before the widow, leaving children.

The appellee concedes that the only question is whether the title was merchantable, but insists that whether or not it is so is always a question of law, and not of fact, and that the only way by which this controversy can be rightly determined is by an examination of the will in question, and a determination by the court in this action whether or not, under the will, the fee to the lands in question vested in the four children of the testator at the time of his death. If it did, counsel say the title is merchantable and the judgment must stand. Such is not our understanding of the law which must control this case. Whether the title is merchantable depends upon whether it is free from reasonable doubt. In *McNutt v. Nellans*, 82 Kan. 424, 108 Pac. 834, it was said: "In determining whether a title is so doubtful that equity will refuse to compel a purchaser to accept it, the court is not required to pass upon the validity of the title itself; the parties whose possible claims may affect the title are not before the court, and no judgment which the court could render would bind them. . . . A marketable title in equity is one in which there is no doubt involved, either as to matter of law or fact. *Maupin, Marketable Title to Real Estate*, 2d ed. chap. 31; *Herman v. Somers*, 158 Pa. 424, 38 Am. St. Rep. 851, 27 Atl. 1050; *Fleming* 30 L.R.A. (N.S.)

v. Burnham, 100 N. Y. 1, 2 N. E. 905; *Vought v. Williams*, 120 N. Y. 253, 8 L.R.A. 591, 17 Am. St. Rep. 634, 24 N. E. 105." The same rule applies where the question of the sufficiency of the title is raised in an action for specific performance, for the reason that the distinction which formerly prevailed between courts of law and equity with respect to marketable titles no longer exists. The same grounds which would justify a court of equity in refusing to compel the vendee to accept the title will now support a judgment to recover back the purchase money paid. *Ladd v. Weiskopf*, 62 Minn. 29, 69 L.R.A. 785, 64 N. W. 99; *Moore v. Williams*, 115 N. Y. 586, 5 L.R.A. 654, 12 Am. St. Rep. 844, 22 N. E. 233; *Howe v. Coates*, 90 Minn. 508, 97 N. W. 129; *Id.*, 97 Minn. 385, 4 L.R.A. (N.S.) 1170, 114 Am. St. Rep. 723, 107 N. W. 397. "It is a great, though perhaps a common, mistake, to suppose that a doubtful title can be made marketable by an opinion of a court on a case stated between vendor and vendee." *Pratt v. Eby*, 67 Pa. 396, 404.

In *Townshend v. Goodfellow*, 40 Minn. 312, 3 L.R.A. 739, 12 Am. St. Rep. 736, 41 N. W. 1056, it is said: "It is not necessary that the title be shown to be bad, nor is it enough, even, that the court may, on the whole, consider it good, if there be doubt or uncertainty about it sufficient to form the basis of litigation; for if there be a doubt, it cannot be thrown upon the purchaser to contest that doubt. . . .

The devisees, including infant heirs, are not parties, and would not be bound by the judgment of the court in this case."

In his classification of cases in which the title will be held doubtful, *Maupin on Marketable Title to Real Estate*, § 284, enumerates those cases: "(1) Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable; or, as it was put by *Alderson, B.*, where there is a 'reasonable decent probability of litigation.' The court, to use a favorite expression, will not compel the purchaser to buy a lawsuit. If there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the title will be deemed unmarketable." "(4) Where the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the court holds the conclusion it arrives at to be open to reasonable doubt in some other court. Generally, it may be said that the opinion of the court upon any question of law on which the title depends will not render the title marketable if the court thinks that another judge or other competent person might entertain a different

opinion upon the same question. The test as to whether a title is doubtful or not upon a question of law has been held to be the certain conviction, of the court, in deciding the point, that no other judge would take a different view."

Authorities might be multiplied to show that the rule is well established that the title tendered need not in fact be bad in order to make it unmarketable or nonmerchandise. The question is whether a reasonably prudent man, familiar with the facts and apprised of the question of law involved, would accept such a title in the ordinary course of business.

The will of Louis Wiltberger clearly expressed the purpose that his widow should take a life estate in the real property in question, that at her death it should pass to such of his four children as should then be living, and to the children of any of the four who had died, the grandchildren to take collectively the shares that would have gone to their respective parents. After the death of the testator, his widow and his four children united in a warranty deed to J. W. Bricker, and the question involved is whether this deed conveyed a perfect and merchantable title. When the deed was made the widow had a life estate, the four children a vested remainder (subject to be divested by their dying before the life estate ended), and the children of these children (there were at least two of them then in being) a contingent remainder. The defendant contends that the general doctrine of *Bunting v. Speck*, 41 Kan. 424, 3 L.R.A. 690, 21 Pac. 288, controls, although the language of the will there construed differs materially from that of the will in this case; that, under the terms of this will, upon the death of the testator the fee title to the lands vested in the four children of the testator, subject to the life estate of the widow, and subject to be divested by their death before the widow, leaving children surviving them; that the limitation over to the children of the children, depending, as it does, upon an event which may or may not happen, cannot have the effect to retard the vesting of the fee in the children of the testator. It is claimed, therefore, that with the execution of the deed, the life estate and the vested remainder united in the same person and therefore merged together, and that the contingent remainder then expired, because there was no longer a life estate to which it could attach. This result would doubtless follow where the unmodified common law prevails. 16 Cyc. Law & Proc. p. 656, 24 Am. & Eng. Enc. Law, p. 413. It might, however, be seriously questioned whether it follows in Kansas, for this rea-

son, among others: Here the union of two estates in one person does not necessarily result in a merger. *Ft. Scott Bldg. & L. Asso. v. Palatine Ins. Co.* 74 Kan. 272, 86 Pac. 142; *Shattuck v. Belknap Sav. Bank*, 63 Kan. 443, 65 Pac. 643. The merging of two estates by their union in a single individual is purely a matter of theory. The two estates are conceived as remaining separate whenever that view is to the advantage of their holder. There is the more reason that they should be kept apart when their merger would operate to the prejudice of one who is not a party to the transaction.

"At law, the rule that whenever a greater estate and a less coincide in the same person without any intermediate estate, the lesser is merged, is invariable and inflexible. In equity, the rules of law as to merger are not followed, and the doctrine of merger is not favored. Equity will prevent or permit a merger, as will best subserve the purposes of justice and the actual and just intent of the parties. Wherever a merger would operate inequitably, it will be prevented. . . . In equity, the merger will be prevented whenever necessary to protect the rights of an innocent third party, or of the person in whom the estates meet." 16 Cyc. Law & Proc. pp. 665, 668.

"In equity the legal rule of merger is not regarded as inflexible, and the question whether the doctrine of merger will be applied or not is determined by the intention of the party in whom the estates unite, provided that his intention shall not be enforced to perpetrate fraud or wrong. . . . The equitable doctrine has superseded the legal doctrine almost entirely at this day; for in England the equitable doctrine controls in courts of law by statute, while in many of the United States equitable remedies can be had in courts of law." 20 Am. & Eng. Enc. Law, 2d ed. pp. 590, 591.

Merger takes place when a greater and a less estate come together in the same person, and when there is no reason for their longer existence as separate estates. The doctrine has its foundation in the convenience of the parties interested, and therefore, whenever the rights of strangers, not parties to the act that would otherwise work an extinguishment of the particular estate, require it, the two estates will still have a separate continuance in contemplation of law." *Moore v. Luce*, 29 Pa. 260, 263, 72 Am. Dec. 629.

It might well be argued that a merger ought not to be allowed in this case because it would defeat the purposes of the testator, and deprive his grandchildren of their rights under the will. Since, how-

ever, no decision we could render would bind those whose possible claims may affect the title, and any opinion we might express would be merely *obiter*, it is unnecessary to pass upon the question of law upon which the sufficiency of the title depends. Enough has been said to demonstrate that the question is one upon which other courts might entertain a different opinion, and that, of itself, is a sufficient reason for holding the title tendered unmarketable.

The judgment will be reversed, with directions to proceed in accordance with these views.

All the Justices concur.

Petition for rehearing denied.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ROBERT SCHLESINGER

v.

FOREST PRODUCTS COMPANY, Plff. in Err.

(— N. J. —, 76 Atl. 1024.)

Corporation — agent — implied authority — estoppel — notice.

1. In order that a corporation may be bound by the acts of one as its agent, either upon the ground of an implied authority or of estoppel, it must appear that the corporation is chargeable with notice of the acts or omissions relied upon to establish such implied authority or estoppel.

Same — implied notice.

2. Notice to the person who is alleged to have acted as agent for a corporation is not such notice to the corporation as will suffice to bind it to third persons, upon the ground of implied authority to him to act as such agent, or upon the ground of estoppel.

Principal — act of agent — ratification.

3. The doctrine of ratification is not applicable to a case where the person who makes the contract was not at the time, and did not profess or assume to be, acting on behalf of a principal.

Contract — goods to be manufactured — assignability.

4. Where a contract for the purchase of goods to be manufactured involved personal confidence, it is not assignable by the vendor.

(June 20, 1910.)

ERROR to the Hudson County circuit of the Supreme Court to review a judgment in plaintiff's favor in an action

Headnotes by SWAYZE, J.
30 L.R.A. (N.S.)

brought to recover commissions for the sale of staves. Reversed.

The facts are stated in the opinion.

Mr. Albert C. Wall for plaintiff in error.

Mr. John W. Queen, for defendant in error:

Freeman had authority to bind the defendant company.

M. Groh's Sons v. Groh, 80 App. Div. 91, 80 N. Y. Supp. 438; Sheridan Electric Light Co. v. Chatham Nat. Bank, 52 Hun, 582, 5 N. Y. Supp. 529; Ring v. Long Island Real Estate Exch. & Invest. Co. 93 App. Div. 445, 87 N. Y. Supp. 682, affirmed in 184 N. Y. 553; 76 N. E. 1107; Hall v. Herter Bros. 83 Hun, 19, 31 N. Y. Supp. 692; Cook, Corp. § 712, p. 2236; Buck v. Troy Aqueduct Co. 76 Vt. 75, 56 Atl. 285; York v. Mathis, 103 Me. 67, 68 Atl. 746; Sun Printing & Pub. Assn. v. Moore, 183 U. S. 642, 46 L. ed. 360, 22 Sup. Ct. Rep. 240; Smith v. Delaware & A. Teleg. & Teleph. Co. 64 N. J. Eq. 770, 58 Atl. 818; Demarest v. Spiral Riveted Tube Co. 71 N. J. L. 14, 58 Atl. 161.

A contract signed by an individual can be proved by parol evidence to be a contract made for and on behalf of a corporation.

Towers v. Stevens Cattle Co. 83 Minn. 243, 86 N. W. 88; Cotting v. Grant Street Electric R. Co. 65 Fed. 545; Jones v. Williams, 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353; Melledge v. Boston Iron Co. 5 Cush. 173, 51 Am. Dec. 59.

The defendant accepted and adopted the stove contracts, and received the benefits of plaintiff's services, and is therefore estopped from claiming lack of authority on the part of Freeman.

Castle v. Lewis, 78 N. Y. 135; Davies v. Harvey Steel Co. 6 App. Div. 166, 39 N. Y. Supp. 791; Tyler v. Anglo-American Sav. & L. Assn. 30 App. Div. 404, 52 N. Y. Supp. 77; Bennett v. Millville Improv. Co. 67 N. J. L. 320, 51 Atl. 706; Linkauf v. Lombard, 137 N. Y. 423, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N. E. 472.

No one can avail himself of the non-performance of a condition precedent who has himself occasioned its nonperformance.

Sibbald v. Bethlehem Iron Co. 83 N. Y. 378, 38 Am. Rep. 441; Mooney v. Elder, 56 N. Y. 238; McQuillen v. Carpenter, 72 App.

Note. — As to assignability of executory contract to perform particular work, as distinguished from a contract for personal services, or a contract of sale, see note to Atlantic & N. C. R. Co. v. Atlantic & N. C. Co. 23 L.R.A. (N.S.) 223.

As to assignability of construction or building contracts, see note to Johnson v. Vickers, 21 L.R.A. (N.S.) 359.

Div. 595, 76 N. Y. Supp. 556; *Vreeland v. Vetterlein*, 33 N. J. L. 249; *Cavender v. Waddingham*, 2 Mo. App. 551; *Cheatham v. Yarbrough*, 90 Tenn. 77, 15 S. W. 1076; *Millett v. Barth*, 18 Colo. 112, 31 Pac. 769; *McFarland v. Lillard*, 2 Ind. App. 160, 50 Am. St. Rep. 234, 28 N. E. 229; *Grosse v. Cooley*, 43 Minn. 188, 45 N. W. 15; *Fairly v. Wappoo Mills*, 44 S. C. 227, 29 L.R.A. 215, 22 S. E. 108.

Swayze, J., delivered the opinion of the court:

This is an action to recover commissions upon a sale of the staves, said to have been made by the defendant company to one Gaffinel, a resident of France. A careful statement of the facts is required to make the case clear. Victor E. Freeman in 1905 engaged in the business to which the present defendant afterwards succeeded. He proposed to organize a corporation to take over his business, and on November 4, 1905, the defendant was incorporated in New York state. The certificate named Freeman, Evans, and Griffin, the incorporators, as the directors for the first year; but there was no formal meeting of the corporation or of the directors until April 6, 1906. Meantime there had been negotiations by correspondence between the plaintiff and Freeman. The plaintiff's letters were addressed to the defendant. Freeman's replies were in his own name, on stationery bearing the defendant's name as a heading. These negotiations resulted in a contract on January 10, 1906, embodied in a letter of which the following is a copy:

Gentlemen:—

With reference to previous letters touching the question of commissions upon orders for staves for export, which letters have been found to be incorrect, I hereby cancel all those previous letters and conditions of same, as relating to this subject, and in lieu thereof I beg to affirm that I am to pay you commission upon the order contracted with Mr. Christian Gaffinel, of Cete, France, of even date, for 1,000,000 staves, at the rate of one and one-half dollars (\$1.50) upon each 1,000 staves, to be paid at the times of, and in proportion to, the periodical part shipments, upon each payment by the consignee.

Very truly yours,
Victor E. Freeman.

Upon the same day a contract was made between Freeman and Gaffinel for the sale of staves to be manufactured. This was in form a written proposal by Freeman for

himself, his heirs and assigns, to sell through Schlesinger, and deliver to Gaffinel, 1,000,000 staves. This proposal was signed by Freeman individually and accepted by Gaffinel. On January 11th, Schlesinger wrote the Forest Products Company, calling their attention to the fact that the letter of January 10th referred only to the contract for 1,000,000 staves, and that it was understood that, if any further sale to the same party should be made, Schlesinger should be entitled to his commissions on that sale. There was evidence justifying a finding that this was assented to. A subsequent sale was made in June, 1906, which took the form of a written contract between Freeman individually and Gaffinel. Gaffinel afterwards refused to recognize anyone but Freeman in the transaction. Only a portion of the staves was ever delivered, and the commissions on the purchase price were paid by Freeman. There was evidence from which it might be found that Freeman was repaid this sum by the defendant.

On April 6, 1906, at a meeting of the company, it was resolved to proceed to carry on the business for which it was incorporated. Freeman offered to transfer his business, including contracts for the delivery of staves, and the directors adopted a resolution, which recited that it was the intention of the incorporators to purchase and take over the business now being carried on by Freeman, and proceeded to accept his offer, and to authorize the issue of stock for the property to be transferred.

The learned trial judge charged the jury that the questions were: (1) Whether the contracts for the staves were made between Gaffinel and the company, or between Gaffinel and Freeman; (2) whether the contract for commissions was between Schlesinger and Freeman or between Schlesinger and the defendant company. On this point he added: "The question resolves itself into one of facts as to the intentions of the parties who were involved in this transaction. The question is whether it was the intention of Schlesinger and of Freeman, when these transactions took place, that the company should make the contract, or whether it was the intention of Freeman and Schlesinger that Freeman individually should make the contract. If you shall determine that the intention was that Freeman should be bound, then, of course, the company cannot be liable, and the verdict would have to be for the defendant. It is only when you shall have concluded that the intention of Freeman was to act for the company, in performance of the power given to him to

act for the company, that the plaintiff can recover."

He also charged that, if Freeman was acting for himself, the contract would be considered Freeman's contract, and not the contract of the defendant, unless the company at some later time adopted or assumed the contract; and that it was for the jury to determine whether the contract was that of the defendant, through Freeman, an agent, or whether it was adopted by the defendant subsequently by some unequivocal action.

In short, the plaintiff was allowed to recover either upon the theory of an original agency of Freeman, or a subsequent adoption of Freeman's contracts by the company.

First, as to Freeman's original agency: The fair interpretation of the charge, under the facts of this case, is that the defendant was liable if such was the intention of Schlesinger and Freeman. It is obvious that this leaves out the essential element of authority from the defendant to Freeman, either express, or implied from the defendant's conduct, or arising out of estoppel. There is no evidence of express authority. The only evidence from which an implied authority could be inferred is the use of the name of the defendant on stationery and on the office door, and the only evidence to justify a finding that the defendant was estopped to deny Freeman's agency is the failure to call Schlesinger's attention to his error in addressing his communications to the defendant.

In order that the defendant may be bound by these acts and omissions, which were acts and omissions of Freeman alone, it should appear that it was chargeable with notice thereof, and failed to object. *Clement v. Young-McShea Amusement Co.* 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 67 Atl. 82. Notice to Freeman was not notice to the company, although he was the active manager, since his interests in this respect were adverse to the company, for they would amount to an appointment of himself as agent, without the knowledge of his associates. *First Nat. Bank v. Christopher*, 40 N. J. L. 435, 29 Am. Rep. 262; *Graham v. Orange County Nat. Bank*, 59 N. J. L. 225, 35 Atl. 1053; *Sudbury v. Merchantville Bldg. & L. Asso.* 57 N. J. Eq. 342, 38 Atl. 420, 45 Atl. 1092. The company was not, at the time these letters were written, organized or prepared to do business. It had as yet done no business, and necessarily, therefore, had done nothing to hold Freeman out as authorized to contract on its behalf. Freeman did not even hold himself out as agent, but wrote and signed all the letters as an individual, and in the 30 L.R.A. (N.S.)

letter of January 10, 1906, canceled in so many words all previous letters, which he writes had been found to be incorrect, and in lieu thereof he distinctly says, "I am to pay you commission;" and thereupon on the same day entered into the Gaffnel contract in his individual name. It would be difficult to show more clearly an intent to become individually responsible. Clearly that was his actual intent, for subsequently, on April 6, 1906, he and the company agreed upon a transfer of his contracts for staves to the company, in consideration of and payment for the stock issued to him, and the company by formal resolution recognized that the business was, up to that time, Freeman's business. The evidence fails to prove facts from which an agency can be implied, or an estoppel to deny agency can arise.

The question of the adoption of the contract is a different one. No doubt the company did adopt, as far as it could, the contract with Gaffnel, and it is urged that it could not receive the benefit of the sale without at the same time incurring the burden of the contract for commissions. This does not follow. The two contracts were distinct, with different parties, and with different objects. If the company adopted the contract between Freeman and Schlesinger, it took the decidedly unusual course of adopting a contract which could only impose a burden upon it,—the obligation to pay the commissions,—and could be of no benefit, since it was already executed on Schlesinger's part, and the customer had already been secured. It is not likely that a precedent of that kind can be found. The contract between Freeman and Gaffnel is different, and the company might well seek the advantage to be derived therefrom. The difficulty is that the doctrine of ratification is not applicable to a case where the person who makes the contract was not at the time, and did not profess or assume to be, acting on behalf of a principal. This subject has been recently discussed with thoroughness in the English courts, and the unanimous conclusion of the House of Lords establishes the rule above stated with most forcible arguments to which we have nothing to add. *Durant v. Roberts* [1900] 1 Q. B. 629; *Keighley v. Durant* [1901] A. C. 240. The necessary result is that, even if there had been a contract for commissions between Schlesinger and the defendant, those commissions were never earned, since no contract of sale enforceable by the defendant was ever procured by the plaintiff.

The contract he procured was a contract with Freeman. Whether it could be assigned by Freeman to the defendant, so

as to enable the defendant to enforce it as against Gaffinel, depends on whether the contract involved personal confidence between the vendor and vendee. Our supreme court has held that a contract for the sale of trees to be grown is assignable, and the assignee may perform as the representative of the assignor. *Parsons v. Woodward*, 22 N. J. L. 196. The Queen's bench in England has applied the same rule to an executory contract to repair wagons. *British Waggon Co. v. Lea* (1880) L. R. 5 Q. B. Div. 149, 49 L. J. Q. B. N. S. 321. The decision in the latter case is expressly put upon the ground that the repairs were of such a character that anyone might make them, and probably the court in the former case had in mind the fact that trees to be grown depended more upon the operation of natural forces than the skill of man. The courts have reached a different result where a personal element is involved. *Robson v. Drummond*, 2 Barn. & Ad. 303; *Humble v. Hunter*, 12 Q. B. 310; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Arkansas Valley Smelting Co. v. Belden Min. Co.* 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308; *Delaware County v. Diebold Safe & Lock Co.* 133 U. S. 473, 33 L. ed. 674, 10 Sup. Ct. Rep. 399. The rule has recently been applied in our own court of chancery to a contract to publish school books. *Wooster v. Crane & Co.* 73 N. J. Eq. 22, 66 Atl. 1093. The case is an especially strong one, since the assignee was an Arizona corporation, succeeding to the rights of the assignor, a New Jersey corporation, with the same stockholders. The learned vice chancellor relied upon the fact that the complainant had the right to rely upon the safeguards provided by our corporation act, and could not be compelled to accept, in lieu of her contract rights, a claim against a corporation under the laws of another jurisdiction, which might not provide the same safeguards.

The same rule has been applied by our supreme court to a case which manifestly involved personal confidence. *People's Bank & T. Co. v. Weidinger*, 73 N. J. L. 433, 64 Atl. 179. In *Tolhurst v. Associated Portland Cement Mfrs.* [1903] A. C. 414, a contract for the supply of chalk for the manufacturers of cement was held to be assignable by one corporation to another, but Lord Halsbury doubted, and only yielded his assent because of the length of duration of the contract, the persons engaged in it, and the nature of the contract itself, while Lord Robertson dissented. The decision was afterwards explained upon the ground that the contract for the supply of chalk for fifty years was

to be treated as a contract for the supply to a given cement-making place, and not a personal contract. *Kemp v. Baerselman* [1906] 2 K. B. 604, 608. In the last case, the defendant had agreed to sell eggs to Kemp, a cake manufacturer. Kemp turned over his business to a corporation of whose 20,000 shares he owned all but 7. The court of appeal held that the defendant was thereby discharged from his obligation. In *New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.* 180 N. Y. 280, 73 N. E. 48, a contract for the sale of printing presses with a New Jersey corporation was held not assignable to a West Virginia corporation, organized to take over the business and contracts of the former.

Recently the question has been reviewed by the supreme court of North Carolina in an able opinion by Mr. Justice Hoke, in which the general rule was accepted, but held not to be applicable to a contract between a railroad company and an individual, for the cutting from the company's timber lands and the delivery on its right of way of a definite quantity of cordwood, which contract was not to be performed by the contractor personally, and did not require or import any special reliance on his skill or business qualifications. *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.* 147 N. C. 368, 61 S. E. 185, 23 L.R.A. (N.S.) 223, 125 Am. St. Rep. 550, 15 A. & E. Ann. Cas. 363. The notes to this case and to *Simmons v. Zimmerman*, 1 A. & E. Ann. Cas. 850, collect the authorities. The injustice of permitting an assignment of a contract for personal services, for the painting of a picture, for a partnership, is obvious. A contract for the sale of goods to be manufactured stands on similar grounds where the vendee relies upon the skill and experience of the manufacturer, as well as upon the implied warranty of quality. No man who has employed a tailor to make a suit of clothes ought to be compelled to accept a suit made by the tailor's assignee. As Lord Denman said (12 Q. B. 317): "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract."

"In principle," says Pollock, "however, the intention of a contracting party is to create an obligation between himself and another certain person, and, if that intention fails to take its proper effect, it cannot be allowed to take the different effect of involving him, without his consent, in a contract with someone else." Pollock, *Contracts*, 7th Eng. ed. 467, 468. He adds (page 471) that rights arising out of a contract cannot be transferred if they are

coupled with liabilities, or if they involve a relation of personal confidence, such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. In the present case, Gaffinel relied in fact upon Freeman's personal performance of the contract, and was careful to stipulate that the staves should be hand-finished by European workmen. We think he was not compelled to accept performance from a corporation to whom it had been assigned. The fact that Freeman agreed for himself, his heirs and assigns, does not make the contract assignable so as to bind Gaffinel. Its object was to bind Freeman's heirs to liability in case of breach, and, so far as concerns assigns, is applicable only to the extent to which the contract might legally be assignable by Freeman; for example, an assignment by him of the money due for staves that might be actually sold and delivered. To hold that these words made the contract assignable in the wider sense would necessitate the conclusion that it might be performed by his heirs at law. A somewhat similar case arose in *Wooster v. Crane & Co.*, cited above.

It cannot be inferred that the corporation, by taking an assignment of the Gaffinel contract, thereby assumed the liability of Freeman on the Schlesinger contract. The Gaffinel contract was treated by the defendant and Freeman as a valuable asset of Freeman, for which stock might properly be issued. The cost of procuring that contract was properly an expense for Freeman to pay; he had his reward in the stock issued to him.

There should have been a nonsuit, and the judgment is reversed in order that a venire de novo may issue.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JULIA TRUSSELL, Admr., etc., of Richard F. Trussell, Deceased, Plff. in Err.,
v.

MORRIS COUNTY TRACTION COMPANY.

(— N. J. —, 77 Atl. 535.)

Carrier — street railway — duty to passenger.

1. A company operating an electric street railway car is bound to exercise a high degree of care to carry its passengers safely in and upon whatever part of the car they ride with the express or implied consent of the company.

Headnotes by TRENCHARD, J.
80 L.R.A. (N.S.)

Same — riding on step — negligence.

2. It is not negligence *per se* for a passenger to ride upon the step of the platform of an electric street railway car.

Same — injury — questions for jury.

3. Where the evidence tends to show that the plaintiff's intestate, with the defendant's consent, rode as a passenger upon the step of the platform of the defendant's electric street railway car because there was no room on the platform or in the car, and that while he was so riding, with his back to the road, holding on to the station with his right hand, the servants of the defendant, without any warning to decedent, drove the car at a speed of 20 miles an hour around a "sharp curve," whereby the decedent was thrown to the ground, 10 feet distant from the track and killed, both the questions of the negligence of the defendant and the contributory negligence of the decedent are for the jury.

(September 16, 1910.)

ERROR to the Morris county circuit of the Supreme Court to review a judgment of nonsuit in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Mr. Charlton A. Reed, for plaintiff in error:

The plaintiff's intestate was not guilty of contributory negligence in riding on the step of the platform.

City R. Co. v. Lee, 50 N. J. L. 435, 7 Am. St. Rep. 798, 14 Atl. 883; *Meesel v. Lynn & B. R. Co.* 8 Allen, 234; *New York, L. E. & W. R. Co. v. Ball*, 53 N. J. L. 283, 21 Atl. 1052; *Brackney v. Public Service Corp.* 77 N. J. L. 1, 71 Atl. 149.

As to the question of negligence sufficient to bar the plaintiff from recovery, see—

North Hudson County R. Co. v. May, 48 N. J. L. 401, 5 Atl. 276; *City R. Co. v. Lee*, supra; *Whalen v. Consolidated Traction Co.* 61 N. J. L. 606, 41 L.R.A. 836, 68 Am. St. Rep. 723, 40 Atl. 645.

The question of the negligence of the plaintiff's intestate was a question that should have been submitted to the jury.

Consolidated Traction Co. v. Thalheimer, 59 N. J. L. 474, 37 Atl. 142; *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167.

Mr. Willard W. Cutler, for defendant in error:

Note. — Riding on platform of street car as negligence, see notes to *Capital Traction Co. v. Brown*, 12 L.R.A. (N.S.) 831, and *Lobner v. Metropolitan Street R. Co.* 21 L.R.A. (N.S.) 972.

Riding on platform of railroad car as negligence, see note to *Norvell v. Kanawha & M. R. Co.* 20 L.R.A. (N.S.) 325.

In taking his stand and riding on the step of the platform of the car, the deceased assumed the risk of such damages as were obviously incident to that position.

Whalen v. Consolidated Traction Co. 61 N. J. L. 606, 41 L.R.A. 836, 68 Am. St. Rep. 723, 40 Atl. 645; New York, L. E. & W. R. Co. v. Ball, 53 N. J. L. 283, 21 Atl. 1052; Watson v. Camden & A. R. Co. 55 N. J. L. 125, 19 L.R.A. 487, 39 Am. St. Rep. 624, 26 Atl. 136; Flynn v. Consolidated Traction Co. 64 N. J. L. 375, 45 Atl. 799; Brackney v. Public Service Corp. 77 N. J. L. 1, 71 Atl. 149; Nirk v. Jersey City, H. & P. Street R. Co. 75 N. J. L. 642, 68 Atl. 158.

In actions for the recovery of damages charged to the negligence of a common carrier, it must appear that there has been a breach of duty on its part, or on the part of those towards whom it stands in the position of master, which has produced the injury.

Feil v. West Jersey & S. R. Co. 77 N. J. L. 502, 72 Atl. 302.

Trenchard, J., delivered the opinion of the court:

This action was brought by the administratrix of Richard F. Trussell to recover damages for his death. At the trial at the Morris circuit the evidence tended to show the facts following: The decedent was a passenger on one of the defendant's electric street railway cars running from Dover to the "ball ground," located between Dover and Rockaway. The car, both inside and on its platforms, was crowded with passengers. Because of the crowded condition of the car, he necessarily took a place on the step of the rear platform, with his back to the road, holding on to the stanchion with his right hand, and while standing in that position paid his fare to the conductor, who made no objection to his riding on the step. The car proceeded with the decedent in that position towards the ball grounds, at a speed of 20 miles an hour, and without slackening speed, and without any warning to decedent, went around a "sharp curve," thereby throwing the decedent to the ground, 10 feet distant from the track, and killing him. When the plaintiff rested, the learned trial judge granted a motion to nonsuit based upon the grounds (1) that the evidence disclosed no negligence upon the part of the defendant company, and (2) that it conclusively appeared that the decedent was guilty of contributory negligence. Upon the judgment entered in pursuance of the nonsuit, the writ in this case was brought, and the nonsuit is assigned for error.

30 L.R.A. (N.S.)

We are of the opinion that the nonsuit cannot be supported upon either ground. A company operating an electric street railway car is bound to exercise a high degree of care to carry its passengers safely in and upon whatever part of the car they ride with the express or implied consent of the company. Scott v. Bergen County Traction Co. 63 N. J. L. 407, 43 Atl. 1060; Hansen v. North Jersey Street R. Co. 64 N. J. L. 686, 46 Atl. 718; City R. Co. v. Lee, 50 N. J. L. 435, 7 Am. St. Rep. 798, 14 Atl. 883; Consolidated Traction Co. v. Thalheimer, 59 N. J. L. 474, 37 Atl. 132; Whalen v. Consolidated Traction Co. 61 N. J. L. 606, 41 L.R.A. 836, 68 Am. St. Rep. 723, 40 Atl. 645. As we have pointed out, the evidence warranted the inference that the decedent was riding upon the step of the platform with the consent of the defendant company. The evidence also tended to show that, under these circumstances, the servants of the defendant company, without any warning to decedent, drove the car around a "sharp curve" at a speed of 20 miles an hour. Clearly the jury might well have found that reasonable foresight upon the part of the defendant's servants operating the car should have anticipated the possibility that the decedent would be thrown from the car, and that reasonable care required that they should guard against it, either by checking the speed of the car, or warning the decedent of the danger. This they did not do. It may be inferred that the managers of the car knew, and the decedent did not know, that the car was about to take the "sharp curve" which was dangerous to the decedent in his situation. The question of negligence of the defendant company was therefore for the jury.

We are of the opinion, too, that the alleged contributory negligence of the decedent was not, under the evidence, a court question. It is not negligence *per se* for a passenger to ride upon the step of the platform of an electric street railway car. Scott v. Bergen County Traction Co. 63 N. J. L. 407, 43 Atl. 1060; Nirk v. Jersey City, H. & P. Street R. Co. 75 N. J. L. 642, 68 Atl. 158. In City R. Co. v. Lee, *supra*, Mr. Justice Knapp, speaking for this court, quoted with approval the language of the Massachusetts supreme judicial court in Meesel v. Lynn & B. R. Co. 8 Allen, 234, as follows: "The seats inside the car are not the only places where the managers expect passengers to remain, but it is notorious that they stop habitually to receive passengers to stand inside the car until the car is full, then to stand upon the platforms until they are full, and continue to stop and receive them even after

there is no place to stand except on the steps of the platforms. Neither the officers of this corporation, nor the managers of the cars, nor the traveling public, seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained upon the ground of its danger. There is therefore no basis upon which the court can decide on the evidence that the plaintiff did not use ordinary care." It is true that a passenger who voluntarily rides upon the platform step when there is room for him inside the car takes upon himself the duty of looking out for, and of protecting himself against, the usual and obvious perils attendant upon his position, such as the danger of being thrown from the step by the ordinary jolting and swinging of the car. *Nirk v. Jersey City, H. & P. Street R. Co. supra*, and cases there cited. But, as we have pointed out, the evidence justified the inference that the decedent rode upon the platform step from necessity, because there was no room on the platform, or in the car, and that he occupied that position with the consent of the defendant. Moreover, it was clearly open to the jury to find that the peril which the decedent encountered was not one of those usual and obvious perils attendant upon his position, but rather was the result of the negligent driving of the car. The alleged contributory negligence of the decedent was therefore for the determination of the jury.

The judgment of the court below will be reversed, and a venire do novo awarded.

PENNSYLVANIA SUPREME COURT.

MARY J. MCCOY, Appt.,

v.

SAMUEL C. NIBLICK et al.

(— Pa. —, 77 Atl. 551.)

Husband and wife — deed by woman — repudiation.

A married woman whose husband does not refuse to join in a deed of her real estate cannot avoid her contract to make the sale, on the theory that he has not joined, where the statute gives her the same right to sell her real estate as though she were sole, except that her husband must join in the deed.

(May 24, 1910.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas for Bucks County in defendants' favor in an action brought to recover possession of certain real estate which plaintiff had con-

veyed by deed which was alleged to be void. Affirmed.

The facts are stated in the opinion.

Messrs. William Stuckert, William R. Stuckert, and Francis M. Gumbes, for appellant:

As plaintiff's contract to convey was not made in the manner prescribed by law, it is, as to her covenant to convey, void, and conveyance by her cannot be specially enforced. In respect to the covenant to convey, it was void at its inception.

Bingler v. Bowman, 194 Pa. 210, 45 Atl. 80; *Rumfelt v. Clemens*, 46 Pa. 455; *McCaskey v. Graff*, 23 Pa. 321; *Jackson v. Summerville*, 13 Pa. 359; *Rathfon v. Locher*, 215 Pa. 571, 64 Atl. 576.

Messrs. Yerkes, Ross, & Ross for appellees.

Brown, J., delivered the opinion of the court:

On the first trial of this case a verdict was directed for the plaintiff on the ground that her contract for the sale of her farm, under which defendant took possession, was void because she was a married woman when she signed it, and her husband had not joined in it. The judgment on the verdict was reversed, as her contract was not void under the act of June 8, 1893 (P. L. 344), and, though not specifically enforceable by reason of the failure of the husband to join in it, it was held that a conditional verdict ought to have been directed, securing to McCormick, the vendee, reimbursement for what he had expended on the faith of the contract before notification that the vendor would not convey.

Note. — Effect of nonjoinder of husband in wife's executory contract to convey, where his joinder is essential to a conveyance.

The specific question here raised is as to the rights of the parties to a valid contract by a *feme covert* to convey real estate, in which her husband did not join, where by statute she cannot convey real estate without her husband joining therein. A rather anomalous situation is presented of a wife having power to make a contract which she is powerless to carry out without the consent of her husband, and his joining therein. But few cases have considered the question. From the few that have, the general principle may be deduced that statutory provisions are not inconsistent because they authorize a *feme covert* to make contracts of all descriptions, including contracts to convey real estate, to the same extent as if she were a *feme sole*, but deny to her the right to convey or encumber her real estate unless her husband joins therein. Under such statutes a contract by a wife to convey her real estate is valid although not subject to specific enforcement

to him. *McCoy v. Niblick*, 221 Pa. 123, post, 355, 70 Atl. 577.

The only question raised on that appeal was the correctness of the ruling of the court below that the contract was void. We reversed, and held that the plaintiff could not regain possession of the property until she had reimbursed the vendee; but we so decided upon the theory—seemingly concurred in by both sides—that she

against her, where her husband refuses to join with her in a conveyance thereof.

This is the doctrine of *McCoy v. Niblick*, and also of *Wolff v. Meyer*, 76 N. J. L. 574, 70 Atl. 1103, affirming without opinion 75 N. J. L. 181, 66 Atl. 959; *Brown v. Dressler*, 125 Mo. 589, 29 S. W. 13; and *Davis v. Watson*, 89 Mo. App. 15.

As said by the court in *Wolff v. Meyer*, supra: "The impossibility of performance of a contract to convey made by a married woman alone is, however, not, strictly speaking, an impossibility in law such as would make the contract void. It is an impossibility which may or may not arise, and is dependent on the will of her husband. One authorized to contract may make a valid contract although the possibility of its performance depends on the will of another."

Corby v. Drew, 55 N. J. Eq. 387, 36 Atl. 827, goes to the extent of holding that equity will not specifically enforce a contract by a married woman to convey her real estate, without reference to whether or not her husband would join therein. This decision was in part, however, based upon the provision of the statute requiring a special form of acknowledgment by a married woman to a conveyance, by which she acknowledged the same to be her voluntary act, the court reasoning that under this provision the contract of a married woman could not be specifically enforced at all, since a court of equity had no power to compel her to sign an instrument declaring the same to be her voluntary act and deed, when, as a matter of fact, the execution of the instrument was not voluntary on her part, but under the coercion of the court. Although the case is not in point as to the facts, this reasoning of the court is disapproved of in *Goldstein v. Curtis*, 65 N. J. Eq. 382, 59 Atl. 639, which holds that it is not essential to the validity of a deed by a married woman in pursuance of a decree of the court that she should make the statutory acknowledgment; neither is it necessary that she should make any conveyance at all, for the decree of conveyance is self-executing.

Wolff v. Meyer, supra, while denying the right of a person contracting with a *feme covert* specifically to enforce her contract to convey real estate, where not joined with her husband, nevertheless sustained the validity of such a contract to the extent of holding her liable for damages for a breach thereof by not conveying the real estate in accordance with the terms of the contract.

was not able to perform because her husband had refused to join in the deed. This most clearly appears in the opinion, written by the writer hereof, for we said: "Under the act of 1893, a married woman may 'sell' her real estate, and make any contract 'necessary, appropriate, convenient, or advantageous' to the exercise of her right to sell; but she may not perform her contract to sell without the join-

The same conclusion was also reached in *Davis v. Watson*, supra, which also sustained the right of a party to a contract with a married woman for the conveyance of her real estate, to recover damages from her for a breach thereof by a failure to convey.

But this case is overruled by *Clay v. Mayer*, 183 Mo. 150, 81 S. W. 1066, which holds that equity will specifically enforce a contract by a married woman to convey her real estate, where such contract was entered into by her after the passage of the married woman's act authorizing her to make contracts with reference to her real estate. *Brown v. Dressler* is cited as authority for this proposition.

In the latter case the conclusion apparently reached is that contracts by a *feme covert*, at least as to self-enforcing mortgages and deeds of trust, may be enforced in equity, but under the protection of the court. In that case the court reasoned that, under the provisions of a statute which gave to a married woman the same right to contract as though a *feme sole*, she is authorized to make contracts in respect of her property, whether real or personal, and such contracts are alike binding on her and on those with whom she contracts. Construing these provisions in connection with another provision of the statute denying to married women the power to encumber or convey their real estate unless their husbands join in such conveyance, the court said that this section did not authorize a *feme covert* to convey her real estate as a *feme sole*, but, on the contrary, required such a conveyance to be by a joint deed with her husband. Construing the two provisions together, the court reached the conclusion that, while the lawmaking power was willing to confer on married women the power to make contracts binding on their real estate, it was unwilling to confer upon them the power of alienating the same absolutely by deed, without the knowledge or acquiescence of their husbands, or to expose them entirely unprotected to the keen edge of self-enforcing mortgages and deeds of trust, but left their contracts of this character to be enforced by and under the protection of the courts. Language is, however, also used which indicates that a court of equity might in a proper case specifically enforce a contract by a married woman to convey her real estate, and it is this language that is quoted and followed with approval in *Clay v. Mayer*.

A. G. S.

der of her husband in the conveyance. She therefore knows when she enters into a contract to sell that she takes the chances, as well as her vendee, that her husband may not join in the deed, and that neither can compel specific performance if he refuses to join. But she knows that her contract or agreement to sell is a valid one, even if neither she nor her vendee may be able to have it specifically enforced, and therefore, whatever the vendee may pay on it, or expend in pursuance of it, must be returned to him by her, when she finds that she cannot specifically perform.

. . . The refusal of the husband to join in the wife's deed cannot operate to relieve her from liability under her contract, any more than her refusal to join in the husband's would relieve him from liability under his." On the last trial it affirmatively appeared from the testimony of the plaintiff herself, and from the deposition of her husband, that he had not refused to join in the deed, and the only conclusion to be drawn by the jury was that she had refused to convey simply because she rued the bargain. This was no more her privilege than if she had been a single woman. She admitted that she had never asked her husband to join in the deed, and he testified that he had never refused to join in the agreement for the sale of the farm.

The plaintiff entered into a valid contract with McCormick. She handed over her title papers that a proper deed might be prepared for him, and she vacated the premises, and permitted him to take possession of them, but, notwithstanding all this, her right was to retake them, provided she could not make him a deed and would be just to him in the matter of his expenditures. But she had no right to retake possession merely because she would not make a deed. When a married woman cannot perform her contract for the sale of her real estate, the law will not make her; but when she simply will not, it will not help her to escape her covenant. When she cannot carry out an honest contract to sell, she is not morally blamable, and the law will exact nothing more from her than compensation to her vendee for any loss he may have sustained in reliance upon the contract; but when she capriciously will not perform, she becomes not only *persona non grata in foro conscientia*, but a plaintiff without a cause of action in a suit at law in repudiation of her contract. As to this, the correct instructions of the trial judge to the jury were that the only excuse that would avail the plaintiff in her refusal to make title was her husband's refusal to join in the conveyance, and that if he had not refused

to join, and she resorted to a plea of his refusal as a scheme to avoid the conveyance, she could not recover. And the burden was upon her to show her husband's refusal. This is a reasonable rule. An honest woman will try to perform her contract to sell her real estate by asking her husband to join in the deed. This is a very simple matter, and, if the husband refuse, it is an end of specific performance. He may refuse for any reason or for none at all. It is sufficient that he refuse, to release the wife from her agreement to convey, but to release her when he does not refuse to join in the conveyance would be in contravention of the plain spirit of the act of 1893, and would turn it into a piece of legislation in aid of every dishonest *feme covert* disposed to repudiate her contract for the sale of her real estate, from whim, caprice, or because she imagines or discovers that she ought to have received more money for her property.

At the time of the second trial the husband of the plaintiff was dead, and she was in a position to make a deed to McCormick. As she failed to show that she could not have made it during the lifetime of her husband, and before she brought this suit, she was rightfully denied a recovery by the verdict of the jury, and must now be content with the purchase money to be paid her by her vendee.

The assignments of error are overruled, and the judgment is affirmed.

PENNSYLVANIA SUPREME COURT.

MARY J. MCCOY

v.

SAMUEL C. NIBLICK et al., Appts.

(221 Pa. 123, 70 Atl. 577.)

Husband and wife — woman's deed — repudiation — recovery of amount.

1. A married woman cannot repudiate her sale of real estate and keep the purchase price because her husband has not joined in the deed, where the statute pro-

Note. — This is a companion case to McCoy v. Niblick, ante, 353, and involves the same question as to the effect of the non-joinder of the husband in an executory contract by the wife to convey her real estate, where the wife is authorized by statute to contract for the sale of her real estate, but is denied the right to convey it unless her husband join in the conveyance.

The question is discussed in a note attached to the case as reported, ante, 353, wherein are gathered the few cases involving the question.

In comparing the two decisions of the

vides that she shall have the same right to dispose of her real estate as an unmarried person, but that she cannot convey real property unless her husband joins in the conveyance.

Trial — ejectment — conditional verdict.

2. In an action by a married woman to recover possession of her real estate conveyed by a deed in which her husband did not join, under a statute permitting her to sell her real estate in the same manner as if sole, except that her husband must join in the deed, a conditional verdict should be rendered designating the amount to which the vendee is entitled for advancements, improvements, and other charges for which he should be reimbursed.

(May 4, 1908.)

APPEAL by defendants from a judgment of the Court of Common Pleas for Bucks County entered upon a directed verdict for plaintiff in an action brought to recover possession of certain real estate which plaintiff had conveyed by deed which was alleged to be void. Reversed.

The facts are stated in the opinion.

Messrs. Yerkes, Ross, & Ross, for appellants:

The contract was not void on the ground of coverture, and there was evidence to submit to the jury which would entitle the defendant McCormick to set off the payments made by him, and to a conditional verdict.

Sinclair v. Evans, 5 Pa. Dist. R. 384; Reed's Estate, 3 Pa. Dist. R. 503; Jenkins v. Pittsburgh & C. R. Co. 210 Pa. 134, 59 Atl. 823; Cable v. Cable, 146 Pa. 451, 23 Atl. 223; Hertzog v. Hertzog, 34 Pa. 418.

Messrs. William Stuckert and William R. Stuckert, for appellee:

The alleged agreement between the plaintiff, a married woman, and defendant Wm. M. McCormick for the sale of plaintiff's land, signed by an alleged agent of plaintiff, who was not authorized in writing to sell the same, the husband not having joined therein, is not binding upon such married woman and her husband or upon either of them.

Glidden v. Strupler, 52 Pa. 400; Trimmer v. Heagy, 16 Pa. 484; Grim's Appeal, 105 Pa. 375; Miller v. Ruble, 107 Pa. 395; Innis

v. Templeton, 95 Pa. 262, 40 Am. Rep. 643; Pearsoll v. Chapin, 44 Pa. 9; Wiltbank v. Tobler, 181 Pa. 103, 37 Atl. 188; Endlich & R. Rights & Liabilities of Married Woman, 118, p. 226, note 4; Story, Eq. § 790.

Brown, J., delivered the opinion of the court:

There was sufficient shown by the appellants to take appellee's sale of her farm out of the statute of frauds. Wishing to sell it, she sent for Charles F. Vandegrift, a real-estate agent, and asked him to expose it to public sale on March 19, 1906. He did so on that day, after reading the conditions of sale signed by himself as her agent. She was present at the sale, and, after a conference with Vandegrift, authorized him to sell the property to McCormick, one of the appellants, at his bid of \$10 per acre, subject to an annuity charge. The property was thereupon knocked down to him, and he signed the agreement to purchase it in the presence of the appellee. On the same day he paid her agent \$120,—10 per cent of the purchase money,—in accordance with the conditions of sale, and the agent procured from her and handed over to him the title papers to the property. Shortly before April 1, 1906, when possession of the farm was to be given to the purchaser, the appellee vacated it, and McCormick took possession. He paid the annuity of \$100 due April 1, 1906, as well as that due the following year. On April 2, 1906, he tendered the balance of the purchase money and demanded his deed, which the appellee refused to give him. Subsequently he paid fire-insurance tax on the barn and contents, and expended \$400 in improving the farm. This ejectment was brought on August 28, 1906, and a verdict directed for the plaintiff, on the ground that her contract for the sale of her farm was void, because she was a married woman when she signed it, and her husband had not joined in it. The case was tried upon that theory alone, and it is the only one advanced on this appeal in asking that the judgment on the verdict be sustained. The effect of sustaining it would be to drive the appellants from the farm and restore it to the appellee without payment by her to McCormick of the percentage of the purchase money which he paid her

Pennsylvania court on this question it would seem that while a wife will be given affirmative relief against the purchaser of her property on an executory contract, where her husband refuses to join in a conveyance thereof, to the extent that she will be permitted to recover the possession of the property which the purchaser obtained under his executory contract, yet as a condition of such recovery she will be required to repay to the purchaser his ex-

penditures under the contract by way of advancements, improvements, etc.

On the other hand a married woman will not be permitted to take advantage of the fact that her husband is required by statute to join in her conveyance of real estate, where he does not bona fide refuse to join therein, and in such a case the court at least will refuse to grant her any affirmative relief.

agent, or reimbursement for what has been paid for annuity dues, fire-insurance tax, and improvements.

There was a time when there would have been no relief for McCormick as the vendee of the appellee, from what he has shown to be her unconscionable conduct; for, until recent years, a married woman, under her plea of coverture, could retake land from her vendee in possession of it without refunding a dollar of the purchase money, though all of it had been paid to her, and without reimbursement for any improvements made, if the land had not been sold or conveyed in the precise mode pointed out by the statute; but this was when her incapacity to contract at all in relation to her real or personal estate was the rule, and her capacity the rare exception. Now her capacity to contract in all respects as if she were unmarried is the rule, and her incapacity the exception. As to her real estate the words of act June 8, 1893 (P. L. 344), are: "A married woman shall have the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell, or otherwise dispose of any property of any kind, real, personal, or mixed, and either in possession or expectancy, and may exercise the said right and power in in the same manner and to the same extent as an unmarried person, but she may not mortgage or convey her real property, unless her husband join in such mortgage or conveyance." A married woman may therefore no longer repudiate her contract for the sale of her real estate, in which her husband has not joined, on the ground that it is void, and keep what has been paid to her on account of it or expended by her vendee in pursuance of it. *Glidden v. Strupler*, 52 Pa. 400; *Grim's Appeal*, 105 Pa. 375, and other cases cited by counsel for appellee, are not now authority for permitting a married woman to profit by her moral dishonesty, except when she undertakes to do what the act of 1893 says she still may not do. For the consequences of not doing that which she undertakes to do by virtue of the powers conferred upon her by that act, she is as answerable for damages as if unmarried.

Under the act of 1893 a married woman may "sell" her real estate and make any contract "necessary, appropriate, convenient, or advantageous" to the exercise of her right to sell; but she may not perform her contract to sell without the joinder of her husband in the conveyance. She therefore knows when she enters into a contract to sell that she takes the chances, as well as her vendee, that her husband may not join in the deed, and that neither can compel specific performance if he refuses to

join; but she knows that her contract or agreement to sell is a valid one, even if neither she nor her vendee may be able to have it specifically enforced, and therefore whatever the vendee may pay on it or expend in pursuance of it must be returned to him by her, when she finds that she cannot specifically perform. The words of the act would be meaningless if any other effect should be given to them. The appellee contracted to sell under the power conferred upon her by the statute to make the contract; but, if not able to perform it, she must place her vendee in the same position he was in before he contracted with her. This is the rule as to all persons *sui juris*; and married women, who now are of this class in the acquisition, ownership, possession, control, use, lease, and sale of their real estate, except when they actually convey, are subject to it. "The act of 1893 gives a married woman the same power that a *feme sole* has to sell her real estate, except that she may not make a valid conveyance unless her husband joins in the deed." *Jenkins v. Pittsburg & C. R. Co.* 210 Pa. 134, 59 Atl. 823. Our Brother Stewart, when on the common pleas, properly said of the act of 1893, in *Reed's Estate*, 3 Pa. Dist. R. 503: "The act makes a clear distinction between the executory contract of sale and the actual conveyance of the wife's land, so far as regards the manner of their execution. It gives her the right to contract for its sale in the same manner, and to the same extent, as an unmarried person; but, when she comes to convey, she may do so only by her husband joining in the deed. If her right to contract for its sale be qualified in like manner with her right to convey, she is no better off with respect to her real estate than she was under the act of 1848. It is this right to contract, and her personal liability in connection therewith, that marks the advance made. The refusal of the husband to join in the wife's deed cannot operate to relieve her from liability under her contract, any more than her refusal to join in the husband's would relieve him from liability under his. Can there be any doubt that the damages in both cases would be measured by the same standard? The only possible difference between the two as to result is that the husband could be required to perform specifically, so far as his own estate in the land is concerned, while performance could not be decreed against the wife on her contract, since her individual deed would be ineffectual for any purpose. This difference emphasizes the distinction found in the act. The wife's contract, unlike that of the husband, conveys no interest in the land, legal or equitable, but creates a personal liability only."

The appellee is entitled to regain possession of her land only after paying McCormick what a jury may find is due him for the purchase money, the annuity, and the fire-insurance tax paid by him, and for whatever expenditures he made for improvements before he was notified that the contract would not be specifically performed because the husband of the appellee would not join in the deed. This equitable result would have been reached by a conditional verdict which the jury ought to have been directed to render, if they believed the facts testified to by the appellants and their witnesses.

As to the first assignment of error, which complains of the court's permission to the appellee to reopen her case after she had closed, and there was an intimation that a nonsuit would be directed, nothing more need be said than that it was not an improper exercise of judicial discretion.

The first, second, and third assignments of error are overruled. The fourth, fifth, sixth, seventh, eighth, and ninth are sustained, and the judgment is reversed, with a venire facias de novo.

TENNESSEE SUPREME COURT.

PARLEE WESTER et al.

v.

REUBEN HURT et al.

(—Tenn. —, 130 S. W. 842.)

Deed — married woman — examination — telephone.

The privy examination of a married woman necessary to validate her conveyance of real estate under a statute prescribing its form cannot be taken by telephone.

(October 1, 1910.)

CERTIORARI to the Court of Civil Appeals to review a decree reversing a decree of the Chancery Court for Roane County dismissing a bill filed to cancel a certain deed of trust. Affirmed.

The facts are stated in the opinion.

Mr. Gideon Hill for complainants.

Messrs. Staples & Stone, for defendants:

As the taking of the acknowledgment was a judicial act, it cannot be attacked except for fraud of the beneficiary.

Burem v. Winstead, 103 Tenn. 288, 52 S. W. 1070; Cason v. Cason, 116 Tenn. 193, 93 S. W. 89; Kennedy v. Security Bldg. & Sav. Assn. (Tenn.) 57 S. W. 394; Thompson v. Southern Bldg. & L. Assn. (Tenn.) 37 S. W. 705; Shell v. Holston Nat. Bldg. & 30 L.R.A. (N.S.)

L. Assn. (Tenn.) 52 S. W. 909; Finnegan v. Finnegan, 3 Tenn. Ch. 515; Grotenkemper v. Carver, 9 Lea, 280; Young v. Harris, 74 Ill. App. 667; Hall v. Hall, 118 Ky. 656, 82 S. W. 269; Morris v. Linton, 61 Neb. 537, 85 N. W. 565; Boldt v. Becker, 1 Neb. (Unof.) 75, 95 N. W. 509; Nimocks v. McIntyre, 120 N. C. 325, 26 S. E. 922; Marsh v. Griffin, 136 N. C. 333, 48 S. E. 735; Summers v. Sheern (Tex. Civ. App.) 37 S. W. 246; Atkinson v. Reed (Tex. Civ. App.) 49 S. W. 260.

Lansden, J., delivered the opinion of the court:

This case is before us upon a certiorari to a decree of the court of civil appeals, reversing the decree of the chancellor, dismissing the complainants' bill.

The facts necessary to be stated are that Mrs. Wester is the owner of a small tract of land in Roane county, and she joined her husband in a deed of trust for the purpose of securing a debt which her son owed to the defendant Hurt, and after signing the deed it was taken to the notary public, who called Mrs. Wester over the

Note. — Validity of acknowledgment or oath taken over telephone.

There appear to be but two cases, in addition to *WESTER v. HURT*, passing upon the validity of an acknowledgment or oath taken over the telephone.

In *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210, it appeared that the validity of an acknowledgment to a deed was questioned upon the ground that at the time the deed was acknowledged by the defendant, who was a married woman, she was "not visibly, and therefore not personally, present before the notary at the time he took her acknowledgment through a telephone, she then being 3 miles distant from him." To this objection the court said: "It is admitted that the certificate of the notary is in due form; and it is not alleged or pretended by the defendant that she did not voluntarily sign and deliver the deeds; nor that she did not voluntarily, and without the hearing of her husband, acknowledge the execution of them through the telephone, after having been informed by the notary of their contents; nor that any deception or fraud was practised to induce her to execute the deeds; nor even that the plaintiffs had notice of the manner in which it is alleged that she acknowledged the execution through the telephone. These particulars are not stated for the purpose of maintaining that, under any circumstances, an acknowledgment of a deed may be taken through a telephone, but for the sole purpose of showing that there is no pretense of fraud, duress, or mistake." Then the court, after reviewing a number of decisions holding that a notary's certificate of acknowledgment is

telephone and attempted to take her privy examination by a conversation in this way. The court of civil appeals held that his acknowledgment was invalid, and granted to Mrs. Wester the relief she prayed by canceling the deed of trust.

The deed of a married woman living with her husband, conveying her general estate, is void without her privy examination. The form of this examination is prescribed by statute (Shannon's Code, § 3753), and every material part of this form is necessary to make the probate of the deed valid upon its face. The action of the officer taking the acknowledgment is a judicial one, and establishes by judicial force: (1) That there was a personal interview between him and the bargainer; (2) that this interview was private and apart from the husband; and (3) that the execution of the deed was confessed to have been made freely, voluntarily, and understandingly, and without compulsion or constraint from her husband, for the purposes therein contained.

When a deed has a certificate attached to

it containing all of the material parts prescribed by the statute, and signed by the proper officer, it establishes the probate of the deed as a matter of judicial determination, and this probate cannot be attacked by extrinsic evidence showing any mere irregularity. It can only be overthrown by proof of fraud or duress, and by a causal connection of the grantee with the fraud.

These conclusions are abundantly established by all of our authorities. It is clear that if the officer taking the privy examination of the married woman does not have a personal interview with her, and does not propound the required questions to her while in her presence, he cannot determine judicially whether the deed has been executed in the manner and under the conditions that the law requires in order to make a valid conveyance of a married woman's estate. This is manifest from the language of the statute itself. The officer is to determine as a matter of judicial judgment that she did execute the instrument freely, voluntarily, and understandingly, and with-

conclusive as to the facts stated therein except where fraud is shown, held that the acknowledgment, in the case at bar, was valid. The inevitable conclusion of such a holding seems to be that where an acknowledgment to a deed is taken over the telephone, and the certificate of acknowledgment is in regular form, it is valid, and cannot be impeached except where fraud is established.

In *Sullivan v. First Nat. Bank*, 37 Tex. Civ. App. 228, 83 S. W. 421, it was held that an oath to an affidavit which was required by statute to be administered in the mode most binding upon the conscience of the individual taking the same, and made by the affiant in the personal presence of the officer, could not be administered over the telephone, although the officer recognized the voice of the affiant. Gill, J., said: "The law requires the affiant to be in the personal presence of the officer administering the oath; not to the end that the officer may know him to be the person he represents himself to be, for it is not required that the affiant be identified, or introduced, or be personally known to the officer, but to the end that he be certainly identified as the person who actually took the oath." And then in considering the question with relation to a possible prosecution for perjury he continued: "It may be true that the officer, when he takes the affidavit of one well known to him, might recognize his voice over the telephone, and therefrom be able to testify that he took the oath and made the affidavit in issue. But it must be borne in mind that the law does not require the clerk or notary to be acquainted with one who becomes an affiant before them. A stranger may appear, sign an affidavit, and demand that the officer

swear him and affix his jurat. In that case the officer certifies and can swear to no more than that the man who affixed the name to the affidavit swore to its truth. The name he signed may have been fictitious, but the individual swore to it as the clerk or notary certified, and he would be subject under that name or his true one to a prosecution for perjury. Now, if the contention of appellant is sound [that personal presence of affiant was not required], the rule must be laid down broadly, and whoever might demand the official jurat by his personal presence might also demand it over the telephone. Had it not so happened in this case that the clerk was acquainted with Sullivan, and identified him by his voice, he could have done no more than certify that a man whom he did not know, but who represented himself to be Sullivan, authorized the name of Sullivan to be signed to the affidavit and swore its contents were true. The clerk could not possibly identify him as the one making the affidavit if the question should afterwards arise. In a prosecution for perjury, such testimony on the part of the clerk would not even raise an issue against the unknown affiant. So, we hold that not only is the personal presence of the affiant required, to the end that by appropriate form and ceremony his conscience may be bound, but that it is required . . . that the officer may see and know that the man who signs also swears. No modern business necessity requires the broadening of these rules. To allow the contention of appellant would be to open a broad door for fraud and imposition, and hold out to the perpetrators a tempting chance for immunity from discovery and identification." E. M. S.

out compulsion or constraint from her husband; and this he cannot do out of her presence, because her appearance, manner, and demeanor may become more potent factors in ascertaining the truth of this than mere formal answers to questions.

The language employed by the legislature in prescribing the form of the certificate made by the officer taking the examination precludes a construction which would uphold an acknowledgment taken in this way, and therefore it was clearly not within the legislative intent that this should be done.

We are of opinion, therefore, that this attempted privy examination of Mrs. Wester was a mere empty form, unauthorized by the statute, and the certificate made by the officer, although it contained the proper words, does not establish the facts certified to. The decree of the Court of Civil Appeals, reversing the decree of the chancellor, is therefore affirmed.

ARKANSAS SUPREME COURT.

DARDANELLE PONTOON BRIDGE &
TURNPIKE COMPANY, Appt.,

v.

MOSES CROOM.

(— Ark. —, 129 S. W. 280.)

Toll bridge — defect — liability for accident.

1. The proprietor of a toll bridge is liable for the loss of a team which falls from the bridge and is killed because of the failure of such proprietor to use reasonable and ordinary care to see that the guard rail was sufficient to withstand such pressure as might be imposed upon it by teams likely to be upon the bridge.

Same — sufficiency of rail.

2. A railing on a bridge, made of light, unbraced pine posts, bolted at the bottom, may be found to be insufficient to meet the requirements which the law imposes upon the owner to render the bridge safe for teams which may be upon it.

Trial — refused instruction — error.

3. It is not prejudicial error to refuse an instruction which is not within the issues presented by the pleadings.

Evidence — opinion — safety of bridge.

4. A properly qualified witness may give an opinion as to the sufficiency and safety of the guard rail on a bridge to protect users from loss or injury.

Trial — argument — comment on interest of witness.

5. Counsel may, in argument, comment on the interest of a witness in the result of the trial, if his testimony is in conflict

with other testimony or established facts in the case.

(May 30, 1910.)

A PPEAL by defendant from a judgment of the Circuit Court for Yell County in plaintiff's favor in an action brought to recover damages for loss of a team and wagon, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. H. M. Jacoway and Sellers & Sellers for appellant.

Messrs. Bullock & Davis, for appellee:

Edgar Shinn's testimony as to the safety and sufficiency of the guard rail was admissible.

St. Louis, I. M. & S. R. Co. v. Lyman, 57 Ark. 512, 22 S. W. 170; McDermott v. Cable, 23 Ark. 200; 17 Cyc. Law & Proc. pp. 34-36; Porter v. Pequonnoc Mfg. Co. 17 Conn. 249; Warren v. Jeunesse (Ky.) 122 S. W. 802.

A greater degree of care and precaution is imposed upon a bridge company with a franchise to take toll, than upon a mere municipality, charged only with keeping the public highway in repair for the use of the public, without toll.

5 Cyc. Law & Proc. p. 1100; St. Louis Bridge Co. v. Miller, 138 Ill. 465, 28 N. E. 1071.

Frauenthal, J., delivered the opinion of the court:

This was an action to recover the value of a team of mules and a wagon which fell from defendant's bridge, and were lost. It was alleged in the complaint that the loss was due to the defendant's negligence in failing "to have a safe and sufficient guard

Note. — Rights and duties of toll-bridge proprietors.

The earlier cases upon this subject are collected and discussed in a note to Clarks-ville & R. Turnp. Co. v. Montgomery County, 58 L.R.A. 155, and this note is supplementary thereto.

The more recent cases are not very numerous, for it is apparently the policy of counties and municipalities to abolish toll bridges and toll roads, and, by purchasing the bridges from the proprietors, convert them into free bridges.

This note is confined to toll bridges, and does not include cases involving free public bridges, or private bridges, or bridges built and maintained solely for the purpose of carrying the trains of certain railroads.

Rights and duties in general.

Equity has jurisdiction to restrain a street railway company's unlawful use of a

rail properly braced and strong enough to insure safe passage over said bridge, and to prevent frightened teams from breaking through into said river." The defendant owned and operated a bridge across the Arkansas river, near the town of Dardanelle, and charged and collected fare for the crossing of persons and property over it. The plaintiff had driven his mules and loaded wagon upon the bridge, and was crossing over same, when the mules, either from fright or other cause, backed the wagon against the railing of the bridge, which broke and gave way, and the mules and wagon were precipitated into the river. The mules were drowned and the wagon lost. The testimony on the part of the plaintiff tended to prove that the bridge was built

of boats, and was what is known as a "pontoon" bridge. Along its sides the defendant had built a railing or barrier. This railing was composed of upright posts, upon which was fastened a plank or streamer. The posts were made of pine, and were fastened to the bottom of the boats with bolts. The testimony on behalf of the plaintiff tended to prove that the posts were not built of strong wood; that the timbers in the railing were light and frail, and that the posts and railing were not braced; that, because the posts were not braced, the railing was not substantial and not strong enough to withstand the weight of a wagon that might ordinarily be expected to be pressed against it. And the testimony tended further to prove that, if the

public toll bridge. *Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co.* 165 Pa. 37, 20 L.R.A. 323, 30 Atl. 511.

An electric railway company has the right to cross a public toll bridge on payment of adequate toll, where the statute gives it the right to use "any street or highway." *Ibid.*

A railroad corporation having no authority under its own charter to acquire and exercise the rights, powers, and franchises of a toll-bridge corporation, or to carry on the business of such other corporation, does not succeed to such rights, powers, and franchises of the toll-bridge corporation by purchasing the whole property employed by the bridge company in maintaining its bridge. *Southern R. Co. v. Mitchell*, 139 Ala. 629, 37 So. 85.

Power to construct railroad toll bridges is not destroyed by the amendment of a statute providing for the formation of corporations to construct bridges, by striking out a provision requiring the articles of incorporation to state whether the bridge is to be for railroad or other purposes, and remitting incorporators to the general provisions of the statute in forming their articles of incorporation, without mentioning railroad purposes as one for which a bridge may be constructed. *Southern Illinois & M. Bridge Co. v. Stone*, 174 Mo. 1, 63 L.R.A. 301, 73 S. W. 453.

A writ of peremptory mandamus, commanding that a toll bridge should be reconstructed and altered so as to accommodate ordinary road travel, will be denied where it appears that the bridge, for nearly thirty years, had been used exclusively as a railroad bridge, and in fact had never been used for ordinary travel, and had, within a few years, been reconstructed, and the bonds issued to pay for such reconstruction had been guaranteed by the railroad company. *State ex rel. Crow v. Boonville Bridge Co.* 206 Mo. 74, 103 S. W. 1052.

In *State Road Bridge Co. v. Saginaw Circuit Judge*, 143 Mich. 337, 106 N. W. 394, the court refused to issue a writ of mandamus to the circuit judge, directing him to vacate an order granting a preliminary injunction restraining a toll-bridge company

from collecting tolls over its bridge, upon the ground that the plaintiff had mistaken its remedy; but the court said that the injunction was improperly issued, as the result was to deprive the company of its property on a mere preliminary hearing.

The mere interest of a plaintiff as a citizen and resident of a town and parish is insufficient in law to maintain an action to compel the authorities to invest the surplus revenues arising from the operation of a toll bridge, and use the interest accruing therefrom for the maintenance and operation of the structure as a free bridge; it not being even alleged that plaintiff had ever used the bridge or expected to use it, or had been or would be injured by the collection of tolls. *Laforest v. Thibodaux*, 117 La. 266, 41 So. 568.

A toll bridge substituted for a ferry will be charged with the license or privilege of free passage resting on the ferry, where its owner continued to use for the bridge the easement for a highway over adjoining lands, in consideration of which the free passage had been granted. *Dupont v. Charleston Bridge Co.* 65 S. C. 524, 44 S. E. 86.

And one entitled to the right of free passage over a toll ferry in consideration of an easement given to the company for a highway over a portion of his land does not lose such right by the payment of tolls on the bridge, made under protest, and with the assertion of a right of free passage. *Ibid.*

A toll bridge, like a toll road, is a public highway, burdened with the legislative grant of a right to the proprietor to charge tolls for passage thereon. *Montgomery County v. Clarksville & R. Turnp. Co.* 120 Tenn. 76, 109 S. W. 1152.

—exercise of power of eminent domain.

The power of eminent domain may be exercised to secure property needed for the construction and maintenance of a toll bridge. *Southern Illinois & M. Bridge Co. v. Stone*, *supra*.

Changing the words "to the uses of said

railing had been built of heavier and sounder timber and the posts properly braced, it would have withstood such pressure. And we are of opinion that there was some evidence adduced in the case which was sufficient to warrant the jury in finding that the railings were not constructed and maintained in such a proper and substantial manner as was necessary to secure the safety of teams that ordinarily crossed the bridge, and which might press against the railings with such force as might be, in the exercise of due care and caution, expected and foreseen; that the loss was due to the insecure and unsubstantial manner in which the railing was constructed and maintained; and that the plaintiff was at the time in the exercise of due care.

At the request of the plaintiff, the court gave the following instruction: "(1) If you find that the defendant owned and operated a bridge across the Arkansas river for the transportation of freight and passengers for toll, it was bound to use reasonable skill and diligence in providing against the ordinary dangers of travel, and to provide and maintain a reasonably safe bridge; and if guard rails and banisters be reasonably necessary for that purpose and practicable, it was bound to construct and maintain them in the places needed and of sufficient strength to be reasonably safe; and, if you find that the defendant failed to so construct and maintain or keep in repair the said bridge, by reason of which the injury

corporation," in the section of a statute providing for the creation of bridge companies, which specifies for what purposes property may be acquired under the power of eminent domain, so as to read "for approaches, road, foot, or wagon ways," does not indicate an intention to deprive a company organized to construct a railroad bridge of the power to condemn property for terminal accommodations for the use of such railroads as may desire to use the bridge, since the word "road" may be held to include railroad. *Ibid.*

The use of a public toll bridge for an electric railway, on payment of adequate tolls, is not a taking of or injury to the property in the exercise of the power of eminent domain. *Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co. supra.*

Approaches.

The fact that a corporation organized to build a bridge is not expressly authorized by its charter to obtain approaches by an exercise of the power of eminent domain does not bring an attempt to secure such approaches in a foreign state within the operation of a constitutional provision of such state, forbidding any company to engage in business other than that expressly authorized by its charter. *Southern Illinois & M. Bridge Co. v. Stone, supra.*

The approaches to a toll bridge and its abutments, as well as the bridge proper, must be kept in repair by the owner, the whole having been erected by him, and, so far as appears, no duty resting upon the public to maintain the approaches or abutments as a part of the highway. The defect complained of having existed for a considerable period of time, no question could properly arise as to the duty of the owner to take notice of it. *Augusta v. Hudson, 94 Ga. 135, 21 S. E. 289.*

The legislature may lawfully grant franchises to erect a toll bridge, which will include the right to provide proper and suitable approaches, and to lay rails thereon for the accommodation of railroad traffic, for the benefit of which the bridge is to be

erected. *Southern Illinois & M. Bridge Co. v. Stone, supra.*

Erection of competing bridges.

The police jury of a parish has the right to restrain by injunction the operation of a free bridge or ferry within the distance from a public toll bridge prescribed by statute or ordinance. *Lafourche v. Robichaux, 116 La. 286, 40 So. 705.*

In determining the limits prescribed in a statute authorizing the erection of a toll bridge, and providing that no other bridge should be erected within half a league "above the said bridge and below the same bridge," the distance is to be measured along the course of the river. *Rouleau v. Pouliot, 36 Can. S. C. 224.*

Duty as to maintenance of bridge.

Toll-bridge proprietors are not insurers of the safety of persons paying tolls thereon. *Washington, C. & A. Turnp. Co. v. Case, 80 Md. 36, 30 Atl. 571.*

Nor is the proprietor of a toll bridge a common carrier. *Gibler v. Terminal R. Asso. 203 Mo. 208, 101 S. W. 37, 11 A. & E. Ann. Cas. 1194.*

The authorities substantially agree that ordinary care is all the law requires of the owners of toll bridges, but to constitute ordinary care, the care must be proportionate to the danger to be apprehended. *Ibid.*

It is not error to refuse an instruction that a bridge company is liable for defects in the bridge, however such defects were caused, and notwithstanding that the company had no knowledge thereof. *Hellyer v. Trenton City Bridge Co. 133 Fed. 843.*

In an action for personal injuries alleged to have been caused by the negligence of a toll-bridge company, it is error to refuse to charge the jury that if the injury complained of was caused by the accidental displacement of a single plank on the bridge, of which the company had no notice, and could not, by the exercise of reasonable diligence, have known, then the verdict must be for the defendant. *Washington, C. & A. Turnp. Co. v. Case, supra.*

complained of occurred, you will find for the plaintiff."

At the request of the defendant, the court gave, among other instructions, the following:

"(3) Defendant is not an insurer of the safety of property carried over its bridge; nor is it required to keep guard rails of such strength that they will not give way or break under any circumstances, or resist extraordinary pressure. It is only required to use ordinary care to keep its guard rails in a reasonably safe condition, which means a condition of safety under ordinary circumstances."

"(5) Before you would be justified in finding for the plaintiff, you would have to find from the evidence that, at the time

of the accident, the bridge, by reason of the defective guard rail, was insufficient to furnish protection to teams under such conditions and circumstances as were likely to occur on said bridge; and you would have to find further that such defective condition existed and was caused by defendant's failure to use ordinary care.

"(6) Before you would be justified in finding for the plaintiff on account of the defective guard rail, as alleged in the complaint, the proof would have to show that, in order to furnish protection to wagons and teams crossing said bridge under the usual and ordinary circumstances, it was necessary to have guard rails of greater strength and sufficiency than the ones shown to have given away; and, further, that the failure to

But in *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091, it was held that a bridge company authorized to construct and maintain a toll bridge, and to collect and receive tolls of such persons as make use of it, is to be held to a higher degree of diligence in caring for the safety of passengers crossing the bridge than a corporation performing that service for the public gratuitously would be.

Of course, a toll-bridge proprietor is liable for injuries proximately caused by its failure to use ordinary care to keep the bridge reasonably safe for traffic.

Thus, a toll-bridge company which maintains a covered toll bridge is liable for injuries proximately caused by its failure to light the bridge at night. *Conowingo Bridge Co. v. Hedrick*, 95 Md. 669, 53 Atl. 430.

So, a bridge company is liable for injuries to a foot passenger, caused by a drove of mules stampeding on the bridge, and getting from the carriage way to the footpath, which were not separated by any railing or barrier, and squeezing and crushing the plaintiff against the outer bridge railing. *St. Louis Bridge Co. v. Miller*, *supra*.

And in *Fox v. Union Turnp. Co.* 59 App. Div. 363, 69 N. Y. Supp. 551, the court said: "A turnpike road is a public highway, and the same duty rests upon a turnpike company to keep its roads and bridges reasonably safe for ordinary travel that rests upon municipalities with reference to roads and bridges owned and maintained by them. The absence of a guard or railing where one is needed to make a highway reasonably safe is a defect."

An instruction that, by the term "ordinary care," as applied to a toll-bridge proprietor, is meant such care as a prudent operator of a toll bridge would exercise under the same or similar circumstances, although unhappily worded, is not misleading or confusing. *Gibler v. Terminal R. Asso.* *supra*.

Where a mule which was being driven to a wagon over a toll bridge owned and kept by a city became frightened by a train on 30 L.R.A. (N.S.)

a railroad near by, ran away, and, because of the absence of a guard rail from the approach to or abutment of the bridge, was precipitated from the structure down a high embankment, the absence of the guard rail was a sufficiently proximate cause of the catastrophe to render the city liable for injuries to person and property thereby occasioned, if such absence was due to the city's negligence. *Augusta v. Hudson*, *supra*.

It is the legal duty of the proprietor of a toll bridge to construct and maintain a railing between the carriage road and the footpath, for the protection of foot passengers, if such railing is the most obvious and appropriate expedient for preventing injuries likely to happen to foot passengers, even if such a railing is not commanded or indicated, either by the law or by the defendant's charter. *St. Louis Bridge Co. v. Miller*, *supra*.

Tolls.

The right to exact tolls on a public bridge does not carry with it the power to prohibit such use of it by the public as is reasonably consistent with its public purposes. *Pittsburg & W. E. Pass. R. Co. v. Point Bridge Co.* 165 Pa. 37, 26 L.R.A. 323, 30 Atl. 511.

A statute authorizing a corporation to construct a bridge and "take reasonable tolls" for the use of such bridge, and authorizing it to establish rules and regulations governing the use of such bridge, does not, by implication, give the corporation the right to prescribe the rate of tolls, so that a statute giving the board of county commissioners power to prescribe tolls is not unconstitutional, as taking away the vested rights of the bridge company. *Tallassee Falls Mfg. Co. v. Commissioner's Ct.* 158 Ala. 263, 48 So. 354.

—vehicles subject to tolls.

The right of a toll-bridge company maintaining a bridge over which passes a highway, to exact tolls, is confined to the vehicles and animals specified in its franchise, and will not be construed by impli-

have rails of greater strength was caused by the negligent failure of defendant to use ordinary care."

The jury returned a verdict in favor of the plaintiff, and the defendant has appealed to this court.

It is contended by counsel for defendant that the evidence adduced in the trial of this case was not sufficient to impose a liability upon it, and was not sufficient to sustain the verdict of the jury. The determination of that question depends upon the duty which the defendant owed to the plaintiff as one of the traveling public over its bridge, and the manner in which defendant has performed that duty. The defendant was the proprietor of a bridge, and made a charge against the public for crossing same. It thereby became its duty to exercise reasonable and ordinary care and prudence in the construction and maintenance of its bridge for the safety and protection of those using it, and to make reasonable provisions to prevent injuries from causes which were likely to arise in the ordinary use of the bridge. A toll bridge should be so constructed that it shall be safe for travel; and the degree of the strength of the structure must be determined by the use which is fairly to be expected to be made

of it. It should be constructed in a manner strong enough to sustain those weights and to protect from injury that character of property which may fairly be expected to cross over it. While not an insurer of the person or property of its customer, the proprietor of a toll bridge is bound to exercise care to see that it is reasonably safe and secure for the purpose for which it was erected and is used. The liability of the proprietor of the bridge is founded upon negligence; and his negligence arises from the failure to exercise the necessary care in seeing that the bridge is safely constructed and maintained. If guard rails are reasonably necessary for the safety of travelers and their property in crossing the bridge, then the owner would be liable for an injury which was caused by a failure to construct and maintain such railing or barrier. In 2 Dillon on Municipal Corporations, § 1005, it is said: "Where a rail or barrier is reasonably necessary for the security of travelers on the road, which, from its nature, would be otherwise unsafe, and the erection of which would have prevented the injury, it is actionable negligence not to construct and maintain such a guard or barrier." *Little Rock Traction & Electric Co. v. Dunlap*, 68 Ark. 291, 57

cation to embrace automobiles. *Mallory v. Saratoga Lake Bridge Co.* 53 Misc. 446, 104 N. Y. Supp. 1025.

Bicycles and tricycles were held in *Cannan v. Abingdon*, 69 L. J. Q. B. N. S. 517, to be carriages, within the terms of a statute prescribing the rates of tolls to be charged on certain designated carriages "or other carriage whatsoever."

But this decision was questioned in *Simpson v. Teignmouth & S. Bridge Co.* 72 L. J. K. B. N. S. 204, where it was held that bicycles did not fall within the terms of a statute providing that tolls might be exacted for every "coach, chariot, hearse, chaise, berlin, landau, and phaeton, gig, whisky, car, chair, or cabriolet, and every other carriage hung on springs, . . . and for each horse or other beast of draught drawing the same. . . ." The court said that while a bicycle would come within the general terms of a carriage hung on springs, yet it was clear that the statute was intended to embrace only carriages drawn by animals.

And in *Smith v. Kynnersley*, 72 L. J. K. B. N. S. 357, it was held that bicycles were not included within the statute prescribing tolls for "every sledge, drag, or such like carriage."

Taxation.

A toll bridge is subject to the maximum tax imposed by a statute which provides for a tax upon toll bridges, graduated in accordance with the size of cities within a certain distance thereof, where a city of the 30 L.R.A. (N.S.)

maximum size is within the prescribed distance, although a city of the smaller class may also be within such distance of the other end of the bridge. *Southern R. Co. v. Mitchell*, 139 Ala. 629, 37 So. 85.

A toll bridge is subject to taxation as such, notwithstanding it has a second deck or story, carrying a railroad track. *Ibid.*

A toll bridge is subject to state taxation where it is wholly within the state, and used for state traffic, notwithstanding the structure also carries trains engaged in interstate traffic; and the fact that the bridge is on the railroad's right of way is immaterial. *Ibid.*

The correct method of fixing the value in one state of the franchise of a toll-bridge company whose bridge lies partly in one state and partly in another is to take such proportion of the total value of the bridge as the length of the bridge within the state bears to the whole length of the bridge, and deduct therefrom the valuation of the tangible property within the state. *Com. v. Covington & C. Bridge Co.* 114 Ky. 343, 70 S. W. 849.

Termination of franchise.

When the right to take tolls expires, there immediately arises the right of the public to use the bridge as a free one, without any right on the part of the builders or their successors to remove the structure and destroy the highway. *Montgomery County v. Clarksville & R. Turnp. Co.* 120 Tenn. 76, 109 S. W. 1152.

A corporation whose corporate life was

S. W. 938; 5 Cyc. Law & Proc. p. 1101; Eads v. Marshall (Tex. Civ. App.) 29 S. W. 170. The guard rail should be effective for the purpose for which it is erected, and should therefore be constructed and maintained in such a reasonably strong and substantial manner as to withstand the ordinary weights and forces that may be likely expected to be pressed against it. This is necessary in order to put the railing in a safe condition for the travel in the ordinary manner over such bridge. Whether or not the railing is in such condition is a question to be determined by the jury, under the peculiar circumstances of each case. 2 Dill. Mun. Corp. § 1019; Wharton, Neg. 2d ed. § 103.

In the case of Walrod v. Webster County, 110 Iowa, 349, 47 L.R.A. 480, 81 N. W. 598, it appears that the horses became frightened and pressed up against the rail of the bridge, which gave way, and the horses fell from the bridge. In that case it was held that there was a liability to the owner of the horses in event the accident would not have happened if the railing had been reasonably substantial, and that this was a question for the jury to determine. In 4 Am. & Eng. Enc. Law, 2d ed. p. 942, it is said: "It is the duty of a bridge proprie-

tor to provide and keep in repair proper railings, so far as they are necessary to secure the safety of travelers, and a failure of this duty affords a ground of action to one sustaining injury in consequence." See also St. Louis, I. M. & S. R. Co. v. Aven, 61 Ark. 149, 32 S. W. 500; Tift v. Towns, 53 Ga. 47; Rosedale v. Golding, 55 Kan. 167, 40 Pac. 284; Townsend v. Susquehanna Turnp. Road Co. 6 Johns. 90; Palmer v. Andover, 2 Cush. 600; Gage v. Pontiac, O. & N. R. Co. 105 Mich. 335, 63 N. W. 318.

In the case at bar we think that the jury were warranted in finding that railings upon the bridge were reasonably necessary for the safety of travelers and their property, and that there was some evidence tending to prove that the railings that were provided were not reasonably substantial enough and suitable for the safety of the persons and their property that ordinarily might be expected to cross the bridge, and to sustain the weights that ordinarily might be expected to press against them. We are of opinion, therefore, that there was sufficient evidence to sustain the verdict of the jury, and that the court did not err in giving instruction No. 1 at the request of the plaintiff.

The defendant requested the court to in-

limited both by its articles of association and by the Constitution of the state to thirty years, which, upon its incorporation, secured from the board of supervisors a franchise to bridge a navigable stream and take tolls, cannot, merely by renewing its corporate life for a further period of thirty years, under act No. 328, Public Acts 1905, extend its franchise for taking tolls beyond the original thirty-year period. Rockwith v. State Road Bridge Co. 145 Mich. 455, 108 N. W. 785.

But the legislature may extend the time for taking tolls by a bridge company. State ex rel. Seiders v. Bangor, 98 Me. 114, 56 Atl. 589.

A county may maintain an action to restrain a bridge company from collecting tolls for passage over its bridge after its right to collect such tolls had ceased by reason of the expiration of the time fixed in its charter. Montgomery County v. Clarksville & R. Turnp. Co. supra.

The failure of bridge proprietors for six years after a bridge has been destroyed by fire to make any use of the remnants of the bridge, or to take any steps to rebuild it, amounts to an abandonment; and the county commissioners may take possession of the piers and abutments remaining, without making compensation to the bridge proprietors therefor. Sears v. Tuolumne County, 132 Cal. 167, 64 Pac. 270.

The right of a turnpike company to collect tolls upon a bridge built to replace another bridge, destroyed during the War, under a special act which fixed no limit for the enjoyment of the right, is limited to 30 L.R.A. (N.S.)

the time prescribed by the original act incorporating the turnpike company, where the bridge forms a link in the turnpike, and the original act provided that the turnpike company should use a bridge being built by third parties. Montgomery County v. Clarksville & R. Turnp. Co. supra.

A bridge company organized to construct and maintain a toll bridge does not lose its corporate functions, so as to render its charter subject to forfeiture, merely by reason of the sale by its shareholders of all of the stock to a municipal corporation. Com. v. Monongahela Bridge Co. 216 Pa. 108, 64 Atl. 909, 8 A. & E. Ann. Cas. 1073.

The provision of the act of May 8, 1876, relative to the acquisition of toll bridges by counties, and the abolition of tolls thereon, which requires a hearing in regard to the propriety of approving and confirming any reports, has reference to timely requests only; and if a request be not made until after the inquiry has been completed and the report regularly approved, then the granting of the request for a hearing is purely a discretionary matter, and the action regarding it will not be reversed except for abuse of discretion. Re Moxham & F. Bridge, 36 Pa. Super. Ct. 298.

The supplement act of 1878, designed to amend the act of 1876, relative to the acquiring of toll bridges by counties, is not unconstitutional because it deprives the commissioners of the right of approval of the report of the viewers. Bridgewater v. Big Beaver Bridge Co. 210 Pa. 105, 59 Atl. 697.

W. M. G.

struct the jury in effect that if the guard rail was not of sufficient strength to meet ordinary requirements at the time of the accident, but that such weakness arose after the rail was placed on the bridge, then, before the plaintiff could recover, it was necessary to prove that defendant knew of the defect, or could have known by the use of ordinary care. The court refused to give the instruction; and in this ruling we do not think that the court committed a prejudicial error. By instruction No. 2, given at the request of the defendant, the court instructed the jury that, before the plaintiff could recover, he must prove that the defendant had been negligent in the manner alleged in the complaint, and that the act of negligence therein set out caused the injury. The act of negligence set out in the complaint was that the defendant "failed to have a safe and sufficient guard rail, properly braced and strong enough to insure safe passage over said bridge;" that is to say, that the rail was not constructed of strong enough timbers, and was not properly braced. This was the act of negligence that the plaintiff was required to prove before he could recover. The act of negligence therefore consisted in a failure to properly construct the guard rail in the beginning; and the liability of the defendant was not made dependent upon the weakness of the rail which was caused by some act or agency that occurred after its construction. The instruction requested was therefore without the issue presented by the complaint and pleadings, and was abstract. The other instructions given by the court confined the right of the plaintiff to recover to his establishing by proof the act of negligence set forth in the complaint; and in effect covered this instruction requested by defendant. *St. Louis, I. M. & S. R. Co. v. Freeman*, 89 Ark. 327, 116 S. W. 678.

It is urged that the court erred in permitting the witness Edgar Shinn to testify that the guard rail was constructed in an improper manner, and that it was not substantial and safe. This contention is made upon the ground that this was but the opinion of the witness. But we think that this witness possessed an experience and knowledge relative to the subject-matter to qualify him as a skilled witness. The conclusion and judgment of the witness related to a subject-matter not universally understood. The witness was giving evidence in regard to a matter that required the aid of an experience outside of that possessed by the jury to fully understand it. His testimony was therefore admissible. "A witness's opinion is admissible as evidence, not only where scientific knowledge is required to comprehend the matter testified about, but 30 L.R.A. (N.S.)

also where experience and observation in the special calling of the witness give him knowledge of the subject in question beyond that of persons of common intelligence." *Little Rock & M. R. Co. v. Shoecraft*, 56 Ark. 465, 20 S. W. 272; *T. & C. Ins. Co. v. Fouke* (Ark.) 127 S. W. 461; *Lawson, Expert Ev.* 73; 17 Cyc. Law & Proc. p. 36; *Moore v. Kenockee Twp.* 75 Mich. 332, 4 L.R.A. 555, 42 N. W. 944; *Porter v. Pequonnoc Mfg. Co.* 17 Conn. 249.

Complaint is also made of certain remarks by counsel for the plaintiff in his argument to the jury. Some of these remarks were mere expression of opinion, and some were instigated by and in retort to remarks made by opposing counsel. In some of the remarks criticism was made of an opposing witness. The counsel said that the career of this witness was wrapped up in this bridge, and he had to sustain it by his testimony. We think that counsel have the right to refer to the interest which opposing witnesses have in the result of the trial, and to comment upon such interest if the testimony of such witnesses is in conflict with other testimony or established facts in the case. We have carefully examined all the remarks complained of, and we are of the opinion that, while some of them were improper, none of them was of such a prejudicial nature as to call for a reversal. *Kansas City Southern R. Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428; *Reese v. State*, 76 Ark. 39, 88 S. W. 841; *Byrd v. State*, 76 Ark. 286, 88 S. W. 974; *Choctaw, O. & G. R. Co. v. Doughty*, 77 Ark. 1, 91 S. W. 768; *St. Louis, I. M. & S. R. Co. v. Raines*, 90 Ark. 398, 119 S. W. 665.

We have examined into the other errors which counsel for defendant urge were committed in the trial of this case. We do not deem it useful to set them out. We do not think that any of these alleged errors was so prejudicial as to deprive the defendant of a fair and impartial trial upon the issues involved in the case.

The judgment is affirmed.

KANSAS SUPREME COURT.

RILEY LAKE

v.

A. J. HARGIS, Appt.

(82 Kan. 711, 109 Pac. 670.)

Replevin — bond — damages — expenses of suit.

In a replevin action before a justice of the peace, the plaintiff gave the ordinary

Headnote by GRAVES, J.

bond at the commencement of the action. The defendant gave a redelivery bond, and retained possession of the property replevined. Upon the trial, the defendant was adjudged to be the owner and entitled to the possession of the property. No appeal was taken. The judgment became final and the plaintiff paid the costs. Afterward the defendant commenced an action for damages upon the bond given by the plaintiff, in which he claimed damages for loss of time, attorneys' fees, and expenses incurred in making his defense. Held that in the absence of malice, want of probable cause, or bad faith on the part of the plaintiff, damages of this nature cannot be recovered upon the replevin bond.

(June 11, 1910.)

APPPEAL by defendant from a judgment of the District Court for Barber County in plaintiff's favor in an action brought to recover the amount alleged to be due upon a certain replevin bond. Reversed.

The facts are stated in the opinion.

Mr. G. M. Martin for appellant.

Mr. Seward I. Field, for appellee:

Attorney fees, expenses, and loss of time

Note. — Elements of damages recoverable in an action on replevin bond.

In this note it is intended to discuss only what are the elements of damages recoverable in an action on the replevin bond, as distinct from the measure or amount of damages. For example, the value of the property replevied is usually one of the items recoverable, but how that value may be ascertained and as of what time will not be treated. So, also, the conclusiveness of the judgment in the replevin action as to the value of the property replevied is not treated. As to duty to preserve and return property seized on writ of replevin, see note to *Three States Lumber Co. v. Blanks*, 69 L.R.A. 283.

Value of property.

As a general rule the obligee in a replevin bond, in case of a failure to return, is entitled to recover, as one of his items of loss, the value of the property. *Sweeney v. Lomme*, 22 Wall. 208, 22 L. ed. 727; *Washington Ice Co. v. Webster*, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947; *Ward v. Hood*, 124 Ala. 571, 82 Am. St. Rep. 205, 27 So. 245; *Ginaca v. Atwood*, 8 Cal. 446; *Sopris v. Lilley*, 2 Colo. 496; *Webster v. Price*, 1 Root, 56; *Buel v. Davenport*, 1 Root, 261; *Ormsbee v. Davis*, 16 Conn. 508, a. c. later appeal, 18 Conn. 555; *Bradley v. Reynolds*, 61 Conn. 271, 23 Atl. 928; *Gould v. Hayes*, 71 Conn. 86, 40 Atl. 930; *Thomas v. Price*, 88 Ga. 533, 15 S. E. 11; *Franks v. Matson*, 211 Ill. 338, 71 N. E. 1011; *Martin v. Hertz*, 224 Ill. 84, 79 N. E. 558; *Treman v. Morris*, 9 Ill. App. 237; *Chapin v. Matson*, 37 Ill. App. 257; *Scott v. Rogers*, 56 Ill. App. 571 (though de-

are recoverable in an action on a replevin bond.

Cobbey, Replevin, § 1358; *Gregory Grocery Co. v. Beaton*, 10 Kan. App. 256, 62 Pac. 732; *Tyler v. Safford*, 31 Kan. 608, 3 Pac. 333; *Moxley v. Haskin*, 39 Kan. 653, 18 Pac. 820; *Dodson v. Cooper*, 37 Kan. 346, 15 Pac. 200; *Underhill v. Spencer*, 25 Kan. 71; *Loofborow v. Shaffer*, 28 Kan. 71; *Nimocks v. Welles*, 42 Kan. 39, 21 Pac. 787; *Rhodes v. Auld*, 5 Kan. App. 225, 47 Pac. 170; *Mulvane v. Tullock*, 58 Kan. 622, 50 Pac. 897; *Little v. Bliss*, 55 Kan. 94, 39 Pac. 1025; *Manning v. Manning*, 26 Kan. 98.

Graves, J., delivered the opinion of the court:

This is an action upon an ordinary replevin bond given at the commencement of an action of replevin before a justice of the peace. *Riley Lake* had in his possession a hog which *A. J. Hargis* claimed to own. *Lake* refused to surrender the hog, and *Hargis* commenced an action of replevin before a justice of the peace to recover possession of it. *Lake* gave a redelivery bond and re-

stroyed by act of God); *Pace v. Neal*, 92 Ill. App. 416; *Richardson v. Gilbert*, 135 Ill. App. 363; *Schrader v. Wolfen*, 21 Ind. 238; *Story v. O'Dea*, 23 Ind. 326; *Whitney v. Lohmer*, 26 Ind. 503; *Wiseman v. Lynn*, 39 Ind. 50; *Peffley v. Kenrick*, 4 Ind. App. 510, 31 N. E. 40; *Lindsey v. Hewitt*, 42 Ind. App. 573, 86 N. E. 446; *Hinkson v. Morrison*, 47 Iowa, 167 (though destroyed pending replevin suit); *Clement v. Duffy*, 54 Iowa, 632, 7 N. W. 85; *Manning v. Manning*, 26 Kan. 98; *Edwards v. Bricker*, 66 Kan. 241, 71 Pac. 587; *Roman v. Stratton*, 2 Bibb, 199; *Farnham v. Moor*, 21 Me. 508; *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462 (*dictum*); *Karthaus v. Owings*, 2 Gill & J. 430; *Arnold v. Bailey*, 8 Mass. 145; *Huggeford v. Ford*, 11 Pick. 223; *Parker v. Simonds*, 8 Met. 205; *Leighton v. Brown*, 98 Mass. 515; *Stevens v. Tuite*, 104 Mass. 328; *Maguire v. Pan-American Amusement Co.* 205 Mass. 64, 91 N. E. 135; *Busch v. Fisher*, 89 Mich. 192, 50 N. W. 788; *Young v. Pickens*, 45 Miss. 553; *Hazlett v. Witherspoon* (Miss) 25 So. 150 (though destroyed by fire without fault of defendant or surety); *George v. Hewlett*, 70 Miss. 1, 35 Am. St. Rep. 626, 12 So. 855 (though destroyed by fire after execution of bond, without fault of surety); *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308; *Caldwell v. West*, 21 N. J. L. 411; *Lutes v. Alpaugh*, 23 N. J. L. 165; *Peacock v. Haney*, 37 N. J. L. 179; *Pettit v. Allen*, 64 App. Div. 579, 72 N. Y. Supp. 287; *Sieboldt v. Konatz Saddlery Co.* 15 N. D. 87, 106 N. W. 564; *Berwanger v. Bristol*, 3 Ohio N. P. 161; *Gibbs v. Bartlett*, 2 Watts & S. 29; *Phillips v. Stroup*, 1 Monaghan (Pa.) 517, 17 Atl. 220; *Muhling v. Ganeman*, 4 Baxt. 88; *Talcott v.*

tained possession of the animal. The trial was had before a jury, and the verdict was in favor of Lake, who was adjudged to be the owner and entitled to the possession of the hog. No appeal was taken and the judgment became final. Hargis paid the costs.

Afterward Lake commenced this action upon the bond given by Hargis at the commencement of the replevin action to recover damages for loss of time, attorneys' fees, and expenses incurred in and about that action. The petition recited the facts concerning the commencement of the replevin action, including the bond given by Hargis. The bond reads:

Replevin Bond.

State of Kansas } ss.:
Barber County }

Whereas A. J. Hargis has this 8th day of June, 1908, commenced an action against Riley Lake before the undersigned justice of the peace of Lake City township in said

Rose (Tex. Civ. App.) 64 S. W. 1000; McLeod Artesian Well Co. v. Craig (Tex. Civ. App.) 43 S. W. 934; Miltimore v. Bottom, 66 Vt. 168, 28 Atl. 872; Ruttan v. Short, 12 U. C. Q. B. 485.

This is true though the value of the property is not fixed in the replevin action. *Ginaca v. Atwood*, supra (because of compulsory nonsuit); *Whitney v. Lehmer*, 26 Ind. 503; *Yelton v. Slinkard*, 85 Ind. 190; *Lindsey v. Hewitt* and *Manning v. Manning*, supra (because of voluntary dismissal by plaintiff); *McKey v. Lauffin*, 48 Kan. 581, 30 Pac. 16 (because of voluntary dismissal of replevin action by plaintiff in replevin action); *Kentucky Land & Immigration Co. v. Crabtree*, 118 Ky. 395, 80 S. W. 1161, 4 A. & E. Ann. Cas. 1133 (because of voluntary dismissal of replevin action by plaintiff, where condition was that he would prosecute the action); *Washington Ice Co. v. Webster*, 68 Me. 449.

When a return is awarded in the replevin suit, the surety, in case the property is not returned, is liable for its value on his covenant to return, even without execution or other demand for its return, as the judgment establishes the liability. *Sweeney v. Lomme*, 22 Wall. 208, 22 L. ed. 727.

But the value of the property is not recoverable in an action on the bond, under a condition to perform the judgment by returning the property if a return be adjudged, and by paying such sums of money as may be adjudged against the plaintiff, where the plaintiff dismissed the action, and the court did not adjudge either a return of the property or the payment of any sum. *Kentucky Land & Immigration Co. v. Crabtree*, supra.

A surety on a replevin bond conditioned that plaintiff will pay all costs and damages which may be awarded against him, and will deliver the property to the de-

county, for the recovery of divers goods and chattels, all of the aggregate value of \$12. Now, we, the undersigned residents of said county bind ourselves to the defendant in the sum of \$24 that said plaintiff shall duly prosecute the above-entitled action, and pay all costs and damages that may be awarded against him, and if a return of the property therein delivered to him be adjudged, that he will deliver the same to said defendant.

H. S. Miller.

Dave Freemyer.

Approved by me this 8th day of June, 1908. S. G. Stewart, J. P.

Upon these facts the plaintiff's statement of damages in the petition is as follows: "This plaintiff states that he has been damaged by said defendant by reason of said action, in the loss of time in attending upon said case, and in expenses of himself and attorney and attorneys' fees, in the sum of \$75. Wherefore he prays judg-

ment if a return be awarded, cannot be held for the value of the property when, after a regular trial, judgment for costs alone is rendered in favor of the defendant, which judgment is duly paid. *Citizens' State Bank v. Morse*, 60 Kan. 526, 57 Pac. 115.

And where an undertaking in an action of replevin commenced in the justice court bound the sureties "for the prosecution of the action, for the return of the said property to the said defendant, if return thereof be adjudged by the said court, and for the payment to the said defendant of such sum as may for any cause be recovered against the said plaintiffs," and the jury found generally for the defendant, but through ignorance of the law failed to find the value of the property, so that the justice rendered a judgment for costs only, the sureties were held not liable on their undertaking for the value of the property, even though, on appeal to the county court, a judgment was there rendered for the value of the property. *Mitchum v. Stanton*, 49 Cal. 302.

The value of the replevined property is not recoverable in an action on the bond, when there is no allegation of failure to return the property. *Wall v. Humphreys*, 4 Dana, 209.

A redelivery bond conditioned merely for the return of the goods is satisfied by their return or tender, even though in a depreciated condition, and their value cannot be recovered. *Douglass v. Douglass*, 21 Wall. 98, 22 L. ed. 470.

A seizure of goods by the marshal under a writ de retorno habendo, and a tender thereof to the obligee in a redelivery bond, is a satisfaction of a covenant in such bond to return the goods, and will prevent the obligee recovering for their value in an action on the bond, even though he refused

ment against the defendant in the sum of \$125, and for costs of this action."

To this petition a demurrer was filed by the defendant upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendant then filed an answer consisting of (1) a general denial; (2) an admission that he commenced the action of replevin before the justice of the peace, and gave the bond as alleged in the petition. He further alleged in substance that the action was commenced in good faith, and after a full and fair consultation with an attorney who advised the action; that he conscientiously believed he was the owner of the hog and entitled to its immediate possession; and that, after his defeat in court, he fully paid the judgment entered upon the verdict.

To this answer the plaintiff filed a demurrer on the ground that it did not state any defense to the petition. The demurrer was sustained except as to the general denial. The case proceeded to trial to the court

without a jury. It was agreed that the amount of damages claimed by the plaintiff was reasonable, if he was entitled to recover anything. Thereafter the court filed conclusions of fact and law. After reciting the facts as above stated, the court announced the following conclusions of law:

"The court finds as a matter of law, that a bond in replevin, such as the one sued on in this action, contemplates a liability of principal and surety thereon, for the attorneys' fees in defending a replevin action, such as the case prosecuted before the justice of the peace, as herein found, together with the expenses and loss of time in such defense, and that in this case, the plaintiff, Riley Lake, is entitled to recover the sum of \$125 as his attorneys' fees, expenses, and loss of time in defending said replevin suit before said justice of the peace.

"To all of which findings of fact and conclusions of law the defendant, A. J. Hargis, excepted and excepts.

"It is therefore considered, ordered, and adjudged by the court that the plaintiff

to accept them because damaged or deteriorated. *Ibid.*

If no writ of *de retorno habendo* is issued in a replevin action, it is the duty of a defeated defendant who has retained possession by giving a redelivery bond containing a covenant to return, to seek the plaintiff, and deliver the property to him if he will receive it, and if he fails to do so, it is a breach of the bond which will make him liable for its value. *Ibid.*

In case a portion only of the property is returned, the obligee in a replevin bond containing a covenant to return is entitled to recover the value of that portion of the goods not returned. *Washington Ice Co. v. Webster*, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947; *Ginaca v. Atwood*, 8 Cal. 446; *Franks v. Matson*, 211 Ill. 338, 71 N. E. 1011.

If the plaintiff in the replevin suit suffers a nonsuit or dismissal, or withdraws his suit, the condition to prosecute with effect is breached, and an action lies against the sureties for the value of the goods or other damages, even though the value of the property and damages for the detention were not found in such replevin action. *Mills v. Gleason*, 21 Cal. 274; *Cox v. Sargent*, 10 Colo. App. 1, 50 Pac. 201 (dismissal); *Persse v. Watrous*, 30 Conn. 139; *Truitt v. Collins*, 2 Pennw. (Del.) 36, 45 Atl. 541; *Keenan v. Washington Liquor Co.* 8 Idaho. 383, 69 Pac. 112. *Contra*: *Vinyard v. Barnes*, 124 Ill. 350, 16 N. E. 254 (dismissal).

The same thing is true when the condition of the bond is "to answer such judgment, execution, or decree as may be rendered or issued" in the case. *Glover v. Gore*, 74 Ga. 680 (voluntary dismissal).

—effect when ownership not absolute.

The successful defendant in a replevin
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action, who has merely a special interest or lien, in case of a nonreturn of the property, is entitled to recover on the covenant to return in the replevin bond, merely the value of his interest or lien, if the plaintiff in the replevin action is the general owner. *Ernst Bros. v. Hogue*, 86 Ala. 502, 5 So. 738; *Perrigo Gold Min. & Tunneling Co. v. Grimes*, 2 Colo. 651 (action between mortgagor and mortgagee); *Gould v. Hayes*, 71 Conn. 86, 40 Atl. 930; *Hannon v. O'Dell*, 71 Conn. 698, 43 Atl. 147; *King v. Ramsay*, 13 Ill. 619; *David v. Bradley*, 79 Ill. 316; *Magerstadt v. Harder*, 199 Ill. 271, 65 N. E. 225; *Treman v. Morris*, 9 Ill. App. 237; *Nichols & S. Co. v. Bishop*, 12 Okla. 250, 70 Pac. 188.

But if the unsuccessful claimant in such replevin action is a stranger having no interest therein, the recovery is not limited to such special interest or lien, but the full value is recoverable. *Sweeney v. Lomme and Perrigo Gold Min. & Tunneling Co. v. Grimes*, supra (*semble*); *Atkins v. Moore*, 82 Ill. 240.

Where the general owner of chattels is entitled to their possession, and it was so adjudged in an action of replevin brought against him by one having a special lien thereon, the latter, when sued on his replevin bond, may set up in mitigation of damages his special lien, when absolute title was not adjudged in the replevin action to be in the defendant in such action. *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161; *Ringgenberg v. Hartman*, 124 Ind. 186, 24 N. E. 987; *Consolidated Tank Line Co. v. Bronson*, 2 Ind. App. 1, 28 N. E. 155.

In *Huggeford v. Ford*, 11 Pick. 223, the obligors in a replevin bond were allowed to show in reduction of damages, that there were customhouse duties on the goods with which they were chargeable, and to have that sum deducted in estimating the value

have and recover of and from the defendant, A. J. Hargis, the sum of \$125, and that said judgment bear interest at the rate of 6 per cent per annum from this date, and that the plaintiff also recover the costs of this action taxed at \$31.60. In accordance herewith let execution issue."

This was erroneous. A replevin bond given at the commencement of the action states the conditions under which it is given and the measure of the indemnity which the defendant will receive thereunder. One of the stipulations in the bond, and the one upon which the plaintiff in this action relies, reads: "And pay all costs and damages that may be awarded against him." No liability could accrue upon this clause of the bond until a breach thereof occurred. None

is alleged. It is not claimed that any judgment for costs or damages was awarded against Hargis which he failed to pay. On the contrary it is conceded that he paid the judgment in full. The word "damages" as used in this bond refers to damages which may be occasioned to the defendant by the detention of the property replevied, and its loss if not returned when a return is adjudged. It does not embrace damages of a general nature, such as may be recovered in an action brought upon a bond given to obtain a writ of attachment or injunction, under §§ 192 and 242 of the Civil Code (Gen. Stat. 1901, §§ 4626, 4689; Code 1909, §§ 102, 254). In such cases the bond provides for and secures "all damages which

of the goods, as the payment of the duties by the plaintiff in replevin is equivalent to a return to that amount.

When property levied upon by a sheriff by virtue of several executions is replevied by a stranger to the writ, and judgment of return is rendered in the replevin action, but return is not made, the sheriff in an action on the replevin bond is entitled to recover sufficient to satisfy the writs of execution. *Tanton v. Slyder*, 93 Ill. App. 455.

In *Bartlett v. Kidder*, 14 Gray, 449, personal property owned in common was attached on mesne process against one of the co-owners, and an action of replevin was brought in the name of all, but without the consent of the attachment debtor, against the attaching officer, and dismissed. In an action on the replevin bond, it was held that only the value of the interest of the attachment debtor was recoverable.

Although the failure to return to court a writ of replevin after service, either through the negligence of the plaintiff or of the officer employed by him, is a failure to prosecute to effect, within the meaning of that term in a condition of the bond, so as to render such plaintiff liable in damages for the value of the property in an action on such bond, yet he can show in mitigation of damages that the property replevied belonged to him. *Allen v. Woodford*, 36 Conn. 143.

Interest.

When the plaintiff in an action on a replevin bond is entitled to recover the value of the property, interest is generally allowed to compensate for the detention. *Washington Ice Co. v. Webster*, 125 U. S. 426, 31 L. ed. 790, 18 Sup. Ct. Rep. 947; *Ward v. Hood*, 124 Ala. 570, 82 Am. St. Rep. 205, 27 So. 245; *Gould v. Hayes*, 71 Conn. 86, 40 Atl. 930; *Hopkins v. Ladd*, 35 Ill. 178; *Franks v. Matson*, 211 Ill. 338, 71 N. E. 1011; *Treman v. Morris*, 9 Ill. App. 237; *Pace v. Neal*, 92 Ill. App. 416; *Walls v. Johnson*, 16 Ind. 374; *Story v. O'Dea*, 23 Ind. 326; *Arnold v. Bailey*, 8 Mass. 145; 30 L.R.A. (N.S.)

Huggefords v. Ford, supra; *Leighton v. Brown*, 98 Mass. 515; *Parker v. Simonds*, 8 Met. 205; *Caldwell v. West*, 21 N. J. L. 411; *Peacock v. Haney*, 37 N. J. L. 179; *Muhling v. Ganeman*, 4 Baxt. 88.

Damages for detention.

When the undertaking is for the payment of such sum as shall be recovered against the plaintiff in the replevin suit, no recovery can be had on such bond for damages caused by the wrongful taking, unless awarded in the replevin suit. *Ginaca v. Atwood*, 8 Cal. 446.

Upon a condition in a replevin bond that the principal will prosecute his suit to effect and without delay, damages for the detention of the property pending the replevin suit, and prior to the award of return, are not recoverable unless adjudged against the principal in the replevin suit. *Sopris v. Lilley*, 2 Colo. 496 (disapproving intimation to contrary in earlier appeal, 1 Colo. 286).

Where the undertaking of the bond is to pay all damages that may accrue by reason of the unlawful detention of the property, no damages for the detention accruing prior to the judgment in the replevin action are recoverable in an action on the bond, when, though litigated in the action of the replevin, they were not awarded, as the matter is *res judicata*. *Colorado Springs Co. v. Hopkins*, 5 Colo. 206.

But damages for detention of replevied property have been held recoverable in an action on the bond, though not assessed in the replevin action. *Shepard v. Butterfield*, 41 Ill. 76 (condition of bond does not appear).

In the absence of an order in the replevin suit for a return of the property, no damages for detention accruing after the judgment in the replevin action are recoverable in an action on the bond, because if the obligee is not entitled to have the property returned, he is not entitled to damages for its detention. *Colorado Springs Co. v. Hopkins*, supra.

In a suit on a replevin bond conditioned

he may sustain by reason of the attachment, if the order be wrongfully obtained." Civ. Code, § 192. A replevin bond is not intended to give such indemnity, but replevin in this respect is like any other civil action, and where it is commenced in good faith and without malice or want of probable cause, payment of the judgment will extinguish further liability. *John Deere Plow Co. v. Spatz*, 78 Kan. 786, 20 L.R.A. (N.S.) 492, 99 Pac. 221; *Myers v. Shertzer*, 82 Kan. 278, 108 Pac. 105; *Cobbey, Replevin*, §§ 925, 975, 976; *Citizens' State Bank v. Morse*, 60 Kan. 526, 57 Pac. 115; *Winstead v. Hulme*, 32 Kan. 568, 4 Pac. 994. In an action on a bond, no recovery can be had for a sum greater than the bond was

given to secure,—in this case, \$24. 34 Cyc. Law & Proc. p. 1582; 24 Am. & Eng. Enc. Law, 2d ed. p. 534.

The case was tried upon a wrong theory. It seems to have been assumed that an action on a bond in replevin is controlled by the same rule as that which obtains in actions upon bonds in attachment and for injunction, where the writ has been wrongfully obtained. We do not concur in this view. This theory of the case, which we think erroneous, naturally led the court to a wrong view of the action generally, and an erroneous judgment naturally followed.

The judgment is reversed.

All the Justices concur.

that plaintiffs in the replevin action should prosecute the replevin to final judgment, and pay such damages and costs as the defendants in that suit should recover against them, and also return and restore the same goods and chattels in like good order and condition as when taken, in case such should be the final judgment, if, in a judgment for return in the replevin action, there was no assessment of damages, and if, upon issuance of a writ of restitution, the goods were not returned, damages for detention may be assessed and allowed in the action on the bond. *Smith v. Dillingham*, 33 Me. 384, followed in *Thomas v. Spofford*, 46 Me. 408.

The sureties on a defendant's replevy bond cannot be held liable for the value of the use of the replevied property which accrued prior to the time the property was replevied, for their obligation is created by the bond, and dates from its date. *Bateman v. Hipp*, 51 Tex. Civ. App. 405, 111 S. W. 971.

The obligor in a replevin bond conditioned "to prosecute the suit with effect, . . . and to return the property in case it shall be so awarded, and to pay all such damages as may be assessed against the plaintiff, and the costs of the suit," etc., is not liable in an action on the bond, in damages for the hire of the replevied chattel, when judgment in the replevin action was rendered for the return of the property and costs only, but no inquiry was had or damages assessed for the injury sustained by reason of the action; since the obligation was to pay damages assessed, and none were assessed. *Kenley v. Com.* 6 B. Mon. 583.

—depreciation.

In an action on a replevin bond conditioned to pay such damages and costs as the defendant should recover and for the return of the goods replevied in like good order and condition as when taken, if the defendant succeeds, and the goods are returned in a depreciated condition, damages for the depreciation are recoverable. *Washington* 30 L.R.A. (N.S.)

Ice Co. v. Webster, supra; *Bradley v. Reynolds*, 61 Conn. 271, 23 Atl. 928; *Franks v. Matson*, supra; *Yelton v. Slinkard*, 85 Ind. 190; *Citizens' Nat. Bank v. Oldham*, 136 Mass. 515.

In *Dalby v. Campbell*, 26 Ill. App. 502, in which the condition of the bond was not given, it was also held that damages for depreciation of property during its wrongful detention are recoverable in an action on the replevin bond.

When the plaintiff in an action on a replevin bond has recovered, as damages for the detention of the replevied article, the value of its use, he cannot also recover the amount of its natural depreciation, as this would be giving double damages. *Odell v. Hole*, 25 Ill. 204 (horse).

But it is otherwise when there has been abuse or want of reasonable care of the replevied article. *Ibid.*

It was held in *Fair v. Citizens' State Bank*, 69 Kan. 353, 105 Am. St. Rep. 168, 76 Pac. 847, 2 A. & E. Ann. Cas. 960, in which the condition of the bond was not given, that where, as a compliance with the alternative judgment in an action of replevin providing for a return of the specific property or the value thereof, the property was returned, though depreciated in value, an action may be maintained to recover such depreciation; that the statute contemplates that the property be returned in substantially the same condition, and of the same value, as when taken. Hence, the defendant in the replevin action was allowed to recover for depreciation of a replevied note caused by the running of the statute of limitations.

—injury to business.

Damages for injury to business owing to the replevying of trade fixtures are recoverable under a condition of a replevy bond to pay all damages sustained by the replevying of the goods, even though not assessed in the replevin action. *Gould v. Hayes*, supra.

Damages to the good will of the business of the defendant in replevin cannot be

recovered in an action on the bond. *Dalby v. Campbell*, supra (conditions of bond not stated).

Loss of profits on sale of replevied articles may be recovered. *Seldner v. Smith*, 40 Md. 602.

Attorney fees.

Usual and customary attorneys' fees necessarily expended in defeating the replevin action are recoverable in an action on the bond containing a condition "for the payment of all costs and damages occasioned by the wrongful suing out of said writ of replevin." *Harts v. Wendell*, 26 Ill. App. 274; *Siegel v. Hanchett*, 33 Ill. App. 634; *Washburne v. Burke*, 84 Ill. App. 587; *Richardson v. Gilbert*, 135 Ill. App. 363.

And even though they have not yet been paid, they are recoverable if a liability to pay exists. *Siegel v. Hanchett*, supra.

But attorney fees expended in prosecuting the action on the bond are not recoverable, though the bond is conditioned "for the payment of all costs and damages occasioned by the wrongful suing out of said writ of replevin." *Washburne v. Burke*, supra.

Under a statute declaring the unsuccessful plaintiff in replevin liable for "all legal costs, as well of the action of replevin as the action on said bond, and all such other costs and damage as the defendant in replevin may show himself entitled to," the plaintiff in the replevin action is liable on his replevin bond, to the defendant for the reasonable amount of fees, above the taxed fee, which he has to pay his attorney for services required in consequence of the replevin. *Yantis v. Burditt*, 2 Dana, 254.

Attorney fees have also been held recoverable in some cases in which the nature of the conditions of the bond was not indicated. *Scott v. Rogers*, 56 Ill. App. 571; *Pace v. Neal*, 92 Ill. App. 416; *Dalby v. Campbell*, 26 Ill. App. 502; *Gilbert v. Sprague*, 196 Ill. 444, 63 N. E. 993.

They have also been held not recoverable. *Edwards v. Bricker*, 60 Kan. 241, 71 Pac. 587.

In an action on a replevin bond conditioned for the prosecution of the action of replevin with effect without delay, the plaintiff cannot recover his attorney fees expended in defending the replevin action, though the plaintiff in the replevin action suffered a nonsuit or was unsuccessful, and a statute provided that when the replevin bond is forfeited, the defendant, in action upon it, "shall recover such sum as shall be just and equitable." *Davis v. Crow*, 7 Blackf. 129 (plaintiff in replevin nonsuited); *Consolidated Tank Line Co. v. Bronson*, 2 Ind. App. 1, 28 N. E. 155 (plaintiff in replevin unsuccessful).

Nor can he recover his attorney fees expended in the action on the bond. *Davis v. Crow*, supra.

In a suit on a replevin bond plaintiff is not entitled to prove the value of stenographer's fees and costs, including attor-

neys' fees necessary and incidental to conducting the replevin suit, when the condition of the bond was to prosecute the suit to effect and without delay, and make return of the property replevied, if return shall be awarded, and save and keep harmless the sheriff for having replevied the property, and pay all costs and damages occasioned by wrongfully suing out said writ of replevin. *Gilbert v. American Surety Co.* 61 L.R.A. 253, 57 C. C. A. 619, 121 Fed. 499, writ of certiorari denied in 190 U. S. 560, 47 L. ed. 1184, 23 Sup. Ct. Rep. 855.

The obligor in a replevin bond conditioned "to prosecute the suit with effect, . . . and to return the property in case it shall be so awarded, and to pay all such damages as may be assessed against the plaintiff, and the costs of the suit," etc., is not liable in an action on the bond for the attorney fees of the successful defendant in the replevin action, in whose favor judgment was there rendered for the return of the property and costs only, but no inquiry was had or damages assessed for the injury sustained by reason of the action; since the obligation was to pay damages assessed, and none were assessed. *Kenley v. Com.* 6 B. Mon. 583.

Attorney fees incurred in defending the replevin suit are not recoverable in a suit on the replevin bond conditioned that the plaintiff will duly prosecute the action and perform the judgment of the court by returning the property, if return be adjudged, and pay to the defendant such sums of money as may be adjudged against the plaintiff, where plaintiff voluntarily dismissed his action, and nothing but legal and taxable costs were adjudged against the plaintiff. *Kentucky Land & Immigration Co. v. Crabtree*, 118 Ky. 395, 80 S. W. 1161, 4 A. & E. Ann. Cas. 1133.

The same is true of hotel bills, horse hire, and loss of time and labor, in procuring attendance of witnesses. *Ibid.*

Expenses which the defendant in the replevin suit was obliged to incur in the defense of the replevin suit, including attorney fees, and also in the action on the replevin bond, are not recoverable in the action on the bond, conditioned simply that the principal obligor in the bond should pay whatever damages and costs should be recovered against him, and return the property if such should be the final judgment, first, because the bond does not require it, and, second, because taxable costs are in contemplation of lawful indemnity. *Maguire v. Pan-American Amusement Co.* 205 Mass. 64, 91 N. E. 135.

Where a writ of replevin was against two persons, and, the property not being found, the action, by statutory authority, was continued as one in trover, in which a judgment for damages was rendered against one defendant, and in favor of another, the latter, in an action on the replevin bond, cannot recover his attorney fees incurred in defending the trover action; as the replevin bond was not intended to cover costs and attorney fees incurred in the trover

action. *Reno v. Woodyatt*, 81 Ill. App. 553.

The successful defendant in a replevin action is not entitled to recover as part of his damages, in an action on the plaintiff's bond, the excess of solicitor-and-client-costs of his defense over and above his taxed party-and-party costs in the replevin action, though the bond is conditioned for the payment to the defendant of such damages as he should sustain by the issuing of the writ of replevin, since in contemplation of law taxable costs are a full indemnity. *Williams v. Crow*, 10 Ont. App. Rep. 301.

Since attorney fees, though embraced in a promissory note given for rent, are not collectable by distress warrant, the surety on a replevy bond growing out of a levy under the distress warrant is not liable for such fees. *Jones v. Findley*, 84 Ga. 52, 10 S. E. 541.

Attorney fees are not recoverable in an action on a replevin bond if not pleaded. *Edwin v. Cox*, 61 Ill. App. 567.

Costs.

—condition to pay or perform judgment.

The obligor in a delivery bond conditioned "to perform the judgment of the court" is liable for the costs of the replevin action adjudged against the replevin defendant, and not paid. *Morrill v. Daniel*, 47 Ark. 316, 1 S. W. 702; *Galloway v. Bethume*, 6 Bush, 113.

This is true though the property itself was returned in accordance with the judgment of the court. *Morrill v. Daniel*, *supra*.

Costs in the replevin suit are recoverable by the successful defendant suing on the replevin bond, when the condition is that the obligors will pay to the obligee any judgment he might recover in the replevin action, etc. *Gould v. Hayes*, 71 Conn. 86, 40 Atl. 930; *Brabon v. Pierce*, 34 Mich. 39; *John Church Co. v. Dorsey*, 38 Misc. 542, 77 N. Y. Supp. 1065 (action on redelivery bond).

In an action on a replevin bond given in the justice court, containing such a condition, costs awarded the defendant in the circuit court, to which the plaintiff in the replevin action had appealed it from the justice court, are recoverable, although on such appeal the costs in the justice court were paid, and an appeal bond was given. *Brabon v. Pierce*, *supra*.

Where a plaintiff in a replevin action gives an undertaking conditioned for the payment to the defendant of such sum as may "for any cause" be recovered against the plaintiff, and judgment for costs is rendered against the plaintiff, the surety is liable for such costs. *Katz v. American Bonding & Trust Co.* 86 Minn. 168, 90 N. W. 376; *Rhodes v. Burkart*, 28 S. C. 154, 5 S. E. 347; *Tibbles v. O'Connor*, 28 Barb. 538; *Carlton v. Dixon*, 14 Or. 293, 12 Pac. 394.

And if a judgment for costs is rendered against such plaintiff both in the trial court and on appeal, the surety on such undertaking is liable for the costs in both courts. 30 L.R.A. (N.S.)

Tibbles v. O'Connor and *Carlton v. Dixon*, *supra*.

But an undertaking given by a defendant in an action of replevin, conditioned to pay "any damages awarded against him in said suit," does not include costs, as "damages" in a legal sense do not include costs. *Brock v. Bolton*, 37 S. C. 40, 16 S. E. 370.

The surety on the bond of the unsuccessful defendant in an action of replevin is liable for all of the plaintiff's costs in such action, though a former statute requiring such bond to be conditioned for the delivery to the plaintiff of the property "if such delivery should be adjudged, and for the payment of such sum as may for any cause be recovered against the defendant," was changed so as to require the bond thereafter to be conditioned "for the delivery thereof, with damages for its deterioration and its detention, if delivery can be had, and if such delivery cannot for any cause be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the unlawful taking or detention, with interest thereon, as damages for such taking and detention." *Hall v. Tillman*, 110 N. C. 220, 14 S. E. 745.

Expenses incurred by the successful defendant in a replevin action are not recoverable in an action on a replevin bond which, by statute, covers payment to the defendant only of "any sum which the judgment awards to him against the plaintiff." *Firestone v. Aetna Indemnity Co.* 67 Misc. 443, 123 N. Y. Supp. 107.

—condition to pay costs and damages *eo nomine*.

Costs obtained by the successful defendant in a replevin action are recoverable from the surety on the replevin plaintiff's bond, conditioned that the plaintiff should pay "all damages and costs" which should be awarded against him. *Campbell v. Laue*, 2 Neb. (Unof.) 63, 95 N. W. 1043.

Expense for printing necessarily expended in defeating the replevin action is recoverable in an action on the replevin bond, containing a condition for the payment of all costs and damages occasioned by the wrongful suing out of the writ of replevin. *Harts v. Wendell*, 26 Ill. App. 274.

In an action on a replevin bond conditioned to pay costs, etc., given in replevin of goods seized under execution, all the costs incurred in the action in which execution issued are recoverable, though part of them may have been incurred by the execution defendant. *Larson v. Laird*, 36 Ill. App. 402.

Where, under a statute providing that plaintiff in replevin shall give bond to pay such damages and costs as the defendant shall recover against him, and, on the plea of *non cepit* only, a verdict was entered for defendant and judgment rendered in his favor for costs only, such costs and interest are recoverable in an action on the bond. *Hovey v. Coy*, 17 Me. 266.

The sureties of a defendant in an action

of replevin, who retained the property by giving a forthcoming bond, in case of his defeat, are liable, not only for the value of the property, but also for the costs, under a statute providing that "if the property be in possession of the losing party, the execution shall command the sheriff to take the property in controversy, if the same may be had, and deliver the same to the successful party; and if not to be had, that he make the value thereof, together with the damages and costs, of the goods . . . of the party and his sureties against whom the judgment is rendered," although the bond itself was not conditioned for costs. *Phillips v. Cooper*, 59 Miss. 18; *Sparks v. Hopsen*, 83 Miss. 124, 35 So. 446.

A surety on a redelivery bond "conditioned that he [defendant in replevin action] will appear in and defend the action, and deliver the property to the plaintiff, if he recovers judgment therefor, . . . and that he will pay all costs and damages that may be adjudged against him for the taking or detention of the property," cannot be held for the costs of a continuance granted at the request of the defendant in the replevin action, when the latter was ultimately successful. *American Soda Fountain Co. v. Dean Drug Co.* 136 Iowa, 312, 111 N. W. 534.

—condition to prosecute action.

The defendant's costs recovered in the replevin action are recoverable by him in an action on the bond, where there was a breach of a condition of the replevin bond to prosecute the suit to effect, by taking a nonsuit. *Langdoc v. Parkinson*, 2 Ill. App. 136.

Or by an unsuccessful suit, when the defendant in the replevin action regained possession of the property by giving a redelivery bond, and recovered a judgment for costs in such replevin action. *Tibbal v. Cahoon*, 10 Watts, 232; *Balsley v. Hoffman*, 13 Pa. 610.

A constable who seized horses on a writ of execution, which were thereafter replevied by the execution debtor, who later suffered a nonsuit, may, in an action on the replevin bond, conditioned for the prosecution of the action of replevin without delay, recover the cost of feeding the horses while in his possession. *Davis v. Crow*, 7 Blackf. 129.

The surety on a replevin bond conditioned that his principal shall prosecute his suit "with effect" is liable for all the costs of the successful defendant adjudged in his favor in the replevin suit, up to the penalty of the bond, although the verdict and cost exceed the appraised value of the property replevied. *Ingram v. Cox*, 5 Pa. Dist. R. 617.

The surety on a replevin bond conditioned according to statute that the plaintiff will prosecute the suit with effect, etc., make return of the property if return be adjudged, etc., is not bound for the costs of the replevin suit, where the

statute provides that if the plaintiff in replevin fails to prosecute his suit with effect, the court or jury shall assess the value of the property and damages for the use of the same, and that in such case judgment shall be against the plaintiff and his sureties, that he return the property or pay the value so assessed, and double the damages assessed for the detention of the property; since the statute is silent as to costs. *Morrow v. Shepherd*, 9 Mo. 214.

—condition to return property.

The costs of a writ of *retorno habendo* are recoverable in an action on a replevin bond, on breach of a condition to return, as they are not the recovered costs of the replevin suit, but costs accruing after such judgment to enforce the same. *Langdoc v. Parkinson*, *supra*.

—conditions of bond not given.

It is proper to include the marshal's commission of 5 per cent in a judgment given on a replevin bond for goods distrained for rent. *Alexander v. Thomas*, 1 Cranch, C. C. 92, Fed. Cas. No. 174.

In *Burn v. Blecher*, 14 U. C. C. P. 415, it was held that the successful defendant in an action of replevin is entitled in action on the bond, to recover the costs incurred in the replevin action.

Taxable costs incurred by the successful defendant in a replevin suit, and which he rendered himself liable to pay, are recoverable in an action on the bond, but not costs made by the plaintiff in the replevin suit. *Kellar v. Carr*, 119 Ind. 127, 21 N. E. 463.

The costs recovered against the unsuccessful plaintiff in a replevin action are recoverable against the sureties on his bond without first making a demand on the principal in the bond, or suing out a writ of execution on the judgment. *Cook v. Lothrop*, 18 Me. 260.

In *Howe v. Handley*, 28 Me. 241, it was held that the successful defendant in a replevin action, who recovered judgment for a return of the property and for damages and costs, was entitled, in an action on the bond, the terms of which are not given, to the amount of the judgment for costs recovered in the action of replevin, with interest from the time of judgment, his reasonable expenses incurred in that action, with interest from the same time, and his reasonable expenses incurred in the suit on the bond.

The replevin bond is sufficient to cover the costs in all the courts where the replevin action was begun in the justice court, removed on *certiorari* to the supreme court, which reversed the judgments in the two former courts, both of which had been in favor of the plaintiff, "with costs of all the courts." *Monroe v. Heintzman*, 46 Mich. 12, 8 N. W. 571.

—limit imposed by penalty.

Costs of the successful party in an action

of replevin are not recoverable in an action on the bond, when it causes the amount of the penalty to be exceeded. Branscombe v. Scarbrough, 6 Q. B. 13.

—liability of surety to principal.

In *Hallman v. Dellinger*, 84 N. C. 1, it was held that a surety on a replevin bond is not liable to his principal for costs which the latter had been compelled to pay. This would seem to be elementary, but the trial court went astray on the question.

R. A. E.

KENTUCKY COURT OF APPEALS.

JOSEPH LEVI, Appt.,

v.

LOEVENHART & COMPANY.

(138 Ky. 133, 127 S. W. 748.)

Bankruptcy — discharge — order for payment — effect.

The liability of an employer upon an accepted order of his employee, to pay a certain sum per week out of the latter's wages until a certain debt is satisfied, is extinguished by the discharge of the employee in bankruptcy.

(April 28, 1910.)

APPEAL by plaintiff from a judgment of the Chancery Branch, First Division, of the Circuit Court for Jefferson County, dismissing a petition filed to enforce an assignment of wages. Affirmed.

The facts are stated in the opinion.

Note. — Effect of discharge in bankruptcy upon assignment of wages to be earned in the future under contract terminable at will.

But one case in point, other than *LEVI v. LOEVENHART*, seems to have been reported since the preparation of the note on this question appended to the *Citizens' Loan Asso. v. Boston & M. R. Co.* 14 L.R.A. (N.S.) 1025.

The case of *Re Ludeke*, 171 Fed. 292, involved a substantially similar point, and the same conclusion was reached as in *LEVI v. LOEVENHART & Co.* In the former case the question arose as to whether a discharge in bankruptcy would release the lien of an execution which, under the order of the state court, had been made a lien upon the salary of the discharged bankrupt, as the same became due and payable to him, and it was held that, as to salary earned subsequently to adjudication in bankruptcy, a discharge in bankruptcy freed the bankrupt's salary from the effect of the execution, since the judgment under which the execution was levied was thereby discharged, and the lien did not actually attach until the salary accrued.

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Messrs. Samuel A. Lederman and Kohn, Baird, Sloss, & Kohn, for appellant:

Wages to be earned under an existing contract have an existence as property, and are therefore the subject-matter of assignment or sale.

Holt v. Thurman, 111 Ky. 84, 98 Am. St. Rep. 399, 63 S. W. 280; *Manly v. Bitzer*, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464; *Boone v. Connelly*, 12 Ky. L. Rep. 190.

The property right created by an assignment of wages to be earned, in the wages, is distinct from the personal obligation of the assignor to pay the debt, if the assignment be to secure a money obligation.

3 Page, Contr. § 1284; *Bishop, Contr.* § 1193.

The acceptance by the defendant of the assignment was a confession by it of notice, and an agreement on its part to apply the wages when earned according to the terms of the assignment, thus safeguarding the property right therein of the plaintiff, and forming a contract between him and the defendant; upon the breach of which plaintiff has the right to recover as for money converted.

3 Page, Contr. § 1284; *Bishop, Contr.* § 1193.

The release of Metzler, the obligor, from the personal obligation to pay his debts, by the discharge in bankruptcy, did not affect the property right or interest which he conveyed to the plaintiff in the wages which he earned from the defendant, and which the defendant agreed to retain and pay to the plaintiff.

1 *Loveland, Bankr.* 3d ed. § 202; *Citizens' Loan Asso. v. Boston & M. R. Co.* 196 Mass. 528, 14 L.R.A. (N.S.) 1025, 124 Am. St. Rep. 584, 82 N. E. 696, 13 A. & E. Ann. Cas. 365; *Bishop v. John H. Hibben Dry Goods Co.* 30 Ky. L. Rep. 727, 99 S. W. 644; *Brooks v. Eblen*, 127 Ky. 727, 106 S. W. 308; *Huffman v. Leslie*, 23 Ky. L. Rep. 1982, 66 S. W. 822; *Starks v. Curd*, 88 Ky. 167, 10 S. W. 419; *Smith v. Gowdy*, 3 Ky. L. Rep. 538; 1 *Remington, Bankr.* §§ 1144, 1150.

The wages earned by Metzler subsequent to his discharge are property subject to the lien created by him before his discharge.

Citizens' Loan Asso. v. Boston & M. R. Co. supra; *Mallin v. Wenham*, 209 Ill. 252, 65 L. R. A. 602, 101 Am. St. Rep. 233, 70 N. E. 564; *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498; *Johnson v. Donohue*, 113 Tenn. 446, 83 S. W. 360; 1 *Remington, Bankr.* § 760, p. 451 and note; 2 *Remington, Bankr.* § 2677, p.

1591; 16 Am. & Eng. Enc. Law, 2d ed. p. 774.

The validity of the assignment, and the right or property conveyed by it, are to be determined wholly by the law of the state of the assignment, and not by the bankruptcy law.

1 Remington, Bankr. §§ 1139, 1140; Thompson v. Fairbanks, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; Re H. G. Andrae Co. 117 Fed. 561; Porter v. Lazear, 109 U. S. 84, 27 L. ed. 865, 3 Sup. Ct. Rep. 58; Long v. Bullard, 117 U. S. 617, 29 L. ed. 1004, 6 Sup. Ct. Rep. 917.

Mr. Nathan Kahn for appellees.

Lessing, J., delivered the opinion of the court:

On October 1, 1906, Albert G. Metzler, who was then in the employ of Loevenhart & Company, gave to Joseph Levi the following order:

Louisville, Kentucky, Oct. 1, 1906.

Messrs. Loevenhart & Company,

Louisville, Kentucky.

Gentlemen:

Kindly pay to Mr. Jos. Levi \$7.50/100, seven and 50/100 dollars, each week, out of my salary as long as I am in your employ, or until my indebtedness of \$500 to Mr. Jos. Levi is settled.

[Signed] Albert G. Metzler.

—directing them to pay to said Levi out of his wages the sum of \$7.50 per week until a debt due him, amounting at that date to \$500, and evidenced by a promissory note, was satisfied. Loevenhart & Company accepted this order, as appears from the following indorsement thereon: "Accepted. Loevenhart & Company, Oct. 1st, 1906." Thereafter Metzler filed his petition in bankruptcy, and was in due time adjudged a bankrupt, and discharged. After he became a bankrupt, Loevenhart & Company discontinued the payment of the weekly stipend to Levi, and on March 10, 1908, he filed suit in the Jefferson circuit court to compel Loevenhart & Company to comply with the terms of the order, and to pay to him a balance alleged to be due him on his debt, amounting to \$237.50. He pleaded, further, that Metzler was still in the employ of the defendants, and had been ever since they ceased paying him as per the order, and that, under the terms of the order, there was then in their hands, or should have been, more than enough money, if they had complied with their agreement, to satisfy the balance of his debt.

A special demurrer and certain motions 30 L.R.A. (N.S.)

to strike were disposed of, and the defendants answered in five paragraphs. The first is a traverse. The second pleads payment by Metzler. The third pleads usury in the note to the amount of \$265.50. The fourth pleads, substantially, that Levi had taken advantage of the embarrassed financial condition of Metzler, and had overreached him, and induced him to execute an unconscionable contract, the enforcement of which was against a sound public policy, and that, because of the advantage thus taken of him in procuring him to execute the contract for \$500, when, as a matter of fact, he only received \$222.85, the same should not be enforced. In the fifth paragraph he set up the discharge of Metzler by the bankruptcy court, and filed with his answer copies of the orders of the Federal court for the western district of Kentucky, showing his adjudication and discharge in bankruptcy, together with a schedule filed by him in said court, in which plaintiff is given as a creditor, and he sought to be relieved from the payment of plaintiff's claim along with others. This adjudication and discharge they pleaded in bar of plaintiff's right to recover.

Plaintiff replied, traversing the allegations of the first, second, third, and fourth paragraphs, and pleaded, in response to the fifth, that he had taken no part in the bankruptcy proceedings, had filed no claim, and, in short, had ignored the proceedings therein. A demurrer was sustained to the fourth and fifth paragraphs of his reply. He declined to plead further, and, over⁹ his objection, his petition was dismissed, with judgment for costs. He appeals.

There is really but one question involved on this appeal, and that is whether or not the discharge in bankruptcy satisfied plaintiff's debt, and relieved the bankrupt, and Loevenhart & Company for him, of any further liability on account of the order and acceptance above set out. It is not seriously denied that the adjudication in bankruptcy discharged the \$500 debt which plaintiff held against Metzler; but it is argued that, by this order, plaintiff acquired a property right in Metzler's wages, of which he could not be deprived by the discharge of the bankrupt, and on this theory rests his right to recover. This court has, in a number of cases, held that such an order, given by a debtor to his employer in favor of a creditor, operates as an equitable assignment of the wages designated in the order, and that the title of the creditor to the wages covered by the order is superior to that of any attaching or execution creditor. Holt

v. Thurman, 111 Ky. 84, 98 Am. St. Rep. 399, 63 S. W. 280; Manly v. Bitzer, 91 Ky. 596, 34 Am. St. Rep. 242, 16 S. W. 464; Boone v. Connelly, 12 Ky. L. Rep. 190. This is the extent to which these cases have held, and the question has arisen only as to the rights of creditors to subject wages that have been earned. The terms of the order were literally complied with by appellees at all times before Metzler's discharge, and it is only with the right of plaintiff to hold them liable for wages not then earned, but to be earned in the future, that we are now called to pass upon.

Undoubtedly the order in question secured to plaintiff an equity—suspended, as it were—which attached immediately that the wages were earned, and secured to him a priority in the earned wages to the extent stipulated in the order superior to that of any other creditor; but such right did not attach until the wages were earned. The order was valid only so long as the indebtedness to plaintiff remained unsatisfied. It is of no higher or greater dignity than the debt. It is merely an agreement that there shall be appropriated out of the debtor's wages a stipulated sum, to be credited on his debt until it is satisfied; i. e., paid or discharged. By his discharge in bankruptcy Metzler settled every debt that he owed,—was entirely, completely, and finally relieved from any and all liability on account thereof; and as plaintiff's claim was set up and described in the proceeding in the bankruptcy court as a debt owing by Metzler, it was likewise canceled, satisfied, and settled, and, being settled, the conditions of the order were fully satisfied, and appellee relieved from all liability thereunder.

This being so, it becomes unnecessary to discuss the further questions of interest raised by counsel in their briefs.

Judgment of the lower court is affirmed.

MISSOURI SUPREME COURT.

MAGDALENA STROTTMAN, Appt.,
v.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY, Resp't.

(228 Mo. 154, 128 S. W. 187.)

New trial — right to after reversal.

A plaintiff whose judgment is reversed on appeal after consideration of the law and the facts is not entitled to the benefit of a statute permitting the institution of a new suit within a year in case of a nonsuit or a reversal of a judgment in his favor, where 30 L.R.A.(N.S.)

the appellate court is authorized to award a new trial reverse, or affirm, since the reversal referred to in the statute must be held to mean one in which the merits of the cause have not been adjudicated.

(May 13, 1910.)

Note. — Reversal on merits without remanding as a bar to a new action.

Although much general language may be found concerning the effect of a judgment of an appellate court which reverses a judgment or decree of a trial court, cases which have expressly discussed the question presented in STROTTMAN v. ST. LOUIS, I. M. & S. R. Co., that is, whether a mere judgment of reversal without remanding, after due consideration of the law and facts of the case, will bar the bringing and maintaining a new suit, have been difficult to find.

Many of the cases cited to propositions apparently in point in this note were found, upon examination, to be cases in which the cause was remanded to the lower court for further proceedings, or were otherwise disposed of than by a mere reversal. Other cases were found to use language so broad that it was impossible to determine whether the court reversing the judgment of the lower court had considered the merits of the case, or whether the judgment was reversed because of some mere technical reason. General expressions were also found to the effect that when the appellate court reverses for causes going to the merits, and the reversal shows an intention finally to decide the case upon the merits, the judgment is then a bar to a new action. Although such expressions are clearly correct, and plenty of authority may be found to sustain them, care should be taken in their citation, since the court or author using the expression very probably had in mind a judgment of reversal with petition dismissed, or cases in which final judgment was rendered in favor of the defendant, and not a bare judgment of reversal.

However, a number of authorities have been found which, without doubt, are valuable in a discussion of this question. The Missouri cases have been fully discussed in the STROTTMAN CASE, and they will not be repeated here.

In Platz v. Burton & C. Cider & Vinegar Co. 7 Misc. 473, 28 N. Y. Supp. 385, a judgment of a county court reversing on its merits a judgment in favor of plaintiff and reciting that no liability was shown on the trial against the defendant, was held to be a bar to a subsequent action for the same cause. The court, after pointing out that this case did not come within the exception of the statute, providing that the county court had no power to grant a new trial upon reversing a justice's judgment, stated that the county court was limited to the powers granted it by a statute which provided that the appellate court must render judgment according to the justice of the case without regard to technical errors or defects which do not affect the merits, and

A PPEAL by plaintiff from a judgment of the Circuit Court for City of St. Louis in defendant's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's husband. Affirmed.

The facts are stated in the opinion.

Messrs. Block & Sullivan, for appellant:

A reversal without remanding is not an adjudication of the merits, but is equivalent to a nonsuit by the plaintiff.

Robinson v. Musser, 78 Mo. 153; Musser v. Harwood, 23 Mo. App. 495; Zursfluh v. People's R. Co. 46 Mo. App. 643; Berning v. Medart, 56 Mo. App. 450; A. M. Stevens Lumber Co. v. Kansas City Lumber Co. 72 Mo. App. 258; Young v. Thrasher, 123 Mo. 312, 27 S. W. 326; Smith v. Adams, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 506; Stone v. Grand Lodge, A. O. U. W. 117 Mo. App. 297, 92 S. W. 1143; Donnell v. Wright, 199 Mo. 312, 97 S. W. 928; Briant v. Fudge, 63 Mo. 491; Estes v. Fry, 160 Mo. 81, 65 S. W. 741; Mason v. Kansas City Belt R. Co. 226 Mo. 212, 26 L.R.A. (N.S.) 914, 125

S. W. 1133; Hennessey v. Bavarian Brewing Co. 63 Mo. App. 111, a. c. 145 Mo. 109, 41 L.R.A. 385, 68 Am. St. Rep. 554, 46 S. W. 966; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Gardner v. Michigan C. R. Co. 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; Spring Valley Coal Co. v. Patting, 210 Ill. 346, 71 N. E. 371; Illinois C. R. Co. v. Bentz, 108 Tenn. 670, 58 L.R.A. 690, 91 Am. St. Rep. 763, 69 S. W. 317; Holland v. Hatch, 15 Ohio St. 465.

Messrs. J. F. Green and R. T. Ralley for respondent.

Graves, J., delivered the opinion of the court:

This cause is here for a second time. There was at least an attempted adjudication of it in Strottman v. St. Louis, I. M. & S. R. Co. 211 Mo. 227, 109 S. W. 769. We have purposely used the word "cause" instead of the word "case." The cause when first here came by appeal from Jefferson

that it may affirm or reverse the judgment of the justice in whole or in part, and as to any or all of the parties, and for errors of law or of fact.

In Larkins v. Terminal R. Asso. 122 Ill. App. 246, affirmed in 221 Ill. 428, 77 N. E. 678, it was held that a statute providing that if judgment be given for the plaintiff and the same be reversed by writ of error, or upon appeal if the time limited for bringing such action shall have expired during pendency of the suit, he may commence a new action within one year from such reversal, cannot be applied where a judgment was reversed without remanding, and a finding of facts was entered in accordance with a section of the practice act, providing in effect that if any final determination of any cause be made by the appellate court, as the result of the finding of the facts, different from the finding of the lower court, it shall be the duty of the appellate court to recite in its final order or decree, the facts as found, and that the judgment shall be final and conclusive as to all matters of fact in controversy.

The court said: "We conclude that where an appellate court has reversed a judgment for causes going to the merits, and the reversal shows an intention finally to decide the case upon the merits, such judgment is a final one upon the facts constituting the cause of action and has all the characteristics necessary to constitute it *res judicata*; that our statute upon the subject, declaring that it shall be the duty of the appellate court to recite in its final order, judgment, or decree in such cases, the facts as found, and that the judgment of such court shall be final and conclusive as to all matters of fact in controversy in such cases, is intended to be final, and to preclude any further litigation concerning the matters constituting the same cause of action."

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In this case the plaintiff contended that the purpose of the above section of the practice act was to enable the supreme court to determine from the finding of the facts whether the law of the case had been correctly applied, and that it was not intended that such a finding should convert a judgment of reversal into an adjudication that would operate as an estoppel. The court, however, in answer to this contention said: "In very many cases, however, there can be no reason of the amount involved, be no appeal from the appellate to the supreme court. If therefore, the finding of facts by this court is simply to show the supreme court the reasons moving the appellate court to the action taken by it in such a case, what is the effect of the statute upon those cases in which no appeal can be taken from the appellate to the supreme court? It must follow from such a construction of the statutes that in such cases the judgment of the appellate court is final and *res judicata*, while the same rule does not apply to cases in which an appeal may be taken. The statute, however, is general in its terms, making no distinction between the different classes of cases above referred to, but appears to be alike applicable to all cases in which the appellate court makes a finding of fact. The statute says plainly and without any equivocation, in cases where there is a reversal based wholly or in part upon the finding of facts, different from the finding of the trial court, 'it shall be the duty of such appellate court to recite in its final order, judgment, or decree the facts as found, and the judgment of the appellate court shall be final and conclusive as to all matters of fact in controversy in such cause.' The reading of the statute is not that the finding of the facts and the judgment of the appellate court shall be final and conclusive upon the supreme court,

county. Plaintiff, the widow of an engineer in the employ of defendant, sues for the alleged negligent killing of her husband. The negligence charged was the failure of a telegraph operator to deliver a train despatcher's message, through which failure a collision occurred and plaintiff's husband was killed. When that case came on for hearing in this court, by majority opinion it was held that the deceased engineer and telegraph operator were fellow servants under the act of 1897 (Laws 1897, p. 90), but it was further held that such act of 1897 did not give the widow a right of action. This court upon an examination and hearing upon both the facts and the law entered a simple judgment of reversal, in words as follows: "Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in the form aforesaid, by the said Jefferson county circuit court

rendered, be reversed, annulled, and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the court that the said appellant recover against the said respondent its costs and charges herein expended, and have execution therefor. (Opinion filed.)"

The present case was instituted in the circuit court of the city of St. Louis by a petition containing two counts. The two counts are the same save and except in the second there is an allegation of wanton and wilful negligence and a prayer for punitive as well as other damages. In this count actual damages for \$5,000 and additional punitive damages are claimed. Both counts of said petition contain the following allegations: "Within six months next after said accident, injury, and death of the plaintiff's husband, she brought her action against the defendant in the circuit court of Jefferson county to recover damages

in passing upon the case in appeal, but that it shall be final and conclusive as to all matters of fact in controversy in such cause."

The court in this case also refused to adhere to the contention of the plaintiff, that to hold such a judgment final would be in effect to deprive him of his constitutional right to trial by jury. It should be noted that this note is not primarily concerned with the constitutionality of the above statute, and that there may be many cases not within the scope of this note which discuss that question.

There are a number of cases from Illinois which would seem, however, to favor the doctrine that a reversal without remanding, with a finding of facts pursuant to the practice act, is not a bar to a new action. Thus in *Union Nat. Bank v. Manistee Lumber Co.* 43 Ill. App. 525, it was said: "While a finding here of the facts after a jury trial, contrary to the verdict, may under § 87 of the practice act of 1872, be made the final determination of the cause, in case the judgment below is simply reversed without remanding, yet such judgment is no bar to another action."

So, in *Chicago, R. I. & P. R. Co. v. Berg*, 57 Ill. App. 521, the court used the following language: "We shall therefore reverse the judgment with a finding as a fact, that the injuries of the appellee were occasioned by his own carelessness, and not by any negligence of the appellant.

"Such a finding is merely an end of this suit; it is justification for not remanding the cause, but it is no bar to a new suit."

In *Chicago Forge & Bolt Co. v. Rose*, 69 Ill. App. 123, where a judgment was reversed with a finding of facts, without remanding the cause, the court said: "This disposes of the present action, but it will 30 L.R.A.(N.S.)

not be a bar to a future action for the same cause if one shall be brought by the plaintiff."

In *West Chicago Street R. Co. v. Boeker*, 70 Ill. App. 67, the court said in denying a petition for a rehearing when a judgment had been reversed with a finding of the facts and without remanding, "This disposition of this case is no bar to another suit."

The above cases were all reviewed in the *Larkins Case*, supra, and the expressions above set forth, in the first three at least, considered mere *dicta* of the courts.

In *Spees v. Boggs*, 204 Pa. 504, 54 Atl. 346, and *Fries v. Pennsylvania R. Co.* 98 Pa. 142, it has been generally held without further discussion that a reversal of judgment without a new venire is not a bar to a second action for the same cause.

A case of some interest in this connection, although not strictly in point, is *Hutter v. Paige Iron Works*, 127 Ill. App. 177, where it was held that the statute granting a plaintiff the right of a new action within one year after the reversal of a judgment in his favor, if during the pendency of the suit the time limited for bringing the action had expired, did not apply to a case where the appellate court not only reversed the judgment entered by the lower court, but also awarded a venire facias de novo, but that it applied only to cases in which judgments were reversed on appeal or writ of error and the cause not remanded.

The question of constitutional power of appellate court upon reversing judgment for plaintiff on verdict to direct a judgment for defendant without remanding the case for a new trial is discussed in a note to *Gunn v. Union R. Co.* 2 L.R.A.(N.S.) 362.

G. V.

therefor, and to recover upon the cause of action sued for herein, and subsequently, on May 14, 1903, recovered a judgment against the defendant therein, and said cause was thereupon taken by the defendant to the supreme court of Missouri, on appeal, and said judgment was by the supreme court of Missouri on the 2d day of April, 1908, reversed, to the damage of the plaintiff in the sum of five thousand dollars (\$5,000), for which she prays judgment." Other allegations in the two respective counts of the petition were such in substance as are found in the petition when the cause was formerly here.

To this petition, the defendant filed a demurrer in this language: "Now comes the defendant in the above-entitled cause and demurs to the first count of the amended petition filed therein for the reasons following: First. Because said first count of said amended petition fails to state facts sufficient to constitute a cause of action against this defendant. Second. Because it appears on the face of said first count that plaintiff has no cause of action against this defendant. And defendant demurs to the second count of said amended petition for the reasons following: First. Because said second count of said amended petition fails to state facts sufficient to constitute a cause of action against this defendant. Second. Because it appears on the face of said second count that plaintiff has no cause of action against this defendant."

This demurrer, the trial court sustained, and entered its judgment for the defendant, and from such judgment the plaintiff has appealed. The cause was briefed and argued here both upon the merits and upon the question of *res judicata*. Such sufficiently states the case.

1. In our judgment the present case is determined without a rediscussion of the merits of the cause. The present case, whilst here upon petition and demurrer, is as if it were here upon all the original facts with an answer pleading former adjudication. The petition was evidently so drawn as to force this situation. It avers all the facts necessary to be set out in an answer pleading former adjudication, and the demurrer raises the issue by conceding the pleaded facts. The demurrer performs a further office by raising a clear issue of law, i. e., that the petition upon its face shows a former adjudication of the cause of action stated, and for that reason discloses no right of action in the present case. We are therefore brought to the single question as to the force and effect of a simple judgment of reversal in an appellate court in a case where such court passed upon the entire cause, including both the law and the

facts. The exact question is here for the first time. In all the history of the court, this is the first time a judgment of reversal in a case of this character has been treated as a nonsuit, and a suit reinstituted, carried to judgment, and appealed to this court. It is therefore interesting because of its novelty, if for no other reason.

The question must turn somewhat upon our statutory provisions. The various statutes are: Rev. Stat. 1899, § 639 (Anno. Stat. 1906, p. 658), which reads: "The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury or to the court sitting as a jury, or to the court, and not afterward." Rev. Stat. 1899, § 806 (Anno. Stat. 1906, p. 815): "The supreme court, St. Louis court of appeals, and Kansas city court of appeals, in appeals or writs of error shall examine the record and award a new trial, reverse or affirm the judgment or decision of the circuit court, or give such judgment as such court ought to have given as to them shall seem agreeable to law; but it shall not be necessary, for the review of the action of any lower court on appeal or writ of error, that the motion for new trial in arrest of judgment or instructions filed in the lower court, shall be copied or set forth in the bill of exceptions filed in the lower court: Provided, the bill of exceptions so filed contains a direction to the clerk to copy the same, and the same are so copied into the record sent up to the appellate court. When the facts in a special verdict are insufficiently found, they may remand the cause and order another trial to ascertain the facts." Rev. Stat. 1899, § 2868 (Anno. Stat. 1906, p. 1652): "Every action instituted by virtue of the preceding sections of this chapter shall be commenced within one year after the cause of such action shall accrue."

Acts 1905, p. 138, which were enacted in lieu of Rev. Stat. 1899, § 2868, read thus: "Every action instituted by virtue of the preceding sections of this chapter shall be commenced within one year after the cause of such action shall accrue: Provided, that if any action shall have been commenced within the time prescribed in this section, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or after a judgment for him the same be reversed on appeal or error, such plaintiff may commence a new action, from time to time, within one year after such nonsuit suffered or such judgment arrested or reversed." Rev. Stat. 1899, § 4285 (Anno. Stat. 1906, p. 2357): "If any action shall have been commenced within the times respectively prescribed in this chapter, and the plaintiff therein suffer a nonsuit, or,

after a verdict for him the judgment be arrested, or after a judgment for him the same be reversed on appeal or error, such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered or such judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may, in like manner commence a new action within the time herein allowed to such plaintiff, or, if no executor or administrator be qualified, then within one year after letters testamentary or of administration shall have been granted to him."

Section 4285, *supra*, appears under article 2 of chapter 48, which pertains to limitations of personal actions. The chapter contains two articles, one pertaining to limitations of real actions and the other to limitations of personal actions. Section 2868, *supra*, appears in chapter 17, which is entitled, "Damages and Contributions in Actions of Tort," and the amendment of 1905 would leave the amended section in the same chapter. Sections 639 and 866 appear in chapter 8, entitled "Code of Civil Procedure." The first section mentioned is in article 5 of chapter 8, which article is entitled, "Pleadings, and the Rules of Pleadings," and the second section, *supra*, is in article 12 of chapter 8, and such article is entitled, "Practice in the Supreme Court and Courts of Appeals." Such are the several statutory provisions involved in a discussion of the question.

It is immaterial in our judgment how we classify the case at bar. Plaintiff proceeded upon the theory that the case falls within the limitations as to time of bringing suit fixed by the damage act. She proceeded in the first case as also in this case, upon the theory that her right of action would lapse unless suit was brought within a year from the death of her husband. We say that it is immaterial because by an examination of § 4285 under the chapter pertaining to limitations of actions generally, and the act of 1905 eliminating the old § 2808 of the damage act, and enacting a new § 2868 in lieu thereof, it will be observed that the saving clause of the general statute of limitations found in said § 4285 has been substantially transplanted to the damage act by said act of 1905, *supra*. *Clark v. Kansas City, St. L. & S. R. Co.* 219 Mo. loc. cit. 530, 118 S. W. 40.

Discussing this saving clause added to the damage act by the act of 1905, in the *Clark Case*, *supra*, we said: "There has long existed in our statutes (chapter 48 on Limitations of Actions, art. 2, Personal Actions [Anno. Stat. 1906, pp. 2345-2365]), a section containing a saving clause in case of a non-

suit, and providing that a plaintiff 'may commence a new action from time to time, within one year after such nonsuit suffered' [§ 4285].

This saving clause was substantially borrowed and used in the new § 2868, *supra*, now part of chapter 17 on Damages and Contributions in Actions of Tort. But in said article 2, chapter 48, it is further provided as follows (§ 4292): 'The provisions of this chapter shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute.' Proper construction of the last section precludes the idea that § 4285 applies to actions instituted for damages for torts under the damage act. This, because the damage act carries its own special statute of limitations, which must control. *Gerren v. Hannibal & St. J. R. Co.* 60 Mo. 405; *Wilson v. Knox County*, 132 Mo. 387, 34 S. W. 45, 477; *Davenport v. Hannibal*, 120 Mo. 150, 25 S. W. 364; *Revelle v. St. Louis, I. M. & S. R. Co.* 74 Mo. 438; *Packard v. Hannibal & St. J. R. Co.* 181 Mo. 421, 103 Am. St. Rep. 607, 80 S. W. 951. In the latter case it was held that a widow, nonsuited within the year, might sue again, provided she instituted her suit within a year after the cause of action accrued, not within a year after nonsuit suffered. *McQuade v. St. Louis & S. R. Co.* 200 Mo. loc. cit. 157, 98 S. W. 552. It is practically conceded by counsel for appellant that unless § 2868, passed in 1905, applies to the case at bar, then the demurrer is well taken; for up to that time, as the law stood, there was no saving clause tolling the statute of limitations relating to damage suits grounded on torts, and permitting a nonsuit and the institution of a new suit within one year after the nonsuit. It is conceded, too, that the act of 1905 was passed to remedy the construction put on the damage act by *Gerren v. Hannibal & St. J. R. Co. supra*."

In the *Clark Case*, suit had been brought within the year but before the act of 1905 was enacted. Pending the suit, the act of 1905 was enacted and went into effect on June 16, 1905. On August 19, 1905, a nonsuit was taken, and thereafter within a year after the nonsuit a new suit was filed. This second suit was more than one year after the cause of action accrued, but we reached the conclusion that § 2868, as enacted in 1905, applied, and the new suit was within time. Upon this question, the present case is not more difficult. Here the original action was brought within the year, and the reversal was had long after the act of 1905 became effective.

Section 866 simply provides for the character of judgments the appellate courts may

render. Such courts "shall examine the record, and" (1) "award a new trial," (2) "reverse" the judgment, or (3) "affirm" the judgment, or (4) "give such judgment as such court (meaning trial court) ought to have given." The awarding of a new trial of necessity requires the reversal of the judgment nisi. This section is of but little importance save as a side light.

The real question is the proper construction of the new § 2868 as enacted in 1905, when taken with § 639. Under such sections, in a case where this court has passed upon both the law and facts of a case and reversed the judgment nisi, can the plaintiff bring and maintain a new suit, if brought within the year specified in § 2868? We think not, and for reasons which follow.

2. Inasmuch as our new § 2868 is in substance the same as § 4285, the history of the latter section becomes important. Section 4285 had its origin in Laws of 1807. *Vide Terr. Laws* (vol. 1) p. 144, chap. 42, § 2. In substance it has remained the same throughout. The original act read: "And provided also, if in any of the before-mentioned cases any plaintiff obtains a judgment, which upon appeal or writ of error shall be reversed, or any plaintiff shall suffer a nonsuit, such plaintiff, his heirs, executors, or administrators, as the case may require, may commence a new action or suit from time to time within one year after such judgment reversed or nonsuit suffered as aforesaid, and not after."

Thus throughout our existence as a state, and for years before, we have had this statutory provision, and yet this is the first time that this court has been called upon to meet the question here presented. It would seem singular that in all these years a case fully heard upon law and fact, and reversed, was considered as ended, and yet when we transplant the same statute into the damage act, that a life of a different character would be thereby infused into it.

Plaintiff is not without some authority in this state, however. We are cited to the case of *Donnell v. Wright*, 199 Mo. loc. cit. 304, 312, 97 S. W. 928, 930, but this case does not help the plaintiff. There are some remarks made by the writer of that opinion which might lend color to plaintiff's claim, but this color is taken away by the following subsequent statement of Judge Lamm in that case: "In leaving this view of the matter, it should be said (to guard against misunderstanding) that the question is not here, and therefore we do not decide, that an opinion of this court holding plaintiff has no case at all on the facts and the law, which opinion is followed by a judgment of reversal only, leaves the identical

issue on the identical facts open to reargitation in a new suit,—it being meet to dispose of that question only when reached as a live matter in a live case, and not *obiter*, or by the by." It is further eliminated as an authority, because it appears that two of the judges only concurred in the result of that case. Being one of the judges thus concurring in the result, it would not be improper to state that this limited concurrence was made on the theory that some *obiter* remarks in the opinion might be construed as a holding of the court.

The question came up in the case of *Musser v. Harwood*, 23 Mo. App. 405. Musser was the defendant in the case of *Robinson v. Musser*, 78 Mo. 153, which case simply reversed a judgment obtained by Robinson against Musser. Robinson had given a bond for costs, and the case of *Musser v. Harwood* was an action on that bond. Hall, J., of the Kansas city court of appeals, in discussing the question as to the force and effect of our judgment of simple reversal, said: "The supreme court had the right to reverse the judgment of the circuit court, and to render final judgment in favor of the defendant in the case of *Robinson v. Musser*; it had the power to reverse such judgment and dismiss the petition in such case. *Gatewood v. Hart*, 58 Mo. 261; *Jenkins v. McCoy*, 50 Mo. 348; *McGee v. Larramore*, 50 Mo. 425. A reversal of the judgment and dismissal of the petition by the supreme court would have been a final determination of the case. Did the simple reversal of the judgment, without remanding the case, have the same effect? Both modes have been indiscriminately used by all the appellate courts of this state in finally determining cases. In the cases last cited the judgments were reversed and the petitions dismissed. But in other cases to accomplish the same end the judgments has been simply reversed, and the cases not remanded. In *Bell v. Hannibal & St. J. R. Co.* 86 Mo. 612, the court held that the plaintiff had made no case and that the defendant ought to have had judgment in the circuit court, and finally disposed of and determined the case by simply reversing the judgment. In *Walden v. Dudley*, 49 Mo. 422, the court held likewise, and simply reversed the judgment. And in *Speak v. Ely & W. Dry Goods Co.* 22 Mo. App. 122, the St. Louis court of appeals, by Thompson, J., said: 'The judgment will be reversed. The plaintiff has had his day in court, has failed to make out a case or to offer any evidence in contradiction of the evidence of defendant, which is clear, consistent, and entirely probable, and which shows that plaintiff has no case. It does not therefore appear that the ends of justice will be served by remanding the

cause. The judgment will be reversed merely. It is so ordered.' We quote the above language as so clearly showing the practice in this state in this respect. It would be an endless and fruitless task to discover and cite all the cases in our reports, in which cases have been finally determined by our appellate courts by simply reversing the judgment. We are clearly of the opinion that the supreme court, by ordering simply the reversal of the judgment in the case under discussion, intended to and did finally determine it, as said court had the full power so to do. The judgment actually entered was a final judgment upon the merits, and was a complete bar to another suit on the same cause of action by the plaintiff, Robinson. The judgment of a simple reversal was entered in accordance with the opinion of the court, and, as has been said, it was intended to and did have the effect stated."

In this opinion, Philips, P. J., and Ellison, J., concurred. Later the Kansas city court of appeals dealt with the subject and overruled the Musser Case, *supra*. A. M. Stevens Lumber Co. v. Kansas City Lumber Co. 72 Mo. App. loc. cit. 260. In the lumber company Case, Smith, P. J., said: "The rule to be extracted from the foregoing authorities is that the simple reversal of a judgment without remanding will destroy its effect as an estoppel and throw the whole matter open; restore the *statu quo ante bellum*. And if the action was commenced within the period prescribed by the appropriate statute of limitations, the unsuccessful plaintiff may bring another action on his demand within a year after the reversal of his judgment, since such judgment is no bar thereto. We are unwilling to follow the rule declared in Musser v. Harwood, *supra*, in so far as the same is repugnant to that just stated. The prototype of this case, as seen by reference to the allegations of the petition hereinbefore set forth, was brought within five years after the cause of action accrued, and since this was brought within one year after the reversal of the judgment in the former, we must therefore resolve the preliminary question previously stated against the defendant's contention." The cases relied upon by Judge Smith are: Berning v. Medart, 56 Mo. App. 443; Zurfluh v. People's R. Co. 46 Mo. App. 636; Briant v. Fudge, 63 Mo. 489; Shaw v. Pershing, 57 Mo. 416; Houts v. Shepherd, 79 Mo. 141; State ex rel. Lafayette County v. O'Gorman, 75 Mo. 371.

A review of these cases will be of value. The Briant Case was this: Hayes, as sheriff of Cass county, had sold lands in partition and taken notes for the purchase money, dated April, 1860. Briant, the plaintiff in

the case cited above, was a subsequent sheriff and was directed by the court to close up the said partition proceeding. The notes to Hayes became due in 1862, but Hays went out of office about that time. By order of court, Dale, a sheriff between Hays and Briant, was directed to close up the partition proceedings. Dale brought suit and obtained judgment against Fudge and others in 1870, which judgment upon the motion of Fudge, filed in 1871, was set aside by the circuit court in July, 1872, because there had been no sufficient service on Fudge. This motion of Fudge had been served upon Briant, and before the motion was actually sustained, *i. e.*, on March 11, 1872, Briant brought the suit which reached this court. Briant was defeated in the circuit court and sued out his writ of error in this court. By our decision, the cause was reversed and remanded.

In the course of the opinion, Norton, J., said: "From this state of facts the question rises whether, notwithstanding the lapse of ten years from the time the cause of action accrued and the institution of this suit, the action can be maintained under § 19, p. 919, Wagner's Stat. This is the only point presented for our consideration. The statute provides as follows: 'If any action shall have been commenced within the times respectively prescribed in this chapter, and the plaintiff therein suffered a nonsuit, or after a verdict for him the judgment be arrested, or after a judgment for him the same be reversed, on appeal or writ of error, such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered or judgment arrested or reversed.' It would seem to follow from the above that on the arrest or reversal of the judgment rendered in the suit of Dale against the defendant, another suit might have been brought on the same cause of action within one year after the arrest or reversal, even although ten years had elapsed. The intention of the legislature, doubtless, was to give a party who should commence his action within the time prescribed as a bar to his recovery, and had, from any of the causes mentioned in the section, failed to succeed in his suit or obtain the benefit of a judgment, the right to renew or maintain a new action within the time specified."

To our mind this case lends no support to the views announced by Judge Smith. The facts of the case do not bring it within that clause of the statute relating to cases upon appeal.

The case of Shaw v. Pershing, *supra*, is not at all in point, and does not even squint at the proposition. In that case it would appear that Shaw had first instituted his

action in ejectment in the United States court before the expiration of the statutory period. In that court he suffered a nonsuit, and then within a year brought his suit in the state court. The defendant urged the statute of limitations. Our court simply held that the terms of our tolling statute were sufficiently broad to cover the case, and that inasmuch as action had been brought in the United States court within time, and then reinstituted in the state court one year after nonsuit suffered, the statute of limitations did not bar the action.

Houts v. Shepherd, supra, is also relied upon by Judge Smith. That case is as far from the mark as is the *Shaw Case*. The second syllabus properly states the case and our holding, and reads thus: "Within five years after the plaintiffs attained their majority they brought suit to set aside defendant's final settlement as administrator for fraud. In that action there was a nonsuit. Within one year thereafter this suit was brought. More than ten years had elapsed since the final settlement. Held, that this suit was not barred by the statute of limitations."

The facts and our holding in *State ex rel. Lafayette County v. O'Gorman*, 75 Mo. 370, are well stated in the third syllabus, which reads: "The statute which provides that a party who suffers a nonsuit in an action commenced within the time prescribed by the statute of limitations shall have the right to commence a new action within one year, applies as well to voluntary as to involuntary nonsuits. Rev. Stat. 1879, § 3239."

The foregoing are all the cases from this court cited by the learned judge in the *Lumber Company Case* as the foundation for the holding therein made. The question at issue in the *Lumber Company Case* was not at issue in either of these cases, and our opinions furnish absolutely no basis for the conclusion reached. There is also cited the cases of *Atkison v. Dixon*, 96 Mo. 582, 10 S. W. 163, and *Crispen v. Hannovan*, 86 Mo. 160, which simply hold that a judgment of a circuit court which has been reversed by this court is a nullity. In the *Atkison Case*, a judgment of the circuit court, which had been reversed by this court, was offered as evidence and rejected by the trial court. The parties were trying to establish the reasonable values of rents and profits on lands. This court thus disposes of the question: "On the trial, plaintiff offered in evidence the judgment rendered by the Bates county circuit court in 1876, in his favor against Louis Dixon, in which the monthly value of the premises in dispute was fixed at \$8. This evidence was objected to, the court sustained the objection and refused to re-

ceive it, and this action is claimed to be erroneous. The judgment thus offered was reversed by this court in the opinion reported in 70 Mo. 381, whereby the same became a nullity, and thereafter conferred no rights, and had no vitality for any purpose. *Crispen v. Hannovan*, 86 Mo. 167, 168; *Freeman*, Judgm. § 481. At the time said judgment was rendered Mrs. Dixon was not a party to the suit, and, as to her, the judgment was *res inter alios acta*. *Henry v. Woods*, 77 Mo. 277." It will thus be seen that this case lends no light, and the *Crispen Case*, supra, goes no further.

Judge Smith, in the *Lumber Company Case*, further relies upon two cases from the St. Louis Court of Appeals. The first is *Zurfluh v. People's R. Co.* 46 Mo. App. loc. cit. 642, whereat Judge Biggs, who wrote the opinion, says: "We are therefore of the opinion that the plaintiff's instructions were not authorized by the evidence, and that the verdict and judgment were against the law and the evidence. The other questions presented by the briefs, we need not discuss. My associates concur in this opinion, but we differ as to the proper disposition of the case. They are of the opinion that the cause ought not to be remanded, but a simple order of reversal be entered. I understand their position to be that a simple reversal is not an adjudication on the merits, but is equivalent only to a nonsuit; that in the present case the plaintiff ought to have been nonsuited, as asked by the defendant; and that it is the duty of this court to make such judgment as the circuit court ought to have made. I think the proper practice is to remand a cause, unless the proof is such as to authorize this court to make a final judgment for the appellant."

The second is *Berning v. Medart*, 56 Mo. App. loc. cit. 449, where *Rombauer, P. J.*, said: "The supreme court and this court have recently adopted the rule not to remand a cause for new trial where the plaintiff's evidence furnishes no substantial ground of recovery, unless it clearly appears that some hiatus in plaintiff's evidence may likely be supplied on a retrial of the cause in conformity with the true state of the facts. As the reversal of the judgment for the plaintiff is equivalent to a nonsuit only, and the plaintiff is still at liberty to substantiate his recovery in a new action, if so advised, the rule works no hardship."

Such are the cases relied upon by Judge Smith in the *Lumber Company Case*. In so far as the opinions from this court are concerned, none of these are in point.

In the later case of *Ordelheide v. Wabash R. Co.* 80 Mo. App. loc. cit. 368, the St. Louis court of appeals reversed the case without remanding it. Judge Biggs filed a

separate opinion and certified the case to this court. In so doing, he said: "Upon this ground I concur in reversing the judgment, but I am of the opinion the case ought to be remanded. The rule of practice is that where an appellate court in an action at law reverses a judgment in favor of plaintiff, the cause will be remanded unless it appears that all the facts have been proven, and that upon such facts the plaintiff could not possibly recover. *Gateway v. Hart*, 58 Mo. 261; *Brown v. Home Sav. Bank*, 5 Mo. App. 1; *Berning v. Medart*, 56 Mo. App. 443; *Rutledge v. Missouri P. R. Co.* 123 Mo. loc. cit. 140, 24 S. W. 1053, 27 S. W. 327. In the *Berning Case*, supra, we held that a cause should be remanded if it appeared that an hiatus in plaintiff's evidence might be supplied on a retrial. In the case here the plaintiff may be able on a retrial to show that the contract was entered into and the grain house built in aid of defendant's business as a common carrier, and that the house was intended to take the place of a freight house at *Wright City*, which under the statute the defendant was compelled to build. If these are the facts, the house when built was within the protection of the statute, which rendered the defendant absolutely liable for its destruction. The ruling of my associates in refusing to remand the case is, in my opinion, opposed to the decisions in the foregoing cases. This rule of practice is an important one, and in the disposition of causes it ought to be strictly observed. I therefore ask that the case be certified to the supreme court." When the case reached this court (175 Mo. 337, 75 S. W. 149), it was decided without adverting to the question upon which it was certified to this court. We likewise reversed the cause.

In *Stone v. Grand Lodge*, A. O. U. W. 117 Mo. App. 297, 92 S. W. 1143, the Kansas City court of appeals follows the ruling in the *Lumber Company Case*.

Upon these cases, the plaintiff contends that a judgment of reversal is equivalent to a nonsuit; that it amounts to nothing more than a nonsuit, and that a new suit can be reinstituted within a year after such judgment. In the *Berning Case*, supra, Judge Rombauer does say that this court has said that a judgment of reversal was equivalent to a nonsuit, but he cites us to no case, and if it has been so held where the question was an issue, we have been unable to find the case. Nor is it equivalent to a nonsuit. It is true that at common law the plaintiff could take a nonsuit at any time before verdict. 14 Cyc. Law & Proc. p. 401. But this rule is modified by our statute, § 639, quoted supra, by which the 30 L.R.A. (N.S.)

nonsuit must be taken before the cause is submitted to the jury or to the court. A judgment of reversal comes after a submission. Not only so, but in many cases it comes after an investigation of both law and facts, and after a judicial conclusion has been reached as to the merits of the case under the law and facts. When we consider § 639 along with § 2868, we cannot say that there is any similarity between a nonsuit and a judgment of reversal. Nor can we say, in all cases, that a judgment of reversal is equivalent to a judgment on either a voluntary or involuntary nonsuit. In nonsuits there is no adjudication of the issues involved in the case, whereas in most of the cases wherein the appellate courts simply reverse the case, there has been an adjudication of the issues on the law and facts of the case. There might be cases wherein we could reverse the case without remanding, and yet leave the issues upon the merits untouched. Thus in *McQuitty v. Wilhite*, 218 Mo. 586, 131 Am. St. Rep. 561, 117 S. W. 730, we reversed the case without remanding, and yet never passed upon the merits of the case at all.

By the first count of her petition the plaintiff, *McQuitty*, sued the administrators of *W. R. Wilhite*, deceased, for the value of her services. In the second count, she sued for the specific performance of a contract to convey real estate. The trial court found against plaintiff on the first count, but she failed to appeal. But the trial court found for plaintiff on the second count, and the administrators appealed. This judgment we reversed on the ground that plaintiff had sued the wrong parties. In other words, such action should have been against the heirs, and not the administrators. We have no doubt in a case like this the plaintiff could sue again, but where upon appeal we examine the facts and apply the law, and reverse the case for the reason that plaintiff upon the merits is not entitled to recover, such judgment of reversal is a finality. It ends the case for all time.

3. What we have said in the closing sentences of the preceding paragraph is certainly the reasonable thing. We should never give a statute an unreasonable construction. The word "reversed," as used in § 4285 and in the new § 2868, should be construed to mean a reversal wherein the merits of the cause have not been adjudicated, as in the *McQuitty Case*, supra. If the statute is to receive the construction contended for by the plaintiff, there would be no end to litigation. The statute says, "Such plaintiff may commence a new action, from time to time, within one year after . . . such judgment . . . reversed." This would mean, according to plaintiff's contention,

that if the plaintiff was successful below and we reversed the judgment, she could bring the action over within one year, and if again successful before the jury and we reversed that judgment, she could again bring it over, and so on until such time as she might be defeated, nisi, or until we entered or directed a verdict for defendant. It must be observed that the statute uses the words "from time to time," and if she can reinstitute her suit after one reversal, she can continue to so reinstitute it after each subsequent reversal.

By statute, we are authorized to enter judgments of simple reversal, and these judgments may or may not be finalities. If the merits of the cases are adjudicated and passed upon, they are final, but if not, they are not necessarily so. So that, considering the whole statute, we are of opinion that a reasonable construction thereof precludes the plaintiff from again suing after a judgment of reversal in a case wherein the merits of the controversy have been investigated and adjudicated by the court; and this fact is one of easy determination.

In the case at bar, it is not claimed that the plaintiff is relying upon any new facts, but is relying upon the same facts adjudicated in the former case. But if she had new facts, she has lost her opportunity. She might have asked for a modification of the judgment, as such has been permitted in some instances. Thus in *Rutledge v. Missouri P. R. Co.* supra, this court thus spoke in an opinion on a motion to modify a judgment of reversal: "On motion to modify the judgment, it has been suggested that plaintiff may have a cause of action upon further proof that the signal on which the engineer acted originated with the yard master. Plaintiff hence prays that the judgment be modified so as to remand the case; and thus give him an opportunity to amend, and present that phase of the case to the trial court, the statute of limitations having intervened as against any new action he might bring. On consideration of this motion we are of opinion that it should be granted. *Bowen v. Missouri P. R. Co.* (1893) 118 Mo. 541, 24 S. W. 430; *Lilly v. Tobbein* (1891) 103 Mo. 477, 23 Am. St. Rep. 887, 15 S. W. 618. Accordingly, the final judgment of this court will be that the judgment of the circuit court be reversed, and the cause remanded."

It would appear that both plaintiff and the court in that case understood that the judgment of reversal was a finality, and unless modified no further action could be taken by plaintiff. Other cases of like tenor might be cited.

4. But going a step further we are of opinion that this court has in effect refused 30 L.R.A. (N.S.)

to entertain the views urged by plaintiff. Thus in the case of *Carroll v. Inter-State Rapid Transit Co.* 107 Mo. loc. cit. 664, 17 S. W. 891, Barclay, J., said: "My associates entertain a positive opinion that where (as here) it appears that, in every view of the facts, plaintiff has no right of action whatever, the cause should not be remanded for a new trial upon the reversal of an erroneous judgment. Many cogent reasons, no doubt, can be given for that opinion, and it has the sanction of precedents, extending through many years. My personal impression has been that where the trial court in an action at law refuses to nonsuit, and we conclude that its ruling in that regard is erroneous, the cause should, on a reversal of the judgment, be remanded so that plaintiff might, if so advised, dismiss his action, or take a voluntary nonsuit, and thus avoid such effects as might possibly be held to flow from a plain judgment of reversal. Plaintiff would have the right to take such course in the circuit court before the latter could properly enter a final judgment against him (*Rev. Stat. 1889, § 2084; Lawrence v. Shreve* [1858] 26 Mo. 492), and the reviewing power of this court extends no further in actions at law than to pronounce such judgment as the trial court 'ought to have given.' *Rev. Stat. 1889, § 2304.* But this view of the subject has not met the approval of my colleagues, and the point involved is not such as seems to demand further persistency on my part to maintain an individual opinion. Accordingly, the judgment of the circuit court is reversed, with the concurrence of all the judges of this division."

We can but conclude from this that the court entertained the opinion that a judgment of reversal was a finality. At that time Judges Sherwood, Black, Brace, and Barclay constituted Division 1 of this court. Later, the personnel of the court changed, and in the case of *Keown v. St. Louis R. Co.* 141 Mo. loc. cit. 95, 41 S. W. 929, the question must have again come up, for Judge Barclay, who wrote the opinion in this case as well as in the *Carroll* Case, supra, concludes his opinion thus: "Conceding the full force of plaintiff's evidence, it does not tend to prove the essential facts of a breach of duty toward Keown. Whether submitted testimony tends to establish negligence is a question of law. Where the testimony does not have such tendency it is the duty of the court to so declare upon a proper request. The learned trial court should have given the instruction asked, denying plaintiff a recovery on the merits. It is hence unnecessary to go into an inquiry as to the alleged contributory negligence of Keown. The judgment

is reversed, in which conclusion the writer concurs, referring to his observations in *Carroll v. Inter-State Rapid Transit Co.* (1891) 107 Mo. 653, 17 S. W. 889, touching that disposition of cases of this sort. Macfarlane, Robinson, and Brace, JJ., concur."

It must be concluded that the court again discussed the character of the judgment to be entered, because Judge Barclay refers especially to his individual views in the *Carroll Case*. In both of these cases, Judge Barclay was insisting upon remanding the cause so as to allow the plaintiff to take a nonsuit, but the other members of the court were evidently of the opinion that there were no merits in either case, and finally determined them by a simple judgment of reversal. Had it ever occurred to them that a judgment of reversal was tantamount to a nonsuit they evidently would have answered Judge Barclay's insistence by so suggesting.

But beyond this, the vast number of cases which this court has disposed of by a simple judgment of reversal bespeaks the interpretation placed upon § 4285 at least. This section has been with us since the organization of the court. Section 2868, *supra*, is in words the same, so that the interpretation given to the one must be applied to the other.

Counsel for defendant has industriously collated a great number of our cases wherein we have fully adjudicated the merits and entered a simple judgment of reversal. He has selected some opinions from every judge upon this bench in three or more decades. We shall not burden this opinion with a list of the cases, but they are causes wherein we have said that under the facts no recovery could be had, and then entered a simple judgment of reversal. The curious can examine the brief for the interesting collation of the cases both from this court and the several courts of appeals.

If the conduct of this court means anything, in view of the fact that § 4285 has been upon the Missouri Statutes since the territorial days of 1807, it means that we have always understood that a simple reversal was the end of a case wherein we undertook to determine the merits of the controversy. And we now say that the statute under consideration in the case at bar should be so construed.

It follows from this, that Judge Hall, in the original case in this state, *i. e.*, *Musser v. Harwood*, 23 Mo. App. 495, was right when he said: "It would be an endless and fruitless task to discover and cite all the cases in our reports, in which cases have been finally determined by our appellate courts by simply reversing the judgment.

We are clearly of the opinion that the supreme court by ordering simply the reversal of the judgment in the case under discussion intended to and did finally determine it, as said court had the full power so to do." The doctrine of the *Musser Case* we approve, and those differing therefrom, which we have elsewhere mentioned, should be and are overruled.

5. A thought or two more and we dismiss the subject, save and except to note some cases outside of Missouri cited by the plaintiff. An examination of our cases shows that we have indiscriminately used judgments of reversal, and judgments of reversal and dismissal of the petition. For instance, in *Gatewood v. Hart*, 58 Mo. loc. cit. 205, we disposed of the case thus: "The judgment is reversed, and as it is evident that a new trial could be of no avail to the plaintiffs, their petition will be dismissed; all the judges concur." In *Rutledge v. Missouri P. R. Co.* 123 Mo. loc. cit. 137, 24 S. W. 1057, 27 S. W. 327, at the conclusion of the opinions written in Division 1, we used this language: "We hold that plaintiff's injuries cannot justly be ascribed to the want of such a rule as their juridical cause; and that the trial court should have given the defendant's instruction in the nature of a demurrer to the evidence. It follows that the judgment should be reversed (*Carroll v. Inter-State Rapid Transit Co.* [1891] 107 Mo. 664, 17 S. W. 889), and it is so ordered."

Thus it will be observed that we have reached the same object, *i. e.*, a disposition of the merits of the controversy through different wordings of our opinions and judgments. Other similar instances could be cited, but these serve to illustrate. There can be no doubt that a reversal of the judgment and a dismissal of the plaintiff's petition finally determines the cause. So, too, may the simple judgment of reversal, if it appear that the merits of the cause were submitted and adjudicated. What was held in judgment does not always appear from the judgment itself, but may be gathered from the pleadings and whole record of the case. In the case at bar it appears from the plaintiff's petition that we held in judgment at the prior hearing both law and facts, and therefore the merits of the controversy.

6. Plaintiff, in addition to the cases in this state, has cited us the following: *Smith v. Adams*, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566; *Gardner v. Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Spring Valley Coal Co. v. Patting*, 210 Ill. 342, 71 N. E.

371; Illinois C. R. Co. v. Bentz, 108 Tenn. 670, 58 L.R.A. 690, 91 Am. St. Rep. 763, 69 S. W. 317.

The Smith Case, *supra*, does not reach the question. Mr. Justice Field, in discussing an incidental question in the case, used this language: "But there is a ground, not taken by the respondent, which forces itself upon our consideration, and that is, that the judgment of the supreme court of the territory is not in form a final judgment. It not merely reversed the judgment of the district court, but remanded the cause to that court for further proceedings according to law and the judgment of the appellate court. A judgment of a lower appellate court which reverses the judgment of the court of original jurisdiction, and remands the case to it for further proceedings, is not a final judgment. A judgment of reversal is only final when it also enters or directs the entry of a judgment, which disposes of the case. On this ground, therefore, as well as on the previous ground, the appeal must be dismissed."

This is every line in that opinion discussing the effect of a judgment; and it will be observed that the judgment which Mr. Justice Field denominated not final was a judgment wherein the judgment nisi had been reversed and the cause remanded. In the Gardner Case, *supra*, plaintiff had first sued in the state courts of Michigan. In the lower court of the state he recovered. This judgment was reversed by the supreme court, but the cause was remanded. Plaintiff then went to the lower court and took a nonsuit, but thereafter brought his suit in the United States court. In the Federal court the defendant contended that plaintiff was estopped by the judgment of the Michigan court. This contention was disallowed because there had been no final judgment. This was clearly right, because the remanding of the case left it open for further proceedings, including a nonsuit, if plaintiff desired such.

The Bucher Case, *supra*, is well stated in the first syllabus, which reads: "The plaintiff sued the defendants in a state court and recovered judgment. The highest appellate court of the state, reviewing the case, decided the points of law involved in it against the plaintiff, set aside the judgment for error in the ruling of the court below, and sent the case back for a new trial. The plaintiff then became nonsuit, and brought the present suit in the circuit court of the United States on the same cause of action. Held, that he was not estopped." The point is the same as that in the Gardner Case just adverted to, but neither of these cases refer in the least to the situation of the case we have at bar. 30 L.R.A. (N.S.)

The Illinois case, *supra*, covers the same question as in the Bucher and Gardner Cases. The first syllabus states the case and reads: "A judgment by the United States circuit court of appeals reversing a judgment of the United States circuit court in a personal injury case, and remanding the cause for a new trial, is not a final judgment, and, if followed by a nonsuit, cannot be pleaded as an estoppel in a subsequent suit in a state court on the same cause of action."

The Tennessee case, *supra*, is fully covered by the first syllabus, which reads: "Where the United States circuit court of appeals reverses a judgment in favor of plaintiff, declaring that he has no right of recovery, even upon his own theory, under the law as administered by the Federal courts, and remands the cause for a new trial, and the plaintiff thereupon takes voluntary nonsuit and brings a new action in the state court, the decision of the Federal court is not conclusive, either as *res adjudicata* or as a declaration of the law of the case, upon plaintiff in the prosecution of his action in the state court, where a different view of the law applicable to the case prevails, under which he is entitled to recover."

It will be observed that in each of the five cases the judgment under discussion was one wherein the judgment nisi had not only been reversed, but the cause had been remanded. The cases are therefore absolutely foreign to the question at issue in this case. No one would contend that a judgment of this court which reversed the judgment nisi, and remanded the cause, would be a final judgment.

Later the plaintiff added to her brief the following cases: Spees v. Boggs, 204 Pa. 506, 54 Atl. 346; McOmber v. Chapman, 42 Mich. 117, 3 N. W. 288; Coffin v. Cottle, 16 Pick. 383; Wooster v. Forty-Second Street & G. T. Ferry R. Co. 71 N. Y. 473. As to these be it said that the statutes of the several states as to the character of judgments which appellate courts may render are so different that but little light can be gathered from the opinions without considering the statutes. Of these cases, when the statutes are considered, the Pennsylvania case is the only one which subserves the purposes of the plaintiff in this case, if, in fact, under all the statutory provisions of that state, that case should be considered in point.

After all, the question here as in all states is one which must be determined upon the statutory provisions, and the construction thereof, either tacit or explicit, given by the court.

We shall not consume further time and

space. It follows from what has been said that the judgment of the lower court is right and should be affirmed.

It is therefore ordered that the judgment be affirmed.

All concur.

NEBRASKA SUPREME COURT.

DUNDEE REALTY COMPANY

v.

ISAAC S. LEAVITT, Impleaded, etc., Appt.

(— Neb. —, 127 N. W. 1057.)

Innocent purchaser — unrecorded deed.

1. A purchaser of real estate from one who has already sold and conveyed the same to another, whose deed is not recorded, cannot hold the land as an innocent purchaser unless he was, at the time of his purchase, without notice, actual or constructive, of the rights of the prior purchaser.

Same — burden of proof.

2. The burden of proof is upon the party who alleges that he purchased without notice.

Same — unrecorded deed — constructive notice.

3. The plaintiff purchased a lot in Omaha, and failed to record his deed, but took possession, and caused the grade to be lowered by removing large quantities of soil therefrom at an expense of nearly \$200. Afterwards the defendant purchased the lot at about one half of its value from the same grantor, and caused his deed to be recorded. The defendant made no inquiry as to the rights of plaintiff. Held, that defendant is chargeable with constructive notice of plaintiff's rights in the lot, and is not an innocent purchaser without notice.

(October 22, 1910.)

APPPEAL by defendant Leavitt from a judgment of the District Court for Douglas County, quieting title to certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. H. P. Leavitt, for appellant:

The essentials and character of possession of real property, sufficient to constitute constructive notice of title or claim in the occupant, must be sufficient to charge the purchaser with bad faith, and must be actual, open, visible, notorious, unequivocal,

Headnotes by SEDGWICK, J.

Note. — Possession of vendee under unrecorded deed as notice of title, see note to Niles v. Cooper, 13 L.R.A.(N.S.) 109.

And as to requisites and sufficiency of possession generally to impart notice, see pages 78 et seq., of the same note. 30 L.R.A.(N.S.)

and exclusive,—not occasional, for a special or temporary purpose, and not consistent with the title of the apparent owner by the record.

Crooks v. Jenkins, 104 Am. St. Rep. 337, note; Millard v. Wegner, 68 Neb. 574, 94 N. W. 802; Hunt v. Lipp, 30 Neb. 469, 46 N. W. 632; Chicago, R. I. & P. R. Co. v. Welch, 83 Neb. 106, 118 N. W. 1116; Townsend v. Little, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357; Holland v. Brown, 140 N. Y. 344, 35 N. E. 577; Brown v. Volkening, 64 N. Y. 76.

The rule relates to present actual possession, existing at the time of the transfer to the subsequent purchaser.

Bingham v. Kirkland, 34 N. J. Eq. 230; Hunter v. Watson, 12 Cal. 376, 73 Am. Dec. 543; Roussain v. Norton, 53 Minn. 560, 55 N. W. 747; Coleman v. Barklew, 27 N. J. L. 357; Hiller v. Jones, 66 Miss. 636, 6 So. 465.

The burden of proof is upon the holder of the unrecorded instrument, to prove by clear and convincing evidence that the purchaser from the record owner had actual notice, or implied notice, necessarily inferred from actual, open, visible, and unambiguous possession at the time of the conveyance.

Anthony v. Wheeler, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. W. 404; Holmes v. Stout, 10 N. J. Eq. 419; Sheldon v. Powell, 31 Mont. 249, 107 Am. St. Rep. 429, 78 Pac. 491; McMechan v. Griffing, 3 Pick. 149, 15 Am. Dec. 198; Gratz v. Land & River Improv. Co. 40 L.R.A. 393, 27 C. C. A. 305, 53 U. S. App. 499, 82 Fed. 381; Hiller v. Jones, supra; Atlantic City v. New Auditorium Pier Co. 67 N. J. Eq. 610, 59 Atl. 158; Red River Valley Land & Invest. Co. v. Smith, 7 N. D. 236, 74 N. W. 194; Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co. 82 N. Y. 476; Marshall v. Dunham, 66 Me. 539; Bush v. Golden, 17 Conn. 594; Wilkins v. Anderson, 11 Pa. 399; Morris v. Daniels, 35 Ohio St. 406; Catrett v. J. S. Brown Hardware Co. (Tex. Civ. App.) 86 S. W. 1045; Hooper v. De Vries, 115 Mich. 231, 73 N. W. 132; Walter v. Brown, 115 Iowa, 360, 88 N. W. 832; Center v. Planters' & M. Bank, 22 Ala. 743; Hoyt v. Jones, 31 Wis. 389; Beman v. Douglas, 1 App. Div. 169, 37 N. Y. Supp. 859; Smith v. Yale, 31 Cal. 180, 89 Am. Dec. 167; Hamilton v. Williford, 90 Ga. 210, 15 S. E. 753; Gerson v. Pool, 31 Ark. 88; Giles v. Hunter, 103 N. C. 194, 9 S. E. 549; Lamar v. Hale, 79 Va. 147; Varwig v. Cleveland, C. C. & St. L. R. Co. 54 Ohio St. 455, 44 N. E. 92; Advance Thresher Co. v. Esteb, 41 Or. 469, 69 Pac. 447; Lake v. Hancock, 38 Fla. 53, 56 Am. St. Rep. 159, 20 So. 811; Sheffey v. Bank of Lewisburg, 33 Fed. 315;

Jones, Real Prop. in Conveyancing, § 1500; Lowden v. Wilson, 233 Ill. 340, 84 N. E. 245; Schwoebel v. Storrie (N. J. Eq.) 74 Atl. 969; Scott v. Farnam, 55 Wash. 336, 104 Pac. 639; Feinberg v. Stearns, 56 Fla. 279, 131 Am. St. Rep. 119, 47 So. 797; Ely v. Pace, 139 Ala. 293, 35 So. 877; Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co. 108 Va. 862, 62 S. E. 954, 1119; Boltz v. Boain, 28 Ky. L. Rep. 842, 90 S. W. 503; Sidelinger v. Bliss, 95 Me. 316, 49 Atl. 1094; Hull v. Diehl, 21 Mont. 71, 52 Pac. 782; Austin v. Staten, 126 N. C. 783, 36 S. E. 338; Wilkins v. McCorkle, 112 Tenn. 688, 80 S. W. 834; Paul v. Kerswell, 60 N. J. L. 273, 37 Atl. 1102; Daly v. Rizzutto (Wash.) 29 L.R.A. (N.S.) 467, 100 Pac. 276; Kruse v. Conklin, 82 Kan. 358, —L.R.A. (N.S.)—, 108 Pac. 856.

The defendant had a right to examine and rely upon the record.

Ames v. Miller, 65 Neb. 204, 91 N. W. 250.

Messrs. McGilton, Gaines, & Smith, with Mr. Frank H. Gaines, for appellee:

Possession of the property by one under contract of purchase is notice to the world of his claims thereunder.

Uhl v. May, 5 Neb. 158; Nolan v. Grant, 51 Iowa, 519, 1 N. W. 709; Lyman v. Russell, 45 Ill. 281; Rogers v. Turpin, 105 Iowa, 183, 74 N. W. 925; Lantry v. Parker, 37 Neb. 353, 55 N. W. 962; Dorweiler v. Callanan, 91 Iowa, 299, 59 N. W. 74; Tate v. Pensacola Gulf, Land & Development Co. 37 Fla. 439, 53 Am. St. Rep. 258, 20 So. 542; Lipp v. South Omaha Land Syndicate, 24 Neb. 609, 40 N. W. 129.

Where a claim to real estate can be sustained only upon the ground that the person asserting it is a subsequent purchaser in good faith, such person is required to show affirmatively that he purchased without notice of the equities of another, and relying upon the apparent ownership of his grantor.

Bowman v. Griffith, 35 Neb. 362, 53 N. W. 140; Pfund v. Valley Loan & T. Co. 52 Neb. 474, 72 N. W. 480.

Sedgwick, J., delivered the opinion of the court:

The plaintiff and defendant both derive their claims to the real estate in question through one Miles Moore; the plaintiff through an unrecorded contract of purchase and alleged possession and improvement of the property, and the defendant through a warranty deed, duly recorded. The defendant claims to be an innocent purchaser without notice of plaintiff's rights. The trial court found against him, and he has appealed.

1. The first question requiring consideration relates to the burden of proof in such 30 L.R.A. (N.S.)

cases. Many courts have held that when one party produces a warranty deed which recites full consideration, and has been duly recorded, the burden is upon the prior purchaser with an unrecorded title to prove notice or circumstances equivalent to notice. Indeed, it would appear from the note to Anthony v. Wheeler, 17 Am. St. Rep. 288, and authorities there cited, that this rule is almost universal. Although the court of appeals of Texas has held otherwise, and the courts of Alabama, California, Iowa, Missouri, and some decisions in the state of New York have to some extent modified the rule, our own decisions have placed the burden of maintaining this issue upon the party who alleges that he purchased the property without notice of outstanding claims. In Bowman v. Griffith, 35 Neb. 361, 53 N. W. 140, the third paragraph of the syllabus states the law as follows: "Where a claim to real estate can be sustained only upon the ground that the person asserting it is a subsequent purchaser in good faith, such person is required to show affirmatively that he purchased without notice of the equities of another, and relying upon the apparent ownership of his grantor." And in the body of the opinion it is said: "The burden was upon him, and he was bound to prove both payment in ignorance of defendant's equities, and that he relied upon the title of his grantor." To support this proposition decisions are cited from Iowa, Michigan, and New York.

The defendant argues that these statements of the court are *dicta* merely, and says in his brief that the rule thus stated is undoubtedly correct, but that "the question as to whether the plaintiff would not have sustained his burden of proof, and made a prima facie case, if he had shown the purchase and payment of the consideration, after having examined and relied upon the record title appearing in his grantor," was not involved in the case. This language concedes that the burden of proof was upon the party who alleges that he purchased without notice of outstanding equities, and assumes that that burden is sustained by making the proof suggested in the above quotation from the brief. The above holding in Bowman v. Griffith is referred to with approval in Baldwin v. Burt, 43 Neb. 245, 61 N. W. 601, and Phoenix Mut. L. Ins. Co. v. Brown, 37 Neb. 705, 56 N. W. 488, and is expressly approved in Pfund v. Valley Loan & T. Co. 52 Neb. 473, 72 N. W. 480. It may be that some of the cases holding a contrary doctrine can be distinguished on account of the legislation upon this subject in those jurisdictions. Our statute provides that deeds and other instruments not recorded "shall be adjudged void as to all

creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments shall be first recorded." [Comp. Stat. 1897, § 4108.] It would seem that one who expects to bring his claim within this statute should allege and prove all of the statutory requirements, including that he was without notice of the outstanding deed. This requires him to allege and prove a negative, and undoubtedly the ordinary rule would obtain as to the sufficiency of the proof offered to make a *prima facie* case, and as to the necessity that the opposing party produce such evidence as was in his possession or under his control; but, when the evidence upon this point is all before the court or jury, there must be a preponderance in favor of the party alleging purchase without notice, or the issue cannot be found in his favor.

2. The plaintiff alleges that the defendant had actual notice of the plaintiff's interest in the land, and also that the plaintiff had taken such possession and made such improvements upon the land as to give constructive notice to anyone who attempted to deal with it. Mr. George, who is principally interested in the plaintiff company, testified positively that he told the defendant, prior to the defendant's purchase, that he (George) had a contract for the land, and was improving it for his company. The defendant as positively denies these statements. It has, however, been universally held that actual personal notice is not indispensable. The plaintiff purchased the land at an agreed price of \$300, \$100 of which was paid at the time of purchase. The plaintiff soon afterwards took possession of the land, which is a lot in Dundee place, in the city of Omaha, and made a contract with a grading firm to grade this lot, together with various other lots owned by the plaintiff. These lots were graded under this contract, and the soil was removed from the lot in question to about the depth of 2 feet. The defendant was familiar with these lots, and knew that this grading was being done, including the grading upon the lot in question. He saw Mr. George while the grading was being done, and admits that he asked no questions in regard to the ownership of the lots, nor whether the parties grading it were doing so in their own right, as owners, or for some other person. The grading of this lot cost the plaintiff something over \$180. There is no other evidence in the record as to the real value of the lot than that plaintiff contracted to pay \$300 for the lot before it was graded, and expended nearly \$200 in grading it. After this grading was done, the defendant bought the lot of Mr. Moore for \$250, obtained his deed, and placed it upon record.

ord. He says that soon after that he had a conversation with Mr. George, in which Mr. George told him that the plaintiff was the owner of the lot, and he made no denial of that fact. He thought, he says, that he would permit Mr. George to find out who was the owner when he examined the record. Mr. George, as above stated, testifies that this conversation took place before the date of the purchase by the defendant.

The defendant insists that this grading of the lot was not such an act of possession as required him to make any inquiry in regard to the rights of the parties who were doing the grading or procuring it to be done. He insists that the same parties were grading other lots at the same time that did not belong to them, nor to this plaintiff, and that he had the right to assume that Mr. Moore still owned the lot and was procuring this grading to be done. We think the defendant is wrong in this position. When he saw unequivocal acts of ownership being exercised over the property, he was under obligations to inquire who was thus assuming to be the owner of the property; and under such circumstances he could not presume, without inquiry, that Mr. Moore was expending about \$200 in improving the lot, and immediately thereafter would sell to him for \$250 a lot that, before the improvement, was worth \$300.

If the defendant was innocent in the transaction, his neglect to follow up the inquiry so plainly suggested by the circumstances will bring the loss, if any, upon him, rather than upon the plaintiff, who was at least equally innocent.

The judgment of the District Court is affirmed.

NEW MEXICO SUPREME COURT.

TERRITORY OF NEW MEXICO

v.

DICK EAGLE, Appt.

(— N. M. —, 110 Pac. 862.)

Evidence — dying declaration — extremity.

1. Where a dying person makes no declaration that he knows his danger or is conscious of his impending death, and there is nothing in his conduct, or that of those

Headnotes by WRIGHT, J.

Note. — Dying declarations; how sense of impending death evidenced.

This question is fully treated in a subdivision of the note, "Dying declarations as evidence," in 56 L.R.A., beginning at

present, understandingly acquiesced in by him, from which such consciousness of impending death may be ascertained, yet, where it is reasonably to be inferred from the terrible character of the wound and his state of illness that he was sensible of his danger and conscious of impending death, his statements, made under such circumstances, relative to the homicide, are properly admitted as a dying declaration.

Criminal law — taking dying declaration to jury room — error.

2. Under a statute (Comp. Laws, § 3002) providing, "when the jury retires to consider its verdict, it shall be allowed to take the pleadings in the cause, the instructions of the court, and any instruments of writing admitted as evidence, except depositions," it is error to permit the dying declaration, which has been reduced to writing, to be

page 406, and this note accordingly includes only cases decided since the time of the former note.

For later cases as to the right of the jury to determine from the facts whether sufficient foundation has been laid for admitting certain statements as dying declarations, see note to *State v. Doris*, in 16 L.R.A. (N.S.) 660.

Statements of deceased.

One of the best and most common forms of evidence of a sense of impending death is statements of the deceased. He alone can know the condition of his own mind. And thus it has frequently been held that proof of statements of a declarant, alone, sufficiently evidences a sense of impending death on his part. No particular form of expression is necessary for this purpose, but in the following cases proof of various forms of statements by dying persons to the effect that they believed they were about to die have been held sufficiently to evidence a sense of impending death: *Starks v. State*, 137 Ala. 9, 34 So. 687; *Walker v. State*, 146 Ala. 45, 41 So. 878; *Moore v. State*, 146 Ala. 687, 40 So. 345; *Gregory v. State*, 140 Ala. 16, 37 So. 259, second trial, 148 Ala. 566, 42 So. 829; *Pate v. State*, 150 Ala. 10, 43 So. 343; *Brown v. State*, 150 Ala. 25, 43 So. 194; *Henninburg v. State*, 151 Ala. 26, 43 So. 959; *Twitty v. State* (Ala.) 53 So. 308; *Grant v. State*, 118 Ga. 804, 45 S. E. 603; *Cleveland v. Com.* 31 Ky. L. Rep. 115, 101 S. W. 931; *Kelly v. Com.* (Ky.) 119 S. W. 809; *Pryor v. State* (Miss.) 39 So. 1012; *State v. Biango*, 75 N. J. L. 284, 68 Atl. 125; *Patterson v. State*, 49 Tex. Crim. Rep. 613, 95 S. W. 129.

And repeated and persistent statements of this kind sufficiently indicate an abandonment of hope in spite of attempts of friends or physicians to encourage the decedent. *Pitts v. State*, 140 Ala. 70, 37 So. 101; *State v. Brady*, 124 La. 951, 50 So. 806.

So, where deceased, on the day of his death and the day before, repeatedly said 30 L.R.A. (N.S.)

taken to the jury room for investigation and examination by the jurors.

(August 29, 1910.)

A PPEAL by defendant from a judgment of the District Court for Bernalillo County, convicting him of murder. Reversed.

Statement by Wright, J.:

The defendant, Dick Eagle, was indicted at the September, 1908, term of Valencia county district court for murder in the first degree for killing a Pueblo Indian, Santiago Eteewa; said killing having taken place in Valencia county. After the finding of the indictment and arrest of the defendant, but

he would die, and had a written declaration prepared by a magistrate, his sense of impending death was held to be sufficiently apparent, although, when the declaration was being taken down by the magistrate, deceased said he felt very well, and asked the magistrate if he thought he was going to die. *Rose v. State*, 144 Ala. 114, 42 So. 21.

And where evidence of repeated statements and of the condition of the deceased shows that he was hopeless, and witnesses testify that a declaration was made with a full sense of impending death, the admissibility of the declaration is not affected by a bare expression of deceased at another time, to a physician who had told him that he would recover, "that he hoped for the best." *Highsmith v. State*, 41 Tex. Crim. Rep. 32, 50 S. W. 723, 51 S. W. 919.

It is not necessary, in order to show a sense of impending death, that deceased should state at the time of his declaration that it was made under a sense of impending death, but it is sufficient if he made other statements from which it is clearly apparent that he firmly believed that death was imminent, and had no hope of recovery. *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018; *Clemmons v. State*, 43 Fla. 200, 30 So. 699; *Smith v. Com.* 113 Ky. 19, 67 S. W. 32.

And the following expressions have been held to show sense of impending death:

—a remark of deceased to his wife, that he had something to say to her before he died, and a statement that he was cut to death. *Greer v. State*, 156 Ala. 15, 47 So. 300;

—a statement in a written declaration, "being in fear and expectation of death, do make the following statement as my dying declaration." *State v. Jeswell*, 22 R. I. 136, 46 Atl. 405, 12 Am. Crim. Rep. 260;

—repeated exclamations by deceased, shortly after being wounded, to the effect that he was going to die, and expressing concern for his family. *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690;

—a request, together with a statement that he was going to die, that he be gotten

before arraignment, he was confined in the county jail of Bernalillo county, at Albuquerque, New Mexico. On the 27th day of November, 1908, in the district court of Valencia county, then in session at the courthouse in the county of Bernalillo, in the territory of New Mexico, this cause being then pending in the said district court of the county of Valencia, and the district court of Bernalillo county being also in open session on some part of said day, the district attorney being present in behalf of the territory, the defendant was brought into court, in custody of the sheriff, and was arraigned upon the indictment, and entered a plea of "not guilty." He was afterwards remanded to the custody of the sheriff of Bernalillo county to await trial.

At the time of said arraignment, defendant was not represented by counsel nor had he been prior thereto. No other arraignment was ever had in this matter other than above stated. Afterwards, when counsel was appointed to defend him, at their request the venue of the case was changed from the county of Valencia to the county of Bernalillo, and without any further arraignment the case proceeded to trial. The territory produced an alleged dying declaration of the deceased, Santiago Eteewa. This was introduced in evidence over the objections of defendant. At the conclusion of the trial, and when the case was submitted to the jury, the dying declaration of Santiago Eteewa, which had been reduced to writing, was taken by the jury to the jury room,

home as soon as possible, that he might be there when he died. *Logan v. State*, 149 Ala. 11, 43 So. 10;

—and a request, together with similar statements, that his wife and the doctor be sent for. *Graham v. State*, 57 Tex. Crim. Rep. 104, 123 S. W. 691;

—so, "I am shot to death. Send for my wife and children and the doctor." *State v. Bordelon*, 113 La. 690, 37 So. 603;

—and "I am going to die. I want my children." *Rice v. State*, 49 Tex. Crim. Rep. 569, 94 S. W. 1024.

The decedent's hopeless state of mind is sufficiently shown, even as against the testimony of a witness that deceased, shortly before he died, "seemed to be getting along very well," where it appears that deceased, after being shot, said he was killed, and thereafter frequently and repeatedly said that he was going to die from the wound, and asked the witness to take care of his family. *Smith v. State*, 145 Ala. 17, 40 So. 957.

Evidence that deceased begged witness to knock him in the head is admissible as tending to show that he had no hope of recovery. *Willis v. State*, 49 Tex. Crim. Rep. 139, 90 S. W. 1100.

And deceased's statement to his physician in regard to his condition, that "this is mighty bad, isn't it?" or words to that effect, is admissible as tending to show, though not within and of itself sufficient to show, that he was then conscious of approaching death. *Long v. State*, 48 Tex. Crim. Rep. 175, 88 S. W. 203.

But, on the other hand, a sense of impending death is not sufficiently evidenced merely by showing that deceased said he believed he was going to die, where there is also evidence of statements tending strongly to show that he expected to live. *Coyle v. Com.* 122 Ky. 781, 93 S. W. 584.

And that at the time of making a declaration, declarant stated that he did not expect to live, does not render the declaration admissible as a dying declaration, if all the other conversation and acts tend to show that he did not expect to die. 30 L.R.A. (N.S.)

Tibbs v. Com. 138 Ky. 558, 28 L.R.A. (N.S.) 665, 128 S. W. 871.

So, in the following cases, indirect statements have been held not sufficiently to evidence a sense of impending death: *Collins v. People*, 194 Ill. 506, 62 N. E. 902; *Brom v. People*, 216 Ill. 148, 74 N. E. 790; *State v. Phillips*, 118 Iowa, 660, 92 N. W. 876; *State v. Knoll*, 69 Kan. 767, 77 Pac. 580; *Barnes v. Com.* 110 Ky. 348, 61 S. W. 733; *Bilton v. Territory*, 1 Okla. Crim. Rep. 566, 99 Pac. 163.

In *People v. Brecht*, 120 App. Div. 769, 105 N. Y. Supp. 436, affirmed in 192 N. Y. 581, 85 N. E. 1114, it was held that the element of abandonment of hope of recovery was not shown by deceased's answers to categorical questions by a coroner, that he believed he was about to die, and that he hoped God would let him recover, where it further appeared that no one had told him of his dangerous condition and the likelihood of his soon dying, and his condition was not such as would probably impress him with a consciousness of the nearness of death.

Statements of deceased and surrounding circumstances combined.

It is not necessary that a written statement contain an express declaration of belief in impending death, nor that such express words be shown by other evidence to have been used by a deceased, but a sense of impending death is sufficiently evidenced by any credible testimony showing such statements or circumstances as would convince a reasonable mind that the declarant was under the belief that he was about to die. *State v. Bridgham*, 51 Wash. 18, 97 Pac. 1096.

So, also, it is not necessary, in order to show a sense of impending death on the part of a deceased declarant, that he should have said in so many words that he believed he was going to die, or that he could not live longer, but this may be shown by any statements of deceased, by the surrounding conditions, and all the circum-

also over the objection of defendant. The jury returned a verdict of murder in the second degree. After the verdict, motion for a new trial and motion in arrest of judgment were made by defendant's counsel, and overruled by the court. The defendant was sentenced to twenty years in the penitentiary, and from this verdict and sentence defendant appealed to this court.

Messrs. Frank H. Moore and H. F. Raynolds for appellant.

Mr. Frank W. Clancy, Attorney General, for the Territory:

The dying declaration of the deceased was properly admitted.

McLean v. State, 16 Ala. 672; Wills v. State, 74 Ala. 21; Kilpatrick v. Com. 31

Pa. 198; 1 Greenl. Ev. § 158; Wharton, Crim. Ev. § 282; Ward v. State, 78 Ala. 446.

A dying declaration is not a deposition.

Lutcher v. United States, 19 C. C. A. 259, 41 U. S. App. 54, 72 Fed. 968; Crenshaw v. Miller, 111 Fed. 451; Indianapolis Water Co. v. American Straw-Board Co. 65 Fed. 535; 1 Bouvier's Law Dict. title, Deposition; The Sallie P. Linderman, 22 Fed. 558; 21 Cyc. Law & Proc. pp. 979, 980.

Wright, J., delivered the opinion of the court:

Considering the assignments of error in the order of importance rather than in the order discussed in the brief, we find that

stances. State v. Power, 24 Wash. 34, 63 L.R.A. 902, 63 Pac. 1112.

And in most of the cases there are circumstances in addition to the statements of the decedent which are relied upon as evidence of his sense of impending death at the time of making a dying declaration; and a sense of impending death may be evidenced either by affirmative statements or by circumstances, or by both. Robinson v. State, 130 Ga. 361, 60 S. E. 1005.

So, a sense of impending death "may be shown not only by what the injured person said, but by his conduct and condition, and by the nature and extent of his wounds; and it is sufficient if these show that the declarations were made without expectation of recovery, and under a sense of impending death, notwithstanding the declarant may not have said that he was without hope, or that he was going to die." State v. Roberts, 28 Nev. 350, 82 Pac. 100.

And a sense of impending death "may be inferred from the general statements, conduct, manner, symptoms, and condition of the declarant, which flow as the reasonable and natural results from the extent and character of his wound or the state of his illness." Williams v. State, 108 Ind. 87, 79 N. E. 1079.

A "court must draw a rational conclusion from all that was said, taken in connection with such surrounding circumstances as must have been known to the declarant, as to whether said declarant was in such condition of mind as would render his declaration competent." Winfrey v. State, 41 Tex. Crim. Rep. 538, 56 S. W. 919.

"This appreciation of certain dissolution may be inferred from the conduct, condition, or statements of declarant." State v. Kuhn, 117 Iowa, 216, 90 N. W. 733.

So, in State v. Bohanon, 142 N. C. 695, 55 S. E. 797, a dying declaration was held admissible where deceased said that he was dying, and "there was other sufficient evidence tending to show that he knew he was in extremis," and he in fact died within two hours after making the declaration.

Each case, therefore, depends to a large 30 L.R.A. (N.S.)

extent upon its own circumstances; but without attempting to detail the circumstances of each case, the general nature of some of the circumstances relied upon, together with statements, to show a sense of impending death on the part of a decedent, may be indicated. Thus, in the following cases the circumstances showing the sense of impending death were the actual condition and conduct of the deceased at the time, together with his words, tending to show his state of mind. McKwen v. State, 152 Ala. 38, 44 So. 619; Ward v. State, 85 Ark. 179, 107 S. W. 677; State v. Uzzo (Del.) 65 Atl. 775; Copeland v. State, 58 Fla. 26, 50 So. 621; Gipe v. State, 165 Ind. 433, 1 L.R.A. (N.S.) 419, 112 Am. St. Rep. 238, 75 N. E. 881; State v. McKnight, 119 Iowa, 79, 93 N. W. 63, 12 Am. Crim. Rep. 252; Arnett v. Com. 114 Ky. 593, 71 S. W. 635; Com. v. Hargis, 124 Ky. 356, 99 S. W. 348; Kennedy v. Com. 30 Ky. L. Rep. 1063, 100 S. W. 242; State v. Dixon, 131 N. C. 808, 42 S. E. 944; State v. Quick, 150 N. C. 820, 64 S. E. 168; Connell v. State, 46 Tex. Crim. Rep. 259, 81 S. W. 746.

And these circumstances may sufficiently show a sense of impending death on the part of the declarant, although, both before and after his declaration, his physician informed him that there was a chance for him to recover if an operation were performed. Wheeler v. State, 112 Ga. 43, 37 S. E. 126.

So, expressions of belief that he was dying, taken in connection with the fact that he was in fact in *extremis*, sufficiently show a decedent's sense of impending death, although he also asked for a doctor. Milton v. State, 134 Ala. 42, 32 So. 653.

And where deceased was in a dying condition, and had several times said that he would die from his wounds, and had given no indication of a change of conviction on this subject, the fact that he hoped to live until the next day was no indication that he did not still regard himself as rapidly approaching death. State v. McCoomer, 79 S. C. 63, 60 S. W. 237.

Sense of impending death is shown where a deceased, ten or fifteen minutes before his death, said he was going to die, asked

the second error complained of relates to the admission in evidence of the dying declaration of Santiago Eteewa. The general rules governing the admissibility of dying declarations are too well established to need any lengthy discussion. In the case of *Blackburn v. State*, 98 Ala. 63, 13 So. 274, the court, in discussing this question, uses the following language: "Such declarations are not admissible unless they appear to have been made under a sense of certain and impending death. It is not what the court which passes upon their admissibility may believe the character of the deceased was; for, although it may appear to the court, or to anyone capable of thinking rationally, that there was no possible hope of recovery, yet the question,

aside from that, is, What was the state of the declarant's mind when the declarations were made? Did he appreciate the fatal character of his injury, and were his declarations uttered under the sense and solemnities of impending dissolution? If so, then, 'when the death of the deceased is the subject of the charge, and the circumstances the subject of the dying declarations,' they may be admitted in evidence, otherwise not." *Walker v. State*, 52 Ala. 192; *Kilgore v. State*, 74 Ala. 7; *Ward v. State*, 78 Ala. 441; *Hussey v. State*, 87 Ala. 121, 6 So. 420. See also *Wharton*, *Homicide*, 3d ed. §§ 631, 632, 634, 637; *Underhill*, *Crim. Ev.* §§ 102-104, inclusive; 4 *Enc. Ev.* pp. 922-930.

that his family be sent for, told them he was going to die, and told them good-by, although he had previously been hopeful since he was shot, five days before. *Rice v. State*, 51 Tex. Crim. Rep. 255, 103 S. W. 1156.

Other cases holding the actual condition and conduct of the declarant, together with his statements and the fact that his physician had told him in effect that he could not recover, to be sufficient evidence of a sense of impending death, are: *R. v. Louie*, 10 B. C. 1; *State v. Fleetwood* (Del.) 65 Atl. 772; *State v. Dennis*, 119 Iowa, 688, 94 N. W. 235; *State v. Nowella*, 135 Iowa, 53, 109 N. W. 1016; *Pennington v. Com.* 24 Ky. L. Rep. 321, 68 S. W. 451, 12 Am. Crim. Rep. 238; *Boyd v. State*, 84 Miss. 414, 36 So. 525; *State v. Barnes*, 75 N. J. L. 426, 68 Atl. 145; *State v. Fuller*, 52 Or. 42, 96 Pac. 456; *Com. v. Rhoads*, 23 Pa. Super. Ct. 512; *Roberts v. State*, 48 Tex. Crim. Rep. 378, 88 S. W. 221; *O'Boyle v. Com.* 100 Va. 785, 40 S. E. 121; *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, 7 A. & E. Ann. Cas. 881.

And these circumstances, together with sending for a priest, are sufficient evidence (*People v. Stacy*, 119 App. Div. 743, 104 N. Y. Supp. 615, affirmed in 192 N. Y. 577, 85 N. E. 1114), although deceased stated in answer to a question before making his statement that he felt very well (*People v. Buettner*, 233 Ill. 272, 84 N. E. 218, 13 A. & E. Ann. Cas. 235).

In the following cases a sense of impending death has been held to be sufficiently evidenced by the character of the declarant's wound or wounds, or the nature of his illness, together with statements: *Kirklin v. State* (Ala.) 53 So. 253; *State v. Cord*, 157 Cal. 562, 108 Pac. 511; *Harper v. State*, 129 Ga. 770, 59 S. E. 792; *Oliver v. State*, 129 Ga. 777, 59 S. E. 900; *Rowsey v. Com.* 116 Ky. 617, 76 S. W. 409; *People v. Governale*, 193 N. Y. 581, 86 N. E. 554; *Jones v. State*, 52 Tex. Crim. Rep. 303, 124 Am. St. Rep. 1097, 106 S. W. 345.

And these circumstances, together with sending for a priest or preacher, have been 30 L.R.A. (N.S.)

held sufficient, in *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624, and *State v. Ilead*, 60 S. C. 516, 39 S. E. 6.

In other cases the circumstances considered have included both the nature and condition of the injuries and the condition and conduct of the declarant, together with his statements. Such cases are: *Smith v. State*, 136 Ala. 1, 34 So. 168; *Walker v. State*, 139 Ala. 56, 35 So. 1011; *Parker v. State* (Ala.) 51 So. 260; *People v. Shehadey*, 12 Cal. App. 648, 108 Pac. 146; *Weaver v. People*, 47 Colo. 617, 108 Pac. 331; *State v. Bonar*, 71 Kan. 800, 81 Pac. 484; *Asher v. Com.* 28 Ky. L. Rep. 1342, 91 S. W. 662; *Guest v. State* (Miss.) 52 So. 211; *State v. Brown*, 188 Mo. 451, 87 S. W. 519; *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470; *State v. Hennessy*, 29 Nev. 320, 90 Pac. 221, 13 A. & E. Ann. Cas. 1122; *Nelson v. State*, 3 Okla. Crim. Rep. 468, 106 Pac. 647; *Hawkins v. United States*, 3 Okla. Crim. Rep. 651, 108 Pac. 561; *Keaton v. State*, 41 Tex. Crim. Rep. 621, 57 S. W. 1125; *State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

So, in *Hunter v. State*, 54 Tex. Crim. Rep. 224, 130 Am. St. Rep. 887, 114 S. W. 124, these circumstances were held to show a sense of impending death, although a brother of the deceased did not think the latter was going to die at the time his dying declaration was made.

In addition to these circumstances, it has further appeared in some cases that deceased had been told by his physician that he could not live. Thus, in *Burton v. Com.* 24 Ky. L. Rep. 1162, 70 S. W. 831, the court said: "The nature of the wounds, the length of time that had elapsed since he received them, the advice of the physician, and the condition of the deceased at the time, all taken together, must have satisfied the deceased that death was impending."

Other somewhat similar cases are: *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339; *Fuqua v. Com.* 24 Ky. L. R. 2204, 73 S. W. 782, on second appeal after new trial, 118 Ky. 578, 81 S. W. 923; *Morgan v. State*,

An examination of the evidence in this case discloses the fact that the evidence upon which the admission of the dying is predicated is contained wholly in the testimony of Dr. Dillon, Mr. Allen, and Mr. Bibb, the notary public who took the statement.

Q. Describe what you found—what his condition was?

A. Well, I found a wound, a bullet wound, supposed to have entered—about—the point of entrance about half an inch to the left of the ensiform appendage, and it ranged downward. The bullet had left the body at about the mid scapular line, posteriorly just above the brim of the pelvis.

Q. Stand up and show where it went in and went out.

A. (Witness demonstrating.) The bullet entered about here (indicating).

Q. Yes?

A. About half an inch to the left of the top of this little cartilage that comes down on the breast bone, and it came out right about there (indicating), just above this pelvic bone. The wound where the bullet had entered was a small puncture—aperture—from which there had been little blood, if any,—external bleeding,—but the wound here was a large gaping wound from which there was bleeding when I examined him. That day there was no intestinal discharge; but the second time I saw him there was a discharge of the intestinal contents at the point of exit of the bullet. Further examination showed that there had

54 Tex. Crim. Rep. 542, 113 S. W. 934; Douglas v. State (Tex. Crim. Rep.) 124 S. W. 933.

And such circumstances may be sufficient, although the deceased also used the words, "I can't afford to die." State v. Craig, 190 Mo. 332, 88 S. W. 641.

Or the words, "If I have to die." House v. State, 94 Miss. 107, 21 L.R.A. (N.S.) 840, 48 So. 3.

A sense of impending death is also sufficiently evidenced where the physicians have told the deceased that he was about to die, and he had told his wife that he was dying, and to make arrangements about the insurance on his life, and he had received extreme unction, which is administered only when death is impending. R. v. Laurin, 6 Can. Crim. Cas. 104.

And the fact that a person mortally wounded consents to be moved to a sanitarium for the satisfaction of his wife and children is not inconsistent with his own abandonment of the hope of recovery, as shown by all the other circumstances. State v. Howard, 120 La. 311, 45 So. 200.

Circumstances in the absence of statement.

In some cases, as in *TERRITORY v. EAGLE*, it does not appear that the dying person made any statement tending to show that he knew his danger or was conscious of his impending death. It is not essential, however, that he should have made any statement or given utterance to language expressive of a sense of impending death, but this may be inferred by deceased's conduct and deportment, his apparent condition, involving the nature and extent of the wounds inflicted, being obviously such that he must have felt and known that he could not survive, and the communications made to him, if any, especially by his medical advisers, if assented to or understandingly acquiesced in by him. State v. Gray, 43 Or. 440, 74 Pac. 927.

So, in the absence of any statement showing deceased's state of mind, a sense of impending death has been inferred in the following cases, from the circumstances indicated:

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—character of wound and deceased's condition and conduct. Newberry v. State, 68 Ark. 355, 58 S. W. 351; Jones v. State, 88 Ark. 579, 115 S. W. 166;

—nature of wound and information by physician, acquiesced in by decedent. Jarvis v. State, 138 Ala. 17, 34 So. 1025;

—information by physician and father, impliedly acquiesced in. Stevens v. State, 138 Ala. 71, 35 So. 122.

So, a sense of impending death is shown where deceased was told by his physician that he could not recover unless by a rare chance, after a surgical operation, whereupon he made a statement, and within a few minutes thereafter died, although he agreed to submit to the operation. State v. Thompson, 49 Or. 46, 124 Am. St. Rep. 1015, 88 Pac. 583.

And likewise, where deceased was in fact dying from a gunshot wound, had been informed that, in the opinion of his physician, he could survive but a few hours, and it appears from the testimony of an interpreter that he realized and apprehended his condition and the imminence of death. State v. Ju Nun, 53 Or. 1, 97 Pac. 96, affirmed on rehearing in 53 Or. 8, 98 Pac. 513.

In very few cases is there an entire absence of anything in deceased's conduct or that of those present, and of a physician's advice, as well as of any statement of deceased, tending to show his state of mind, as in *TERRITORY v. EAGLE*, making it necessary to infer a sense of impending death merely from the character of the wound and his physical condition.

But in Jones v. State, 130 Ga. 274, 60 S. E. 840, it was held that the circumstances were sufficient to make a prima facie showing of deceased's sense of impending death, where it appeared that he had just been shot through the heart, and was found lying prostrate on the ground, was scarcely able to move, never spoke again, and died in fifteen or twenty minutes.

On the other hand, "where the question is one of life and death to a man who has been suddenly stricken down, who has still something to live for, and whose mind is busy with the idea of prosecuting those

been marked internal hemorrhage. The abdomen was markedly distended. His temperature was subnormal, about 96, I think. His heart action—the heart was rather rapid, about 88 to 90, varying. The man was conscious, but in a rather semiconscious, or rather dazed condition. He was not fully normal. He vomited blood; vomited all the nourishment we could give him, and even vomited water, and later he developed an almost incessant hiccup, or rather, it would come on and last for probably thirty minutes or an hour, and then subside for a little while and then return again.

Q. Can you state from the course and direction, or from the point of entrance and point of exit of the bullet, what organs were traversed by the bullet?

A. Not absolutely. . . .

Q. From that examination of him and your attendance upon him, state, if you can, what was the cause of his death?

A. I think the chief lesion, or chief cause of death, was peritonitis, due to the bullet wound.

Q. The primary cause of death, then, was the bullet wound?

A. The bullet wound; yes, sir.

Q. What was your professional opinion as to the character of the wound—that is, as to whether it was—it would be fatal or not, when you first saw him?

A. I told his friends that I thought he would die in a few days.

Nowhere in this testimony does it appear

by whom he has been injured, proof that the last spark of hope has left his breast can hardly be considered convincing unless it comes in the form of a specific admission to that effect, by word or sign from the man himself, since no one else can know." State v. Daniels, 115 La. 59, 38 So. 894.

And a sense of impending death is not shown by deceased's mere assent, when asked by a physician if he did not recognize that he was in a critical condition. Phillips v. State, 50 Tex. Crim. Rep. 127, 94 S. W. 1051.

Expressions of physician's opinion.

As seen in many of the above cases, the fact that a physician had expressed to the declarant his opinion that the latter could not recover is admissible in evidence as a circumstance tending to show that deceased was conscious of approaching death.

So, in Com. v. Rhoads, 23 Pa. Super. Ct. 512, the court said: "His own belief in his impending death was confirmed by the statements to him of the surgeon."

Other cases relying upon the expression of the physician's opinion to the deceased, together with statements of the latter, as showing, his sense of impending death, are Jackson v. State, 94 Miss. 83, 47 So. 502; State v. McMullin, 170 Mo. 608, 71 S. W. 221.

And a sense of impending death may be sufficiently shown by evidence of surgeons' advice to deceased that he could not live, and statements of the latter, showing his concurrence in their views, although the wife of deceased denies that deceased thought he was going to die. State v. Parker, 172 Mo. 191, 72 S. W. 650.

But it is not necessary that a physician should have told deceased he was going to die. Grant v. State, 118 Ga. 804, 45 S. E. 603.

And in State v. Boggan, 133 N. C. 761, 46 S. E. 111, statements of deceased, after his doctors had told him that his wound would very probably prove fatal, though they extended some hope that he might be saved by means of an operation, were held to show an absence of all hope. 30 L.R.A. (N.S.)

So, in State v. Brady, 124 La. 951, 50 So. 806, the court said: "Physicians do not always impress their patients in assuring them that there is hope . . . That physicians and others have hope does not affect the admissibility of the declaration if the dying man had no hope."

On the other hand, physicians do not always impress their patients with their opinions that there is no hope. So, although a decedent said at the time that he believed he was fatally shot, and he was in fact dangerously wounded, and although he was later told by one of his doctors that he was bound to die, but then said in answer to a question that he did not know that he realized how mortally wounded he was, his sense of impending death thereafter was held not to be sufficiently evident. Craven v. State, 49 Tex. Crim. Rep. 78, 122 Am. St. Rep. 799, 90 S. W. 311.

Aside from the cases where evidence of the physician's opinion as to decedent's condition, communicated to the decedent, is admissible as tending to show the latter's state of mind, such opinion, when not communicated to the deceased, may be given in evidence to show that deceased was actually in a condition from the very nature of which he either would or would not have a sense of impending death. Heningburg v. State, 153 Ala. 13, 45 So. 246; Gipe v. State, 165 Ind. 433, 1 L.R.A. (N.S.) 419, 112 Am. St. Rep. 238, 75 N. E. 881; Newton v. State, 51 Fla. 82, 41 So. 19.

Sending for physician.

The effect of showing that the deceased asked for a physician seems to depend largely upon the other circumstances of the case. A "request made by the deceased for a physician's aid may, in connection with his other expressions and the circumstances, be regarded as indicating a hope of cure. . . . But not necessarily so, since a physician may be desired merely to alleviate pain, or other purpose than to prolong life. . . . Taken in connection with the proof that the deceased was in fact in *extremis* while speaking them, the expressions of belief as to his condition are not controlled

that Dr. Dillon told Eteewa of his condition, or in his presence, in any manner, indicated that Eteewa could not recover.

Mr. Allen testified as to the character of the wound to the same general effect as did Dr. Dillon, and, in addition thereto, testified with reference to what was said and done in the presence of Eteewa at the time of the taking of the deposition, as follows:

A. It was only a few words. I was only there just a short time, and I told him that I was going back. I made up my mind to send for a notary or bring a notary at once and take his statement. I told him I would be back in an hour or so. I sent a messenger for Mr. Bibb and returned to McCarty's in an hour or so—two or three hours, and he made a second statement similar to the first one.

The Court: That was to Mr. Bibb?

A. Yes; to Mr. Bibb, and I was present.

Q. You were present?

A. I was present. I told him that I was going to bring a justice of the peace, or Mr. Bibb.

Q. There was nothing said directly as to whether he would get well or would not?

A. No, sir; I did not mention it to him.

Q. How was his condition the second time as compared with the first?

A. Well, about the same, as far as I could see, he had taken no nourishment or anything of the sort. They told me—about the same, and I did not see any material difference in the length of time.

Q. Was this statement supposed to be after the doctor had been there?

A. The doctor was there at the same time—at my first visit. The doctor lived in Laguna and went home. I returned with Mr. Hunt and Mr. Bibb. Mr. Bibb met me there. The doctor and I were there together on other matters.

Q. Mr. Allen, from your observation of his condition at the time that Mr. Bibb was there, what, if any, opinion did you form as to whether he would live or die? . . .

A. I thought he would die.

Q. Describe his appearance, and what indications there were that led you to the opinion.

by his request for a doctor." *Milton v. State*, 134 Ala. 42, 32 So. 653.

"The fact that he asked that the doctor be sent for was not, in itself and alone, sufficient to affect the admissibility of the declarations under the predicate. It was shown that he was at the time suffering with severe pain . . . and it was natural that he should want the doctor to allay his sufferings." *Pitts v. State*, 140 Ala. 70, 37 So. 101.

"His desire to reach a physician was doubtless only to relieve present pain." *State v. Kuhn*, 117 Iowa, 216, 90 N. W. 733.

The words "send for the doctor" are not an indication of hope. "It often happens that dying men wish to see a physician in order to obtain some relief from pain. The mere desire to see a physician does not rebut the declaration that he was shot to death." *State v. Bordelon*, 113 La. 690, 37 So. 603.

In *Hawkins v. State*, 98 Md. 355, 57 Atl. 27, the court said: "To assume in the face of all the testimony in this case that her cry for relief disproved the sincerity of her statement that she knew she was dying would be to deny to her the privilege of asking the alleviation of what the doctor said he knew, as soon as he saw her, was intense agony."

But where the deceased, at and after the time of making certain declarations, was going about, and later requested that a physician be sent for, his sense of impending death was not sufficiently shown, though he afterwards said he was about to die. *Brown v. Com.* 26 Ky. L. Rep. 1269, 83 S. W. 645.

In *Bilton v. Territory*, 1 Okla. Crim. Rep. 566, 99 Pac. 163, sending for additional 30 L.R.A. (N.S.)

medical aid was said to show hope of recovery.

And though deceased said he thought he was going to die, yet if he eagerly asked a physician what he thought of the case, and on his advice started on a journey to a distant city for an operation as being his one chance of recovery, his sense of impending death, without any hope of recovery, is not sufficiently shown. *State v. Gianfala*, 113 La. 463, 37 So. 30.

Sending for priest, etc.

"The expression of the desire of the deceased for the consolations of religion, and especially when the particular religion or church of the deceased provides for the administering of certain rites to its members when, and only when, they are actually in *articulo mortis*, has always been regarded by the courts as one of the strongest proofs that the deceased is in that condition of mind which is requisite to the admission in evidence of his statements as dying declarations." *People v. Buettner*, 233 Ill. 272, 84 N. E. 218, 13 A. & E. Ann. Cas. 235.

So, in the following cases, sending for a priest or preacher, or a request that one be sent for, has been held to be evidence tending, in connection with other circumstances, to show a sense of impending death: *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470; *People v. Conklin*, 175 N. Y. 333, 67 N. E. 624; *People v. Stacey*, 119 App. Div. 743, 104 N. Y. Supp. 615, affirmed in 192 N. Y. 577, 85 N. E. 1114; *State v. Head*, 60 S. C. 516, 39 S. E. 6.

And in *R. v. Laurin*, 6 Can. Crim. Cas. 104, the fact that deceased had received extreme unction, which is administered only

A. Well, his ghastly appearance—his face, and his pulse was very weak.

Q. Anything else about his appearance that you noted specially at that time?

The Court: What appearance of blood about him?

A. Very little of it on the outside, I think. He was bleeding internally—very little on the outside. He had the same shirt on when he was shot—supposed to be. The hole was in the shirt in both sides. He was in his shirt sleeves. It was warm weather.

Q. At any time when you were with him did you notice any vomiting?

A. Yes, sir; later in that day.

Q. Not either of those times?

A. No, sir; I did not notice him vomiting.

Mr. Bibb had no conversation with Eteewa other than the direct questions shown in the dying declaration, and did not at any time ask Eteewa as to his condition or his hope or lack of hope of recovery. There was nothing in the dying declaration itself to indicate the state of mind of the

when death is impending, was held to be one circumstance showing a sense of impending death.

Arranging business.

Another circumstance tending strongly to show a sense of impending death on the part of the deceased is his arranging business matters. Thus, in *People v. Shehadey*, 12 Cal. App. 648, 108 Pac. 146, the fact that deceased gave directions for the division of his estate was one element of the evidence of his sense of impending death.

So, in *State v. Colvin*, 226 Mo. 446, 126 S. W. 448, deceased's sense of impending death was evidenced in part by the fact that he sent in the night for a neighbor to write his will, which he thereupon executed.

And calling a lawyer and making a will disposing of his property, and telling his wife what to do about managing his business, etc., were among the circumstances showing sense of impending death in *Crockett v. State*, 45 Tex. Crim. Rep. 276, 77 S. W. 4.

Conclusion of witness.

In *Delaney v. State*, 148 Ala. 586, 42 So. 815, it was held that a sense of impending death cannot be shown by the bare conclusion of a witness that "deceased knew he was going to die in a short time." A witness cannot "testify that another knew or did not know a certain fact, but must detail the facts from which such conclusion is drawn."

In *Davis v. State*, 120 Ga. 843, 48 S. E. 305, however, a sense of impending death on the part of deceased was held to be sufficiently shown to admit a dying declaration.

deceased at the time the declaration was made. From an examination of the testimony, it nowhere appears that Santiago Eteewa indicated at any time, by word of mouth or otherwise, that he realized his condition, and had surrendered all hope of recovery. Under the foregoing evidence, it then becomes necessary to determine whether the dying declaration of Santiago Eteewa was made under the sense of impending death, and thereby became admissible under the rule heretofore stated. There being no expressions from Eteewa himself from which this can be determined, and nothing in his conduct at the time the declaration was made from which it may be inferred that he was conscious of his condition, and no communications having been made to him by his medical adviser or friends which were assented to or understandingly acquiesced in by him, we must rely solely upon the terrible character and extent of the wound inflicted in determining whether Eteewa was under the sense of impending death at the time he made the declaration admitted in evidence as a dying

declaration, by testimony of a witness that "he realized that he was mortally wounded."

And in some other cases this class of evidence seems to have been admitted. Thus, in *Lang v. State* (Ala.) 52 So. 340, a witness testified that deceased knew he was going to die, and that witness did not encourage deceased, but told him he thought he would die; and this, together with evidence that deceased said that he was killed and bound to die, was held to show a sense of impending death on the part of the deceased.

And in *Lewis v. State*, 48 Tex. Crim. Rep. 614, 89 S. W. 1073, a sense of impending death was shown by testimony of the mother of deceased that she was with him for three days previous to his death, and that he realized that he was going to die, and stated he was conscious of approaching death, and had no hope of recovery.

So, in *State v. Ju Nun*, 53 Or. 1, 97 Pac. 96, affirmed on rehearing in 53 Or. 8, 98 Pac. 513, testimony of an interpreter that deceased realized and apprehended his condition and the imminence of death was relied on in part to show the latter's sense of impending death.

And where the witness to whom deceased's statement was made said he did not think deceased realized that he was going to die, a sense of impending death was held not to have been shown by evidence that deceased, on the way to the hospital, said, "I am done for," and that upon arrival there the physician told him "his chances were pretty slim." *People v. Hayes*, 9 Cal. App. 301, 99 Pac. 386.

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declaration. In discussing this question, 2 Wigmore on Evidence, § 1442, says: "In ascertaining this consciousness of approaching death, recourse should naturally be had to all the attending circumstances. It has been contended that only the statements of the declarant could be considered for this purpose, or, less broadly, the nature of the injury alone could not be sufficient; i. e., in effect, that the declarant must have shown in some way by conduct or language that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case, the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained. Such is the settled judicial attitude." See also *Gipe v. State*, 105 Ind. 433, 1 L.R.A.(N.S.) 421, 112 Am. St. Rep. 238, 75 N. E. 881. This seems to have been the well-settled rule in England also. In *John's Case*, as reported in 1 East, P. C. 357, 358, it appears that it was the unanimous opinion of the judges that "if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence." See also *R. v. Woodcock*, 1 Leach, C. L. 503; *Anthony v. State*, Meigs, 265, 33 Am. Dec. 143; *McLean v. State*, 16 Ala. 672; *Hill v. Com.* 2 Gratt. 595, 608; 3 Russell, Crimes, 9th American from 4th London ed. p. 250. And see *Green v. State*, 154 Ind. 655, 57 N. E. 637; *John's Case*, 1 East, P. C. 358, supra; *Donnelly v. State*, 26 N. J. L. 463; *Starkey v. People*, 17 Ill. 17; 1 Roscoe, Crim. Ev. 37; 1 Bishop, New Crim. Proc. 1212; 1 Elliott, Ev. 355. In the case of *Mattox v. United States*, 146 U. S. 140, 151, 38 L. ed. 917, 921, 13 Sup. Ct. Rep. 50, the court commented upon and approved this doctrine. See also Wharton, Homicide, 3d ed. § 634. In the case at bar it appears that, on the day the declaration was made, the doctor examined the wounds of Santiago Eteewa and pronounced the same fatal. From his testimony (quoted supra) it appears that the wound was of such a terrible nature and character that his symptoms as to vomiting, internal bleeding, subnormal temperature, rapid pulse, distended abdomen, and later the excretions from the wounds, were of such a serious and dangerous nature that it must be inferred therefrom that Eteewa was conscious of his condition and under the sense of impending death at the time the statement was made. In the case of *Anthony v. State*, supra, the court used the following language: "If the dangerous nature and character of the wound, the state and illness

of the party, her sinking condition, and her statement of extreme suffering, and of those symptoms which usually precede death, are circumstances from which in any case the consciousness of danger can be collected, they exist in the present case, and would justify the inference of such consciousness." The facts in this case, therefore, can lead to but one conclusion; viz., that the statement of Santiago Eteewa was made under the sense of impending death, and properly admitted as a dying declaration.

The appellant also assigns as error the taking of the dying declaration to the jury room, over the objection of appellant. This dying declaration had been reduced to writing and introduced in evidence. The supreme court of Washington, in passing upon this point under a statute similar to ours, in the case of *State v. Moody*, 18 Wash. 176, 51 Pac. 359, says: "Again, it is claimed that the court erred in allowing the dying declaration to go to the jury room for the investigation of the jury, over the objections of the appellant. We think, without any question, that this was reversible error. The statute does not permit witnesses or depositions to go to the jury room, and for the very best of reasons. And certainly the dying declaration is in substance a deposition of a witness; the solemnity of the occasion simply taking the place of the oath which is ordinarily administered to a witness who subscribes to a deposition. No cases are cited on this proposition, but we think it so plainly falls within the ban of the statute and of the law that the citation of authorities is unnecessary." The dying declaration in this case contains all of the evidence of the deceased, and it would appear to us that the reasoning of the court in the case cited supra is sound. Our statute provides as follows: "When the jury retires to consider its verdict, it shall be allowed to take the pleadings in the cause, the instructions of the court, and any instruments of writing admitted as evidence, except depositions." N. M. Comp. Laws 1897, § 3002. It would not be contended for a moment that a witness could be introduced into the jury room after the case had been closed. The same argument would apply with equal force to the deposition of a witness, and under the rule laid down in the Washington case cited supra, a dying declaration has all of the essential characteristics of a deposition. If permitted in the jury room for examination and investigation by the jurors, being all of the evidence of that particular witness, it gives undue prominence and weight to the evidence of the deceased, and clearly comes within the ban of the statute cited supra.

The appellant also assigns as error the

fact that he was arraigned at the court-house in Bernalillo county, outside of the county of Valencia, the county where appellant was indicted, and where the homicide occurred. The circumstances surrounding this arraignment appear in the statement of facts. In view of the fact that the case must be reversed and remanded for a new trial below, and that the alleged irregularity will doubtless be obviated upon the further proceedings in the cause, we do not find it necessary to pass upon this assignment.

Two other assignments of error were made by the appellant, both of which, in the opinion of the court, were serious, but inasmuch as they will not, in all probability, arise upon a retrial of this case, the court declines to discuss and pass upon the same.

For the reasons above stated, the cause is reversed and remanded for a new trial; and it is so ordered.

POPE, CH. J., and PARKER, McFIE, and MEACHEM, JJ., concur. ABBOTT, J., having tried the case below, did not participate in this opinion.

GEORGIA SUPREME COURT.

SOUTHERN RAILWAY COMPANY, Plff.
in Err.,
v.
G. W. WALLIS.

(133 Ga. 553, 66 S. E. 370.)

Carrier — duty to stop at flag station — demurrers overruled — error.

1. A railway company is bound to stop its passenger trains in response to proper signals at a flag station at which it is in the habit of stopping trains of that character.

(a) There was no error in overruling the special demurrers.

Same — operation of trains on Sunday — work of necessity.

2. The general assembly, by enactments codified in Penal Code 1895, § 420, wherein the running of the freight and excursion trains on Sunday is made a misdemeanor, and wherein regular trains for the carrying of the mails or passengers are expressly excepted from its provisions, gave expression to public policy as to the legality of running the excepted trains on Sunday, and a legislative construction that the running of regular mail and passenger trains comes within the exception of Penal Code 1895, § 422, which makes it a misdemeanor for any person to pursue his ordinary calling on the Sabbath day, works of necessity and charity excepted.

Trial — instructions — confusion.

3. In a suit for damages alleged to have been occasioned by the negligence of a defendant railroad company, a charge "that the plaintiff must further show that his injury, if any, was not caused by his own negligence, and that he could not have avoided the injury by the exercise of ordinary care and diligence," is not open to the criticism that it confused and blended §§ 2322 and 3830 of the Civil Code of 1895, to the prejudice of the defendants.

Damages — excessiveness — injury to passenger.

4. The verdict was not excessive.

(November 20, 1909.)

Note. — Duty to give regular train service on Sunday.

This note does not cover the question of whether a carrier has a right to operate trains on Sunday. Nor does it cover the question of whether the operation of trains is a work of necessity.

Where a carrier undertakes to operate trains on Sunday there can be no question but that it is bound to perform its legal duties incidental thereto. It has been laid down in a number of cases, however, that where a carrier does not hold itself out to operate trains on Sunday, it is not bound to do so.

Thus, in *Walsh v. Chicago, M. & St. P. R. Co.* 42 Wis. 23, 24 Am. Rep. 376, where an action was brought for failure to perform a special contract to transport plaintiff to a certain place and return on Sunday, the court said: "From this reference to the allegation of the complaint, it seems obvious that it is in reality an action on contract, and must be treated as such. It is manifest that the action is not sustainable for a breach of duty as carrier, because the defendant was under no obligation to carry the plaintiff or any other person on its road on that day. It does not run passenger trains on Sunday for the accommodation of the public, nor does it hold itself out to the world as ready to engage in the transportation of passengers on that day. If the plaintiff had presented himself at the passenger depot on the morning of the 14th of September, offered to pay the usual fare, and insisted upon being carried to Watertown that day, it is very evident that it would not have been a breach of duty for the defendant to have refused to carry him. The common carrier is bound to transport an individual upon being paid a reasonable rate of fare, unless it has a valid excuse for not performing that duty. Here the defendant had a perfectly valid excuse for not running its passenger trains on Sunday (Rev. Stat. chap. 183, § 5), and this was doubtless well understood by the plaintiff. Hence the plaintiff felt the necessity of counting upon an express contract of carriage in both counts, and of proving such contract, in order to maintain the action."

So, in *Merchants' Wharfeboat Asso. v.*

ERROR to the Superior Court for Fayette County to review a judgment in plaintiff's favor in an action brought to recover damages for defendant's alleged wrongful failure to stop its train and receive plaintiff as a passenger. Affirmed.

The facts are stated in the opinion.

Messrs. Charlton E. Battle, Howell Hollis, and Blalock & Culpepper for plaintiff in error.

Mr. J. W. Wise for defendant in error.

Evans, P. J., delivered the opinion of the court:

G. W. Wallis sued the Southern Railway Company for failing to stop its train at a station and to receive him as a passenger, alleging that he was a physician, and had patients at Kenwood and Helmer, regular stations on the line of defendant's road, where the defendant's passenger cars stopped to take on and let off passengers. The remaining paragraphs of the petition were as follows:

Wood, 64 Miss. 661, 60 Am. Rep. 76, 2 So. 76, it is implied that carriers are not bound to transact business on Sunday, but it is held that if they do enter upon business on that day, they cannot protect themselves for negligence because it occurred on Sunday. In this case an action was brought against a warehouseman and forwarder, to recover for a loss sustained through the burning of goods while on defendant's wharf, awaiting transportation. It appeared that the defendant had an opportunity to forward the goods by steamer on Sunday, and that if this had been done, the loss would have been prevented. It also appeared that defendant was accustomed to ship such goods on Sunday. The court said: "By the laws of this state (Code of 1880, § 2949) the transaction of secular business on the Sabbath is prohibited and made penal, but the proviso to that section is 'that nothing in this section shall apply to railroads or steamboat navigation in this state.' The business in which appellant was engaged in reference to the property of the appellees was so intimately connected with that of steamboat navigation, and so necessary to it, as to fall within the exception of the proviso to the statute. We do not understand that a railroad company or a steamboat is bound to transact business on the Sabbath merely because the statute permits it to be done, but if they hold themselves out to the public as so doing, and enter upon business which, according to their usages and habits, will be transacted on that day, they cannot shield themselves for either misfeasance or nonfeasance, because it was done or omitted to be done on the Sabbath."

So, in *Guinn v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 453, recovery was allowed for damage resulting from delay in forwarding hogs received on Sunday for transportation. 30 L.R.A. (N.S.)

"(4) That on February 2, 1908, your petitioner was not well, and went on said train to said above-named place for the purpose of seeing his patients, and to keep from driving through the country in the cold and bad weather, on account of his physical condition.

"(5) That in the afternoon on said day your petitioner went to Helmer, Georgia, a station on said railroad company's line, and where they take on passengers, and is a regular flag station for the purpose of taking on passengers, for the purpose of boarding said train, and when said train came, he, in accordance with the rules of the company and the custom, flagged said train, and tried to wave the same down to a stop for the purpose of getting on said train.

"(6) Your petitioner shows that the engineer on said train saw him, and saw him give the signal to stop; but said engineer refused to stop or notice your petitioner, but went on by said station, and

portation. The court here also expressed an opinion that a carrier is not bound to transact business of this kind on Sunday. It was there said: "while the company could not lawfully be required to furnish cars on Sunday to load the hogs and move them, yet, having received them into its pens for transportation, the law imposed upon it the duty as a common carrier to ship them after that day without unreasonable delay. The gist of this section is the negligent delay in shipping the hogs, which extended far beyond this Sunday."

And where the proprietor of a stage coach books a passenger on Sunday for transportation on that evening, he is liable to the latter for the amount paid by him for a post chaise to reach his destination after the proprietor had refused to make the trip, because there were no other passengers. *Sandiman v. Breach*, 7 Barn. & C. 96.

And in *Philadelphia W. & B. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 416, where the plaintiff sued to recover for a loss sustained by reason of the defendants' delay in forwarding cattle received by them on Sunday, it was held that, after acceptance for transportation, it became the carriers' duty to forward the stock without unnecessary delay, and that if any damage resulted from a neglect of this duty, the fact that they had been received or carried on Sunday would afford no excuse for the injury. To the same effect in *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292.

In *Gauthier v. Cole*, 17 Fed. 716, where a contract was made with the proprietors of a steamboat line to send one of its steamers, in continuation of its Sunday trip, to a specified place for freight, in an action for a breach, the contract was held void.

J. T. W.

left your petitioner standing there on the ground, without any means of conveyance for the purpose of getting home, which acts of said engineer petitioner charges as negligence.

"(7) Your petitioner says that he had no means of conveyance for reaching home, and could not get any; that it was just at night, cold and bad weather, dark and muddy roads, and your petitioner had to walk home, a distance of 7 miles, through mud, water, and ice; and on account of said walk and said exposure he was made sick and confined to his bed for some time, causing him severe pain and suffering, and that he has not fully recovered from same up to this time."

The defendant demurred generally and specially to the petition. The court overruled the demurrers, and the case was tried, with the result that the plaintiff was allowed \$250 as damages. The defendant moved for a new trial, which was refused, and it excepts.

1. The relevancy and pertinency of the allegations in the fourth paragraph were challenged by special demurrer. The averments of this paragraph are but matters of inducement, introductory to the narrative of the plaintiff's cause of action. The defendant demurred specially to the fifth paragraph, because of a failure to specify in what way the train was flagged, or what custom or rule of the company was violated. The allegation of this paragraph is tantamount to saying that it was the habit of the defendant to stop its passenger train at this particular station whenever signaled, but that it failed to do so on this occasion when flagged. No agent in the service of the company could fail to know what was meant by this allegation. The defendant also by special demurrer moved to strike that portion of the sixth paragraph which alleged that the plaintiff was without means of conveyance for the purpose of getting home, and all of paragraph 7. These averments describe the circumstances under which the plaintiff found himself after the defendant's train failed to stop, and were proper to be considered by the jury in estimating his damages, if, under the allegations of the petition, the plaintiff was entitled to recover. The rule is well established that a railroad company is bound to stop its trains in response to proper signals at a flag station at which it is in the habit of stopping trains of the kind so signaled. *San Antonio & A. P. R. Co. v. Safford* (Tex. Civ. App.) 48 S. W. 1105; *Wilson v. New Orleans & N. E. R. Co.* 63 Miss. 352; *Thomas v. Southern R. Co.* 122 N. C. 1005, 30 S. E. 343; *Morse v. Duncan* (C. C.) 14 Fed. 396. Such is the case made by the 30 L.R.A., (N.S.)

petition, and the general demurrer was properly overruled.

2. The defendant pleaded "that the 2d day of February, 1908 [the day the plaintiff avers the train failed to stop], was upon the Sabbath Day, and the defendant had the right to refuse to enter into a contract of carriage if it desired to do so, and that it was guilty of no breach of duty as a carrier by not stopping at said station." The defendant contends that it is under no duty to enter into any contract of carriage on Sunday, nor is it under duty to stop its passenger trains at a particular station, when run on Sunday, for the purpose of receiving passengers. This contention is not sound. At common law, contracts made on Sunday were valid and enforceable. *Hayden v. Mitchell*, 103 Ga. 431 (3), 440, 30 S. E. 287; *Bishop, Contr.* 2d ed. § 536. Nor was it a crime at common law to pursue one's ordinary calling on the Sabbath Day. *Bishop, supra*, § 538; 2 *Bishop, New Crim. Law*, §§ 950 et seq. By statute the doing of certain acts on the Sabbath Day has been made penal. And a contract made on the Sabbath Day in furtherance of a violation of a criminal statute is obnoxious to public policy, and will not be enforced. But unless the contract is in furtherance of a violation of a criminal statute, or is prohibited, it is valid and enforceable. *Sanders v. Johnson*, 29 Ga. 526; *Dorough v. Equitable Mortg. Co.* 118 Ga. 178, 45 S. E. 22; *Red Cypress Lumber Co. v. Perry*, 118 Ga. 879, 45 S. E. 674. There is no statute in this state prohibiting a carrier from running a passenger train on the Sabbath Day, or prohibiting it from entering into contracts of carriage on that day. By Penal Code 1895, § 420, it is made penal to run freight or excursion trains on the Sabbath Day; but "regular trains" for the carrying of the mails or passengers" are expressly excepted therefrom. The prohibition of Penal Code 1895, § 422, against any person pursuing his business or ordinary calling on the Lord's Day when not a work of necessity or charity, does not apply to the running of passenger trains; otherwise, it would have been idle for the general assembly to have made the running of an excursion passenger train on the Sabbath Day an indictable offense. The two sections (420 and 422) are *in pari materia*, and must be construed together. It would seem that, the general assembly having expressly or by necessary implication legalized the running of passenger trains on the Sabbath Day, the doing of the work necessary thereto is to be regarded as a "work of necessity." But, aside from this, a railroad company which runs a regular passenger train on the Sabbath will not be relieved

of the performance of its legal duties incidental thereto.

3. One of the grounds of the motion complains that the court erred in charging "that the plaintiff must further show that his injury, if any, was not caused by his own negligence, and that he could not have avoided the injury by the exercise of ordinary care and diligence." The vice of this charge is said to consist in blending two separate and distinct rules of law applicable to the defense; the same being in part the provisions of Civil Code 1895, §§ 2322, 3830. We see no error in this instruction of which the railroad company can complain.

4. It is also said that the verdict is excessive. Under the case made, as contained in the record, we cannot so say.

Judgment affirmed.

All the Justices concur.

GEORGIA SUPREME COURT.

SOUTHERN RAILWAY COMPANY, Impleaded, etc., Plff. in Err.,
v.

W. J. HARBIN.

(— Ga. —, 68 S. E. 1103.)

Joint tort — acquittal of one defendant — effect.

In an action against a railway company and its servant, to recover damages for the homicide of the plaintiff's son, solely in consequence of the servant's misfeasance, where a verdict is returned finding the servant not liable, but finding in favor of the plaintiff against the railway company, such verdict should be set aside and a new trial granted.

(Holden, J., dissents.)

(September 22, 1910.)

ERROR to the Superior Court for Fulton County to review a judgment in plaintiff's favor as to defendant Southern Railway Company, in an action brought to recover damages for the alleged negligent killing of plaintiff's son. Reversed.

Statement by Beck, J.:

W. J. Harbin brought suit against the Southern Railway Company and James Michael to recover damages for the homicide of a son, James Harbin, who was struck and killed by a locomotive of the defendant company which was being operated on its tracks by the codefendant, James

Michael, who was an engineer in the employment of the company. The suit was "brought jointly against said defendants for their concurrent acts of negligence which caused the homicide." It was alleged in the petition that the decedent was in the employment as a switchman on a yard crew, and that, in the discharge of his duties, he had to throw two switches which connected what is known as a shop track with the north-bound main line, in order to allow the engine with which he was working to pass on and over said main line, and eventually to get to the south-bound main line; that it was necessary for him to go along the tracks a certain distance to another switch in the discharge of his duties; that while proceeding along the track and changing the switches, he could easily have been seen by the engineer and fireman, who were directing the engine which killed him, for

Note. — Effect of verdict for servant in an action against master and servant for servant's negligence or misfeasance.

This subject was discussed in a note to McGinnis v. Chicago, R. I. & P. R. Co. 9 L.R.A. (N.S.) 880. Several decisions upon this question have been handed down since the preparation of the earlier note.

The cases very generally sustain the rule laid down both in the McGinnis Case and in SOUTHERN R. Co. v. HARBIN, that a verdict exonerating the servant in an action brought against the master and the servant, for personal injuries caused solely by the misfeasance of the servant, requires an acquittal of the master also.

Thus, in Morris v. Northwestern Improv. Co. 53 Wash. 451, 102 Pac. 402, in which the master mechanic of the defendant company was also sued, the court, following *Doremus v. Root*, 23 Wash. 710, 54 L.R.A. 649, 63 Pac. 572, and *Stevick v. Northern P. R. Co.* 39 Wash. 501, 81 Pac. 699, both of which are referred to in the McGinnis Case, to which the earlier note is appended, said: "There is no allegation of independent negligence on the part of appellant. Its negligence grows out of and follows from the negligence of its master mechanic, in his neglect in the performance of the duty it had intrusted to him. If Cadwell was negligent, then appellant was negligent in law, and must answer for the consequent injury; if Cadwell was not negligent, no liability could be imposed upon appellant, because the only negligence upon which its negligence was predicated did not exist. Appellant's relation to the cause of action falls clearly within the rule of *respondet superior*, and the verdict in favor of Cadwell was in legal effect a verdict in its favor, and no judgment against it could be founded thereon."

The same rule was followed in *Sipes v. Puget Sound Electric R. Co.* 54 Wash. 47, 102 Pac. 1037, where the plaintiff, a con-

a distance of 500 feet from the place where he was struck; that he had to work with his face towards the north, and, in the exercise of due care, he proceeded to walk upon the south-bound main line so as to have his face in the direction from which trains or engines might come upon him, and while so walking, in plain view of the employees operating the engine which struck him, he was run down without any warning or any effort to stop the engine until after he was struck; that the engine was operated at a high and negligent rate of speed; that the engineer, one of the defendants, failed to blow the whistle or ring the bell of said engine, or cause the same to be rung, and failed to keep proper lookout ahead, and failed to check his engine

and to slow up as the engine approached the switch point, as ordinary care required; that this conduct of the defendant Michael was very negligent in view of the crowded condition of the yard at that time and the loud noises being made with escaping steam from other engines; that instead of running in the proper direction on the south-bound track,—that is, towards the south,—Michael was running his engine north on said track; that the engine which killed decedent was being run in violation of law, in that there was, on a street which crosses the defendant company's tracks at grade, a line of electric railroad, and the defendant engineer failed to cause the engine to come to a full stop within 50 feet of the place of crossing, and then to move slowly for-

ductor in the employment of an electric railway company, sued both the railroad company and its general manager. The court said: "The decision in *Doremus v. Root* is based upon the principle that the master and servant are privies in law, and therefore a judgment in favor of the servant in an action to recover damages for a tort committed by the servant is a bar to an action against the master, to recover damages for the same tortious act of the servant. The principle of that case has been repeatedly reaffirmed in this court, and the case has often been cited with approval in other jurisdictions."

And in *Chicago, St. P. M. & O. R. Co. v. McManigal*, 73 Neb. 580, 103 N. W. 305, 107 N. W. 243, the court said: "The company and Rogers were privies in a sense other and different from that in which that term is used in ordinary cases of alleged joint tortfeasors. . . . A verdict and judgment in favor of the agent, free from error, and such as the evidence alone supports, must exonerate the principal."

In the *Sipes Case*, supra, the court said that the only distinction between the case at bar and the *Doremus Case* was that, in the latter case, the negligent servant was charged with misfeasance, and in the *Sipes Case* with nonfeasance; but that this did not affect the liability of the servant in that jurisdiction. Upon the subject, liability of an agent or servant for his own negligence or nonfeasance, see note to *Ward v. Pullman Co.* 25 L.R.A.(N.S.) 343.

The decision in *Texas & P. R. Co. v. Huber* (Tex. Civ. App.) 95 S. W. 568, is contrary to the decisions in the cases cited above. The action was against the railroad company and its engineer, and the verdict was in favor of the latter and against the railroad company. On appeal, the verdict was sustained for the reasons given in the following quotation from the case: "We also overrule the tenth assignment, which contends that a motion in arrest of judgment ought to have been sustained because the verdict in favor of Oliphant was a finding that he was free from negligence and he being the agency through which the 30 L.R.A.(N.S.)

railway company committed the negligence, if any was committed, the verdict against this appellant was unfounded. The question was considered in *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744, where it was held, in a case of similar character, that, although such a verdict has the appearance of being based on inconsistent and contradictory findings of the jury, this is not of itself enough to require the reversal of a judgment against the passive defendant; the reason being that the finding in favor of the defendant whose act constitutes the negligence complained of, and the finding against the other, in the same case, by the same jury, can be attributed to improper conduct of the jury in arbitrarily exonerating the former, and not necessarily to a finding that there was no negligence on his part."

It should be noted, however, that the *James Case* was an action for malicious prosecution against a principal and an agent, and the court expressly distinguished between an action for a tort characterized by the existence of a wrongful intent, such as an action for malicious prosecution, and an action for a tort arising from negligence merely. In view of the distinction carefully made in the *James Case*, it might be questioned whether it could be considered in any way authority for the decision in the *Huber Case*.

And the decision in *Illinois C. R. Co. v. Murphy*, 123 Ky. 789, 11 L.R.A.(N.S.) 352, 97 S. W. 729, is apparently to the contrary, although the court does not seem to meet the question squarely. It was held that in an action against a railroad company and its engineer for negligent killing a person on the track, where the negligence of the company in running the train at an excessive speed is clearly established, a verdict against it, and in favor of the engineer, will not be disturbed on appeal, where the jury may have found that the engineer acted as a prudent man in attempting to avoid the accident after the peril was discovered.

The decision appears to present the rath-

ward, in violation of § 515 of the Penal Code, as well as in violation of the rules of the defendant company; and that in running across and beyond said crossing, the engineer was violating the laws of the state, and that he also violated a valid ordinance of the city of Atlanta by running at a speed exceeding the limit fixed by the ordinance. And it was alleged that "the said Michael, being in sole charge of the movement of said engine, was the entire representative of the defendant railway in the movements thereof."

There was evidence supporting the allegations of negligence upon the part of the engineer. The jury returned a verdict in favor of the plaintiff against the railway company, but in favor of the company's codefendant, James Michael. The railway company made a motion for a new trial, which was overruled, and it excepted.

Messrs. McDaniel, Alston, & Black for plaintiff in error.

Mr. A. H. Davis, for defendant in error:

As the law of Georgia allows the railway company to be sued as a joint tortfeasor with the employee whose negligence caused the damage, it necessarily follows that the law governing such actions must

apply, and by that law the jury has the right to hold neither, both, or either of the defendants liable.

Mashburn v. Dannenberg Co. 117 Ga. 580, 44 S. E. 97; *Western U. Teleg. Co. v. Griffith*, 111 Ga. 558, 36 S. E. 859; *Hollingsworth v. Howard*, 113 Ga. 1099, 39 S. E. 465; *Finley v. Southern R. Co.* 5 Ga. App. 728, 64 S. E. 312; *Walton v. Miller*, 109 Va. 210, 132 Am. St. Rep. 908, 63 S. E. 458; 2 *Hilliard, Torts*, p. 312.

The capacity of a suit of this kind to eventuate in discharging the engineer from liability, and still render the company liable, has been recognized.

Southern R. Co. v. Cash, 131 Ga. 540, 62 S. E. 823.

Beck, J., delivered the opinion of the court:

Under the decision of this court in the case of *Southern R. Co. v. Grizzle*, 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244, a railway company and its engineer may be jointly sued for a negligent homicide, where the negligence of the company results solely from the act and conduct of the engineer. And in the case at bar counsel for plaintiff relies for authority to support the finding

er curious result of holding that the negligence of the railroad company due solely to the negligence of the engineer in running the train at an excessive rate of speed, was continued up to the point of the injury, so as to make the railroad company liable therefor, while the engineer himself might be exonerated from liability if he, after becoming aware of the danger, used all reasonable efforts to avoid it.

Although the case would seem to be squarely in point, some doubt of the position which the court really intended to take is presented by the following quotation: "If the plaintiff is entitled to his verdict against two tortfeasors, but the jury are able to agree only as to one of them, and gives a verdict accordingly, we know of no law that prevents the plaintiff from having at least what the jury has given him." This suggests, at least, that the court considered that there was some negligence on the part of the company beyond the negligence of the engineer, which was imputable to the company.

The decision in *Bedenbaugh v. Southern R. Co.* 69 S. C. 1, 48 S. E. 53, has been cited as contrary to the general rule as laid down in the *HARBIN* and *Doremus* Cases, but it is not at all clear that the decision in the *HARBIN* CASE has any bearing upon this question. The verdict was for the defendant servant, and against the defendant railway company, and the attorney for the latter moved that judgment be entered in its favor notwithstanding the verdict, upon the ground that the plaintiff's cause of ac- 30 L.R.A. (N.S.)

tion was based entirely upon the alleged negligence of the engineer, and the jury by their verdict having exonerated the engineer, the basis of the action was gone. The court, without any discussion, decided against the contention of the defendant railway company, basing its decision upon *Gardner v. Southern R. Co.* 65 S. C. 341, 43 S. E. 816, and *Carson v. Southern R. Co.* 68 S. C. 55, 46 S. E. 525. In the *Gardner* Case, however, the decision was reversed because of the error of the court in instructing the jury that there must be a verdict for the defendant if the agent or servant was not guilty of negligence, the court saying that, under the charge, the jury would have been bound to find in favor of both defendants, even though they believed that the master himself did the acts complained of, as alleged in the cause of action. And in the *Carson* Case, the complaint alleged that the master was negligent in furnishing defective appliances, and that the servant was negligent in his use of them. It will be seen that in both of these cases there was negligence, or, at least, there might have been negligence found on the part of the master or some other servant, which was entirely disconnected from the negligence of the defendant servant; and consequently these cases are not authority for the decision in the *Bedenbaugh* Case, if in that case the liability of the master was based wholly upon the negligence of the defendant servant.

The proposition that a verdict in favor of a defendant servant who was charged with

in favor of the plaintiff against the railway company (while in the same verdict the codefendant, the engineer, whose actual negligence is alleged to have caused the homicide, is exonerated) upon decisions of this and other courts and the rule laid down in text-books, to the effect that, where several are sued as joint tort-feasors, there may be a finding against one or all of the defendants joined in the action. But we do not think that this rule, in view of the acts of negligence pleaded in this case, is applicable. Under the allegations of negligence in the petition, made to show liability upon the part of the defendants, the only acts of negligence were committed by the engineer who was operating the engine at the time it struck and killed the deceased, James Harbin; and under the decision in the case of *Southern R. Co. v. Grizzle*, supra, the negligence alleged in the present case constituted misfeasance upon the part of the railway company's employee, its codefendant. If he were guilty of the negligence pleaded, the railway company, of course, was liable upon the principle of *respondent superior*. The company itself was not, and could not have been, guilty

of any negligence independently of the acts of misfeasance upon the part of its engineer. By the verdict of the jury, Michael was found not guilty of negligence causing the death of the plaintiff's son; and where the codefendant was not and could not have been guilty of negligence that would render it liable save on the principle of *respondent superior*, we do not think that liability could be imputed to it where its employee was exonerated, when he alone performed the act which constitutes the basis for the charge of negligence.

In the case of *McGinnis v. Chicago, R. I. & P. R. Co.* 200 Mo. 347, 9 L.R.A.(N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 A. & E. Ann. Cas. 656, where a verdict was found exonerating the servant in an action against the master and servant for personal injuries caused by the misfeasance of the servant, the Missouri supreme court said: "We are firmly of the opinion that in cases where the right to recover is dependent solely upon the doctrine of *respondent superior*, and there is a finding that the servant, through whose negligence the master is attempted to be held liable, has not been negligent, as was true in the case

negligence does not exonerate the master, sued in the same action for other negligence, either on his part or on the part of the other servants, resulting in injury to the plaintiff, needs but to be stated; and it is plain that such cases present an entirely different question from that presented by the title to this note, where the sole basis of the cause of action is the negligence of the defendant servant, and which is imputed to the master, under the doctrine of *respondent superior*. A few cases emphasizing the distinction, however, may be cited.

Thus, in *Finley v. Southern R. Co.* 5 Ga. App. 722, 64 S. E. 312, where the railroad and the yard master and assistant yard master were sued together, and negligence on the part of the individual defendants and also on the part of the engineer was alleged, the court directed a new trial upon the ground that the verdict was against all three defendants, and there was no negligence shown on the part of the individual defendants; but the court said: "We are of the opinion, also, that the court erred in charging the jury that the plaintiff could only recover upon such acts of negligence as were shown to be chargeable to the servants Hagan and Turner. . . . But the defendant company, as a tort feasor, though sued jointly with Hagan and Turner, might be liable for the negligence of some employee other than they, if, as is alleged in the petition, the negligence of the engineer contributed to the injury."

So, in *Clay v. Chicago, M. & St. P. R. Co.* 104 Minn. 1, 115 N. W. 949, the defendant railway company claimed that judgment

should have been directed for it notwithstanding the verdict, since the jury, having exonerated the alleged negligent conductor, thereby also exonerated the company; but the court held that the defendant company was not entitled to a directed verdict for the reason stated, in the absence of evidence showing that the negligence alleged was the breach of a duty imposed upon the conductor solely.

And in *Republic Iron & Steel Co. v. Lee*, 227 Ill. 246, 81 N. E. 411, a judgment in favor of a vice principal sued with the master was held not to be necessarily inconsistent with a judgment against the master, where the negligence alleged consisted of a negligent order, given by both the defendant vice principal and another vice principal, and the evidence showed that the defendant vice principal had not given the order.

Attention should be called to the dissenting opinion in *SOUTHERN R. Co. v. HARBIN*, where the argument is made that, inasmuch as, under the Code, the presumption of negligence on the part of the company arises upon proof that, without fault on the part of deceased, he was killed, and no such presumption prevails against the servant, the jury might be fully justified in finding against the company, against whom the plaintiff would be aided by the presumption, while there might not have been sufficient evidence, unaided by the presumption, to justify the jury in finding against the defendant servant. This argument is very plausible, but it is also very subtle and somewhat intangible.

W. M. G.

in hand, there should be no judgment against the master. The verdict in this case is a monstrosity. The jury say French was guilty of no negligence, yet, in the same breath, say the company was guilty of negligence, although nothing further was done by the company than what it did through French, its servant." And in the case of *Doremus v. Root*, 23 Wash. 715, 54 L.R.A. 649, 63 Pac. 574, the court says: "Joint tort feorsors are liable to the injured person (other than that he may have but one satisfaction) as if the act causing the injury was the separate act of each of them; and they have, except in certain special cases, no right of contribution among themselves. But the defendants in this character of action are in no sense joint tort feorsors, nor does their liability to the plaintiff rest on the same or like grounds. The act of an employee, even in legal intentment, is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of *respondent superior*,—the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment, and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employee; and when the employer is compelled to answer in damages therefor, he can recover over against the employee. *Oceanic Steam Nav. Co. v. Compañía Transatlántica Española*, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987; note to *Carterville v. Cook*, 16 Am. St. Rep. 248; 1 *Shearm. & Redf. Neg.* 5th ed. § 242; 2 *Van Fleet*, *Former Adjudication*, p. 1162." Again, on page 716 of 23 Wash., *Fullerton, J.*, in that case, further says: "So also, in such an action, whether brought against the employer severally or jointly with the employee, the gravamen of the charge is, and must be, the negligence of the employee, and no recovery can be had unless it be proved, and found by the jury, that the employee was negligent. Stated in another way: If the employee who causes the injury is free from liability therefor, his employer must also be free from liability. This was held in *New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109." 30 L.R.A. (N.S.)

In the note to case of *McGinnis v. Chicago, R. I. & P. R. Co.* supra, 9 L.R.A. (N.S.) 881, it is said: "In *Montfort v. Hughes*, 3 E. D. Smith, 591, it was held that if, in a joint action against master and servant, founded solely upon the negligence of the servant, the master not being present nor acting in the matter, the servant is acquitted, there can be no recovery against the master. In such a case a verdict against the master and in favor of the servant would be self-contradictory. *Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co.* 165 Ind. 361, 75 N. E. 649." See, in same connection, note to the *McGinnis Case* in 9 A. & E. Ann. Cas. 660. And in the case of *Ivanhoe Furnace Corp. v. Crowder*, 110 Va. 387, 66 S. E. 63, the supreme court of appeals of Virginia, affirming the judgment of the court below in overruling a motion in arrest of judgment and a motion for a judgment notwithstanding a verdict, said: "If the court had adhered to its original position, and entered judgment upon the verdict for \$3,500 which was first rendered by the jury, and the case in that situation had been brought before us upon the petition of the *Ivanhoe Furnace Corporation, McGinnis v. Chicago, R. I. & P. R. Co.* 200 Mo. 347, 9 L.R.A. (N.S.) 880, 118 Am. St. Rep. 661, 98 S. W. 590, 9 A. & E. Ann. Cas. 656, and *Doremus v. Root*, 23 Wash. 710, 54 L.R.A. 649, 63 Pac. 572, relied upon by plaintiff in error, would have been pertinent and entitled to very grave consideration; but the case before us differs materially from the cases cited." Other cases in support of the conclusion which we have reached might be cited, but the question involved is elaborately discussed in the decisions which we have referred to and in the cases there cited.

Judgment reversed.

All the Justices concur, except

Holden, J., dissenting:

I cannot concur in the ruling made by a majority of the court, and must dissent from the judgment of reversal. In a suit for damages brought against a railroad company and its engineer, for the killing of the son of the plaintiff, where the sole ground upon which liability of the defendants is claimed is the misfeasance of the engineer, the servant of the company, in operating one of its trains, it is not proper to rule that a verdict in favor of the engineer, and against the company, cannot stand, because it is contradictory. If the proof of the facts raising a presumption that the railroad company was guilty of

the acts of negligence alleged did, under the law, raise such presumption against the engineer as well as against the railroad company, or if such proof raised no presumption against either, a verdict finding against the railroad company, and in favor of the engineer, might be said to be contradictory, and it might be proper to set it aside for this reason. But the presumption of negligence of the railroad company created by the law of this state upon proof by the plaintiff that the company, in the operation of its train, killed the son of the plaintiff, without fault of the deceased, is not applicable to the servant who is charged with the acts causing the homicide, in a suit against the latter and the railroad company. Under Civil Code 1895, § 2321, upon the trial of such a case, upon proof that, without fault of the deceased, he was killed by the running of the train of the company, the presumption that the company was negligent, as alleged in the declaration of plaintiff, arises. Such proof alone would raise no presumption of negligence against the engineer, the other defendant, or that he did the acts of which complaint is made. *Southern R. Co. v. Cash*, 131 Ga. 537, 62 S. E. 823. If, upon the trial, the plaintiff proved the homicide, and that it occurred without fault of the deceased, and no other evidence was introduced by plaintiff, or by either of the defendants, the evidence introduced would authorize a recovery against the railroad company, but there would be no evidence before the jury authorizing a recovery against the engineer. If, after plaintiff introduced such evidence, making the proof of the facts above stated, other evidence was introduced by plaintiff and defendants, and this other evidence was equally balanced in its effect upon the mind of the jury upon the question as to whether or not the engineer was guilty of the acts complained of, it would be the duty of the jury to render a verdict against the railroad company because it had not rebutted the presumption of negligence against it, and to render a verdict in favor of the engineer, because the plaintiff had not shown by a preponderance of the testimony that the engineer was guilty of such acts. The law gave the plaintiff the right to sue the defendants jointly; and it is not proper to set aside the verdict of the jury because it was rendered in accordance with, and in the observance of, the rules of evidence prescribed by the law, to be applied by the jury in trying the case and rendering a verdict.

30 L.R.A.(N.S.)

IDAHO SUPREME COURT.

ELISHA STRONG et al., Appts.,

v.

WESTERN UNION TELEGRAPH COMPANY, Respt.

(18 Idaho, 389, 109 Pac. 910.)

Telegraph rules — limitation of liability — validity.

1. A telegraph company is chartered for public purposes, has the power of eminent domain, is a public agent, and exercises quasi public employment, and is required to perform the duties it was chartered to perform with the same care, skill, and diligence that a prudent man would, under like circumstances, exercise in his own affairs; and it is contrary to public policy to permit it, by rules and regulations, to restrict its liability for damages resulting from its own negligence or carelessness.

Same — reasonableness — determination.

2. The reasonableness or unreasonableness of rules and regulations made by a telegraph company must be determined with reference to public policy, precisely as in the case of common carriers, and a stip-

Headnotes by SULLIVAN, Ch. J.

Note. — Validity of limitation of liability of telegraph company for unrepeatd messages.

This note is supplementary to the note in 11 L.R.A.(N.S.) 560, where the general question of the validity of a stipulation limiting the liability of a telegraph company for unrepeatd messages is discussed, and also supplementary to the note to *Box v. Postal Teleg. Cable Co.* 28 L.R.A.(N.S.) 566, discussing the application of such stipulation to failure or delay in transmission or delivery.

It will be observed from the earlier notes that there is considerable conflict of opinion as to the validity of a stipulation relieving a telegraph company from liability for mistake or delay in transmission, or delay or failure in delivery, of an unrepeatd message. It will also be noted that the courts in New York and Massachusetts, as well as the earlier decisions of other states, were uniform in holding that such a stipulation is valid, at least in the absence of gross negligence or wilful misconduct.

This was also recognized in *Halsted v. Postal Teleg. Cable Co.* 193 N. Y. 293, 10 L.R.A.(N.S.) 1021, 127 Am. St. Rep. 952, 85 N. E. 1078, affirming 120 App. Div. 433, 104 N. Y. Supp. 1016, where the mere change of the word "eighty" to "eighth" in the transmission of a telegram was held not to show gross negligence on the part of the telegraph company. In this case it was contended that the printed blank was insufficient to limit the telegraph company's liability for negligence. The court, however, said: "It was not necessary that the word 'negligence' should be used in the stip-

ulation which exempts such company from damages for its own negligence is void.

Same — negligence in transmission — appeal — reversal — amendment.

3. Held that the evidence in this case shows negligence on the part of the telegraph company, and that the sufficiency of the complaint not having been challenged by demurrer or upon the introduction of evidence, but being first challenged by a motion for a nonsuit, which is not a ground for a nonsuit, that upon a reversal of this case, the plaintiff should be allowed to amend his complaint so as to allege negligence in the transmission of said telegram.

Negligence — gross — ordinary.

4. The term "gross negligence" is used to denote a degree of carelessness greater than the degree implied by "ordinary negligence," and is sometimes used to denote wilful negligence or fraud.

Telegram — incorrect transmission — negligence.

5. Where a telegraph company fails to transmit a message correctly, the proof of that fact is prima facie evidence of the company's negligence.

Same — burden of proof.

6. If the failure to correctly transmit a telegram was not the result of the negligence of the company, the means of show-

ulations of the contract. It was a sufficient protection to the defendant that the contract required a repetition of the message, or an insurance, in order to make the defendant liable for mistakes or delays in the transmission or delivery, beyond the amount received for sending the same. Such mistakes or delays, whether caused by the negligence of the defendant's servants, if not gross, as by wilful misconduct, or by causes beyond its control, were covered sufficiently by the clause of the contract."

So, in *Wheelock v. Postal Teleg. Cable Co.* 197 Mass. 119, 83 N. E. 313, 14 A. & E. Ann. Cas. 188, where a message addressed to Australia was never delivered, the stipulation as to unrepeatd messages was held reasonable and binding, in the absence of wilful misconduct or gross negligence on the part of the telegraph company.

In accord with the above cases, but contrary to the weight of authority, and the modern trend of opinion, is the recent case of *M. M. Stone & Co. v. Postal Teleg. Co.* (R. I.) 29 L.R.A.(N.S.) 795, 76 Atl. 762, where the court, after setting out in full the usual stipulation found on the backs of telegraph blanks in regard to unrepeatd messages, the insurance of repeated messages, and messages sent over other lines, said: "We are of the opinion that the regulation set out in this question is a reasonable one. The provision seems primarily intended to limit the liability of the company for mistakes in transmission rather than for delay, though the rule includes a limitation of the company's liability for delay in transmission. The liability of the company under this agreement is graded 30 L.R.A.(N.S.)

ing that fact is within the possession of the company, and it may show it as a defense.

Same — negligent transmission — evidence — sufficiency.

7. Held that the evidence shows that said telegram was delivered to the agent of the company for transmission, and was accepted by it, that the company made a mistake in its transmission; and that showing made a prima facie case in favor of the plaintiff, and the court erred in granting a nonsuit and entering a judgment of dismissal.

Agent — contract with — modification by principal — effect.

8. Held that the contract for the sale of the cattle was made with the commission company.

On rehearing.

Telegram — company as agent of sender.

9. A sender of a telegraphic message does not constitute the telegraph company his agent, and is not bound to the receiver of the message by the terms of the message as negligently changed or altered by the company.

Same — independent principal — liability.

10. A "telegraph company" is a public service corporation engaged in a public utility, and in receiving, transmitting, and

in accordance with the compensation received for transmitting the message. Correctness in transmission, which, from a consideration of the whole rule, appears to include promptness in delivery, may be insured by a contract and the payment of an additional fee. All these provisions in the contract of sending appear to be reasonable, and within the right of the company to impose. As is urged in the argument of the defendant's counsel, the sender is fully aware how important the prompt delivery of his message is; the message as delivered to the company ordinarily gives no indication of its importance. If the sender desires to have special care expended upon it, it is not unreasonable to ask him to pay for such particular attention. Some messages may be of trivial importance, others of great importance. By negligence in the transmission or delivery of one message, the damages incurred may amount to no more than the cost of sending the message. In respect to another message, the damages might amount to a large sum. These facts are unknown to the telegraph company, but they are within the knowledge of the sender. In these circumstances, therefore, it is fair to allow the telegraph company to enter into some agreement with the sender for liquidating or ascertaining the damages which it may be called upon to pay, and grading its charges for the service in accordance therewith. If the company is to be held to a very small liability, as for the bare amount of the tolls, it can afford to transmit the message for a very small sum; but if it may be held liable for large damages, it must, for its own protection, charge more

delivering messages should be treated as an independent principal or contracting party, and be held liable both in contract and tort, the same as other principals.

Same—mistake—measure of damages.

11. Where S. & S. sent a telegram to C. L. S. & C. Co., inquiring if the company would honor draft in payment for eighty-four head of steers at \$3.95 per hundred, and the telegraph company negligently changed or altered the message so that, when received at its destination and delivered to the sendee, it read \$3.25 instead of \$3.95, and the stock was shipped and C. L. S. & C. Co. paid therefor, at the rate of \$3.25, if S. & S. acted prudently and with due diligence after discovering the mistake, so as to minimize the damage and loss, the measure of damage which they will be entitled to recover from the telegraph company for its tort will be the difference between the market value of the stock the day the message was sent, and the price actually paid by C. L. S. & C. Co.

(January 15, 1910.)

A PPEAL by plaintiffs from a judgment of the District Court for Bear Lake County dismissing an action brought to recover damages for alleged negligent failure

for the service." It will be noted that the language of the court is directly opposed to that of the court in *STRONG v. WESTERN U. TELEG. CO.*

Following the rule laid down in the earlier Texas cases, it was held in *Western U. Teleg. Co. v. Robertson* (Tex. Civ. App.) 126 S. W. 629, that, while a telegraph company may limit its liability for an unrepeatable message, the limitation cannot be extended so as to relieve it from the consequences of its negligence; and therefore in this case, where it appeared that, through the negligence of the company, a message stating the price of land to be one twenty-five per acre was changed to read seventy-five per acre, the company, through its stipulations as to unrepeatable messages, could not defeat recovery of the consequent damages.

This would seem also to have been recognized in *Joshua L. Bailey & Co. v. Western U. Teleg. Co.* 227 Pa. 522, — L.R.A. (N.S.) —, 76 Atl. 736, where a cipher message was slightly changed in transmission, and the court said: "In this and many other jurisdictions, a telegraph company may make reasonable rules affecting its responsibility, but it cannot stipulate for exemption from liability caused by its own negligence."

That the stipulation as to unrepeatable messages is void as against public policy is also recognized in *Williamson v. Postal Teleg. Cable Co.* 151 N. C. 223, 65 S. E. 974. The real question in issue in this case, however, was whether the court would recognize the rule laid down in New York, merely because the contract was there entered into. (For notes on the law governing liability

correctly to transmit and deliver a telegram. Reversed.

The facts are stated in the opinion.

Mr. Thomas L. Glenn, for appellants:

The stipulations on the back of the message providing that the sender must, to hold the company liable, order the message to be repeated, and pay a fee therefor, are void as against public policy.

Joyce, *Electric Law*, §§ 681, 683-685; *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419; *Western U. Teleg. Co. v. Way*, 83 Ala. 542, 4 So. 844; *Western U. Teleg. Co. v. Short*, 53 Ark. 434, 9 L.R.A. 744, 14 S. W. 649; *Western U. Teleg. Co. v. Cobbs*, 47 Ark. 344, 58 Am. Rep. 756, 1 S. W. 558; *Hart v. Western U. Teleg. Co.* 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 637; *Redington v. Pacific Postal Teleg. Cable Co.* 107 Cal. 317, 48 Am. St. Rep. 132, 40 Pac. 432; *Western U. Teleg. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Western U. Teleg. Co. v. Shotter*, 71 Ga. 760; *Adams v. Bunker Hill & S. Min. Co.* 12 Idaho, 637, 11 L.R.A. (N.S.) 844, 89 Pac. 624; *Western U. Teleg. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Western U. Teleg. Co. v. Jones*, 95 Ind. 228, 48

bility of telegraph companies, see notes in 5 L.R.A. (N.S.) 751; 23 L.R.A. (N.S.) 648; 28 L.R.A. (N.S.) 490; and 63 L.R.A. 532.)

In *Western U. Teleg. Co. v. Smith* (Tex. Civ. App.) 130 S. W. 622, it was held that the stipulation in regard to unrepeatable messages would not protect a company from liability when, through its negligence, the name of the addressee, "Tom Smith," was changed to "M. Smith," in consequence of which the message was delayed several days in delivery.

In *Lothian v. Western U. Teleg. Co.* (S. D.) 126 N. W. 621, where a message was delayed in delivery at least five days, the court after saying that according to a statute a carrier of messages by telegraph was a common carrier, and required to use the "utmost diligence," held that, even assuming its obligation as a common carrier might be limited by a special contract, its stipulation in regard to unrepeatable messages could not exonerate it from the gross negligence, fraud, or wilful wrong of itself or its servant.

As above pointed out, in New York the stipulation is held valid in the absence of gross negligence or wilful misconduct on the part of the telegraph company or its employees, and therefore, where such gross negligence or wilful misconduct is present, the stipulation will not protect the company. A case of this nature is *Weld v. Postal Teleg. Cable Co.* 199 N. Y. 88, 92 N. E. 415, which distinctly recognizes the above doctrine. In this case, besides several minor and immaterial mistakes, a material mistake was made in a price at which an agent was directed to sell cotton.

G. V.

Am. Rep. 713; *Sweatland v. Illinois & M. Tele. Co.* 27 Iowa, 433, 1 Am. Rep. 285; *Russell v. Western U. Tele. Co.* 57 Kan. 230, 45 Pac. 598; *Western U. Tele. Co. v. Eubanks*, 100 Ky. 591, 36 L.R.A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068; *Ayer v. Western U. Tele. Co.* 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495; *United States Tele. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Shaw v. Postal Tele. & Cable Co.* 79 Miss. 670, 56 L.R.A. 486, 89 Am. St. Rep. 666, 31 So. 222; *Reed v. Western U. Tele. Co.* 135 Mo. 661, 34 L.R.A. 492, 58 Am. St. Rep. 609, 37 S. W. 904; *Western U. Tele. Co. v. Kemp*, 44 Neb. 194, 48 Am. St. Rep. 723, 62 N. W. 451; *Western U. Tele. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339; *Schwartz v. Atlantic & P. Tele. Co.* 18 Hun, 157; *Brown v. Postal Tele. Co.* 111 N. C. 187, 17 L.R.A. 648, 32 Am. St. Rep. 793, 16 S. E. 179; *Western U. Tele. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627; *Southern Exp. Co. v. Caldwell*, 21 Wall. 267, 22 L. ed. 558; *Passmore v. Western U. Tele. Co.* 78 Pa. 242; *Walker v. Western U. Tele. Co.* 75 S. C. 512, 56 S. E. 38; *Kirby v. Western U. Tele. Co.* 7 S. D. 623, 30 L.R.A. 621, 65 N. W. 37; *Western U. Tele. Co. v. Mellon*, 100 Tenn. 429, 45 S. W. 443; *Pepper v. Western U. Tele. Co.* 87 Tenn. 554, 4 L.R.A. 600, 10 Am. St. Rep. 699, 11 S. W. 783; *Marr v. Western U. Tele. Co.* 85 Tenn. 544, 3 S. W. 496; *Wertz v. Western U. Tele. Co.* 8 Utah, 499, 33 Pac. 136; *Gillis v. Western U. Tele. Co.* 61 Vt. 461, 4 L.R.A. 611, 15 Am. St. Rep. 917, 17 Atl. 736; *Western U. Tele. Co. v. Reynolds Bros.* 77 Va. 173, 46 Am. Rep. 715; *Berry v. West Virginia & P. R. Co.* 44 W. Va. 538, 67 Am. St. Rep. 781, 30 S. E. 143; *Beatty Lumber Co. v. Western U. Tele. Co.* 52 W. Va. 410, 44 S. E. 309; *Thompson v. Western U. Tele. Co.* 64 Wis. 531, 54 Am. Rep. 644, 25 N. W. 789; *White v. Western U. Tele. Co.* 5 McCrary, 103, 14 Fed. 710; *Abraham v. Western U. Tele. Co.* 11 Sawy. 28, 23 Fed. 315; *Western U. Tele. Co. v. Cook*, 9 C. C. A. 680, 15 U. S. App. 445, 61 Fed. 624; *Great Northwestern Tele. Co. v. Laurance*, Rap. Jud. Quebec 1 B. R. 1.

Messrs. **Clark & Budge**, for respondent:

The stipulation limiting liability is valid.

Primrose v. Western U. Tele. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *Camp v. Western U. Tele. Co.* 1 Met. (Ky.) 164, 71 Am. Dec. 461; *Hart v. Western U. Tele. Co.* 66 Cal. 579, 56 Am. Rep. 119, 6 Pac. 637; *Western U. Tele. Co. v. Carew*, 15 Mich. 525; *Coit v. Western U. Tele. Co.* 130 Cal. 657, 53 L.R.A. 678, 80 Am. St. Rep. 153, 63 Pac. 30 L.R.A. (N.S.)

83; *Kiley v. Western U. Tele. Co.* 109 N. Y. 231, 16 N. E. 75; *Grinnell v. Western U. Tele. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Birney v. New York & W. Printing Tele. Co.* 18 Md. 341, 81 A Dec. 607; *United States Tele. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Ellis v. American Tele. Co.* 13 Allen, 226; *Redpath v. Western U. Tele. Co.* 112 Mass. 71, 17 Am. Rep. 69; *Clement v. Western U. Tele. Co.* 137 Mass. 463; *Wann v. Western U. Tele. Co.* 37 Mo. 472, 90 Am. Dec. 395; *Becker v. Western U. Tele. Co.* 11 Neb. 87, 38 Am. Rep. 356, 7 N. W. 868; *Breese v. United States Tele. Co.* 48 N. Y. 132, 8 Am. Rep. 526; *Pegram v. Western U. Tele. Co.* 97 N. C. 57, 2 S. E. 256; *Lassiter v. Western U. Tele. Co.* 89 N. C. 335; *Harris v. Western U. Tele. Co.* 9 Phila. 88; *Passmore v. Western U. Tele. Co.* 78 Pa. 238; *Aiken v. Western U. Tele. Co.* 5 S. C. 358; *Western U. Tele. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Western U. Tele. Co. v. Catchpole*, 1 Tex. App. Civ. Cas. (White & W.) 108; *Western U. Tele. Co. v. Smith*, 3 Tex. App. Civ. Cas. (Willson) 86; *Western U. Tele. Co. v. Hearne*, 77 Tex. 83, 13 S. W. 970; *Womack v. Western U. Tele. Co.* 58 Tex. 176, 44 Am. Rep. 614; *Western U. Tele. Co. v. Coggin*, 15 C. C. A. 231, 32 U. S. App. 245, 68 Fed. 137; *Birkett v. Western U. Tele. Co.* 103 Mich. 361, 33 L.R.A. 404, 50 Am. St. Rep. 374, 61 N. W. 645; *Jacob v. Western U. Tele. Co.* 135 Mich. 600, 98 N. W. 402; *Riley v. Western U. Tele. Co.* 8 Misc. 217, 28 N. Y. Supp. 581; *Western U. Tele. Co. v. Elliott*, 7 Tex. Civ. App. 482, 27 S. W. 219; *Wheelock v. Postal Tele. Cable Co.* 197 Mass. 119, 83 N. E. 313, 14 A. & E. Ann. Cas. 188; *Halsted v. Postal Tele. Cable Co.* 193 N. Y. 293, 19 L.R.A. (N.S.) 1021, 127 Am. St. Rep. 952, 85 N. E. 1078; *Monsees v. Western U. Tele. Co.* 127 App. Div. 289, 111 N. Y. Supp. 53.

Proof of an error is not sufficient proof of negligence.

White v. Western U. Tele. Co. 5 McCrary, 103, 14 Fed. 710; *Becker v. Western U. Tele. Co.*, *Western U. Tele. Co. v. Neill*; and *Western U. Tele. Co. v. Hearne*.—*supra*: *Sweatland v. Illinois & M. Tele. Co.* 27 Iowa, 433, 1 Am. Rep. 285; *Thompson v. Western U. Tele. Co.* 64 Wis. 531, 54 Am. Rep. 644, 25 N. W. 789; *Halsted v. Postal Tele. Cable Co.*; *Womack v. Western U. Tele. Co.*; *Breese v. United States Tele. Co.*, and *Aiken v. Western U. Tele. Co.*,—*supra*.

Sullivan, Ch. J., delivered the opinion of the court:

This action was brought by the appellants, as plaintiffs, to recover damages in the sum of \$581.17, alleged to have been

sustained by reason of an error in the transmission of a telegraphic message delivered by appellants to respondent, at the town of Soda Springs, Idaho, on or about March 6, 1907, to be transmitted to parties in Denver, Colorado. The principal issue made by the pleadings was whether the defendant was liable because of a mistake made in the transmission of said telegram. The action was tried by the court and a jury, and at the close of plaintiffs' evidence, counsel for the defendant moved for a nonsuit, which motion was granted by the court, and judgment of dismissal was entered. The appeal is from said order and the judgment.

The following facts, among others, appear from the record: The telegraphic message was written upon one of the respondent company's telegraph blanks, with all the printed provisions upon said blanks. Said telegraph blank contained the following matter, to wit: "Western Union Telegraph Company, Incorporated. . . . Send the following message subject to the terms on back hereof, which are hereby agreed to." The following is the telegram written thereon:

Soda Springs, Idaho, March 6, 1907.
To Colorado Live Stock & Commission Company,

Denver Stock Yards, Denver, Colorado.

Will you honor draft of W. L. White on you in payment of eighty-four head of steers, at three ninety-five per hundred, 2 per cent shrink, weighed here?

Strong & Stark.

On the face of said telegram the following printed matter occurred: "Read the notice and agreement on the back," and on the back of the said telegraph blank appears the following:

All messages taken by this company are subject to the following terms: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any repeated message, beyond fifty times the sum received for sending the same, unless espe-

cially insured; nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of a message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz., 1 per cent for any distance not exceeding 1,000 miles, and 2 per cent for any greater distance. No employee of the company is authorized to vary the foregoing. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the cost of such delivery. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

Robert C. Clowry,
President and General Manager.

Said telegram was introduced in evidence on the trial, and one of the plaintiffs testified as follows: "No, sir; at the time I delivered the telegram to the defendant, I did not ask that it be repeated; I have reference to plaintiffs' Exhibit A; I did not request that it be telegraphed back for comparison. No, I did not offer the telegraph company any additional compensation for such purpose. . . . We were negotiating the sale with one W. L. White, who was agent for the Colorado Live Stock & Commission Company; he was acting as their agent; we agreed to sell the company quite a number of cattle, beef steers. I do not remember the weight of the steers. I have got it down; there were eighty-four head of steers, they weighed something near 1,000 pounds; we at this time agreed with this agent as to the price per hundred weight, that is to say, \$3.95 per cwt.; this was net with 2 per cent shrink; I agreed with the agent on the price for the cattle, and then went and sent a message to the company to find out whether the agent was

responsible or not." In response to said telegram, the following reply was received:

Denver, Colorado, 3, 6, 1907.
To Strong & Stark,
Soda Springs, Idaho.

Will honor draft as per telegram if cattle are billed to us.

Colorado Live Stock
& Commission Company.

It further appears from the testimony that the telegram, when delivered to the commission company, read \$3.25 per hundredweight, making a difference of 70 cents per hundredweight between the offer and the acceptance, and that was caused by the mistake made by the respondent in transmitting the telegram from Soda Springs to Denver; and that the steers referred to were delivered to the said W. L. White, and shipped by him to the Colorado Live Stock & Commission Company, at Denver; and that said commission company paid for them at the rate of \$3.25 per hundredweight, and refused to pay \$3.95 per hundred, as stated in the telegram as delivered to the telegraph company for transmission. Upon that state of facts, the question is presented whether the telegraph company is liable for the difference of 70 cents per hundredweight.

The respondent does not deny that a mistake was made, but contends that it is not liable for the reason that the telegraph blank contained a certain, printed stipulation, to the effect that the telegraph company should not be liable for a mistake or delay in the transmission or delivery of the message, unless the sender ordered it repeated, and paid one half of the regular charge in addition to the regular charge for sending such message, and it is admitted by the appellants that they did not request the respondent to repeat said message.

There appears to be considerable conflict in the various decisions upon the question of the validity of the printed stipulation upon a telegraph blank, limiting the liability of the company for mistakes and delays in transmission of messages. In some of the decisions it is held that such stipulations are valid, and in others, that they are not valid, and are contrary to public policy. *Kemp v. Western U. Teleg. Co.* 28 Neb. 661, 26 Am. St. Rep. 363, 44 N. W. 1064, held that such stipulations are invalid under a statute which expressly declares that they shall not be binding. In that case there was a mistake made in transmitting the telegram. "8 o'clock" was written in the telegram delivered for transmission, and when delivered it read "10 o'clock." The court held, under § 12 of an act relating to

telegraph companies, that said company was "liable for the nondelivery of despatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ."

In *Western U. Teleg. Co. v. Lowrey*, 32 Neb. 732, 49 N. W. 707, the court held, under the provisions of said § 12, supra, that the plaintiff was entitled to damages for delay in delivering an unrepeatable message. It thus appears that the legislature of the state of Nebraska has considered that such stipulations printed on a telegraph message, relieving the company of liability for mistakes in transmitting or delay in delivering messages, were contrary to public policy, and settled the matter by enacting a law to that effect.

In Mississippi, Kentucky, and Oklahoma, telegraph companies are by law declared to be common carriers, and the supreme courts of those states held that said stipulation above quoted is invalid, and unavailing as a defense, under the Constitution and statute which declared telegraph companies to be common carriers in their line of business, and subject to liability as such. *Postal Teleg. & Cable Co. v. Wells*, 82 Miss. 733, 35 So. 190; *Western U. Teleg. Co. v. Eubanks*, 100 Ky. 591, 36 L.R.A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068; *Blackwell Mill. & Elevator Co. v. Western U. Teleg. Co.* 17 Okla. 376, 89 Pac. 235, 10 A. & E. Ann. Cas. 855.

It was held in the Oklahoma case that telegraph companies were liable for the full amount of the loss sustained by reason of their failure properly to deliver messages within a reasonable time, notwithstanding an express stipulation in the contract of carriage that such company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of unrepeatable messages, beyond the amount received for sending the same, and that, construed in the light of the statutes of Oklahoma, such stipulation is unreasonable and contrary to public policy, and therefore void. In that case the negligence consisted in the unreasonable delay in the delivery of a message.

These decisions proceed upon the theory that telegraph companies are common carriers, made so by the provisions of the Constitutions or the statutes in those states. We have no constitutional or statutory provision in this state that such stipulation is void, or that telegraph companies are common carriers. Then the question is presented: What should be the rule in this state as to such rules and regulations, in the absence of any constitutional or statutory provisions?

It is contended by counsel for respondent that the great weight of authority upholds the right of the telegraph company to adopt

reasonable rules and regulations to govern the sending of messages, and to adopt rules and regulations such as the stipulation under consideration, fixing the liability of the company for delay or mistakes in the transmission or delivery of messages to the sum paid for sending the message, and that said stipulation is a reasonable one. In support of this contention, they cite, with other decisions, *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883; 14 Sup. Ct. Rep. 1098. In that opinion the court declares that telegraph companies are not common carriers, except in so far as they are obliged to serve all alike, and that they may protect themselves by stipulations similar to those under consideration in this case. The court said: "By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering, a message, whetler happening by negligence of its servants or otherwise."

That case involved the sending of a message which was in cipher and intelligible only to the sender and his agent to whom it was addressed. The court there holds that telegraph companies resemble railroad companies and other common carriers in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination; that they have a duty to the public, but that they are not common carriers; and that their duties are different and are performed in different ways; and that they are not subject to the same liabilities; and that, like common carriers, they cannot contract with their employers for exemption for liabilities occasioned by their own negligence, but that they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent; and whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier,—citing *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556.

In the *Primrose* Case, the court referred to the fact that the telegram did not impart to the telegraph company an important business transaction, and did not indicate that if it were not transmitted correctly, pecuniary loss might be incurred. In the case at bar, where it appears that the telegram was legibly written and delivered to the

operator, it did impart to the telegraph company that it concerned an important business transaction, and imparted notice to the company to the effect that pecuniary loss might result in case a mistake was made in correctly stating the price per hundred-weight of the cattle referred to. It was not like a cipher telegram, that was "nonsense" to the operator. In the *Primrose* Case stress is laid upon the fact that the telegram there involved was in cipher and unintelligible. The only mistake made in that telegram was the change of an "a" to a "u," the telegraphic character for an "a" being a dot and a dash, and for "u," two dots and a dash. In the telegram involved in the case at bar, the word "ninety" was changed to "twenty." The telegraphic characters for the word "ninety" are as follows: "- . . - . . - . . ."—and the word for "twenty" as follows: "- . - . - . - . . ." It will be observed from the foregoing that those words when written out in telegraphic characters are very different; and if the figures were used in sending said telegram, the characters for the figure "9" are "- . . -" and for the figure "2" "- . . . ;" and it was carelessness and negligence for an operator to either send or receive the word "twenty" for the word "ninety" in either figures or words.

Counsel also cites *Camp v. Western U. Teleg. Co.* 1 Met. (Ky.) 164, 71 Am. Dec. 461, where it was held that a person desiring to send a message is admonished by the notice printed across said message that, to guard against a mistake in transmission, it should be repeated. The court said: "He is also notified that if a mistake occur, the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition."

Counsel also cites *Western U. Teleg. Co. v. Carew*, 15 Mich. 525. The court there holds that it would be extremely unjust, considering the small amount of compensation for sending a message, and would effectually put an end to this method of correspondence, to hold them liable for the entire correctness of all messages transmitted; or to hold them responsible for all damages which may accrue from an error, especially when only a single transmission, without repeating, is relied upon or paid for; or to deny them all power to make rules and regulations to limit their liability even in the case of repeated messages; and the court says it would be equally unreasonable to require them to repeat a message when they are paid only for a single transmission. Some of the courts have based their decisions on the rule laid down in those cases.

The last two decisions were rendered, one in 1858 and the other in 1867, when telegraph

raphy was in its infancy, and in a very imperfect, uncertain condition, and messages could not be sent or received with the correctness and accuracy with which they are sent in the present day with the improved telegraphic machinery and appliances, and greater expertness of operators. The court in the latter case refers to the small amount paid for the transmission of a message, and it was evidently in the mind of the court that telegraph companies were poor, struggling corporations; but experience and history now bears out the statement that telegraph companies have become immensely rich on the "small stipend" charged for sending messages, which would indicate that they are charging a great deal more than it actually costs to transmit such messages, and to give them a fair return upon the capital invested in the business. The Michigan court, it seems, was mistaken when it suggested that to hold them liable "would effectually put an end to this method of correspondence," as it is shown that a number of the states have held telegraph companies liable, and it has not "effectually put an end to this method of correspondence," as it is used a great deal more at the present time than it ever was before, regardless of the courts holding it liable for damages arising because of its negligence. Telegraphy has been so perfected with its improved machinery, instruments, equipment, and appliances that, with competent and careful operators, telegrams may be sent with accuracy. That being true, telegraph companies should be held to a higher degree of care, fidelity, and diligence than could reasonably have been required of them at the dates when the last above-cited opinions were rendered, and they should be held to a higher degree of care in sending and delivering telegrams that involve the property rights of either the sender or receiver than perhaps they would be in social telegrams, or telegrams that do not involve property rights, and others of particular interest to the sender or receiver. While, under the decision of the United States Supreme Court above cited, a telegraph company is held not to be a common carrier, it is, however, a corporation doing business for the public, and must be held liable for damages arising from its own carelessness and negligence or the carelessness and negligence of its agents. While it may make rules and regulations in regard to the conduct of its business, the reasonableness or unreasonableness of such rules must be determined with reference to public policy, precisely as in the case of common carriers. Public policy is that principle of law under which freedom of contract or private dealing is restricted by law for the good of the community,—

the public good. 32 Cyc. Law. & Proc. p. 1251. A stipulation in a contract which exempts the corporation from damages for its own negligence is void, when applied to a telegraph company, as well as when applied to a common carrier.

In *Western U. Teleg. Co. v. Eubanks*, 100 Ky. 591, 36 L.R.A. 711, 66 Am. St. Rep. 361, 38 S. W. 1068, the supreme court of that state has clearly distinguished, if not reversed, the doctrine laid down in *Camp v. Western U. Teleg. Co. supra*, and there holds that a stipulation such as the one under consideration in this case, providing that unless the message is repeated, the company is not liable, is invalid, and says: "It is true that in *Camp v. Western U. Teleg. Co. supra*, the same or a similar stipulation as the one in question, as to the repetition of messages, was held to be valid, but that case was decided in 1858, and before the adoption of the present Constitution."

In the *Eubanks Case* the decision of the Supreme Court in *Primrose v. Western U. Teleg. Co. supra*, is referred to in the following manner by the court: "It is true that that decision upheld the stipulation in question as well as the stipulation in regard to cipher messages and obscure messages, but it is also true that Chief Justice Fuller and Mr. Justice Harlan dissented, and Mr. Justice White took no part in the decision. It will also be seen from the opinion that many courts of last resort had decided otherwise as to such stipulations,"—and then cites many other authorities holding that such stipulations are invalid.

In *Smith v. Western U. Teleg. Co.* 83 Ky. 112, 4 Am. St. Rep. 126, the court, in discussing the obligation of telegraph companies, said: "It is, however, a public agent; it exercises a quasi public employment; carefulness and fidelity are essentials to its character as a public servant, and public policy forbids that it should abdicate as to the public by a contract with the individual. He is but one of millions; his business will perhaps not admit of delay or contest in the courts, and he is *ex necessitate* compelled to submit to any terms which the company might see fit to impose; but the law should not uphold a contract under which a public agent seeks to shelter itself from the consequences of its own wrong and neglect. Its liability for neglect is not founded purely upon contract. It is chartered for public purposes; extraordinary powers are therefore conferred upon it; it has the power of eminent domain; if it did not serve the public, it could not constitutionally lay a wire over a man's land without his consent; and by reason of the gift of these privileges, it is required to receive

and transmit messages, and is liable for neglect, independent of any express contract. The public are compelled to rely absolutely upon the care and diligence of the company in the transaction of this business, so wonderful in its growth, so necessary to the life of commerce, and useful beyond estimate; and if it relies upon a notice or contract to restrict its liability, it must be one not in violation of public policy; and in view of the vast interests committed to a telegraph company, the extraordinary powers given it, and the virtual monopoly it almost necessarily enjoys, the court should compel it *nolens volens* to perform the corresponding duties of diligence and good faith to the public thereby created. Any other rule would defeat the very purposes for which these companies are chartered, to wit, the safe and speedy transmission of messages for the public; and while they may reasonably restrict their liability, yet they cannot do so as against their own negligence. They undertake to exercise a public employment which in many respects is analogous to that of a common carrier, and they must therefore bring to it that degree of skill and care which a prudent man would under the circumstances exercise in his own affairs; and any stipulation by which they undertake to relieve themselves from this duty, or to restrict their liability for its nonuse, is forbidden by the demands of a sound public policy. To hold otherwise would arm them with a very dangerous power, and leave the public comparatively remediless."

As holding or tending to hold that a telegraph company is liable for misconduct or negligence, regardless of said stipulation, see *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419; *Western U. Teleg. Co. v. Short*, 53 Ark. 434, 9 L.R.A. 744, 14 S. W. 649; *Western U. Teleg. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Western U. Teleg. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Western U. Teleg. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713; *Sweatland v. Illinois & M. Teleg. Co.* 27 Iowa, 433, 1 Am. Rep. 285; *Western U. Teleg. Co. v. Eubanks*, supra; *Ayer v. Western U. Teleg. Co.* 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495; *United States Teleg. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519; *Shaw v. Postal Teleg. & Cable Co.* 79 Miss. 670, 56 L.R.A. 486, 80 Am. St. Rep. 666, 31 So. 222; *Reed v. Western U. Teleg. Co.* 135 Mo. 661, 34 L.R.A. 492, 58 Am. St. Rep. 600, 37 S. W. 904; *Kemp v. Western U. Teleg. Co.* 28 Neb. 661, 26 Am. St. Rep. 363, 44 N. W. 1064; *Western U. Teleg. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339; *Postal Teleg. Cable Co. v. Robertson*, 36 Misc. 785, 74 N. Y. Supp. 876; *Brown v. Postal Teleg. Co.* 111 N. C. 187, 30 L.R.A. (N.S.)

17 L.R.A. 648, 32 Am. St. Rep. 793, 16 S. E. 179; *Western U. Teleg. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Aiken v. Western U. Teleg. Co.* 5 S. C. 358; *Kirby v. Western U. Teleg. Co.* 7 S. D. 623, 30 L.R.A. 621, 624, 65 N. W. 37; *Western U. Teleg. Co. v. Mellon*, 100 Tenn. 429, 45 S. W. 443; *Wertz v. Western U. Teleg. Co.* 8 Utah, 499, 33 Pac. 136; *Gillis v. Western U. Teleg. Co.* 61 Vt. 461, 4 L.R.A. 611, 15 Am. St. Rep. 917, 17 Atl. 736; *Western U. Teleg. Co. v. Reynolds Bros.* 77 Va. 173, 46 Am. Rep. 715; *Beatty Lumber Co. v. Western U. Teleg. Co.* 52 W. Va. 410, 44 S. E. 309; *Thompson v. Western U. Teleg. Co.* 64 Wis. 531, 54 Am. Rep. 614, 25 N. W. 789; *Western U. Teleg. Co. v. Cook* (C. C. A., Cal.) 9 C. C. A. 680, 15 U. S. App. 445, 61 Fed. 624; *Great Northwestern Teleg. Co. v. Laurance*, Rap. Jud. Quebec, 1 B. R. 1; also *Joyce, Electric Law*, 2d ed. §§ 681, 683-685, 689, 692, 701, 702, 707, 712.

In summarizing the diversity of decisions as to such stipulations by telegraph companies, that text writer (Joyce), in § 716, says: "It is evident from the preceding decisions that it is impossible to formulate any other than what might well be called a composite rule, and inasmuch as the state courts are showing a more decided inclination to adhere to their own precedents, it is doubtful whether, as against such precedents, a court would follow decisions of other state courts, even though they might be deemed to constitute what has been called the weight of authority."

Owing to the fact that many of the decisions which hold that the stipulation under consideration is valid and binding are based upon the decisions of *Camp v. Western U. Teleg. Co.* 1 Met. (Ky.) 164, 71 Am. Dec. 461, decided in 1858, and *Western U. Teleg. Co. v. Carew*, 15 Mich. 525, which was decided in 1867, and long before telegraphy had reached its present state of efficiency and accuracy, this court is not inclined to follow that line of decisions. Since a telegraph company is a public agent, exercising a quasi public employment, carefulness and fidelity are essentials to its character as a public servant, and public policy forbids that it should be released by its own rules or regulations from damages occasioned by its carelessness and negligence. It is chartered for public purposes; it has the power of eminent domain; the public are compelled to rely absolutely on the care and diligence of the company in the transmission of messages, and by reason of those powers and the relation it sustains to the public, it is obligated to perform the duties it is chartered to perform with the care, skill, and diligence that a prudent man would under like circumstan-

ces exercise in his own affairs; and if it fails to do so, it is liable in damages for such failure, and cannot restrict its liability by rule or regulation which attempts to excuse it for its own negligence. It is a public servant and must serve the people impartially, carefully and in good faith. We do not hold that the company is an insurer against mistakes or delays arising from causes beyond its own control, but it is liable for damages arising from the use of defective instruments or want of skill or care on the part of operators. A stipulation exempting it from liability for its own negligence would be contrary to public policy.

Some of the authorities hold that a telegraph company may adopt rules and regulations which legally exempt it from "ordinary negligence," but that they cannot make such rules or regulations that will shield or protect them from damages arising from "gross negligence." They draw a distinction between "ordinary negligence" and "gross negligence." Bouvier, in his Law Dictionary, defines negligence to be "the omission to exercise proper care and caution, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do." Mr. English, in his Law Dictionary, defines negligence to be the "omission to exercise proper care and caution; failure to perform a duty or doing it improperly," and the facts in such case must decide the degree of negligence. Thompson, on Electricity, § 186, referring to the different degrees of negligence, says: "Modern Judicial opinion is drifting toward the view that a division of care and correlatively of negligence into degrees is a matter too subtle and refined for the ordinary purposes of justice, and it has been well said that gross negligence is nothing more than negligence with an epithet."

The term "gross negligence" undoubtedly describes colloquially a greater degree of carelessness than the term "ordinary negligence," but the legal significance of the term is difficult to ascertain. In one view, "gross negligence" is deemed equivalent in law to fraud or to intentional wrong; in another, it is deemed exactly synonymous with ordinary negligence; while in a third, it is deemed to be applicable to those degrees of carelessness, whatever they may be, existent between ordinary negligence and wilful negligence or fraud. Gray, Communication by Teleg. § 37. And in § 38, the author says: "The doctrine that in legal contemplation there is no distinction between gross negligence and ordinary negligence has certainly not been adopted uniformly by the courts 30 L.R.A. (N.S.)

which have considered negligence on the part of a telegraph company."

In certain cases "gross negligence" is evidently deemed the equivalent in legal contemplation of "ordinary negligence." In many cases, however, "gross negligence" is used to denote a degree of carelessness greater than the degree implied by "ordinary negligence," and one of which the law takes distinct legal cognizance. It is thus used in those cases in which telegraph companies are permitted to limit their liability for losses occurring through their ordinary negligence, but at the same time are not permitted to limit their liability for losses occurring through their gross negligence. Unfortunately, in only one of these cases is an attempt made to define gross negligence, or a test offered to distinguish it from either ordinary negligence or fraud. In the rest of these cases, therefore, it is impossible to determine whether gross negligence is deemed to be synonymous with wilful negligence or fraud, or to be applicable only to those degrees of carelessness, whatever they may be, existent between wilful and ordinary negligence.

In the fourth volume of "Words and Phrases," pp. 3168, 3169, we find the following definitions of "gross negligence," supported by the many authorities cited there: "Gross negligence is the want of even a slight care and diligence." And again: "Gross negligence is the want of that diligence which even careless men are accustomed to exercise." And, "Gross negligence is the want of that care which every man of common sense, however inattentive he may be, takes of his own property," and "is nothing more than negligence with the addition of a vituperative epithet."

We shall not undertake to add anything to the numerous definitions cited of "negligence," and "gross negligence," but do hold that if damages occur by reason of mistakes made because of defective instruments or incompetent operators, or through carelessness or negligence that with ordinary care might have been avoided, the company is liable. And where it appears that the word "ninety" was erroneously transmitted "twenty," the company is liable, unless it can show that the mistake was made under circumstances and conditions over which it had no control. Telegraph companies must therefore be held to a greater degree of care than is included in "wilful negligence" or "fraud."

It is contended by counsel for respondent that the complaint does not allege negligence on the part of the company in making the mistake in sending said telegram, and for that reason does not state a cause of action. The sufficiency of the complaint,

however, was not challenged by demurrer or upon the admissibility of evidence, and was only raised upon the motion for a nonsuit. This, however, is not a ground for a nonsuit. Section 4354, Rev. Codes, provides that an action may be dismissed or a judgment of nonsuit entered on five separate grounds. None of the first four mentioned applies to the case at bar, but the fifth is applicable, and provides that the court upon motion may grant a nonsuit, if plaintiff fails to prove a sufficient case for the jury. It was evidently on that ground that the court sustained the motion for a nonsuit, and entered a judgment of dismissal, as it is virtually conceded the court held that said stipulation was valid. This court holds that the evidence introduced on the trial was sufficient to show negligence; in other words, to make a *prima facie* case, and as the judgment must be reversed and the cause remanded, the plaintiffs should be permitted to amend their complaint, if they desire to do so. If application had been made at the close of the trial, to amend the complaint to conform to the proof, the court no doubt would have granted the application, as, under the views expressed in this opinion, the plaintiffs made a *prima facie* case by the evidence introduced. Where a telegraph company fails to transmit a message correctly, the proof of that fact is *prima facie* evidence of the company's negligence. So, proof by the plaintiff of the contract, which may be implied by the delivery of the message to be transmitted and its acceptance by the defendant's agent, and of the breach, makes out a *prima facie* case, and the plaintiff need not go further and show any further negligence or omission of the defendant. *Jones, Teleg. & Teleph. Co. § 36.* If the failure was not the result of negligence, the means of showing that fact is almost invariably within the exclusive possession of the company, and for the courts to require the sender to prove the negligence, after showing the mistake, would be in many cases to require an impossibility, not infrequently resulting in enabling the company to evade a just liability. Section 36, *supra*, and authorities there cited.

We conclude that when the sender delivers a message to the agent of a telegraph company for transmission, and it is received by him for transmission, it is clearly implied and understood that the message must be correctly sent, and upon proof that it was not correctly sent, a *prima facie* case is made. Then if the mistake was not occasioned by incompetent operators or defective instruments, and was occasioned by the elements or some matter or thing over which the company had no control, it devolves upon the company to prove that as a matter

of defense. Therefore, when the plaintiff proved that said message was delivered to the agents of the company for transmission, and that they accepted it and made a mistake in its transmission, the plaintiff had made a *prima facie* case, and the court erred in granting a nonsuit and entering a judgment of dismissal.

It is also contended by counsel for respondent that the agreement for the sale of the cattle was made with the agent of the Colorado Live Stock & Commission Company, and that, by reason of that contract, the steers were shipped to said commission company, and that fact would render said company liable for the balance due on said steers, at the rate of \$3.95 per hundred-weight. There is nothing in that contention, for the reason that the appellants did not close the contract for the sale with White, but closed it with the commission company. The negotiation for the sale of the steers was begun with White, but appellants would not sell them until they communicated with the company by telegraph. In the reply telegram, the company stated that they would honor the draft if the cattle were billed to them. The contract was made directly with the commission company, and not with White, and on that state of facts the commission company could not be compelled to pay a greater price than it had agreed to pay as per its reply telegram.

The judgment is reversed and the cause remanded for further proceedings, in accordance with the views expressed in this opinion. Costs of appeal are awarded to appellant.

Stewart and Ailshie, JJ., concur.

A rehearing having been granted, **Ailshie, J.**, on June 28, 1910, handed down the following additional opinion:

A rehearing was granted in this case on that particular portion of the original opinion of the court, which holds that "the contract was made directly with the commission company, and not with White, and on that state of facts the commission company could not be compelled to pay a greater price than it had agreed to pay as per its reply telegram."

On the reargument of this case on the point submitted, the controversy has revolved about the legal proposition as to whether or not a telegraph company, in receiving and sending a message, acts as the agent of the sender. A determination of this question is necessary to a correct and proper understanding of the principle of law applicable in the determination of the case. We have made a very careful and somewhat extended examination, both of the

text writers and the court decisions on this question, and emerge from the investigation fully convinced that the authorities are irreconcilable on the question. This confusion, it seems to us, has arisen out of the endeavor on the part of the courts to determine just what particular settled and established rule of law is applicable, and should be invoked in dealing with an entirely new agency as applied in business and commerce. This is a difficulty which constantly confronts the courts. New inventions are constantly coming into use; new uses, both public and private, are coming into being; new methods and means of transacting and carrying on business are applied; and it is a problem fraught with too many difficulties and embarrassments, as the books will readily disclose, for the courts to apply, in every instance, the correct principle of law, so as to accomplish substantial justice to all concerned, and at the same time promote the public interests involved.

In the early days of communication by telegraph, when cases began to find their way into the English and Scotch courts, it was held by those courts that the law of agency did not apply, and that the company should not be treated as an agent of the sender of a message, but rather as an agency of the government. *Henckel v. Pape*, 40 L. J. Exch. N. S. 15, L. R. 6 Exch. 7, 23 L. T. N. S. 419, 19 Week. Rep. 106; *Allen, Teleg. Cas.* 567; *Verdin Bros. v. Robertson* (1871) 10 Sc. Sess. Cas. 3d series, 107; *Allen, Teleg. Cas.* 697. To the same effect see *Playford v. United Kingdom Electric Teleg. Co.* L. R. 4 Q. B. 706; *Allen, Teleg. Cas.* 437; *Dickson v. Reuter's Teleg. Co.* L. R. 2 C. P. Div. 62, L. R. 3 C. P. Div. 1, 24 Eng. Rul. Cas. 774. There the telegraph is under the control of the government and is operated in connection with the postoffice department (32 & 33 Vict. chap. 73), and the cases were apparently decided on the theory that the government is not responsible for the negligence, errors, or mistakes of its clerks and servants. In this country there seems to have been more or less diversity of opinion. Some of the cases, and especially the early cases, proceeding upon the implied, if not express, theory that the company is the agent of the sender, and that the law of agency is the rule of law to be applied in such cases.

Mr. Gray, in his work on *Communication by Telegraph*, written twenty-five years ago, at § 104, says: "While the employer of a telegraph company is responsible upon the words of a message as delivered, where they are the ones that he authorized, is he responsible upon them where, owing to the negligence of the company, they differ materially from the ones that he authorized? 30 L.R.A. (N.S.)

This question is answered in the negative in England and in Scotland. In this country, on the other hand, it is answered, as a general rule, in the affirmative. Courts have rarely considered at length the relationship between a telegraph company and its employer. The view that the employer of a telegraph company is responsible upon a negligently altered message has been rested, it seems, upon two different grounds: (1) A telegraph company is the agent of its employer; consequently, it renders the employer responsible upon any message which it delivers. (2) One who employs a telegraph company employs it to do a certain act,—to communicate a certain message; consequently, he is responsible for the torts of the company committed in the performance of that act. These grounds will now be considered separately and in order."

In a note to this section the author cites *Durkee v. Vermont C. R. Co.* 29 Vt. 127; *Saveland v. Green*, 40 Wis. 431; and *Wilson v. Minneapolis & N. W. R. Co.* 31 Minn. 481, 18 N. W. 291, with the following comment on those cases: "These cases overlook, it seems, the fact that a telegraph company, in delivering an altered message, does an act beyond the scope both of the authority which the employer actually delegates to it, and of the authority that he holds it out as possessing."

Subsequent to the issuance of Gray's work and in 1891, Judge Seymour D. Thompson issued his work on the *Law of Electricity*, and in § 480 says: "In England and Scotland, the idea that the telegraph company is the agent of the sender, to transmit his communication to the addressee, is repudiated." In § 481 he discusses and reviews the decision of the supreme court of Tennessee in *Pepper v. Western U. Teleg. Co.* 87 Tenn. 554, 4 L.R.A. 660, 10 Am. St. Rep. 699, 11 S. W. 783, and disapproves the holding, which he calls "*dictum*," in that opinion, and in § 482 the author says: "It is obvious, however, that the foregoing principle cannot be of universal application. Many cases will arise where the material fact will be, not what was the message which was delivered, but what was the message which was received. The party who originally sends an order by telegraph makes the telegraph company his agent for its transmission and delivery, and, as between himself and the person to whom it is addressed, he is bound by the message as delivered. It follows that where the legal rights of the receiver of the message founded upon an order transmitted therein are in question, he is entitled to put in evidence the message actually received as the original."

Some seventeen years later and in 1907,

Joyce & Joyce issued the second edition of their work on Electric Law, and in § 905 review the conclusion reached by the different text writers as follows: "Mr. Gray (Gray, Communication by Teleg. § 104, note 3) states the rule as holding nonagency of the telegraph company in England, and says that the rule here is *contra*, although he inclines to the English rule [see also Scott & J. Teleg. §§ 340, 341]. Judge Thompson (Thomp. Electricity, 1891 ed. §§ 483-487) holds to the rule which makes the sender who telegraphs a proposal bound by the terms of the message as delivered, on the ground of agency of the telegraph company. In other words, the sender must stand by the proposition embodied in the message as delivered by his agent, and sue the company for the damages he has sustained by its misfeasance; but he qualifies this by the rule that the party who first invites the use of the telegraphic agency impliedly undertakes to assume the risk of the telegraph company's mistakes. This author relies upon Ayer v. Western U. Teleg. Co. 79 Me. 493, 1 Am. St. Rep. 353, 10 Atl. 495; Western U. Teleg. Co. v. Shotter, 71 Ga. 760; Dunning v. Roberts, 35 Barb. 463, and Durkee v. Vermont C. R. Co. 29 Vt. 127, 140. Mr. Crosswell (Crosswell, Electricity, 1895 ed. §§ 684-687) notes substantially the English rule, and briefly considers the Georgia and Maine cases, and states no rule so far as we can discover."

Joyce & Joyce state their conclusion, in § 907, as follows: "We must confess that we believe there can be no logical deduction from the various principles involved, as to what should be the rule. The determination must contain some element of what is called a "moral" ground, or must be an arbitrary, absolute one. We favor, however, the rulings in the Tennessee and Mississippi cases, but admit there is much force in Judge Thompson's conclusion, although that conclusion might have been in accord with the Tennessee and Mississippi cases, if he had had these cases before him."

The American courts are by no means in harmony over this subject. Western U. Teleg. Co. v. Shotter, *supra*, decided in 1884, held unqualifiedly that the telegraph company is the agent of the sender of a message, and that if the message as actually delivered offers merchandise at a less price than the message as written by the sender offered, and the proposition is accepted, the sender is bound by the contract. This rule seems to have been uniformly adhered to by the Georgia courts. See Brooke v. Western U. Teleg. Co. 119 Ga. 695, 46 S. E. 826; Western U. Teleg. Co. v. Flint River Lumber Co. 114 Ga. 576, 88 Am. St. Rep. 36, 40 S. E. 815; Western U. Teleg. Co. v. Cooper, 30 L.R.A. (N.S.)

2 Ga. App. 376, 58 S. E. 517. The Shotter Case has been frequently cited and commented on by the courts and text writers,—sometimes with approval, sometimes with doubts or express disapproval.

The greater number of cases that have had occasion to consider the question of agency have arisen out of the introduction of evidence, or have in some way involved the question of either what constituted the original message or what was the best evidence. Cases dealing with the admission of evidence, or what constituted the best evidence, of the original message, are *Save-land v. Green*, *supra*; *Durkee v. Vermont C. R. Co.* 29 Vt. 127; *Howley v. Whipple*, 48 N. H. 487; *Morgan v. People*, 59 Ill. 58; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Barons v. Brown*, 25 Kan. 410; *Matteson v. Noyes*, 25 Ill. 591; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88; *State v. Hopkins*, 50 Vt. 316, 3 Am. Crim. Rep. 357; *Bond v. Hurd*, 31 Mont. 314, 78 Pac. 579, 3 A. & E. Ann. Cas. 566.

Pepper v. Western U. Teleg. Co. *supra*, decided by the supreme court of Tennessee in 1889, is perhaps the most widely cited, exhaustive, and well-considered American case to repudiate the doctrine that the company is the agent of the sender of the message. This case states the English rule, and reviews the American authorities, and indulges in some independent reasoning and consideration of the rule, and concludes that what is known as the American rule—that the company is the agent of the sender of a message—really rests on the single case of *Western U. Teleg. Co. v. Shotter*, *supra*. The court concludes by repudiating the agency rule, and holds the company as an independent principal.

In 1895 the supreme court of Mississippi was confronted with the same question, and in *Shingleur v. Western U. Teleg. Co.* 72 Miss. 1030, 30 L.R.A. 444, 48 Am. St. Rep. 604, 18 So. 425, cited, approved, and followed the *Pepper Case*, and held that a telegraph company is liable either to the sender or sendee of the message by reason of the delivery of an altered message—to the sender in contract or tort, and to the sendee in tort. This case holds that the liability of a telegraph company for incorrectly transmitting a message, and thus delivering an incorrect copy of the original, is that of an "independent principal" to either the sender or sendee, whichever may be injured thereby. The Mississippi court calls attention to the *Shotter Case*, and declines to follow it. To same effect, see the later case of *Western U. Teleg. Co. v. Potts*, 120 Tenn. 37, 19

L.R.A.(N.S.) 479, 127 Am. St. Rep. 991, 113 S. W. 789.

In 1901 the Kentucky court of appeals in *Postal Teleg. Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119, had under consideration the liability of the sender of a message to comply with the contract proposed by his message, where the message had been changed or altered in the transmission and delivered to the sendee in the changed form. The court reviews the authorities at some length, and then says: "This exact question was fully considered in the case of *Pepper v. Western U. Teleg. Co.* decided by the supreme court of Tennessee, and reported in 87 Tenn. 554, 4 L.R.A. 661, 10 Am. St. Rep. 699, 11 S. W. 783. In that case the court said, viz.: 'The minds of the party who sends a message in certain words, and the party who receives the message in entirely different words, have never met. Neither can, therefore, be bound the one to the other.' " To the same effect, see *Pegram v. Western U. Teleg. Co.* 100 N. C. 28, 6 Am. St. Rep. 557, 6 S. E. 770.

The case of *Germain Fruit Co. v. Western U. Teleg. Co.* 137 Cal. 598, 59 L.R.A. 575, 70 Pac. 658, is relied upon by respondent as authority for the contention that Strong & Stark could recover the full market value of this property from the commission company, notwithstanding the mistake in the telegram and that there was no meeting of the minds of the parties. In that case the plaintiff received a telegram from Cornforth & Company, of Denver, Colorado, asking for prices on oranges. The plaintiff thereupon sent the following message: "Offer Los Angeles, San Gabriel, Santa Anna oranges one fifty, Riversides two sixty." As received the message read: "Offer Los Angeles, San Gabriel, Santa Anna oranges one fifty, Riversides one sixty." Cornforth & Company immediately wired for two carloads of Riverside oranges, which were immediately shipped. After receiving the oranges they paid the fruit company "one sixty" per box, and refused to pay any more. The fruit company thereupon sued the telegraph company for the difference between the price quoted and that received under the altered message. The court cites no authorities, and does not consider the question of agency or whether there was a meeting of the minds of the contracting parties. That case turns wholly upon the finding of the trial court that Cornforth & Company knew that there was a mistake in the telegram, and that Riverside oranges were at that time current on the market at \$2.60 per box. The court held that Cornforth & Company were liable to the fruit company for the reasonable and market value of the fruit, which was \$2.60, and that, knowing 30 L.R.A.(N.S.)

that there was a mistake in the telegram, they were committing a fraud on the fruit company, and that the fruit company could have and should have recovered the full market price from Cornforth & Company. The case also inferentially holds that the fruit company could not waive its right to proceed against Cornforth & Company to collect the market value of the property, and thereby minimize the loss to all parties, and instead thereof sue the telegraph company for the difference, and allow the purchaser of the fruit "to get away with a fraudulently acquired advantage" in such a manner. That case turned upon the peculiar facts there involved, and contains no holding contrary to the general principle of law running through the cases heretofore considered. A consideration of this question of agency has been required, and its determination has been necessary, in order to ascertain whether the sender of a proposition to buy or sell is bound to the sendee, if his proposition is incorrectly delivered. If the company is his agent, then, of course, he is bound by the contract whether the proposition be delivered as given or not, and in such case the sendee would have to look to the sender for any damages he might sustain, while, if no agency exists, there would be no meeting of minds and no contract in a case where the company changed or altered the message making the proposition, and the sendee, if damaged by reason of the delivery of the changed or false message, would be relegated to his action in tort against the company for the wrong committed. If it should be conceded that the company is the agent of the sender of the message, that agency can in no sense extend to the change or alteration of the message. The agency would be special, and limited to the identical message authorized by the sender, and the sendee and everyone else has notice that the company has no authority from the sender to deliver to him or to anyone else an altered or changed message, or one in any manner different from the one filed in the transmitting office. See foregoing quotation from Gray's note to text; *Pegram v. Western U. Teleg. Co.* supra.

Our consideration of the authorities, and of the nature and character of the service rendered by a telegraph company, the public utility it serves, and the public character of its existence, and the franchise it enjoys,—all constrain us to hold that the law of agency is not applicable, and that the company cannot be properly held to be the agent of the sender of the message. A telegraph company should rather be treated as an independent principal or contracting party, and liable as other principals. These companies are in fact very similar to com-

mon carriers, and ought to be treated by the law as it deals with the common carrier. It is true, as said by many of the authorities, that the company is not expected to take the written message as delivered to it, and transport it on the same sheet of paper to the sendee, but that is not the test and is an evasion of the real question. What the sender of a telegraphic message wants and expects is that the words, figures, or characters of his message—not the paper containing them—shall be delivered to the sendee exactly as expressed by him, without change or alteration. He asks the company to become the transmitter or carrier of the inquiry, proposition, news, or intelligence contained in his message, and for this purpose makes the contract and pays the toll or rate established. This is the service of a common carrier. The only difference of any consequence which we can discover is that the telegraph company is not an absolute insurer of the literal accuracy of delivery of every message under all circumstances, yet in this the difference is not so great as was supposed twenty-five years ago. Indeed, the books disclose that telegraph companies were not held to anything like the degree of accuracy a few years ago as is now required of them, and this is at once apparent. Telegraphy had not been developed and perfected then to anything like the exactness, either mechanically or scientifically, that it is now.

Having determined that the telegraph company was not the agent of Strong & Stark, it follows that there was no meeting of the minds of the contracting parties as to the price for which the cattle were to be sold, and that Strong & Stark had a right to reclaim the same upon learning of the mistake made in the delivery of their proposition. They received a draft from White, the agent of the commission company, and shipped the cattle, and did not learn that any error had been made in the transmission and delivery of their message, until after the draft had been presented and the commission company had refused to pay any greater rate than \$3.25 per hundred. While there is no evidence in the record which shows just where the cattle were or what had become of them at the time Strong & Stark received the information of this mistake and the refusal of the commission company to pay \$3.95 per hundred, still it is apparent that they had already been shipped, and that they had very likely been received at the stock yards and perhaps sold, and possibly butchered. This, of course, is somewhat conjectural from the present record. It is clear, however, that the freight rates and expense of shipping had already been incurred, and that if the shippers should

have reclaimed their property, they had still incurred a large expense which they must necessarily take into consideration as prudent and reasonable men, if they should have refused to allow the commission company to retain the stock at \$3.25 per hundred, which the latter had promised and agreed to pay. Whatever damage and loss may have been sustained by the sellers of this property on account of the transaction is directly traceable to the tort committed by the telegraph company in delivering to the commission company an altered and false message. As said by the court in *Pepper v. Western U. Teleg. Co.* 87 Tenn. 571, 4 L.R.A. 663, 10 Am. St. Rep. 699, 11 S. W. 783: "They [Strong & Stark] were bound to have taken just such steps as a reasonably prudent man would take to save himself, had the mistake or error been his own. A man, under such circumstances, is not to be held to have done the wisest and best thing, but to the exercise of reasonable skill and diligence. Whether he so acted or not is a question of fact to be left to the jury under proper instructions by the court." The question would necessarily present itself to the sellers of the property the minute they learned of this mistake and of the condition under which the purchasers had accepted the proposition, as to what was the best thing to do in order to minimize the loss and damage,—whether it was better to let the purchasers take the property at the price they had proposed to pay, and then look to the tortfeasor (the telegraph company) for their damages, or to reclaim the property and seek another purchaser. It may have been impossible to reclaim the property, as it may have been used or consumed or so dissipated that it could not have been found or identified; or the expense of reclaiming it and securing another purchaser might have exceeded by far the difference between the price as named in the proposition and that named in the message as delivered by the telegraph company to the purchaser.

These questions are all proper matters to be submitted to the jury in ascertaining the damage to be awarded. These phases of the question are very clearly and learnedly discussed and considered in the closing portion of the *Pepper Case*. See *Hocutt v. Western U. Teleg. Co.* 147 N. C. 186, 60 S. E. 980, and cases there cited. Since this case must go back for a new trial, it is proper to say here that the measure of damages is not the difference between the price proposed in the telegram delivered by Strong & Stark to the respondent, and that given in the message as delivered to the live stock company. On the contrary, the measure of damages in this case would be the difference between

the market value of the property on the day of sending the telegram, and the price paid by the live stock company in accordance with the telegram as delivered to them. The price of \$3.95 as fixed in the telegram filed at Soda Springs may have indicated the correct market price on that day, but since there was no contract made and no meeting of the minds as to the price, it could not be said as a fact, in the absence of proof, that Strong & Stark could have procured this price for their property, nor can they say with any degree of certainty that the live stock company would have accepted the proposition, had the message been delivered quoting that price. It is true, as said in the Pepper Case, that this telegram might be taken as *prima facie* evidence that such was the market price on that day. *Western U. Teleg. Co. v. Crawford*, 110 Ala. 460, 20 So. 112; *Bowie v. Western U. Teleg. Co.* 78 S. C. 424, 59 S. E. 66; *Barker v. Western U. Teleg. Co.* 134 Wis. 147, 14 L.R.A.(N.S.) 533, 126 Am. St. Rep. 1017, 114 N. W. 440.

This brings us to the concluding and ultimate proposition for which the respondent contends in this case, and that is that a contract was in fact made between Strong & Stark and the live stock company independently of the communication by telegraph. White was apparently a purchasing agent for the commission company, and was at Soda Springs on the date this telegram was sent. He had been negotiating with the appellants concerning the purchase of this stock, and the state of the negotiations is given by Stark in his testimony as follows: "On or about the 6th day of March, 1907, we sold to the Colorado Live Stock & Commission Company a lot of cattle. We were negotiating the sale with W. L. White, who was agent for the Colorado Live Stock & Commission Company; he was acting as their agent; we agreed to sell the company quite a number of cattle, beef steers. I do not remember the weight of the steers, they weighed something near 1,000 pounds; we at this time agreed with this agent as to the price per hundredweight, that is to say, \$3.95 per hundredweight, this was net with 2 per cent shrinkage; I agreed with the agent on the price for the cattle, and then went and sent a message to the company to find out whether the agent was responsible or not." It will be seen that the appellants up to the time of sending the telegram had been negotiating with the commission company through the medium of their purchasing agent, White. They had apparently reached an agreement as to the terms and conditions of the sale, but the vendors of

the stock evidently had some question as to the authority of the agent in some or all respects, and so they sent the telegram set forth in the original opinion in this case. The commission company, on the other hand, instead of advising the vendors that they would abide by any agreement made by White, wired the vendors: "Will honor draft as per telegram if cattle are billed to us." The "telegram" referred to in this reply, as it had been delivered to the commission company, quoted the cattle at \$3.25 instead of \$3.95, as had been agreed upon by the vendors and White. This communication by wire taking place between Strong & Stark, the vendors of the property, and the commission company, the purchasers, was an attempt at abrogation or modification by the principals themselves of the contract which had been entered into by the principal on the one hand and the agent of the company on the other. It relegated the parties to the terms of the new or modified contract. It would be quite a different proposition had White been negotiating and contracting with the vendors of this property as a principal himself; in that case a contract would have been closed and consummated, but since he was dealing as an agent for a principal, and the party with whom he was dealing and his principal subsequently took up the negotiations themselves, they might cancel, affirm, or modify the contract, as they saw fit, and the subsequent affirmance, modification, or cancellation of the contract would be binding on both the principals. The principal could take the matter out of the hands of his agent either in whole or part, and if concurred in by the other contracting party, it would leave the two contracting parties to the new status to be fixed by them.

We conclude, therefore, that in this case the contract made between Strong & Stark on the one hand, as principals, and White on the other hand, as agent for the commission company, was subsequently abrogated by the principals themselves, and that, by reason of the tort committed by the telegraph company in altering the communication, there was finally no meeting of the minds of the contracting parties.

For the foregoing reasons, the original opinion in this case must stand as the opinion and judgment of the court. The judgment of the trial court must be reversed, and the cause remanded, with directions to grant a new trial. Costs awarded to appellant.

Sullivan, C. J., concurs.

KENTUCKY COURT OF APPEALS.

CHARLES PATTERSON'S ADMINIS-
TRATOR, Appt.,
v.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(138 Ky. 648, 128 S. W. 1068.)

Carrier — passenger on roof — injury — liability.

No recovery can be had for the death of one thrown by a jerk from the top of a car, on which he was riding in preference to riding with the crowd within, in the absence of anything to show that the jerk was so violent as to show want of proper care in the operation of the train.

(June 10, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Bell County in defendant's favor in an action brought to

Note. — Riding on top of car as contributory negligence.

As to the liability of the proprietor of a logging or other railroad used for private purposes for injuries sustained by other than employees, while being carried thereon, see *Harvey v. Deep River Logging Co.* 12 L.R.A. (N.S.) 131, and the note appended thereto.

Whether a passenger is guilty of contributory negligence in riding on top of a car depends largely upon the facts of each particular case; and in the following cases it was held that such conduct was not contributory negligence *per se*, so as to warrant taking the case from the jury:

—*Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62, 37 Am. Rep. 423. Although this case denied recovery for injury to a boy, riding on top of a freight car, in performing a service by direction of a brakeman, because of the latter's want of authority to bind the company, the court said: "If, by reason of an accident to the train, the plaintiff had been injured while simply riding on a freight car, the defendant would, on the record before us, be held liable, as it does not appear that the regulations of the company prohibiting passengers from riding elsewhere than in the caboose were conspicuously posted, as required by law;"

—*Gray v. Columbia River & O. C. R. Co.* 49 Or. 18, 88 Pac. 297, where an employee of a contractor whose contract called for carriage of his employees was riding to work on a tank car, with the consent of those in charge of the train, and was injured by a derailment;

—*Missouri P. R. Co. v. Callahan* (Tex.) 12 S. W. 833, where plaintiff, a cattle man, was obliged to get on top of the train after a stop, because the train started before he could reach the caboose, and he was struck

recover damages for the death of plaintiff's intestate, for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Leabow & De Busk and Henritze & Dawson for appellant.

Mr. Benjamin D. Warfield, for appellee:

In taking passage on a freight train, the passenger takes upon himself the additional risk, if any, in excess of the risks incident to a passage on the same railroad on a passenger train.

Ohio Valley R. Co. v. Watson, 93 Ky. 559, 19 L.R.A. 310, 40 Am. St. Rep. 211, 21 S. W. 244; *Louisville & N. R. Co. v. Morris*, 23 Ky. L. Rep. 448, 62 S. W. 1012; *Chesapeake & O. R. Co. v. Austin* (Ky.) 126 S. W. 144; 3 *Hutchinson*, Carr. 3d ed. § 1217.

Deceased should either have ridden inside one of the coaches or cars, or have stayed off the train, and abandoned his

by a water spout, as he was entering the caboose from the top;

—*Trinity Valley R. Co. v. Stewart* (Tex. Civ. App.) 62 S. W. 1085, where the plaintiff was riding to work as a passenger on a flat car which was being pushed ahead of the engine, and was injured by derailment of the car;

—*Mexican C. R. Co. v. Lauricella* (Tex. Civ. App.) 26 S. W. 301, where there was evidence that plaintiff was ordered out of the caboose, and took a position in a buggy on a flat car, which was derailed;

—*Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898, where a drover went upon the cars when ordered out of the caboose, and commanded by the conductor to do so, to ride to where another caboose would be attached, the only alternative being to let his cattle go on without him;

—*Chicago, M. & St. P. R. Co. v. Carpenter*, 5 C. C. A. 551, 12 U. S. App. 392, 56 Fed. 451, where a drover in charge of cattle mounted the train on its starting before he could reach the caboose, and started to walk back on top of the train, as was customary with cattle men, and was struck by a bridge; of which he had no knowledge or warning;

—*New Orleans & N. E. R. Co. v. Thomas*, 9 C. C. A. 29, 23 U. S. App. 37, 60 Fed. 379, where a cattle man rode on top of the car with the acquiescence of the train men, though such riding was prohibited by the company.

And in *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10, where plaintiff accompanied stock, and rode on top of the car by direction of the station agent, the court held that it was the duty of a passenger to occupy a seat inside the passenger car; and while, if he occupied an improper place by the conductor's permission, or with his acquiescence, this would exempt

trip, rather than have taken the risk of riding on top.

Louisville & N. R. Co. v. Sickings, 5 Bush, 9, 96 Am. Dec. 320; *Favre v. Louisville & N. R. Co.* 91 Ky. 546, 16 S. W. 370; *Kentucky C. R. Co. v. Thomas*, 79 Ky. 167, 42 Am. Rep. 208; *Clarke v. Louisville & N. R. Co.* 101 Ky. 34, 36 L.R.A. 123, 39 S. W. 840; *Morel v. Mississippi Valley L. Ins. Co.* 4 Bush, 537; *Shelton v. Louisville & N. R. Co.* 19 Ky. L. Rep. 215, 39 S. W. 842; 3 *Hutchinson*, Carr. § 1198; *Worthington v. Central Vermont R. Co.* 64 Vt. 107, 15 L.R.A. 326, 23 Atl. 590; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Meyere v. Nashville, C. & St. L. R. Co.* 110 Tenn. 166, 72 S. W. 114; 5 *Am. & Eng. Enc. Law*, 2d ed. pp. 678, 679; *Beach*, Contrib. Neg. § 149; *Goodwin v. Boston & M. R. Co.* 84 Me. 203, 24 Atl. 816; *Crawford v. Louisville & N. R. Co. (Ky.)* 122 S. W. 220; *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 147, 34 L.R.A. 141, 44 N. E. 1106; 4 *Elliott, Railroads*, § 1630.

Messrs. C. W. Metcalf and J. W. Alcorn also for appellee.

Hobson, J., delivered the opinion of the court:

On April 21, 1908, a special train was run from Middlesboro to Pineville, to take persons to a political convention held at

Pineville on that day. No fares were collected on the train, and, as everybody went free, there was a considerable crowd. The train consisted of three or four passenger cars, four or five cabooses, and four or five freight cars; there being in all fourteen cars in the train. The cars were full, and a number of persons were riding on the top of the train when it pulled out from Middlesboro. Pineville is 12 miles from Middlesboro, and the persons on top of the train were riding on top of the cabooses or the freight cars. Charles Patterson, a coal miner, twenty-two years old, was one of those on top of the cars. All went well until they reached Pineville. As the train was pulling into that station, it took up the slack, causing the rear cars of the train to jerk, and Patterson, who was riding on one of the rear cars, was by the jerk thrown therefrom, and fell into Straight creek, and was drowned. This action was brought to recover for his death; and at the conclusion of the evidence for the plaintiff, the circuit court instructed the jury peremptorily to find for the defendant. The plaintiff appeals.

Some ten or fifteen witnesses were introduced by the plaintiff. They were on the train and felt the jerk. The sum of their testimony is that there was a considerable jerk of the train, caused by the slack be-

him from blame, the burden of proof is on him to show that he took the position by direction of someone having authority to bind the company; and it not being an incident of the employment of the station agent to assign places in the train to passengers, the direction of such agent to plaintiff to ride on top of the car would not relieve him from contributory negligence.

But under the following circumstances, the courts held that there was such contributory negligence that, as matter of law, recovery would be precluded:

—where a passenger in charge of a car attempted to go to it over the other cars; at least, in the absence of a showing that this method was the usual and perhaps the only one. *Kimball v. Palmer*, 25 C. C. A. 394, 42 U. S. App. 399, 80 Fed. 240;

—where a passenger on an excursion train took a position on the edge of an open coal car, with his foot on a seat in front of him, so that he had no protection in case of a sudden jerk. *Jackson v. Crilly*, 16 Colo. 103, 26 Pac. 331;

—where one in charge of cattle had time to get into the caboose, but, instead, got on top of a freight car, and was injured as a result of this position. *Player v. Burlington, C. R. & N. R. Co.* 62 Iowa, 723, 16 N. W. 347;

—where a shipper's contract provided that he should remain in the caboose while the train was moving, and he was injured while voluntarily upon the moving cars. *Ft. Scott*, 30 L.R.A. (N.S.)

W. & W. R. Co. v. Sparks, 55 Kan. 288, 39 Pac. 1032;

—where plaintiff rode on top of a car after assisting a brakeman, and was injured when the cars were derailed, the court saying that he was not justified in taking a position on top of the car because the caboose was full. *Chaney v. Louisiana & M. River R. Co.* 176 Mo. 598, 75 S. W. 595;

—where plaintiff was riding on the top of the cupola of the caboose, from which he was thrown by the concussion of coupling. *Tuley v. Chicago, B. & Q. R. Co.* 41 Mo. App. 432;

—where plaintiff left the passenger coach, and took a position upon the top of the caboose, without any emergency making it necessary. *McLean v. Atlantic Coast Line R. Co.* 81 S. C. 100, 18 L.R.A. (N.S.) 763, 128 Am. St. Rep. 892, 61 S. E. 900, 1071;

—where plaintiff took a position with others upon the cupola of the caboose because the caboose was crowded, and was struck by a defective water pipe. *St. Louis Southwestern R. Co. v. Rice*, 9 Tex. Civ. App. 509, 29 S. W. 525.

And in *Illinois C. R. Co. v. Brown*, 77 Miss. 338, 28 So. 949, it was held that while the negligence of a drover in riding on top of the car would relieve the company from liability for ordinary negligence, it was not so relieved from the consequences resulting to the drover from its gross negligence, as disclosed by the evidence.

R. L. S.

ing taken up as it pulled up from Straight creek into the station. But, as there were fourteen cars in the train, and it was practically a freight train, on account of the number of cars that were in it, such a jerk was unavoidable, and was such as was fairly incidental to the operation of such a train when the slack was taken up. While there is some proof in the record that the train was operated roughly on the journey, the proof of all the witnesses as to what occurred at the time Patterson fell off is to the effect that the jerk was due to the taking up of the slack; that the train was pulling into the station, and was running at a reduced speed. There is nothing in the record to show that the jerk was greater than was incidental to the movement of such a train, or that it was due in any measure to a want of care on the part of those in charge of the train. There is nothing in the record to show that the jerk was more violent than should have been anticipated by a person of ordinary prudence, riding on such a train.

The plaintiff proved by one witness that he was on the station platform at Middleboro with a number of others; that, while they were standing around there, the conductor said to them, "Boys, crowd it, crowd the train, go to the top;" that the witness then went to the ladder and went up on top of one of the cars, and that Charles Patterson came up right behind him. It is insisted that, as Patterson went up on the cars in obedience to what the conductor said, he was not guilty of contributory negligence, in doing so, and that the company is therefore liable for his death. In support of this we are referred to the case of *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898. In that case a stock drover who had a right to transportation on a freight train which carried his cattle was riding in the caboose, and, when they had reached a certain point, the conductor, in the night, waked him up, telling him that they were going to leave the caboose there, and that he would have to ride to the next point on the top of the cars. He, at the request of the conductor, got on top of the cars, and thus rode about three fourths of a mile, when they undertook to couple the other caboose to the train, and, in making the backward movement, gave the train a terrible bump, which knocked the drover from the top of the car upon which he was riding. A recovery was sustained. But in that case the drover was

required by the conductor to get upon the top of the car. He had to do this, or let his cattle go on without him. He had entered upon his journey, and was entitled to transportation as a passenger. The conductor was wrong in requiring him to leave the caboose and get on top of the car. But here the conductor required nobody to get on top of the car. His language meant that they must crowd the train or go on top. He required nobody to go on top, and the deceased and his companions evidently went on top of the train because they thought it was pleasanter riding there than in the crowded cars. It is true the conductor knew they were up there, and acquiesced in their riding there, but he did not require them to ride there, and when they voluntarily rode on the top of such a train, they took the risk of such jerking and bumping as are fairly incidental to the operation of the train, run without negligence. The falling of the deceased from the train was due to the taking up of the slack when the train was not running at an unusual speed, and it does not appear that anything was omitted by those in charge of the train which they should have done. One of the plaintiff's witnesses, who was one of the companions of the decedent on the train, being asked how the men happened to be on the top of the cars, said: "Why, they just climbed up. I don't know that anybody said climb on top. They just commenced going on top, and it seemed that all the coaches were full. Now, I couldn't say rightfully that they were obliged to go on top, but they just like to ride on top. A great many men love to ride on the top of the train." There were, according to the evidence, about 100 men on the top of the train. Only two of them fell off. The deceased, like the others who were with him, evidently went to the top of the train because he preferred to ride there, rather than in the crowded cars. In doing so, he took the risk due to this mode of travel, and there can be no recovery here, in the absence of proof showing that the jerk from which he fell off was so violent as to show a want of proper care in the operation of the train. This does not appear. We therefore conclude that the death of the deceased was simply due to an accident from a risk which he had assumed in riding upon the top of the train, and that the circuit court properly instructed the jury peremptorily to find for the defendant.

Judgment affirmed.

**NORTH CAROLINA SUPREME
COURT.**

J. O. RICH, Appt.,
v.

ASHEVILLE ELECTRIC COMPANY.

(152 N. C. 689, 68 S. E. 232.)

**Proximate cause — defective street car
curtain — fall of conductor.**

1. The binding of the side curtain of a summer street car in the crevice in which it runs is not the proximate cause of injury to a conductor who, in collecting fares, attempts to raise the curtain to reach passengers in a seat behind it, and because it does not work properly falls from the car. **Same — disobeying statute — injury to servant.**

2. A street car company is not, although it is disobeying a statute in using a car without a vestibule in front in the winter time, liable for injury to a conductor who falls from the running board while attempting to raise a side curtain to collect a fare, since the injury was not one which should have been anticipated, and is therefore not the proximate cause of the wrongful act.

(Clark, Ch. J., dissents.)

(May 27, 1910.)

Note. — Liability of street railway company to employees for failure to perform statutory duty to provide vestibules on cars.

Upon employee's right of action for employer's violation of statute not expressly conferring the right, see note in 9 L.R.A. (N.S.) 376.

The foregoing case appears to be the only one passing squarely upon the liability of a street car railway company to its employees for failure to provide vestibules as required by statute. It is to be noted that the decision is based rather upon the fact that the failure to provide the vestibules was not the proximate cause of the injury, than upon the proposition that the company would not be liable if the injury had been the proximate result of the failure to perform its statutory duty.

It is interesting to note the conflicting views taken by the prevailing and the dissenting opinions. In the former, the statute is considered as being solely for the benefit of the motorman, so that the same style of car might have been so equipped as to have satisfied its requirements. In such a case, of course, the statute could not have benefited the plaintiff in any way. But in the dissenting opinion, it is said that the injury could not possibly have occurred had the defendant obeyed the statute, from which it may be inferred that a different style of car must necessarily have been used. Had the majority taken this view as to the style of the car required by 30 L.R.A. (N.S.)

A PPEAL by plaintiff from a judgment of the Superior Court for Buncombe County granting a nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Manning, J.:

The plaintiff sued to recover damages for injuries received by him on Sunday morning, December 3, 1905, between 10 and 11 o'clock A. M., while acting as conductor on one of the defendant's cars in Asheville. The plaintiff testified that he had been, prior to the injury, a conductor for three years; that he asked to be relieved of his regular run that morning, and to fill an extra man's run, which was to take cars empty to Riverside Park—a distance of about 3 miles—to bring the cadets of Bingham School into church; that when he reported to the car barn he found "signed up" on the bulletin board two open summer cars for this special run; that the weather was cold, something near freezing, a strong wind blowing from the north, cloudy and "spitting snow;" the thermometer had dropped from 49° Far. at midnight to 33° Far. between 10 and 11 A. M.; that the summer cars are not equipped with a vestibule,

the statute, a different conclusion as to the law might have been reached.

The decision in *RICH v. ASHEVILLE ELECTRIC Co.* finds some authority in the decision in *R. v. Toronto R. Co.* 21 Canadian Law Times, Occ. N. 120, as cited in the Digest of Canadian Case Law, in which it is suggested that a conductor, unless he is actually acting as motorman, is not an employee operating a car within the meaning of a statute of the same general effect as the one discussed in the *RICH* CASE.

In a number of cases it has been held that statutes requiring cars to be equipped during the winter time with vestibules or screens so as to protect the motorman or other person controlling the motive power propelling the car are valid as the reasonable exercise of the police power of the state. *State v. Smith*, 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068; *State v. Nelson*, 52 Ohio St. 88, 26 L.R.A. 317, 39 N. E. 22; *Beaumont Traction Co. v. State*, 46 Tex. Civ. App. 576, 103 S. W. 238.

In *Yonkers v. Yonkers R. Co.* 51 App. Div. 271, 64 N. Y. Supp. 955, an ordinance of the city of Yonkers containing similar provisions was held invalid upon the ground that the legislature had not given the city authority to pass such an ordinance.

In all of these cases the question arose upon the attempt of the state or city to enforce penalties for failure to obey the statute or ordinance. W. M. G.

but they have a glass front in the rear of the front platform, and in front of the rear platform; that the seats run across the car and at each end there is a roller curtain which can be pulled down or rolled up as the weather conditions require; that these curtains work in grooves cut in posts at the ends of each seat; that fastened on the outside of each post is a substantial stanchion for holding to as one walks or stands on the running board or step, which board or step runs lengthwise the car on either side, and is used by passengers alighting from or getting on the car, and likewise used by the conductor in going from one end of the car to the other, in collecting fares of passengers; that after reporting at the car barn on the morning of December 3d to Mr. White, the man in charge, he observed that the open cars were "signed up" for the run he was to make; that he complained and requested closed cars on account of the weather; that White told him he would see about it; that he, the plaintiff, looked around and saw three closed cars apparently in good order, and went to report to White, but he had gone, and the other car crews had left, so he took out the open car at 10:05 A. M. and proceeded on his run to Riverside Park; that he had no passengers and took on none; that he had his overcoat, but did not put it on, and stood on the rear platform; that his car made the trip to the park in about twenty minutes; the cadets got aboard, pulled down the curtains, certainly on one side of the car, and the plaintiff started his car back to Asheville; that the car had gone about 200 or 300 yards when he started to collect fares; that he had to roll up the curtain, which was done by a pull, when it rolled up by a spring; that the curtain caught and he jerked it with his right hand, his hand slipped off and either struck his left hand with which he was holding to a stanchion, or it being numbed with cold, slipped loose, and he fell from the running board, and received the injuries for which he sues to recover damages. At the conclusion of the evidence, his Honor allowed the motion, made under the statute, for judgment as of nonsuit, and the plaintiff excepted and appealed to this court.

Messrs. Frank Carter and H. C. Chedester for appellant.

Messrs. Martin & Wright, for appellee:

Plaintiff's fall was an accident, and being one which defendant would not reasonably anticipate, no liability attaches.

Lassiter v. Seaboard Air Line R. Co. 150 N. C. 483, 64 S. E. 202.

Only reasonable care was required of de-

fendant, and there was no evidence of a defect in the car.

Elliott, Railroads, 2d ed. §§ 1273-1275, 1343-1348.

Before the plaintiff could recover, he must show that the absence of the vestibule front was the proximate cause of his injury.

Shaw v. Highland Park Mfg. Co. 143 N. C. 131, 55 S. E. 433.

Manning, J., delivered the opinion of the court:

Construing the evidence in the view most favorable to the plaintiff, as we must do under the uniform rulings of this court, where the motion for judgment as of nonsuit is allowed, we are not convinced that his Honor committed error in allowing the motion. In speaking of an injury occurring to the plaintiff, in *House v. Southern R. Co.* 152 N. C. 397, 67 S. E. 981, where the plaintiff, a servant of the defendant, employed to clean its cars and wash its windows, was injured by attempting, with unusual force, to raise a window which had become tight in the sash, when her hand slipped, broke through the glass, and was severely cut, Mr. Justice Hoke said: "We have repeatedly decided that an employer of labor is required to provide for his employees a reasonably safe place to work, and to supply them with implements and appliances reasonably safe and suitable for the work in which they were engaged. As stated in *Hicks v. Naomi Falls Mfg. Co.* 138 N. C. 319-325, 50 S. E. 703, 705, and other cases of like import, the principle more usually obtains in the case of 'machinery more or less complicated, and more especially when driven by mechanical power,' and does not, as a rule, apply to the use of ordinary everyday tools, nor to ordinary everyday conditions, requiring no special care, preparation, or provision, where the defects are readily observable, and where there was no good reason to suppose that the injury complained of would result. The reason for the distinction will ordinarily be found to rest on the fact that the element of proximate cause is lacking,—defined in some of the decisions as 'the doing or omitting to do an act which a person of ordinary prudence could foresee would naturally or probably produce the injury.' *Brewster v. Elizabeth City*, 137 N. C. 392, 49 S. E. 885. These windows not infrequently become tightened from different causes, and, while it may be a great inconvenience, and should perhaps be given more attention than it receives, no one would say that an injury of this character would ordinarily arise or be likely to ensue, and therefore no actionable wrong has

been established." This case, we think, is decisive of the point presented in the present case, as to the tightening of the curtain which plaintiff was attempting to roll up. No one would say that the injury which plaintiff received—falling from the running board or step—would ordinarily arise or be likely to ensue from this cause. No reason is given, nor does any appear, why the plaintiff, as he had charge of the car, did not examine these curtains before leaving the barn, if he had apprehended any injury as likely to ensue to him from their becoming tightened in the grooves, as such a condition was readily observable. The liability of the defendant, however, was urged before us chiefly upon the ground that it was operating a car for passengers on its line in violation of §§ 2615, 3800, Revisal, which provides that "all street passenger railway companies shall use vestibule fronts. . . on all passenger cars run by them on their lines during the latter half of the month of November, and during the months of December, January, February and March of each year. . . . Provided, further, such companies may use cars without vestibule fronts in cases of temporary emergency in suitable weather," etc. While the evidence does not disclose any causal connection between the failure to use the vestibule front on the car the plaintiff was using and the injury received by him, or that defendant's failure to provide a vestibule front was an act which a person of ordinary prudence could foresee would naturally or probably produce the injury complained of, yet it is insisted by the plaintiff that the running of a passenger car without the vestibule front was forbidden by statute, and constituted negligence, for which the defendant is liable to plaintiff. In *Henderson v. Durham Traction Co.* 132 N. C. 779, 44 S. E. 598, this court said: "After a careful examination of a number of authorities, we are of the opinion that the sound doctrine is that a violation of the public statute or a city ordinance is evidence of negligence, to be submitted to the jury. 'It is generally held, and this we regard as the true doctrine, that the element of proximate cause must be established, and it will not necessarily be presumed from the fact that a city ordinance or statute has been violated. Negligence, no matter in what it may consist, cannot result in a right of action unless it is the proximate cause of the injury complained of by the plaintiff.' Elliott, Railroads, § 711." This case has been approved in *Cheek v. Oak Grove Lumber Co.* 134 N. C. 225, 46 S. E. 488, 47 S. E. 400.

In *Leathers v. Blackwell Durham Tobacco Co.* 144 N. C. 336, 9 L.R.A. (N.S.) 340, 30 L.R.A. (N.S.)

57 S. E. 11, Mr. Justice Connor, speaking again for this court, reviewed in an elaborate opinion the whole doctrine, and quoted with approval, as expressing the conclusion reached by the best-considered authorities, the following language from Thompson on Negligence, vol. 1, § 10: "When the legislature of a state or the council of a municipal corporation, having in view the promotion of the safety of the public or of individual members of the public, commands or forbids the doing of a particular act, the general conception of the courts, and the only one that is reconcilable with reason, is that a failure to do the act commanded, or doing the act prohibited, is negligence as mere matter of law, otherwise called negligence *per se*; and this, irrespective of all questions of the exercise of prudence, diligence, care or skill, so that if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor, and all that remains is to assess his damages." The conclusion of this court is thus stated in that opinion: "Upon careful consideration, we conclude that the law is correctly laid down by Judge Thompson and the other authors quoted, and sustained by the best-considered decided cases. . . . While it is true that if there be any dispute regarding the manner in which the injury was sustained, or if, upon the conceded facts, more than one inference may be fairly drawn, the question should be left to the jury, yet it is equally well settled that when there is no dispute as to the facts, and such facts are not capable of more than one inference, it is the duty of the judge to instruct the jury, as a matter of law, whether the injury was the proximate cause of the negligence of the defendant." *Rolin v. R. J. Reynolds Tobacco Co.* 141 N. C. 300, 7 L.R.A. (N.S.) 335, 53 S. E. 891, 8 A. & E. Ann. Cas. 638. Again, this court was called upon to consider the question in *Starnes v. Albion Mfg. Co.* 147 N. C. 556, 17 L.R.A. (N.S.) 602, 61 S. E. 525, 15 A. & E. Ann. Cas. 470, and, speaking through Mr. Justice Brown, said: "As to the second contention, it is decided squarely against the defendant in the recent case of *Leathers v. Blackwell Durham Tobacco Co.* supra, where it is held not only that a cause of action accrues to the child, if injured, but that it is negligence *per se*, and not merely evidence of negligence, to violate the statute. [Revisal 1905, § 3362.] . . . This brings us to consider defendant's third contention, a matter not fully determined in the *Leathers Case*, and which may be thus stated: That the plaintiff cannot recover, because the employment of him, although wilfully and knowingly done in violation

of the statute, was not the proximate cause of this injury, inasmuch as he did not receive the injury while in the discharge of the duties to which he was assigned." After reviewing the evidence in that case tending to show that the violation of the statute was the proximate cause of the injury received, the court proceeded: "We do not mean to hold that the employer violating the act would be liable in damages for every fatality that might befall the child while in its factory. For instance, had the plaintiff died of heart disease, or from a stroke of paralysis, or been seriously injured by the wilful and malicious act of a workman in knocking him against a machine, or injured from some cause wholly disconnected from the unlawful employment, the defendant could not be held liable in damages simply on account of the employment in violation of the statute. But we do hold that the employment, when wilfully and knowingly done, is a violation of the statute, and that every injury that reasonably and naturally results is actionable. In this case, the connection between the employment and the injury is that of cause and effect, and brings the defendant within the operation of the statute." *Fowle v. Atlantic Coast Line R. Co.* 147 N. C. 491, 61 S. E. 262. It seems to us that the principle is clearly settled by this court in the cases cited, that while the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, he must show a causal connection between the injury received and the disregard of the statutory prohibition or mandate,—that the injury was the proximate cause, and this requirement is fundamental in the law of negligence. In the present case, there is an entire absence of evidence tending to show such causal relation, but on the contrary the plaintiff's evidence negatives it. If we suppose the car equipped with a vestibule front, as required by statute, and the open cars are so equipped in many parts of the country, what causal connection existed between the injury and the negligence, or how could the failure to have a vestibule front be reasonably inferred as the proximate cause of plaintiff's injury? Besides, the manifest purpose of the statute, considered in the *Leathers Case* and the *Starnes Case*, being the statute forbidding the employment of children under twelve years of age in manufacturing establishments (Revisal 1905, § 3362), was not only to protect children of such tender years and immature judgment from injuries likely to ensue from their coming in contact with machinery, but their health from injury by such close confinement, as pointed out in *Rolin v. R. J. Rey-* 30 L.R.A. (N.S.)

nolds Tobacco Co. supra; while the manifest purpose of the statute in the present case was to protect the motorman (not the conductor) from unnecessary exposure to the weather while performing his duty. It will be observed that the statute does not require any particular kind or make of car to be used, but refers only to its equipment. The same necessity for showing the causal or proximate relation between the injury and the alleged negligence is recognized as essential in *Troxler v. Southern R. Co.* 124 N. C. 189, 44 L.R.A. 313, 70 Am. St. Rep. 580, 32 S. E. 550, and the numerous cases citing and approving that decision; for as is said in that case, "where the negligence of the defendant is a continuing negligence (as the failure to furnish safe appliances, in general use, when the use of such appliances would have prevented the possibility of the injury) there can be no contributory negligence which will discharge the master." And the second headnote in *Biles v. Seaboard Air Line R. Co.* 139 N. C. 528, 52 S. E. 129, thus states the principle: "In an action against the defendant railroad, if the jury should find that the plaintiff, while in the performance of his duty, was injured, as the proximate consequence of a defective engine or defective appliance, then the defense of assumption of risk is not open to the defendant, by reason of the fellow-servant act." We have found no case in which the plaintiff was not required to show that his injury was the proximate consequence of the defendant's negligence; even in those cases where the doctrine of *res ipsa loquitur* applies, this causal or proximate relation is sufficiently shown by the act itself, and is inferred from the act from which the injury results. The evidence of the plaintiff, construed in the view most favorable to him, failing to show this causal or proximate relation between the injury received and the negligence of the defendant, we must hold that the judgment of nonsuit was properly rendered, and it is affirmed.

Clark, Ch. J., dissenting:

Two sections of the Code, 2615 and 3800, forbade the defendant to use the summer car (which has no wind shields) at the time it did,—in December,—and the latter section made it a misdemeanor. In *Leathers v. Blackwell Durham Tobacco Co.* 144 N. C. 330, 9 L.R.A. (N.S.) 349, 57 S. E. 11, this court expressly repudiated the doctrine that the violation of a statute was merely "evidence of negligence," and held that such conduct was "negligence *per se*." Connor, J., pages 345-348 of 144 N. C., citing a wealth of authorities to that effect. He thus summed up: "Upon careful considera-

tion, we conclude that the law is correctly laid down by Judge Thompson and the other authors quoted, and sustained by the best-considered decided cases." That case was well considered and is based upon numerous authorities of great weight. A due consideration for the dignity and consistency of our own decisions requires that we adhere to what was there said, after so great deliberation. Even if an unlawful act is only evidence of negligence, that would entitle the plaintiff to have the injury committed in the perpetration of the unlawful act submitted to the jury. If one is engaged in an unlawful act and unintentionally or accidentally slays another, he is not absolved from responsibility, but it is manslaughter. *State v. Vines*, 93 N. C. 493, 53 Am. Rep. 466; *State v. Hall*, 132 N. C. 1107, 44 S. E. 553. If one while engaged in doing an unlawful act injures another, it is certainly negligence. The defendant was violating the law and in the commission of a misdemeanor in running the car. The injury to the plaintiff could not possibly have occurred if the defendant had not disobeyed the statute. There was no evidence of contributory negligence, —though the burden to prove that was upon the defendant, —and it was necessarily error to withdraw the case from the jury.

Aside from the statute, it was negligence for the defendant in midwinter, with the temperature down to freezing and a strong wind blowing from the north, cloudy and "spitting snow," to refuse the plaintiff's request for a closed or winter car, of which there were three, at least, idle under the shed, ready for use. It was in violation of the ordinary dictates of humanity as well as of the statute to require the plaintiff to take instead an open summer car in such weather on a run of 3 miles out beyond the city limits and back. The plaintiff, in the regular winter car which could and should have been given him as he requested, would have been protected in the aisle, from the weather while collecting the fares, and could not have slipped and been hurt. As it was, the curtains being let down to protect the passengers, the plaintiff was obliged to dodge along, under one curtain after another, which he had to lift so that he could collect the fares. While doing this he had to walk along the running board, which was slippery, for it was "spitting snow," and his hands being numb with cold, and the strong north wind blowing the curtains, his hands slipped when trying to raise a curtain which was "caught." The plaintiff in consequence fell off the running board and was hurt.

The facts not being denied, and the law fixing the defendant with negligence, the judge might well have held as a matter of 30 L.R.A. (N.S.)

law that such negligence was the proximate cause of the injury. Certainly he should not have denied the plaintiff the right to have a jury pass on the question. The exposure by the defendant to such weather, unnecessarily and over his protest, was more than negligence. It was inhumane. The statute made the conduct of the company a misdemeanor, even if no harm had accrued to the plaintiff.

The plaintiff, in my judgment, has a right to have a jury, instead of the judge, to pass upon his issues. Employees are entitled to protection from such heedless disregard of their comfort and safety as was shown on this occasion, and are surely entitled to recover for injuries which a jury shall find was sustained from such cause.

OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Plff. in Err.,
v.

GEARY L. NEWBURN.

(— Okla. —, 110 Pac. 1065.)

Carrier — ticket — signature — waiver.

1. Plaintiff purchased a first-class, round-trip, nontransferable ticket, which contained on its face a requirement that he must sign it in ink, and a proviso that, if presented for passage by other than the original purchaser, the same was void; also, a line for his signature, with a line for the signature of the agent, as witness. Without being signed, said ticket was honored for plaintiff's going passage. On his return, he was

Headnotes by DUNN, Ch. J.

Note. — Carriers: waiver of requirement of signature of ticket or coupon.

While the cases involving the question presented by *CHICAGO, R. I. & P. R. Co. v. NEWBURN* are not numerous, they sustain the position taken by the court in that case.

Thus, in *Elser v. Southern P. Co.* 7 Cal. App. 493, 94 Pac. 852, it was held that a requirement that the ticket be signed by the purchaser was waived where one party purchased a ticket for another, and, on the request of the agent, signed the other party's name, so that the latter was unable to identify himself by signing his name when requested to do so by the conductor.

And in the similar case of *Mexican C. R. Co. v. Goodman* (Tex. Civ. App.) 43 S. W. 580, it was held that plaintiff, a married woman, was entitled to ride on a ticket which her husband purchased for her, and to which he signed his own name, on being assured by the selling agent that that would be sufficient.

In *Southern P. Co. v. Bailey* (Tex. Civ.

ejected from the train because said ticket was not signed. There was no evidence showing plaintiff had refused to sign the same. Held, even if essential to the validity of the ticket, plaintiff's signature was waived by the company, and his ejection was wrongful.

Damages — exemplary — act of agent.

2. Under the decisions controlling in the Indian territory, exemplary or punitive damages were not allowable against the principal, unless the evidence showed that the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct, authorizing or approving it, either before or after its commission; and where there is a total absence of such evidence, an instruction authorizing a jury to allow plaintiff such damages is erroneous.

Same — ejection of passenger — loss of time.

3. In an action by a passenger for wrongful ejection from a train, plaintiff's loss of time cannot be considered in assessing his damages, in the absence of evidence as to the value of his time.

(July 12, 1910.)

ERROR to the District Court for Le Flore County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. Reversed.

The facts are stated in the opinion.

App.) 91 S. W. 820, it was held that plaintiff was entitled to ride on a ticket purchased and signed by a daughter, whose description was put on the ticket, instead of the mother's, by the agent, who was informed who the ticket was for, and said it would be all right that way.

In *Kent v. Baltimore & O. R. Co.* 45 Ohio St. 284, 4 Am. St. Rep. 539, 12 N. E. 798, where an agent, in selling a mileage book, did not require the purchaser to sign his name on the back thereof, though such were his instructions and the usual custom in selling such books, and the book was recognized by several conductors as valid before plaintiff was finally ejected, it was held that the requirement that the book be signed was waived.

In *Gregory v. Burlington & M. River R. Co.* 10 Neb. 250, 4 N. W. 1025, recovery for ejection was permitted where plaintiff purchased a reduced-rate, round-trip ticket, and the agent at the destination point refused to validate the ticket for return because it was not signed by plaintiff originally, it not appearing that he was directed or requested to sign when he purchased the ticket.

And in *Head v. Georgia P. R. Co.* 79 Ga. 358, 11 Am. St. Rep. 434, 7 S. E. 217, where the ticket was signed in the wrong place, under the direction of the selling agent, it was held that plaintiff could recover for being ejected because of that fact. 30 L.R.A. (N.S.)

Messrs. C. O. Blake, Thomas R. Beman, and Stuart & Gordon, for plaintiff in error:

The fact that the plaintiff rode on the going portion of the ticket would not estop the defendant, by its conductor, on the train from which plaintiff was ejected, from asserting the invalidity of the ticket for transportation.

Poulin v. Canadian P. R. Co. 17 L.R.A. 800, 3 C. C. A. 23, 6 U. S. App. 298, 52 Fed. 202; *Bowers v. Pittsburgh, Ft. W. & C. R. Co.* 158 Pa. 302, 27 Atl. 893; *Boylan v. Hot Springs R. Co.* 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. Rep. 50; *Dangerfield v. Atchison, T. & S. F. R. Co.* 62 Kan. 85, 61 Pac. 405; *Thorp v. Concord R. Co.* 61 Vt. 378, 17 Atl. 791; *Watson v. Louisville & N. R. Co.* 104 Tenn. 194, 49 L.R.A. 454, 56 S. W. 1024; *Hanlon v. Illinois C. R. Co.* 109 Iowa, 136, 80 N. W. 223; *Clark v. Great Northern R. Co.* 31 Wash. 658, 72 Pac. 477.

The acceptance of a special-contract ticket by the purchaser binds him to the conditions thereof, even though he fails to sign it.

Drummond v. Southern P. Co. 7 Utah, 118, 25 Pac. 733; *Abram v. Gulf, C. & S. F. R. Co.* 83 Tex. 61, 18 S. W. 321; *New York, L. E. & W. R. Co. v. Bennett*, 1 C. C. A. 544, 6 U. S. App. 95, 50 Fed. 496; *Gulf, C. & S. F. R. Co. v. Daniels* (Tex. Civ. App.) 29 S. W. 426; *Rahilly v. St. Paul &*

But where plaintiff refused to sign the ticket when requested to do so by the selling agent, it was held that the requirement was not waived by the fact that the agent sold it without such signature, and that a conductor was justified in putting plaintiff off the train on his refusal to sign, though other conductors had recognized the ticket for passage. *Ketcheson v. Southern P. Co.* 19 Tex. Civ. App. 288, 46 S. W. 907.

In *Dangerfield v. Atchison, T. & S. F. R. Co.* 62 Kan. 85, 61 Pac. 405, where a ticket which required that the purchaser sign it, and that he be identified before the return trip, was purchased from a broker by another party, it was held that he was properly refused passage, and the fact that the selling company did not require the original purchaser to sign the ticket did not waive its provisions or make the ticket transferable.

And in *Comer v. Foley*, 98 Ga. 678, 25 S. E. 671, where a company was authorized to sell tickets in Chicago for Jacksonville, Florida, and return, partly over defendant's road, the tickets to be signed by the purchaser and witnessed by the selling agent, it was held that such company could not bind defendant by selling the return coupons of unsigned tickets with the signature of its agent as witness thereon, to be filled in with the name of the purchaser.

R. L. S.

D. R. Co. 66 Minn. 153, 68 N. W. 853; Hanlon v. Illinois C. R. Co. supra; Walker v. Price, 62 Kan. 327, 84 Am. St. Rep. 392, 62 Pac. 1001.

It was the purchaser's duty to read the ticket, and to know that the conditions imposed thereby were complied with.

Reed v. Texas & N. O. R. Co. (Tex. Civ. App.) 50 S. W. 432; Watson v. Louisville & N. R. Co. 104 Tenn. 194, 49 L.R.A. 454, 56 S. W. 1024.

Mr. T. T. Varner for defendant in error.

Dunn, Ch. J., delivered the opinion of the court:

This action was begun in the United States court for the central district of the Indian territory, sitting at Poteau, in January, 1907, by Geary L. Newburn, defendant in error, hereafter called "plaintiff," against the plaintiff in error, to recover the sum of \$2,000, for damages for an alleged wrongful ejection from a train of defendant on December 13, 1906, at a point between McAlester and Haileyville, in what was then Indian territory. To the complaint defendant filed its answer, consisting of a general and specific denial of all the material allegations contained therein. The cause was tried January 2, 1908, and the jury returned a verdict for plaintiff in the amount prayed for. The evidence showed that plaintiff purchased a first-class, round-trip ticket at Poteau on the line of the St. Louis & San Francisco Railway Company, over that line and the Chicago, Rock Island, & Pacific Railway Company, to South McAlester and return, the ticket on its face, among other things, containing a provision that it was not transferable, and that it "must be signed in ink by the person who is to use it, and if presented for passage by other than original purchaser, or if it shows any alterations, by erasures or otherwise, or more than one date or route is designated, it shall be void, and conductor will refuse to honor, and will take up and collect full fare;" also, an agreement on the part of the purchaser to be governed by all the conditions as stated in the contract, which it recites are fully understood. Immediately following thereafter was a line with "signature for original purchaser" printed beneath, and another line with the word "witness" printed above, and the word "agent" beneath. Plaintiff testified that he used the ticket in going to McAlester, and that on his return, at some point between McAlester and Haileyville, the conductor asked him for his ticket; that he showed the same to him, and the conductor said the ticket was not good, and demanded cash fare; that he then left him until he had collected the tickets and fares through-

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out the balance of the train, when he returned and told him that he must either pay his fare or get off the train; that after talking a while he was grabbed by his shoulder and pushed out of the car door, and after stepping off the car he was given a push and fell, hurting his leg. The testimony of plaintiff stands alone on what took place at the time of his ejection. The conductor, brakeman, and porter all testified that they never saw the plaintiff, that the train did not stop at the time or place where he stated that it did, and that he was not ejected. This evidence was also corroborated by the testimony of the train despatcher, who showed that by his records no reports of any such occurrence had been made to him, although it was the duty of the train operative to make them. As the plaintiff does not testify that the conductor assigned any reason for ejecting him, the record is silent on this proposition; but counsel for defendant, though relying and insisting upon the proposition that the testimony of plaintiff as to his having been ejected is false, assert that, by reason of the fact that plaintiff had failed to sign the ticket, the same was void, and that, even had he been ejected after having refused to pay fare, as stated, the action on the part of the train operative was legal, and that plaintiff had no cause of action; hence the question is raised whether or not plaintiff could be lawfully ejected from the train for the sole reason that the ticket which he held, containing the terms above set forth, had not been signed by him. Plaintiff asserts, and it is not denied, that he was the original purchaser of the ticket, and his possession of it carried with it the presumption of ownership. The manifest purpose requiring it to be signed was to render it nontransferable, and to identify the purchaser, and the mere absence of the signature would not render it void. Walker v. Price, 62 Kan. 327, 84 Am. St. Rep. 392, 62 Pac. 1001; Gregory v. Burlington & M. River R. Co. 10 Neb. 250, 4 N. W. 1025; Kent v. Baltimore & O. R. Co. 45 Ohio St. 284, 4 Am. St. Rep. 539, 12 N. E. 798.

The company sold plaintiff the ticket to enable him to take passage thereon. It could not with reason accept his money and give to him a contract which its agent knew was void. The requirement of the signature was for the benefit of the company. It was beneficial to it that no one but the purchaser should use the ticket, and the time when that fact was intended to be made manifest was at the time of its purchase. This is clear, not only from conditions surrounding and existing in the transaction, but from the fact that the

face of the ticket itself shows that the agent was expected to witness the purchaser's signature. It may be said to be a matter of common knowledge that passengers purchasing tickets state to ticket agents their route and destination, and rely largely on the agents to supply them with tickets meeting their requirements. And certainly it cannot be said to be a reasonable and just rule which would permit the agent of a company to sell and deliver to a passenger a ticket in such condition that the same will be refused and the passenger ejected on its presentation. If, under the facts in this case, the signing of this ticket was essential to its validity, the time to have required that was when the company took plaintiff's money for transportation; and it was too late to insist upon this right under the contract after plaintiff had boarded the train, and was taking passage on the return part thereof. In other words, the company cannot accept and keep plaintiff's money, and then refuse to carry him because of an oversight of this character on the part of one of its agents. In the condition that this record comes to us, the plaintiff's evidence must be taken as true. He was the original purchaser, and, under the circumstances, his ejection from the train was wrongful. In a similar case, the supreme court of Ohio, in the case of *Kent v. Baltimore & O. R. Co.* supra, said: "According to the company's instructions to agents, and by the uniform custom regulating the sale of such tickets, they were required to be signed before their delivery to the purchasers. The company saw fit, in the case at bar, to dispense with this requirement. It received the plaintiff's money, delivered him the ticket, in his ignorance of any request that he sign it, honored it for several trips without first requiring him to sign its conditions. It thereby waived this requirement, and its conductor was not justified, while it still retained plaintiff's money, in ejecting him from its cars by reason of his failure to sign the ticket, which had already gone into full effect between the parties, and his failure to pay the usual fare in money for a passage which was already paid for."

And the supreme court of Nebraska, in the case of *Gregory v. Burlington & M. River R. Co.* supra, said: "The general rule is 'that proof of possession of personal property is presumptive proof of ownership.' 1 Greenl. Ev. § 34. This presumption certainly obtains in this case. The plaintiff was in possession of a ticket issued by a lawfully authorized agent of the company. It was regular in form, properly stamped; in fact, a first-class ticket, with certain conditions. The conditions were not signed,

but there is no proof that the holder was requested to sign the same. There is no allegation in the answer that the ticket was stolen, nor that the plaintiff was not the original purchaser, nor is there a particle of proof to that effect; yet we are asked to declare the ticket void, because the agent selling the same did not require the purchaser to sign the conditions, as it is claimed the rules of the company require. There is no proof whatever that the plaintiff had any knowledge of such rules. And the fact that he presented the ticket for stamping at Lincoln without such signature is evidence tending to prove such lack of knowledge on his part. It will hardly be contended that the plaintiff can be affected by the neglect of the company's agent. He was the agent of their own selection for the sale of tickets. He was authorized to receive the consideration and issue and stamp the ticket and coupons. Can the company plead his default as a defense? Suppose the rules of the company required each conductor of the train to require the holder of such ticket to sign his name to the same, and a portion or all of them neglected to do so, would the ticket thereby be rendered void, if the company retained the consideration? The statement of the proposition shows its absurdity. But even if the agent has failed in some respects in the performance of his duty, still as between the plaintiff and the company, it must bear the loss. And in any event, the defendant cannot retain the consideration and plead the laches of its agent as a defense to the ticket."

Counsel for defendant also complain in their third assignment that the court erred in giving an instruction authorizing the jury to impose exemplary damages upon the defendant as punishment for the offense of ejecting plaintiff. There is a diversity of judicial expression upon this subject, but it is not necessary for us in this case to enter into any protracted discussion thereof. The facts in this case arose and it was brought in the Indian territory, prior to the erection of the state of Oklahoma, and, the decisions of the Supreme Court of the United States being controlling in that jurisdiction, this court is bound by the same. See *Moore v. Atchison, T. & S. F. R. Co.* (Okla.) 110 Pac. 1059, which, upon this question, is on all fours with the instant case, and the cases therein cited, wherein the rule above noted is laid down and observed, and wherein this court, following the case of *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 109, 37 L. ed. 102, 13 Sup. Ct. Rep. 261, held substantially that, under the decisions controlling in a territory, exemplary or punitive damages are

not allowable against a principal unless the evidence showed that the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct, authorizing or approving it, either before or after its commission. Under the authorities noted therein, the instruction given, authorizing the jury to return a verdict for exemplary damages, was error.

This conclusion on our part renders it unnecessary to notice the other questions raised in the case, except the error of the court alleged to have been committed in instructing the jury to allow plaintiff such damages as would compensate him for loss of time occasioned by the wrongful ejection. As there was no evidence in the record upon which this instruction could be predicated, and no showing of the value of time lost, this was error. *Gulf, C. & S. F. R. Co. v. Daniels* (Tex. Civ. App.) 29 S. W. 426.

The judgment of the trial court is, accordingly, reversed, and the case remanded, with instructions to set the same aside, and allow defendant a new trial.

Turner, Williams, Hayes, and Kane, JJ., concur.

ALABAMA SUPREME COURT.

LOWE MANUFACTURING COMPANY,
Appt.,

v.

CLARA PAYNE.

(— Ala. —, 52 So. 447.)

Master — dangerous order — right to obey.

The operator of a machine in a factory is not justified in obeying an order of his boss to clean the machine while it is in motion, if he knows the operation to be dangerous, so as to be entitled to hold his master liable for an injury resulting from the attempt.

(April 21, 1910.)

APPEAL by defendant from a judgment of the Law and Equity Court for Madison County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Lawrence Cooper and George P. Cooper, for appellant.*

The master is not liable, as plaintiff was guilty of contributory negligence.

Mundhenke v. Oregon City Mfg. Co. 47 Or. 127, 1 L.R.A. (N.S.) 278, 81 Pac. 977; 30 L.R.A. (N.S.)

Townsend v. Langles, 41 Fed. 919; *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495; *Ennis v. The Maharajah*, 1 C. C. A. 181, 1 U. S. App. 20, 49 Fed. 111; *Williams v. J. G. Wagner Co.* 110 Wis. 458, 86 N. W. 157; *Foley v. Pettet Mach. Works*, 149 Mass. 294, 4 L.R.A. 51, 21 N. E. 304; *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67, 47 N. E. 506; *Goodridge v. Washington Mills Co.* 160 Mass. 234, 35 N. E. 484; *Russell v. Tillotson*, 140 Mass. 201, 4 N. E. 231; *Cudahy Packing Co. v. Marcan*, 54 L.R.A. 258, 45 C. C. A. 515, 106 Fed. 645; *E. S. Higgins Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264.

Messrs. Taylor & Drake for appellee.

Simpson, J., delivered the opinion of the court:

This is an action by the appellee against the appellant, for damages on account of an injury to the hand, received by the plaintiff as an employee of the defendant. The injury complained of is the loss of a por-

Note. — Servant's right of action for injuries received in obeying a direct command.

The earlier cases of this character are collected and discussed in a note to *Dallemand v. Saalfeldt*, 48 L.R.A. 753, and this note is supplemental thereto.

Cases are not included in which the servant was acting under general orders or commands of the master, or where the orders could not be considered in any way the proximate cause or one of the proximate causes of the injury, or, as is said in *Illinois Car & Equipment Co. v. Walch*, 132 Ala. 490, 31 So. 470, where the direction was not a part of the *res gestæ*.

Cases have not been included in which the servant, while employed in the execution of orders from the master, is injured by some positive act of negligence on the part of the master which is entirely disconnected from the orders.

An example of this kind is *Illinois C. R. Co. v. Jones*, 119 Ky. 158, 80 S. W. 484, where it was held that the fact that the servant voluntarily took part in attempting to make a flying or running switch, which was prohibited by a rule of the company, will not alone prevent his recovery for injuries caused thereby if his superiors ordered it, and then negligently failed to take the ordinary care required by the circumstances to avoid injuring him. A very similar case is that of *Crotty v. Chicago. G. W. R. Co.* 95 C. C. A. 91, 169 Fed. 593.

As to assumption of risk of overstraining muscles in lifting weights under immediate direction of master or vice principal, see note to *Stenvog v. Minnesota Transfer R. Co.* 25 L.R.A. (N.S.) 362.

As to servant's disobedience for rule in

tion of one of the fingers of plaintiff, and the first count alleges defects in the ways, works, etc., in that the cogs were not sufficiently covered to prevent injuries, and that said defect had not been remedied, etc. (in the language of subd. 1 of § 3910, Code of 1907). The second count alleges that plaintiff was a minor, twelve years old, working at a spinning frame, under the orders of a section hand, who ordered her to work at said spinning frame machine, and to whose orders she was bound to conform and did conform, etc., and that "the said Jim Hudgins, as section hand," failed to inform plaintiff of the defective and dangerous condition of the machine, which he knew, and ordered her to clean the cogs while the machine was in rapid motion, etc.

obedience to orders of superior, see note to *Dougherty v. Dobson*, 8 L.R.A. (N.S.) 90.

As to servant's right of action for injuries received in obeying direct command accompanied by assurance of safety, see note to *Brown v. Lennane*, post, 453.

Effect of command in general.

In the great majority of all the cases involving the liability of the master for injuries received by a servant in obeying a direct command, the court recognizes that the command may modify to some degree the rule of law otherwise applicable. Frequently, however, the facts are such that the ordinary rules govern notwithstanding the order or command; as, for instance, where the servant is himself reckless in the manner in which he performs the act, or where the servant was in entire ignorance of the danger, and acted with due care for his own safety; in other words, the servant does not gain anything by the fact that he is acting in obedience to the master's commands, either because of his own conduct, or because the master's liability is definitely fixed independent of the direct command.

Even in many cases in which the facts are such that the command or order may affect the result, it is very difficult to determine just to what extent the result is affected. The direct command of the master merely adds one more circumstance to the case, and its weight will be different in practically every case. It is said in *Jensen v. Kyer*, 101 Me. 106, 63 Atl. 389, in the infinite variety of facts and circumstances presented by negligence cases it is rarely of profit to examine and compare the facts of other cases; the difficulty is in drawing the inference from the facts under the rules of law. While this is an extreme statement, and perhaps not especially applicable to the question under discussion, it points out the extreme difficulty of accurately classifying cases of the character included in this note.

It may be said generally that some cases apparently lay down the rule that neither 30 L.R.A. (N.S.)

The third count is based upon the inexperience of the plaintiff, the failure to warn her of the dangers, and ordering her to clean the cogs while in motion. Demurrer was sustained to count 4, and count 5 relies upon the negligence of said Hudgins, who had superintendence, etc., in directing plaintiff to perform dangerous work, she being inexperienced, etc. Pleas of contributory negligence and assumption of risk were interposed.

No evidence was offered by the defendant. The plaintiff testified that she was fourteen years old last December; that she received the injury while cleaning the frame, and that "Jim Hudgins, section hand," ordered her "to clean the frame when it was running;" also that she had been engaged in

the question of assumption of risk nor that of contributory negligence is affected by the fact that the servant is injured while obeying the master's command; while, on the other extreme, many cases hold that all question of assumption of risk is eliminated, and that the question of contributory negligence, so far as it arises from the mere fact that the servant obeyed the command, is for the jury. Between these extremes, a great variety of expressions of the rule may be found, all probably more or less affected by the facts before the court. The attempt has been made, so far as possible, to group the cases according to very general rules, rather than for the purpose of asserting and supporting specific rules for the individual case.

Of course, no liability attaches to the master because of his orders unless the master is in some way negligent, either in connection with the order, or in connection with the conditions under which the order must be executed.

St. Louis, I. M. & S. R. Co. v. Goins, 90 Ark. 387, 119 S. W. 277; *Garden City Wire Spring Co. v. Boecher*, 94 Ill. App. 96; *Gallivan v. McCarthy*, 147 Ill. App. 545; *Ervin v. Evans*, 24 Ind. App. 335, 56 N. E. 725; *Weed v. Chicago, St. P. M. & O. R. Co.* 5 Neb. (Unof.) 623, 99 N. W. 827.

The order will not create any liability on the part of the master if he is not negligent in respect thereto. *Swierz v. Illinois Steel Co.* 231 Ill. 456, 83 N. E. 168.

Negligence will not be inferred from the mere fact that the servant was ordered to do a dangerous piece of work; some act of positive negligence must be shown. *Turner v. Southern P. Co.* 142 Cal. 580, 76 Pac. 384.

The direct command of the master to do a work does not affect his liability, where the risks incurred are only the ordinary risks of the service.

Dixon v. Western U. Teleg. Co. 71 Fed. 143; *The Pegasus*, 96 Fed. 623; *Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351; *Poorman Silver Mines v. Devling*, 34 Colo. 37, 81 Pac. 252; *Coal Valley Min. Co. v. Nelson*, 87

the work for nearly a year, that she cleaned around the cogs every day, but that she always stopped the frame before cleaning, until the day of the injury; that she was rubbing around the cogs with a piece of cotton when her hand was caught; that the cogs were all covered by a case, but she got behind the case and put her hand in under the case, where the wheels were, and got caught; that she could have stopped the frame, and the cogs would have stopped running, in which case there would be no danger; but the lever by which the cogs would be stopped was easily movable by the hand; that she knew the cogs were turning when the frame was running; that she knew it was dangerous to touch the cogs when in motion; that she had done the same work

at the knitting mills for several months before going to work at defendant's mill; that she knew the spinning frame well, and knew all about the frame, that there was nothing about it that she did not fully understand; that when she first went to work she was told that the cogs were under the casing, and that it was dangerous to handle them when the frame was running; that the frame was in good order, and there was no defect about it; that she had attended school for four years, and could read and write very well.

Jim Hudgins was examined as a witness by the plaintiff, and testified that he had not given any orders to clean the cogs; that it was dangerous to clean them when the machine was running, and against the rules to

Ill. App. 180; *Linderman Box & Veneer Co. v. Thompson*, 127 Ill. App. 134; *O'Hare v. Cochecho Mfg. Co.* 71 N. H. 104, 93 Am. St. Rep. 499, 51 Atl. 257.

If the act ordered done is not a dangerous thing for the servant to undertake, then the master incurs no responsibility because of the order. *Coosa Mfg. Co. v. Williams*, 133 Ala. 606, 32 So. 232.

It is unnecessary to cite cases to the proposition that a servant who, while obeying the master's orders, is injured because of some act of positive negligence on his own part which was in no wise the proximate result of the order, cannot rely upon the master's order to relieve him from the effects of such negligence.

If the order which was given was that of a fellow servant merely, of course the servant cannot rely upon it in any way.

An order does not affect the servant's right of recovery in any way unless it was relied upon by him. *Knorpp v. Wagner*, 195 Mo. 637, 93 S. W. 961.

The doctrine of assumption of risk is not applicable to a seaman where, under the orders of a superior, he makes use of appliances with patent defects. *Lafourche Packet Co. v. Henderson*, 36 C. C. A. 519, 94 Fed. 871.

In *Murphy v. Chicago & A. R. Co.* 127 Ill. App. 446, it was held that an order jokingly given by a foreman, and so understood by the employee, is not a command such as would justify an employee in encountering a danger to life or limb, and, when injury results, permit him to recover.

View that assumption of risk is not affected by obeying direct command.

In some jurisdictions, it is the rule that if a servant is aware of the danger, and appreciates it, he will be held to have assumed the risk, regardless of the fact that he may have been acting under a direct command of the master. It should be noted, however, that, in these cases, the servant was not confronted by any sudden emergency requiring immediate action on his part, without time for reflection. Such a 30 L.R.A. (N.S.)

condition might modify the rule as applied.

Thus, the assumption of the risk of open and apparent dangers is imposed by law upon a servant, and that he undertook the task under the orders of the foreman does not change the rule. *Lee v. Northern P. R. Co.* 30 Wash. 388, 81 Pac. 834.

Orders do not modify assumption of risk. *Karczewski v. Wilmington City R. Co.* 4 Penn. (Del.) 24, 54 Atl. 746; *Punkowski v. New Castle Leather Co.* 4 Penn. (Del.) 544, 57 Atl. 559.

The master's orders do not relieve the plaintiff where he was experienced in the work, and the danger was obvious. *Luckey v. Soffield (N. J. L.)* 57 Atl. 870.

Where a servant knows and appreciates the danger of the act which he undertakes, he does not any the less assume the risk of injury, or become chargeable with contributory negligence, as the case may be, because he undertakes it under the direction of his superior. *Chicago G. W. R. Co. v. Crotty*, 4 L.R.A. (N.S.) 832, 73 C. C. A. 147, 141 Fed. 913.

Even though the servant may perform the work unwillingly, under orders from his superior, yet, if there was no physical compulsion, and if he knew and appreciated the danger thereof, he will in law be treated as having elected to bear the risk, and cannot hold the employer liable if injury results. *Choctaw, O. & G. R. Co. v. Jones*, 77 Ark. 367, 4 L.R.A. (N.S.) 837, 92 S. W. 244, 7 A. & E. Ann. Cas. 430.

It is the general rule that an employee who, knowing and appreciating the danger, enters upon a perilous work, even though he does so unwillingly, and by order of his superior officer, assumes the risk of injury, and cannot recover damages therefor. *Haywood v. Galveston, H. & S. A. R. Co.* 38 Tex. Civ. App. 101, 85 S. W. 433.

And in *Dickenson v. Vernon*, 77 Conn. 537, 60 Atl. 270, the court said: "Although he may have been unwilling to undertake this duty, which was more dangerous than those he had engaged to do, yet if, with such knowledge of its dangerous character, he attempted its performance, because directed by

do so. Tom Pruitt, a witness for plaintiff, testified substantially to the same effect, and also testified to a copy of the rules which were printed and hung on the wall at the entrance of the spinning room, one of which is: "Cleaning of machinery must be done after stopping time. All help are cautioned not to clean machinery while running, as it is dangerous." He also testified that he had spoken to the plaintiff, about the danger of cleaning while the frame was running, had told her of this danger not more than an hour before she was hurt, had seen her wiping off the frame while it was in motion, and told her to keep her hand away from the gear head, that she stopped while he was there, and in half or three quarters

of an hour she had been hurt and was being carried out.

It will be noticed that the only evidence which has the least tendency to sustain any allegation of the complaint is the statement by the plaintiff that "Jim Hudgins, section hand," ordered her "to clean the frame when it was running." Whether that expression means that his order was that she should clean it while it was running, or merely that the order was given while it was running, does not clearly appear; but, however that may be, the plaintiff does not testify that he was one whose orders she was bound to obey, etc., nor that he had any superintendence, nor is there any testimony tending to show that. On the contrary, her witness, Hudgins, testified that Tom Pruitt was over

his employer, and from fear that he might otherwise lose his employment, he was not, for these reasons, relieved of the assumption of the hazards incident to the employment."

So, the question of the servant's assumption of risk is determined in the following cases as dependent, as in all other cases, solely upon the servant's knowledge and appreciation of the danger and his willingness to incur it; and no additional responsibility attaches to the master because of his direct commands to the servant.

Sauvageau v. River Spinning Co. 120 Fed. 961; *Kinzel v. Atlanta, K. & N. R. Co.* 69 L.R.A. 757, 70 C. C. A. 73, 137 Fed. 489; *Southern R. Co. v. Logan*, 71 C. C. A. 281, 138 Fed. 725; *New England Teleph. & Teleg. Co. v. Butler*, 84 C. C. A. 217, 156 Fed. 321; *Briggs v. Tennessee, Coal, Iron & R. Co.* 163 Ala. 237, 50 So. 1025; *Southern Cotton Oil Co. v. Walker*, 164 Ala. 33, 51 So. 169; *Dickenson v. Vernon*, supra; *Worlds v. Georgia R. Co.* 99 Ga. 283, 25 S. E. 646; *Hanson v. Hammell*, 107 Iowa, 171, 77 N. W. 839; *Reis v. Struck*, 23 Ky. L. Rep. 1113, 64 S. W. 729; *Cunningham v. Lynn & B. Street R. Co.* 170 Mass. 298, 49 N. E. 440; *Cristanelli v. Saginaw Min. Co.* 154 Mich. 423, 117 N. W. 910; *Miller v. Grieme*, 53 App. Div. 276, 65 N. Y. Supp. 813; *Kueckel v. O'Connor*, 73 App. Div. 594, 76 N. Y. Supp. 829; *Gensen v. Ohio Oil Co.* 22 Ohio C. C. 276; *Mayott v. Norcross Bros.* 24 R. I. 187, 52 Atl. 894; *Russell v. Riverside Worsted Mills*, 24 R. I. 591, 54 Atl. 375; *Ft. Worth & D. C. R. Co. v. Ramp*, 30 Tex. Civ. App. 483, 70 S. W. 568; *Galveston, H. & S. A. R. Co. v. Sanchez* (Tex. Civ. App.) 65 S. W. 893; *Gilmartin v. Kilgore* (Tex. Civ. App.) 114 S. W. 398; *Texas Bitulithic Co. v. Hutton* (Tex. Civ. App.) 116 S. W. 146; *Krisch v. Richter* (Tex. Civ. App.) 130 S. W. 186; *Bier v. Hosford*, 35 Wash. 544, 77 Pac. 867; *Hencke v. Ellis*, 110 Wis. 532, 86 N. W. 171.

A complaint was held to be insufficient in *Chicago & B. Stone Co. v. Nelson*, 32 Ind. App. 355, 69 N. E. 705, in not alleging that the servant did not know of the dangers of the place in which he was ordered to work. 30 L.R.A. (N.S.)

And in *Wiggins Ferry Co. v. Hill*, 112 Ill. App. 475, it was held that, notwithstanding the servant was injured while obeying a direct command of the master, the complaint was defective in not alleging that the danger was not an obvious one to the servant.

So, in *Shaver v. Home Teleph. Co.* 36 Ind. App. 233, 114 Am. St. Rep. 373, 75 N. E. 288, it was held that a complaint must negative the servant's knowledge of the danger.

In *Gould Steel Co. v. Richards*, 30 Ind. App. 348, 66 N. E. 88, an instruction was held not to be erroneous as tending to mislead the jury into concluding that there might have been a recovery even if the plaintiff had actually known of the danger in obeying the command of a superior.

And in *Wilson v. Southern R. Co.* 73 S. C. 481, 53 S. E. 968, the trial court charged the jury as follows: "That the fact that the servant's work is done in the presence and under the immediate direction of the master's foreman . . . is equivalent to the assurance by the master that the servant may safely proceed to the work required of him, and he is therefore not bound in such a case to search for danger. He may rely for safety upon the conduct of the conductor." This instruction was held not to be erroneous, against the contention that it relieved the plaintiff from the obligation to exercise ordinary care to avoid danger, and that it declared that, no matter what the conditions were, whether known to the conductor or not, or whether known to the plaintiff or not, the latter might blindly go ahead and do what he was told to do.

—illustrative cases.

In the following cases, the servant was denied a recovery upon the ground of assumed risk, notwithstanding he was, when injured, acting in obedience to a direct command:

A brakeman who, in the absence of an emergency justifying his action, participated in staking a car, with full knowledge

seer and acting section hand, and that it was his duty to give orders to the hands. In addition, her own testimony shows that she was perfectly familiar with the machine, and fully aware of the danger; and, even if such order had been given by a proper person, she should not have obeyed it. 1 Labatt, Mast. & S. § 438, pp. 1234 et seq. See also as to the general liability in such cases, *Mundhenke v. Oregon City Mfg. Co.* 47 Or. 127, 1 L.R.A. (N.S.) 278, 81 Pac. 977; *Townsend v. Langles* (C. C.) 41 Fed. 919; *St. Louis Cordage Co. v. Miller*, 63 L.R.A. 551, 61 C. C. A. 477, 126 Fed. 495; *Ennis*

v. The Maharajah, 1 C. C. A. 481, 1 U. S. App. 20, 49 Fed. 111; *E. S. Higgins Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900; *Fones v. Phillips*, 39 Ark. 17, 43 Am. Rep. 264; *Moss v. Mosely*, 148 Ala. 168, 41 So. 1012.

The plaintiff was guilty of contributory negligence. The court should have given the general affirmative charge, as requested by the defendant. The judgment of the court is reversed, and the cause remanded.

Dowdell, Ch. J., and McClellan and Mayfield, JJ., concur.

and appreciation of the danger, assumed the risk of injury, although the conductor may have been negligent in directing that the car be staked when there was another and safe method of accomplishing the same result, and in directing the use of an engine and train in the process of staking when the use of the engine alone was reasonably possible and less dangerous. *Chicago G. W. R. Co. v. Crotty*, 4 L.R.A. (N.S.) 832, 73 C. C. A. 147, 141 Fed. 913.

A railroad engineer who obeys, although reluctantly, an order to take his train through a mountainous region on its regular trip at a time of heavy rains, when landslides are anticipated, assumes the risk of such slides, and cannot hold the company responsible in case his train is carried from the track by a slide which comes upon it so suddenly that there is no time to escape, and the danger of which was not observed by a track inspector, who had passed the spot just before the train reached there; since it must be regarded as pure accident. *Kinzel v. Atlanta, K. & N. R. Co.* 69 L.R.A. 757, 70 C. C. A. 73, 137 Fed. 489.

The mere fact that a section man was proceeding along the track in pursuance of an order of his foreman does not relieve him of assuming the risk from passing trains of which the foreman had no knowledge greater than that of the servant. *Ives v. Wisconsin C. R. Co.* 128 Wis. 357, 107 N. W. 452.

A servant employed in deepening a canal assumes the risk of the fall of standing trees, in complying with the request of his foreman to assist in extinguishing a fire spreading through swamp and underbrush towards property of the employer on the canal bank, the danger of which is as obvious to him as to any person engaged in saving the property. *Maltbie v. Belden*, 167 N. Y. 307, 54 L.R.A. 52, 60 N. E. 645.

If the danger incurred by the servant was not in the manner of digging in a clay bank, but in undermining without leaving supports, and was fully understood by the servant, then there is no ground for the application of the principle that an employee does not assume the risks so as to preclude a recovery where he is acting in obedience to a positive order at a work which, while perilous, threatens no immediate danger. *Cisney v. Pennsylvania Sewer Pipe Co.* 199 Pa. 519, 49 Atl. 309.

In *International & G. N. R. Co. v. Royall*, 37 Tex. Civ. App. 261, 83 S. W. 713, the court said that if the plaintiff was aware of the danger, or if it was obvious and apparent, or if he should, in the exercise of common prudence or ordinary care, have become aware of the danger of going under a car which was being lifted by hydraulic jacks, in obedience to the orders of a superior, it was a risk that was assumed, notwithstanding that the superior may have negligently ordered him to go under there.

After stating that a servant is not required to exercise diligence in order to discover that the master is personally negligent after receiving an order to do a certain work under the immediate control and supervision of the master, the court further said: "But if, during the progress of the work which the servant is then engaged in, in obedience to the direction of the master, the latter, by his negligent conduct, then exposes the servant to peril, and the servant becomes aware of that fact in time, by the means and opportunities then existing, to escape from such danger, but negligently fails to do so, he is precluded from a recovery, notwithstanding the master's negligence."

A lineman who knows of the danger incurred in passing a rope under charged wires incurs the risk of obeying an order to so pass the rope. *Newnom v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.) 47 S. W. 669.

An adult employed in driving a mule to remove coal from a mine, which became frightened at an object which it was required to pass, and broke away and ran out of the mine, assumed the risk of injury when, upon the direction of the boss, he resumes work with the same animal, although under protest, so that he cannot hold the mine owner liable for injuries caused by a similar performance on the part of the mule when again encountering the same object. *Milby & B. Coal & Min. Co. v. Balla*, 7 Ind. Terr. 629, 18 L.R.A. (N.S.) 695, 104 S. W. 860.

A servant assumes the risk of the danger of the slipping of an ordinary ladder, although directed to use the same by a super-

intendant. *McDonnell v. New York, N. H. & H. R. Co.* 192 Mass. 538, 78 N. E. 548.

And in *Consolidated Barb Wire Co. v. Maxwell*, 116 Ill. App. 296, it was held that the direction of a foreman to "go ahead, the tools are all right," would not relieve the plaintiff from the operation of the rules respecting assumption of risk, where he was able fully to comprehend and understand the dangers. In this case, however, the servant was injured by reason of the failure of the defendant to furnish him with a small clutch or clamp for the purpose of holding a steel tool, and the fact that the promise was made in regard to the furnishing of a simple tool may affect the decision.

View that contributory negligence is not affected by obeying direct command.

The test of a servant's conduct as to negligence is in many cases asserted to be the same where he is obeying a direct command as in all other cases; namely, was the conduct that of a reasonably prudent man under like circumstances?

Thus, in *Tubler v. Johnson-McLean Co.* 74 Neb. 840, 105 N. W. 247, in speaking of the contributory negligence of a servant in obeying an order of the master, the court said: "The test of contributory negligence in such cases, as in others, is whether the servant, in obeying, conducts himself as a man of ordinary prudence would conduct himself under the circumstances."

And in *Kelland v. Jos. W. Noone's Sons Co.* 75 N. H. 168, 71 Atl. 947, where the servant was obeying a direct command, the court said that the test of his contributory negligence was to inquire whether the risk he supposed he was running was so great that all fair-minded men would agree that the ordinary man would not have encountered it.

Where a servant knows and appreciates the danger of the act which he undertakes, he does not any the less become chargeable with contributory negligence because he undertakes it under the direction of his superior. *Chicago G. W. R. Co. v. Crotty*, supra.

The rule that a fireman shall obey the engineman is limited by the other rule that the fireman shall refuse to obey an order which exposes him to known danger; and the true meaning of the latter rule is that the employee must refuse to obey orders known to him to be dangerous beyond the peril to be regarded as reasonably incident to his employment. *Stephens v. Southern R. Co.* 82 S. C. 542, 64 S. E. 601.

A superior in authority has no authority to order a servant to commit an act the doing of which would obviously, naturally, or necessarily be attended with danger to life or limb, and obedience to such order under such circumstances would be such negligence as would defeat a recovery by the servant. *Joswoyak v. Lake Shore & M. S. R. Co.* 4 Ohio Dec. Reprint, 317.

Where the servant acts voluntarily, and the danger to be incurred is open and ob-

vious, if the master is to be chargeable with negligence for giving the order, then the servant is equally guilty of negligence in obeying it, and cannot recover. *Greeley v. Foster*, 32 Colo. 292, 75 Pac. 351.

The master is not estopped to claim that the act of the servant was foolhardy and reckless, but, in view of his previous command, such a defense should be viewed with suspicion and scrutinized with care. *William v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900.

The giving of an order generally to go to work and do something that is part of the general work in hand which is not, in the doing of it, an increase of the hazard, does not imply an assurance to the employee that there is no danger in the doing of it, irrespective of how the employee may perform what he is told to do. *McArthur Bros. Co. v. Nordstrom*, 87 Ill. App. 554.

— illustrative cases.

In the following cases the employee was denied a recovery upon the ground of contributory negligence, notwithstanding he was obeying a direct command of the master:

A general order from a conductor to a flagman to catch a train will not justify the latter in attempting to do so at the time when the car is moving at an obviously dangerous rate of speed. *Whitley v. Macon & N. R. Co.* 104 Ga. 764, 30 S. E. 1003.

A finding of negligence on the part of a foreman who ordered the plaintiff to alight from a moving train, and a finding of freedom from negligence on the part of the plaintiff in obeying the order, are not justified where the danger was equally obvious to both. *Chicago, I. & L. R. Co. v. Sanders*, 42 Ind. App. 585, 86 N. E. 430.

An experienced train man who, at the command of his foreman, jumps off a moving train, is not, as a matter of law, in the exercise of due care, where the command was not accompanied by any words from which a threat of discharge in case of refusal could be inferred. *McArthur Bros. Co. v. Troutt*, 88 Ill. App. 638.

A servant is not justified in crawling under cars so as to obey an order to cross over the tracks and load cars on the opposite side, where he might have gone around the cars, or might have crossed over the bumpers in comparative safety. *Slota v. Albert Lewis Lumber & Mfg. Co.* 215 Pa. 434, 64 Atl. 632.

A command to go ahead and start the engine does not justify a servant in running around in front of a moving car, when he could have executed the order as well by passing around the rear of the car. *Kansas & T. Coal Co. v. Reid*, 29 C. C. A. 475, 57 U. S. App. 464, 85 Fed. 914.

A motorman in charge of a car is guilty of negligence which will bar his recovery for injuries in case he leaves a switch at a passing point, and proceeds toward the next one with full knowledge that the car from the opposite direction has passed it, and is coming toward him at a high rate of speed,

although his car has the right of way, and he proceeds under the orders of his conductor and the general instructions of the superintendent. *Mason v. Post*, 105 Va. 494, 11 L.R.A. (N.S.) 1038, 54 S. E. 311.

The fact that a motorman was ordered to cross a steam railroad track without stopping, and assured that there was no liability of accident, is no excuse to an employee of full age and capacity, who can appreciate the danger as fully as his employer, when, in crossing it, he fails to look or listen for approaching trains. *Goodrich v. Chippewa Valley Electric R. Co.* 108 Wis. 329, 84 N. W. 419.

The finding by the jury that plaintiff, while executing an order of his superior, came in contact with cog wheels through his own thoughtlessness, is in irreconcilable conflict with a general verdict in his favor. *Moorewood Co. v. Smith*, 25 Ind. App. 264, 57 N. E. 199.

The negligence of the plaintiff in setting a stool upon which he was to stand while starting a fly wheel in such a way as to require him to catch hold of a cog for support, which resulted in his hand being crushed, precludes a recovery, notwithstanding the foreman ordered him to start the wheel. *King v. Southern R. Co.* 148 Ala. 666, 41 So. 639.

If a superintendent orders the plaintiff in so many words to adjust the belting on moving machinery in the dark, the servant will be deemed guilty of contributory negligence if he obeys the order. *Attleton v. Bibb Mfg. Co.* 5 Ga. App. 777, 63 S. E. 918.

If a servant knows that an elevator will fall if he leaves his post, and allows a slack to occur in a rope used to operate the elevator, he is guilty of contributory negligence in leaving such post, even at the command of the foreman, although it was accompanied by a threat of the loss of his employment, where there was no exigency or necessity for him immediately to obey the order. *Gensen v. Ohio Oil Co.* 22 Ohio C. C. 276.

A servant of long experience as a mill hand, who had acted for months as a foreman of that section of the mill wherein he was injured, and was entirely familiar with the danger of belting pulleys while in motion, was under no duty to subject himself to the danger at the command of the superintendent, and his doing so was such want of due care as to constitute a full defense against the alleged negligence of the superintendent in directing him to belt the revolving pulley. *Cousa Mfg. Co. v. Williams*, 133 Ala. 606, 32 So. 232.

An experienced miner cannot recover for injuries received in obeying the order of a foreman to sink deeper a hole which contained an unexploded charge of dynamite, where the foreman had, in his presence, examined the hole, and told him to go to work at it. The injury was due either to one of the ordinary risks of the service, or else he himself contributed to it by his remissness in not making a further examination, which his orders in no wise precluded. 30 L.R.A. (N.S.)

Poorman Silver Mines v. Devling, 34 Colo. 37, 81 Pac. 252.

Where the plaintiff knew that he was standing upon loose slats resting upon the edges of a vat containing boiling liquor, and knew that any pressure not vertical might cause them to slip, it was held in *Marsen v. Nichols Copper Co.* 134 App. Div. 294, 118 N. Y. Supp. 867, that the servant's knowledge of the situation and of the danger was the same as that of the foreman, and if the foreman was negligent in directing the plaintiff to stand upon the slats, it would seem to follow that the plaintiff was negligent in doing it.

An employee cannot recover damages of a railroad company for an injury proximately caused by his violation of a penal statute or municipal ordinance, notwithstanding the fact that the employer may have ordered him to violate the law. *Little v. Southern R. Co.* 120 Ga. 347, 66 L.R.A. 509, 102 Am. St. Rep. 104, 47 S. E. 953.

View that direct command makes assumption of risk and contributory negligence questions of fact only.

Other cases hold that where the servant is injured while obeying a direct command, the question of the servant's assumption of risk or of his contributory negligence, so far as it consists merely of his obedience, is for the jury,—the fact that the servant was obeying the master's orders having the effect of eliminating both defenses as matters of law.

Thus, in *Perrier v. Dunn Worsted Mills*, 29 R. I. 396, 71 Atl. 796, the court said: "The questions whether an employee has assumed the risk or has been guilty of contributory negligence, in a case where he is required to do his work in haste, either under orders of his superior, or by reason of the exigency of his position, or because of an emergency, and where his whole energy and attention are absorbed in his work; or whether he may be excused from the degree of care ordinarily required, or for temporary forgetfulness of a risk previously known to him, or of a risk which he might under other circumstances, have remembered or appreciated,—have been generally held to be questions for the jury upon all the facts of the particular case."

So, where a servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accidents resulting from the master's negligence. *Sapp v. Christie Bros.* 79 Neb. 701, 113 N. W. 189, 115 N. W. 319.

And a laborer not familiar with the work he was imperatively directed to perform, nor with the situation into which he was hurriedly ordered, and who objected when ordered to do the work, but finally yielded when the foreman insisted, cannot be held, as a matter of law, to be guilty of contribu-

tory negligence. *Zearfoss v. Norway Iron & Steel Co.* 218 Pa. 594, 67 Atl. 867.

In *Sherman v. Texas & N. O. R. Co.* 99 Tex. 571, 91 S. W. 561, the court said that the law does not require a servant in doubtful matters to disobey the orders of the master at his peril, and where a boy seventeen years of age was put to his election to obey the direction of a superior, and lift a piece of iron which was in fact of too great weight for the boy's strength, or to be discharged "right there," the boy would not be precluded from recovery for injuries received in obeying the order.

Although the plaintiff must have been aware of the serious danger of working where he did, he will not be held guilty of contributory negligence, where he felt obliged to work, under the peril of dismissal if he disobeyed. *Oliver v. Dominion Iron & Steel Co.* 37 N. S. 183.

In a number of cases it is stated that something must be accorded to the fact that the servant was acting in obedience to a direct command, and a less stringent rule would be applied under such circumstances, and this applies both to assumption of risk and contributory negligence.

Thus, some risk must necessarily be taken in obedience to orders, and the mere exposure to extra hazard under the direct orders of a superior will not defeat a recovery. *Southern R. Co. v. Rutledge*, 4 Ga. App. 80, 60 S. E. 1011.

So, in *Kansas City, M. & B. R. Co. v. Thornhill*, 141 Ala. 215, 37 So. 412, it was held that the question of the negligence of a section boss in ordering a hand car to be removed from the track in front of an approaching train, and the question of the negligence of the plaintiff, a member of the crew, who attempted to obey the order, were not to be judged by the same standard, for, in addition to the fact that the foreman was in a better position than the plaintiff to comprehend the situation, something was to be accorded, even in the face of such a danger, to the plaintiff's duty and habit of obedience, and to the lack of time for him to consider the situation and to determine his action advisedly, especially as the sudden emergency was itself the product of the boss's negligence; something to his probable and not unreasonable assumption that the foreman would seasonably warn him of the danger, and yet something more to his probable belief that the removal of the car from the track was necessary for the safety of the train men.

And the giving of the order creates the duty of the servant. *Republic Iron & Steel Co. v. Williams* (Ala.) 53 So. 76.

So, where the servant acts in the presence of the master, and by his personal direction, a much less stringent rule is applied as to his assuming the risk than in other cases. *Cumberland Teleph. & Teleg. Co. v. Graves*, 31 Ky. L. Rep. 972, 104 S. W. 356.

The general rule is that a servant may often be deemed to have used ordinary care when acting under the express invitation or the advice of the master, though, but for 30 L.R.A.(N.S.)

that circumstance, his conduct would be deemed clear evidence of negligence. *Butler Ballast Co. v. Hoshaw*, 94 Ill. App. 68.

So, the plaintiff's obedience to the direction of the foreman is a circumstance favoring the absence of contributory negligence as a matter of fact. *Regling v. Lehmaier*, 50 Misc. 331, 98 N. Y. Supp. 642.

And the effect of a direct order of the master is to tend to relieve the servant from the exercise of that degree of caution which would lawfully be expected of him in the absence of such a command. *Moore v. Dudlin Cotton Mills*, 127 Ga. 609, 10 L.R.A.(N.S.) 772, 56 S. E. 839; *Atlanta, K. & N. R. Co. v. Tilson*, 131 Ga. 395, 62 S. E. 281; *Southern Cotton-Oil Co. v. Gladman*, 1 Ga. App. 259, 58 S. E. 249; *Bush v. West Yellow Pine Co.* 2 Ga. App. 295, 58 S. E. 529; *Southern R. Co. v. Rutledge*, supra; *Holsey v. Macon, D. & S. R. Co.* 6 Ga. App. 637, 65 S. E. 690; *Hobbs v. Small*, 4 Ga. App. 627, 62 S. E. 91.

A charge upon the question of contributory negligence which eliminated the right of the servant to rely to any extent upon the judgment of his superior, who, with an assurance of safety, had ordered the servant to go ahead, was held in *Alabama Consol. Coal & I. Co. v. Heald* (Ala.) 53 So. 162, to be erroneous.

It would be unreasonable to require a deliberate judgment from a servant who has received a peremptory order to remove "quick" a dangerous obstruction from in front of a rapidly approaching passenger train. *Illinois C. R. Co. v. Atwell*, 100 Ill. App. 513, affirmed in 198 Ill. 200, 64 N. E. 1095.

A servant ordered by the foreman of a master to perform a particular work has the right to assume that he will not be exposed to unnecessary perils, and to rest upon the implied assurance that there is no danger. *Marshall v. St. Louis Southwestern R. Co.* (Tex. Civ. App.) 107 S. W. 883.

In a few cases, it has been held that the order of the master is to be taken into account in determining whether the danger was one which the servant ought to have discovered in the use of reasonable care.

This is the view taken in *McClure v. Detroit Southern R. Co.* 146 Mich. 457, 109 N. W. 847, where, in passing upon the question whether or not the risk was so obvious that the plaintiff must be held to have assumed it, the court said that the fact that the deceased was ordered under the car by one in authority was to be taken into account in determining whether the deceased was negligent in not informing himself of the danger. Although there is an apparent confusion of the defenses of assumption of risk and contributory negligence, what the court means is clearly that while, in the absence of an order, the court might be able to say, as a matter of law, that the risk undertaken was so obvious that the servant must be held to have known of it if he had exercised ordinary care in observing his surroundings, yet, in view of

the act that he was executing a direct order of the master when he incurred the risk, whether or not it was obvious would be a question for the jury.

So, in determining what a servant ought to have known in the exercise of ordinary care and prudence, the command of the master and his assurance of safety are to be weighed as part of the attendant circumstances. *Jensen v. Kyer*, 101 Me. 106, 63 Atl. 389.

An order accompanied by an assurance of safety may properly be considered by the jury in connection with other evidence, in determining whether or not the employee at the time knew and appreciated the risk. *Anderson v. Pitt Iron Min. Co.* 103 Minn. 252, 114 N. W. 953.

A direct order to do certain work relieves the servant of any necessity of looking for defects. *Wilder v. Great Western Cereal Co.* 130 Iowa, 263, 104 N. W. 434.

—illustrative cases.

A section hand cannot be presumed to have assumed the risk of removing a hand car from the track in front of an approaching train when ordered so to do by the representative of the master. *Cleveland, C. C. & St. L. R. Co. v. Bossert*, 44 Ind. App. 245, 87 N. E. 158.

A section hand who is injured while removing a hand car from the track in front of an approaching train, in obedience to the orders of the foreman, had a right to presume that the foreman, who was in a situation to devote his whole attention to the approaching train and to the efforts of his men to get the hand car off the track, could better determine than he what was best to be done under the circumstances, and could not be charged with contributory negligence. *St. Louis, I. M. & S. R. Co. v. Rickman*, 65 Ark. 138, 45 S. W. 56; *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 184, 113 Am. St. Rep. 85, 91 S. W. 763.

An allegation that a hand car was stopped only a few yards in front of an approaching engine, and that the plaintiff and others of the crew were ordered by the boss to remove the car from the track, which order the plaintiff attempted to perform without time to understand and realize the danger, does not show that the plaintiff assumed the risk of the danger. *Kansas City, M. & B. R. Co. v. Thornhill*, *supra*.

Where the only theory upon which it could be contended that a brakeman was negligent was his failure to jump from a car when he discovered that the brake was not working, the direct command of the conductor would justify him in not jumping, or, at least, it would take away from his act the quality of negligence as a matter of law. *Holsey v. Macon, D. & S. R. Co.* *supra*.

Whether a section hand was guilty of contributory negligence so as to preclude a recovery in obeying an order of a superior to jump off a car moving at the rate of 4 or 5 miles an hour was held to be a ques-

tion for the jury in *Chattanooga Electric R. Co. v. Lawson*, 101 Tenn. 406, 47 S. W. 489.

An engineer who, by the rules of the company, must obey the orders of the conductor as to starting trains, unless such orders are in violation of the rules of the company, is not deprived of a recovery for injuries received by a collision due to his train passing from a double track to a single track, in violation of the rules of the company, where he had asked the conductor if it was all right to go ahead, and the conductor had given him the regulation signal for starting. *Grand Trunk R. Co. v. Miller*, 32 Can. S. C. 454.

A car repairer, in going under a motor car at the command of a superior, is not guilty of contributory negligence in failing to notify the motorman or conductor of his position, when the superior issuing the order was in a position to do so, as the repairer had the right to assume that the superior would look out for his safety. *Sorenson v. Oregon Power Co.* 47 Or. 24, 82 Pac. 10.

In determining whether or not a servant was guilty of contributory negligence while working in a pit under a car, in reaching up over a rail in front of the wheel to feel of a journal, the jury were properly charged that they might take into consideration the fact that the foreman of the car barn had directed the plaintiff to feel of the journal boxes, and find out which one was hot. *Jelinek v. St. Paul City R. Co.* 104 Minn. 249, 116 N. W. 480; *Kochta v. St. Paul City R. Co.* 104 Minn. 528, 116 N. W. 482.

A brakeman is not chargeable with contributory negligence nor with assumption of risk in attempting to make a coupling between an engine and a car whose coupler was 7 inches higher than that of the engine, where a similar coupling had been made twice before that day, and he was acting directly under the commands of a superior servant. *Choctaw, O. & G. R. Co. v. Craig*, 79 Ark. 53, 95 S. W. 168.

A declaration which alleges that a brakeman obeyed the order of a conductor to station himself on the cab or car at the rear end of the train, for the purpose of giving signals to the engineer as to the backing of the train, does not necessarily, as a matter of law, show that the plaintiff voluntarily exposed himself to an obvious and imminent danger. *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 311, 45 So. 761.

A servant called from other work to assist in a ditch, upon work of the manner of doing which the master assumes direction and control, is not bound to inquire into the safety of the place where he is told to stand while working. *Hilgar v. Walla Walla*, 50 Wash. 470, 19 L.R.A.(N.S.) 367, 97 Pac. 498.

Whether a servant at work in a trench, who, at the command and under the eyes of the foreman, takes a position under the machinery used for carrying and lowering into the trench heavy iron pipes, is guilty of contributory negligence, is a question of

fact for the jury. *Pierce v. Arnold Print Works*, 182 Mass. 260, 65 N. E. 368.

Where the master directed a servant to go from the trenches where he was at work to assist other men upon a scaffold, in putting up heavy iron pipes, he did not assume the risk of defects in the scaffold, notwithstanding the fact that the scaffolding had been erected by fellow servants of the plaintiff. *Hagerty v. Evans*, 87 Minn. 435, 92 N. W. 399.

A servant's right to recover cannot be defeated on the ground that he disobeyed an order not to work under certain overhanging ore, where he had been ordered to assist at another kind of work, at another place, and was injured by the fall of the ore. *Illinois Steel Co. v. Olste*, 214 Ill. 183, 73 N. E. 422.

An experienced lineman is not guilty of contributory negligence in failing to inspect a pole before climbing it, where a foreman, after making an inspection, orders the employee to climb it. *Western U. Teleg. Co. v. Holtby*, 29 Ky. L. Rep. 523, 93 S. W. 652.

An inexperienced lineman working under the direction of the foreman is not guilty of contributory negligence in failing to make an inspection of a pole that he has been ordered to climb. *Sias v. Consolidated Lighting Co.* 79 Vt. 224, 64 Atl. 1104.

Although a servant may know that a belt is not as safe as it ought to be, yet the judgment of the servant must be held subservient to that of the master who directs him to proceed with the work, except in cases where the danger is plainly observable. *Goldthorpe v. Clark-Nickerson Lumber Co.* 31 Wash. 467, 71 Pac. 1091.

A servant sent to get two shovels which were standing under a telegraph pole will not be held to have assumed the risk of the pole falling upon him as a result of its being sawed by other servants, under the direction of the same boss. *Southern R. Co. v. Rutledge*, 4 Ga. App. 80, 60 S. E. 1011.

It is error to hold, as a matter of law, that an employee twenty-four years old, of average intelligence and fair education, is chargeable with knowledge that to throw a bucket of water into the fire box of a smelting furnace, containing a bed of highly heated coals, about 9 feet long, 3 or 4 feet wide, and 3 feet deep, is liable to result in a dangerous explosion, where the evidence warrants the inference that he did the act in obedience to an order from the foreman under whom he worked. *Malone v. American Smelting & Ref. Co.* 77 Neb. 876, 110 N. W. 572.

Failure of a thirteen-year-old boy to stop and reflect upon the danger of the proceeding before attempting to obey the sudden command of his foreman to remove threads caught in a moving cogwheel does not, as matter of law, render him guilty of negligence, where he does not put his hands upon the cogs, but grasps the threads, which being too strong for him to break, draw his hand into the cogs. *Dougherty v. Dobson*, 214 Pa. 252, 8 L.R.A. (N.S.) 90, 63 Atl. 748.

son, 214 Pa. 252, 8 L.R.A. (N.S.) 90, 63 Atl. 748.

Where a boy sixteen years of age went into an oat bin with which he was not familiar, pursuant to a specific order, it was held in *Meier v. Way*, J. L. & Co. 136 Iowa, 302, 125 Am. St. Rep. 254, 111 N. W. 420, that the doctrine of assumption of risk had no place, or, at least, it was only a question for the jury.

Whether an order, "When you have a stock, you take some other work to do. Go over to some machine and work," justified a boy fifteen years of age in going to work at a different kind of machine than the one that he had been at work upon, was held to be a question for the jury in *Manola v. Enterprise Stamping Co.* 223 Pa. 116, 72 Atl. 234.

A plea setting up contributory negligence on the part of the servant is defective in not averring that the safer position therein described, which the servant is alleged to have abandoned for a more dangerous one, was one in which he could have complied with the order of his superior in doing the work; and in not further averring that going between the rails to couple cars was so obviously dangerous under the prevailing conditions that an employee should have disregarded the order of his superior and not undertaken it. *Bear Creek Mill Co. v. Parker*, 134 Ala. 293, 32 So. 700.

View that servant is not precluded from recovery unless danger is great and imminent.

In some jurisdictions the courts have laid down the rule that a servant will not be denied a recovery for injuries received in obeying a direct command of the master unless the danger to be incurred is so great and imminent that a reasonably prudent man would have refused to incur it. This, in effect, eliminates the defense of assumption of risk, and confines the master to the defense of contributory negligence. In many cases it is stated that the servant does not assume the risk of obeying a direct command unless the danger is so great and imminent that a reasonably prudent man would not assume it. But such a statement implies the proposition that, in order to assume the risk, the servant must act as a reasonably prudent man would not; in other words, he must be negligent. Consequently the legal effect of this rule is that a servant injured in obeying a direct command of the master may recover therefor unless he himself has been negligent, and the question of assumption of risk is wholly eliminated. And the question whether the danger was great and imminent within this rule is almost invariably held to be a question for the jury.

In some states this rule has been declared with such frequency and emphasis that it may safely be stated as the established rule of those jurisdictions, and cases from those

states are grouped at the close of this subdivision of the note.

A few judicial statements embodying this rule may be given, and it is to be noted that some of these statements refer to assumption of risk, others to contributory negligence, while still others merely state that the servant is not precluded from recovery unless the risk is great and imminent. The legal effect, however, is the same in all cases.

The doctrine of assumed risks does not obtain when the master is present and the servant is ordered under his eye and by his direction to proceed with the work, although the risk or hazard in prosecuting it is as well-known to the servant as to the master, subject always to the exception that the master may excuse himself upon the ground that the work was obviously and clearly dangerous, and so known to be by the servant. *Louisville, H. & St. L. R. Co. v. Armstrong* (Ky.) 125 S. W. 276.

If the danger of obeying an order is not so glaring that no prudent man would have undertaken it, the law will not declare the servant's act of obedience negligence *per se*, but will leave it to the jury to say whether he ought to have obeyed the order. *Galveston, H. & S. A. R. Co. v. Puente*, 30 Tex. Civ. App. 246, 70 S. W. 362.

The risk of injury is not taken by a section hand waiting with the crew of a hand car at a station without telegraph connection for the passage of a fast train known to be overdue, in obeying the orders of the boss to the crew, to take the car on to the next station, and permit the train to pass it there, unless the risk is such that a man of ordinary prudence would not assume it, which is a question for the jury. *Long v. Illinois C. R. Co.* 113 Ky. 806, 58 L.R.A. 237, 101 Am. St. Rep. 374, 68 S. W. 1095.

Where the danger is not so evident that plaintiff might not have relied on the supposedly better judgment of the foreman, or that no prudent man would have obeyed the order of the foreman, then there can be no assumption of risk. *Hunley v. Patterson*, 116 La. 736, 41 So. 54; *Lee v. Powell Bros. & S. Co.* (La.) 52 So. 214.

In *Perry-Matthews-Buskirk Stone Co. v. Spear* (Ind. App.) 73 N. E. 933, the following instruction was held awkward, but was not held erroneous: "Where the servant is ordered to perform his work at a certain place, he may obey such order without being charged with the assumption of risk or contributory negligence unless the danger is so apparent that no prudent person would encounter it."

Where the master commands the servant to go into a dangerous place and perform a dangerous task, or use a defective tool, at a particular time, in a particular way, leaving the latter no discretion as to the time or manner of his performance, the servant may rely upon the command of the master at the master's risk, and not be put to the alternative of either quitting the employment or encountering danger at his

own risk, unless the danger is so glaring and extreme as to be apparent to anyone, and one that a prudent man would not encounter. *Mellette v. Indianapolis Northern Traction Co.* (Ind. App.) 86 N. E. 433.

Similar statements were made in the following cases: *Wrightsville & T. R. Co. v. Lattimore*, 118 Ga. 581, 45 S. E. 453; *Truly v. J. E. North Lumber Co.* 83 Miss. 430, 36 So. 4; *Yazoo & M. Valley R. Co. v. Scott* (Miss.) 48 So. 239; *Ittner Brick Co. v. Killian*, 67 Neb. 589, 93 N. W. 951; *Lowe v. Southern R. Co.* (S. C.) 67 S. E. 460; *Houston, E. & W. T. R. Co. v. De Walt*, 96 Tex. 121, 97 Am. St. Rep. 877, 70 S. W. 531; *Texas & N. O. R. Co. v. Kelly*, 34 Tex. Civ. App. 21, 80 S. W. 1073, affirmed in 98 Tex. 123, 80 S. W. 79; *Hightower v. Gray*, 36 Tex. Civ. App. 674, 83 S. W. 254; *International & G. N. R. Co. v. Wray*, 43 Tex. Civ. App. 380, 96 S. W. 74; *St. Louis & S. W. R. Co. v. Schuler*, 46 Tex. Civ. App. 356, 102 S. W. 783; *Texas & P. R. Co. v. Jones* (Tex. Civ. App.) 123 S. W. 434; *Missouri, K. & T. R. Co. v. Swearingen* (Tex. Civ. App.) 127 S. W. 1192; *Faulkner v. Mammoth Min. Co.* 23 Utah, 437, 66 Pac. 799; *Washington Southern R. Co. v. Cheshire*, 109 Va. 741, 65 S. E. 27; *Christianson v. Pacific Bridge Co.* 27 Wash. 583, 68 Pac. 191; *Green v. Western American Co.* 30 Wash. 87, 70 Pac. 310; *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900.

A similar rule has been asserted in a number of Kentucky cases: *Smith v. Kentucky Lumber Co.* 25 Ky. L. Rep. 1386, 78 S. W. 120; *Dryden v. H. E. Pogue Distillery Co.* 26 Ky. L. Rep. 528, 82 S. W. 262; *Illinois C. R. Co. v. Keebler*, 27 Ky. L. Rep. 305, 84 S. W. 1167; *Lindsay v. Hollerbach & M. Contract Co.* 29 Ky. L. Rep. 68, 4 L.R.A.(N.S.) 830, 92 S. W. 294; *Central Coal & I. Co. v. Thompson*, 31 Ky. L. Rep. 276, 102 S. W. 272; *Cumberland Teleph. & Teleg. Co. v. Graves*, 31 Ky. L. Rep. 972, 104 S. W. 356; *Kirby v. Hillside Coal Co.* 32 Ky. L. Rep. 519, 106 S. W. 278; *Pullman Co. v. Geller*, 128 Ky. 72, 129 Am. St. Rep. 295, 107 S. W. 271; *Owensboro Stave & Barrel Co. v. Daugherty*, 33 Ky. L. Rep. 328, 110 S. W. 319; *Illinois C. R. Co. v. Edmonds*, 33 Ky. L. Rep. 933, 111 S. W. 331; *Long v. Illinois C. R. Co.* 113 Ky. 806, 58 L.R.A. 237, 101 Am. St. Rep. 374, 68 S. W. 1095; *Illinois C. R. Co. v. Langan*, 116 Ky. 318, 76 S. W. 32; *Ross-Paris Co. v. Brown*, 121 Ky. 821, 90 S. W. 568; *Owensboro v. Gabbert*, 135 Ky. 346, 122 S. W. 178; *Pittsburg, C. C. & St. L. R. Co. v. Schaub*, 136 Ky. 652, 124 S. W. 885; *Mason, H. & C. Co. v. Henry*, 134 Ky. 844, 121 S. W. 1001.

In Kansas a similar rule prevails. Thus, in *St. Louis & S. F. R. Co. v. Morris*, 76 Kan. 836, 13 L.R.A.(N.S.) 1100, 93 Pac. 153, the court laid down the following rule: Where a master orders a servant into a situation of danger, and, in obeying the command, the servant is injured, he will not be charged with contributory negligence, or with an assumption of the risk,

unless the danger was so glaring that no prudent man would have encountered it, even under such orders, provided he acts with reasonable prudence in executing such orders.

The same general rule was asserted in the following cases: *Wurtenberger v. Metropolitan Street R. Co.* 68 Kan. 642, 75 Pac. 1049; *Missouri, K. & T. R. Co. v. Walker*, 79 Kan. 31, 99 Pac. 269; *Young v. Missouri, K. & T. R. Co.* 82 Kan. 332, 108 Pac. 99.

In Pennsylvania the courts have adopted the rule that if the master give a servant positive orders to go on with the work under perilous circumstances, the servant may recover for an injury thus incurred if the work was not "inevitably and imminently" dangerous; and this is a question for the jury. *Reese v. Clark*, 198 Pa. 312, 47 Atl. 994; *Williams v. Clark*, 204 Pa. 416, 54 Atl. 315; *Sweigert v. Klingensmith*, 210 Pa. 565, 60 Atl. 253; *Schiglizzo v. Dunn*, 211 Pa. 253, 107 Am. St. Rep. 567, 60 Atl. 724; *Gerding v. Standard Pressed Steel Co.* 220 Pa. 229, 69 Atl. 672; *Hartman v. Reading Wood Pulley Co.* 38 Pa. Super. Ct. 587.

In *Van Duzen Gas & Gasoline Engine Co. v. Schelies*, 61 Ohio St. 298, 55 N. E. 998, the court laid down the following rule: Where an order is given a servant by his superior to do something within his employment apparently dangerous, and in obeying he is injured from the culpable fault of the master, he may recover unless obedience to the order involved such obvious danger that no man of ordinary prudence would have obeyed it; and this is a question of fact for the jury to determine under proper instructions, and not of law for the court.

And the *Van Duzen Case* was followed in *City & Suburban Teleph. Asso. v. Kelly*, 28 Ohio C. C. 820; *Crockett v. Michael*, 29 Ohio C. C. 41.

But in *Northern Ohio R. Co. v. Rigby*, 69 Ohio St. 184, 68 N. E. 1046, it was held that where the superior, while absent, sends an order to an employee to perform certain work or duty, but leaves to such employee the selection of the means and manner of performing the service, the doctrine of the *Van Duzen Case* does not apply.

Nor does it apply where the order was merely a general order. *Cleveland v. Wolf*, 25 Ohio C. C. 406.

—Illinois.

In Illinois the general rule asserted by many cases is that a servant, in obeying a direct command of the master, does not assume the risk of any injury thereby unless the danger is so great that an ordinarily prudent man would not have encountered it; this, as has been pointed out, practically eliminates all question as to assumption of risk. *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651; *Chicago, R. I. & P. R. Co. v. Kinnare*, 190 Ill. 9, 60 N. 30 L.R.A. (N.S.)

E. 57; William Graver Tank Works v. O'Donnell, 191 Ill. 236, 60 N. E. 831; *Gundlach v. Schott*, 192 Ill. 509, 85 Am. St. Rep. 348, 61 N. E. 332; *Illinois Steel Co. v. McFadden*, 196 Ill. 344, 89 Am. St. Rep. 319, 63 N. E. 671; *Western Stone Co. v. Muscial*, 196 Ill. 382, 89 Am. St. Rep. 325, 63 N. E. 664; *Illinois C. R. Co. v. Sporleder*, 199 Ill. 184, 65 N. E. 218; *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669; *Illinois Steel Co. v. Ryska*, 200 Ill. 280, 65 N. E. 734; *Hartrich v. Hawes*, 202 Ill. 334, 67 N. E. 13; *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Cobb Chocolate Co. v. Knudson*, 207 Ill. 452, 69 N. E. 816; *Pressed Steel Car Co. v. Herath*, 207 Ill. 576, 69 N. E. 959; *Barnett & R. Co. v. Schlapka*, 208 Ill. 426, 70 N. E. 343; *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 71 N. E. 863; *Illinois C. R. Co. v. Swift*, 213 Ill. 307, 72 N. E. 737; *Illinois Steel Co. v. Olste*, 214 Ill. 181, 73 N. E. 422; *Leighton & H. Steel Co. v. Snell*, 217 Ill. 152, 75 N. E. 462; *Consolidated Coal Co. v. Shepherd*, 220 Ill. 123, 77 N. E. 133; *North Chicago Street R. Co. v. Aufmann*, 221 Ill. 614, 112 Am. St. Rep. 207, 77 N. E. 1120; *Springfield Boiler & Mfg. Co. v. Parks*, 222 Ill. 355, 78 N. E. 809; *Chicago, R. I. & P. R. Co. v. Rathneau*, 225 Ill. 278, 80 N. E. 119; *East St. Louis Connecting R. Co. v. Meeker*, 229 Ill. 98, 82 N. E. 202; *Marquette Cement Mfg. Co. v. Williams*, 230 Ill. 26, 82 N. E. 424; *Yarber v. Chicago & A. R. Co.* 235 Ill. 589, 85 N. E. 928; *Lee v. Republic Iron & Steel Co.* 241 Ill. 372, 89 N. E. 655; *Union Show Case Co. v. Blindauer*, 75 Ill. App. 358, affirmed in 175 Ill. 325, 51 N. E. 709; *Colson v. Craver*, 80 Ill. App. 99; *Pagels v. Meyer*, 88 Ill. App. 169, reversed on other grounds in 193 Ill. 172, 61 N. E. 1111; *Bennett v. Brown Hoisting & Conveying Mach. Co.* 89 Ill. App. 113; *Illinois C. R. Co. v. Sporleder*, 90 Ill. App. 590; *Butler Ballast Co. v. Hoshaw*, 94 Ill. App. 68; *McFadden v. Sollitt*, 94 Ill. App. 271; *Hass v. Chicago, B. & Q. R. Co.* 97 Ill. App. 624; *Pittsburg, C. C. & St. L. R. Co. v. Hewitt*, 102 Ill. App. 428, affirmed in 202 Ill. 28, 66 N. E. 829; *Chicago Hair & Bristle Co. v. Mueller*, 106 Ill. App. 21, affirmed in 203 Ill. 558, 68 N. E. 51; *Illinois Steel Co. v. Wierzbicky*, 107 Ill. App. 69, affirmed in 206 Ill. 201, 68 N. E. 1101; *Kapaczynski v. Wells & F. Co.* 110 Ill. App. 477, affirmed in 218 Ill. 149, 75 N. E. 751; *Chicago & A. R. Co. v. Bell*, 111 Ill. App. 280, reversed on other grounds in 209 Ill. 25, 70 N. E. 754; *Sattley Mfg. Co. v. Wendt*, 116 Ill. App. 375; *Hinchliff v. Robinson*, 118 Ill. App. 450; *Waukegan v. Sturm*, 118 Ill. App. 479; *Kraft v. Neunkirchen*, 119 Ill. App. 369; *American Brake Shoe & Foundry Co. v. Jankus*, 121 Ill. App. 267; *Chicago, R. I. & P. R. Co. v. Rathneau*, 124 Ill. App. 427, affirmed in 225 Ill. 278, 80 N. E. 119; *Jefferson Theatre Program Co. v. Crejczyk*, 125 Ill. App. 1; *Dalton v. Ogden Gas Co.* 126 Ill. App. 502; *Roehling Constr. Co. v. Thompson*, 129 Ill. App. 20, affirmed in 229 Ill. 42, 82 N. E. 106; *Chicago, R. I.*

& P. R. Co. v. Strong, 129 Ill. App. 196, affirmed in 228 Ill. 281, 81 N. E. 1011; Chicago Suburban Water & Light Co. v. Hyslop, 129 Ill. App. 575, affirmed in 227 Ill. 308, 81 N. E. 379; Glucose Sugar Ref. Co. v. McConnell, 132 Ill. App. 386; Acme Harvester Co. v. Chittick, 132 Ill. App. 611, affirmed in 230 Ill. 553, 82 N. E. 647; Mattoon City R. Co. v. Graham, 138 Ill. App. 70, affirmed in 234 Ill. 483, 84 N. E. 1070, 14 A. & E. Ann. Cas. 853; Corn Product Ref. Co. v. Cherry, 140 Ill. App. 1; Shirk v. Chicago & E. I. R. Co. 140 Ill. App. 22, affirmed in 235 Ill. 315, 85 N. E. 262; Tygett v. Sunnyside Coal Co. 140 Ill. App. 77; Kennedy v. Swift & Co. 140 Ill. App. 141, affirmed in 234 Ill. 606, 123 Am. St. Rep. 113, 85 N. E. 287; Heywood & M. Rattan Co. v. Jacobson, 140 Ill. App. 319, affirmed in 236 Ill. 570, 86 N. E. 110; Illinois Steel Co. v. Brenshall, 141 Ill. App. 36; Malloy v. Kelly-Atkinson Constr. Co. 141 Ill. App. 226, affirmed in 240 Ill. 102, 88 N. E. 234; Chenoweth v. Burr, 146 Ill. App. 443, affirmed in 242 Ill. 312, 89 N. E. 1008.

A servant is not required by law to disobey his master, or, by obeying, assume the hazard of obedience, unless the danger is so imminent that an ordinarily prudent man would not incur it. Offutt v. World's Columbian Exposition, *supra*.

A servant acting under direct orders of the master assumes no risk unless he acts recklessly in obeying them. Western Stone Co. v. Muscial, *supra*.

A servant ordered by one in authority to do a dangerous act is not required to balance the degree of danger, and decide with absolute certainty whether he may safely do the act, and, even if he had knowledge of such danger, it would not defeat a recovery for injury, if, in obeying his master's command, he acted with that degree of prudence which an ordinarily prudent man would have used under the same circumstances. Illinois Steel Co. v. McFadden, *supra*.

Some decisions clearly recognize that under such a rule as asserted by the Illinois courts, the defense of assumption of risk is entirely eliminated, and the master must rely solely upon the defense of contributory negligence.

Thus, in Chicago & E. I. R. Co. v. Heerey, *supra*, the court said: "In the case of a promise to repair or of a command, and perhaps some other cases, the question is one of contributory negligence on the part of the servant, depending upon whether the danger was so great that an ordinarily prudent person would not have encountered it. . . . The employee must always exercise the degree of care which an ordinarily prudent person would have exercised under the same circumstances, but he does not assume the risk resulting from a direct command."

So, in Springfield Boiler & Mfg. Works v. Parks, *supra*, it was held that where the danger is so great and imminent that an ordinarily prudent person would not have 30 L.R.A. (N.S.)

encountered it, the master escapes liability on the ground of contributory negligence rather than of assumption of risk.

In a few decisions in the appellate courts of Illinois, the rule recognized by many of the Illinois decisions, particularly in the supreme court, namely, that a direct command of the master eliminates any question of assumption of risk, is apparently repudiated, and a servant is held to have assumed the risks of which he has knowledge. Logically these cases should be placed in another division of this note, but it would seem that they do not correctly express the view taken by the supreme court, and probably would be overruled if they were carried to the latter court. It will be seen that they are clearly at variance with the rule of that court as set out above.

Thus, a servant is within the operation of the rule as to assumption of risk where, in obeying the order of the master, the risks incurred are as plainly apparent and understood as they are to the master, who gives the order. Slavik v. Cal Hirsch & Sons Iron & Rail Co. 143 Ill. App. 509.

So, a command of the master will not take away the defense of assumption of risk where the servant knows as well or better than the master that the work is dangerous. Conklin Constr. Co. v. Walsh, 131 Ill. App. 609.

And the direction of the master to a servant to perform an act entirely within the general scope of the employment of the servant does not operate to absolve the servant from the assumption of the risk involved. Kolp v. Decatur R. & Light Co. 145 Ill. App. 645.

So, in Thomas v. John Armstrong Lime & Quarry Co. 147 Ill. App. 88, it was held that a servant is not excused in obeying an order where the danger is as apparent to him as to the master.

The exception to the rule as to assumption of risk was said in Royal Trust Co. v. National Provision Co. 139 Ill. App. 136, to exist where a servant is ordered by his master to do certain work which is attended with danger of which he is not fully cognizant, and he relies upon the order to do the work as an assurance that he may safely perform the task. But the qualification "not fully cognizant" is not given in the great majority of the cases of the supreme court in which the rule is laid down.

An order to continue work, with a promise to sharpen the punch head, without notice or knowledge that the work had become extrahazardous on account of the punch being dull, is not a waiver of the assumption of risk on the part of the master. Equitable Powder Mfg. Co. v. Green, 109 Ill. App. 403.

Where a servant knows and apprehends the danger to which he is exposed quite as well as the foreman, it cannot be said that, in obeying the order of the latter to cross a track in front of a train, in full view, and running at a high rate of speed, he was in the exercise of due care for his own safety.

Weber v. Illinois C. R. Co. 143 Ill. App. 498. And it was further held that the court was justified in directing a verdict for the defendant.

— North Carolina.

In North Carolina the general rule is that the servant does not assume the risk of the master's negligence unless the danger is so great and imminent that a reasonably prudent man would not undertake it. Consequently, if the master or his representative is negligent in giving an express order to do a particular piece of work, and the servant is injured, the latter will not be denied a recovery solely upon the ground of assumption of risk, unless the danger is unreasonably great and imminent, in which case he is in reality guilty of contributory negligence.

And the general implication given in the North Carolina cases of this character is that, except in extreme cases, the question of the servant's contributory negligence, where he is injured by obeying an order of the master, is for the jury; and this especially if the alleged contributory negligence consists solely in remaining at work in obedience to the master's commands in the face of great and imminent danger. *Halton v. Southern R. Co.* 127 N. C. 255, 37 S. E. 262; *Allison v. Southern R. Co.* 129 N. C. 336, 40 S. E. 91, reversed on questions of jurisdiction in 190 U. S. 326, 47 L. ed. 1078, 23 Sup. Ct. Rep. 713; *Thomas v. Raleigh & A. Air Line R. Co.* 129 N. C. 392, 40 S. E. 201; *Elmore v. Seaboard Air Line R. Co.* 132 N. C. 865, 44 S. E. 620; *Harrill v. South Carolina & G. Extension R. Co.* 135 N. C. 601, 47 S. E. 730; *Jones v. American Warehouse Co.* 137 N. C. 337, 49 S. E. 355, rehearing denied in 138 N. C. 546, 51 S. E. 106; *Fearington v. Blackwell Durham Tobacco Co.* 141 N. C. 80, 53 S. E. 662; *Liles v. Fosburg Lumber Co.* 142 N. C. 39, 54 S. E. 795; *Biles v. Seaboard Air Line R. Co.* 143 N. C. 78, 55 S. E. 512; *Avery v. West Lumber Co.* 146 N. C. 592, 60 S. E. 646; *Noble v. John L. Roper Lumber Co.* 151 N. C. 76, 134 Am. St. Rep. 974, 65 S. E. 622.

In the Allison Case, *supra*, the court approved instructions to the following effect: If a vice principal suddenly commands a laborer to do an extrahazardous act in the course of his duty (remove a hand car from the track in front of a rapidly approaching train), one that may, though not probably, be safely done by observing due care, and one that must be done at once if done at all, and if the laborer obeys the command promptly, moved only by a faithful sense of duty, and, as a consequence, suffers serious bodily injury, in that case the injured party does not contribute to his own injury.

The order of a foreman is pertinent to repel an imputation of contributory negligence. *Fearington v. Blackwell Durham Tobacco Co. supra*.

But in extreme cases the servant may be

held guilty of negligence as a matter of law.

Thus, the court in *Allison v. Southern R. Co. supra*, said that a person would certainly be guilty of contributory negligence if he obeyed the orders of his superior in cases where it appeared reasonably certain that his obedience would be attended with injury to himself.

To order a brakeman to get a rock and scotch a rolling car in the night time is negligence on the part of a railroad company, acting through its conductor, and therefore the company is liable unless the injury was caused by the negligent manner in which the brakeman performed the duty assigned him. *Haltom v. Southern R. Co. supra*.

— Missouri.

In Missouri, according to the overwhelming weight of authority, a servant never assumes the risk of the master's negligence, and his knowledge of the danger does not affect his right of recovery so far as the question of assumption of risk is concerned, and consequently an order of the master can only affect his right of recovery to the extent that it may be considered as modifying the standard of due care which the servant is obliged to exercise.

In a few Missouri cases in which there was a direct command of the master, the courts do speak of the servant's assumption of risk, and in such cases hold that if the servant is acting under the immediate commands of his master, he will not be held to have assumed the risk of dangers unless they are so glaring and imminent that a reasonably prudent man would not have encountered them. *Bokamp v. Chicago & A. R. Co.* 123 Mo. App. 270, 100 S. W. 689; *Buckner v. Stock Yards Horse & Mule Co.* 221 Mo. 700, 120 S. W. 766; *Dean v. St. Louis Woodenware Works*, 106 Mo. App. 167, 80 S. W. 292.

Although a servant knows that a machine is dangerous, yet, if she is ordered to proceed to work upon it, under a penalty of losing her position or being reduced in pay, the question of the assumption of the extra risk of using the dangerous machine is a question for the jury. *Adolff v. Columbia Pretzel & Baking Co.* 100 Mo. App. 199, 73 S. W. 321.

In many cases the court states that if the master orders the servant into a place of danger, and the servant is injured, he is not guilty of contributory negligence unless the danger was so glaring that a reasonably prudent man would not have entered into it. *Harff v. Green*, 108 Mo. 308, 67 S. W. 576; *Butz v. Murch Bros. Constr. Co.* 199 Mo. 279, 97 S. W. 895; *Kennedy v. Laclede Gaslight Co.* 215 Mo. 688, 115 S. W. 407; *Thompson v. Chicago, R. I. & P. R. Co.* 86 Mo. App. 141; *Browning v. Kasten*, 107 Mo. App. 59, 80 S. W. 354; *Buckalew v. Quincy, O. & K. C. R. Co.* 107 Mo. App. 575, 81 S. W. 1176; *Wilson v. Kansas City Southern R. Co.*

122 Mo. App. 667, 99 S. W. 465; Bokamp v. Chicago & A. R. Co. supra; Jennings v. Swift & Co. 130 Mo. App. 391, 110 S. W. 21; Morgan v. Missouri P. R. Co. 136 Mo. App. 337, 117 S. W. 106; Wilson v. United R. Co. 142 Mo. App. 676, 121 S. W. 1083.

In such a statement of the rule, however, it is difficult to see how the order of the master affects the situation in any way, because, independent of the order of the master, the servant would be considered guilty of contributory negligence if the danger was so glaring that a reasonably prudent man would not encounter it, and probably the only effect of the master's orders in such cases would be that the orders were to be considered by the jury as one of the circumstances which they were to consider in determining whether or not the danger was so glaring that a reasonably prudent man would not have encountered it. As was said above, it is difficult clearly and definitely to express just to what extent the order of the master does affect the situation.

Where a servant was at work on the third floor of a building in the process of erection, engaged in passing up lumber to carpenters at work on the roof, and the floor on which he was standing consisted simply of a network of girders and joists, with an occasional board left lying from girder to joist, it was held in *Butz v. Murch Bros. Constr. Co.* supra, that the mere fact that obedience to the order of the master to do that particular work was accompanied by some danger, and that the danger was known to the servant, would not prevent a recovery unless the danger was so glaring that a reasonably prudent man would not have undertaken it; and that was a question for the jury.

An instruction assuming it to be the servant's duty to obey a city ordinance should not, in a suit between the master and servant, ignore the question of the master's order on the subject. *Moore v. St. Louis Transit Co.* 193 Mo. 411, 91 S. W. 1060.

Even in Missouri, a servant must use ordinary reasonable care for his own safety, notwithstanding he is obeying a direct command of the master.

This, although a street car foreman may have issued a negligent order requiring a motorman to make a run within a certain time, such order does not excuse the motorman from exercising due care in avoiding a collision with another car. *McGahan v. St. Louis Transit Co.* 201 Mo. 500, 100 S. W. 601.

If the master negligently orders and directs the servant's act which renders it unsafe and occasions an injury, a prima facie liability arises on account of the negligent order, unless the dangers are so obvious and imminent as to preclude the right of recovery on the theory of contributory negligence, or it appears the risk is an ordinary one, assumed by the servant. In the circumstances stated, the order of the master implies an assurance that the place is

reasonably safe. *Bennett v. Crystal Carbonate Lime Co.* (Mo. App.) 124 S. W. 608.

Where master's liability is fixed regardless of the command.

In many cases, although the order to do certain work had been given, it does not appear that such order affected the decision in any way, as the facts of the case are such that the order does not add any to the liability of the master; as for instance, where the servant was entirely ignorant of the danger to be incurred, or where he was inexperienced, and the master had failed to instruct him of the danger, etc. *The Ethelred*, 96 Fed. 446; *McGhee v. Campbell*, 42 C. C. A. 94, 101 Fed. 936; *National Steel Co. v. Hore*, 83 C. C. A. 578, 155 Fed. 62; *American Window Glass Co. v. Noe*, 86 C. C. A. 133, 158 Fed. 777; *American Window Glass Co. v. Arnold*, 86 C. C. A. 137, 158 Fed. 781; *Snipes v. Southern R. Co.* 91 C. C. A. 593, 166 Fed. 1; *Delaware & H. Co. v. Beemer*, 96 C. C. A. 493, 171 Fed. 821; *Moss v. Mosely*, 148 Ala. 168, 41 So. 1012; *Alabama Steel & Wire Co. v. Tallant* (Ala.) 51 So. 835; *Goosby v. Crossett Lumber Co.* 91 Ark. 86, 120 S. W. 399; *Staubley v. Potomac Electric Power Co.* 21 App. D. C. 160; *Western & A. R. Co. v. Bryant*, 123 Ga. 77, 51 S. E. 20; *Diezi v. G. H. Hammond Co.* 156 Ind. 583, 60 N. E. 353; *Republic Iron & Steel Co. v. Berkes*, 162 Ind. 517, 70 N. E. 815; *Struble v. Burlington, C. R. & N. R. Co.* 128 Iowa, 158, 103 N. W. 142; *Wildner v. Great Western Cereal Co.* 130 Iowa, 283, 104 N. W. 434; *B. F. Avery & Son v. Meek* (Ky.) 45 S. W. 355; *Louisville & N. R. Co. v. Cason* (Ky.) 116 S. W. 716; *Southern R. Co. v. Hart*, 23 Ky. L. Rep. 1054, 64 S. W. 630; *Shanks v. Citizens' General Electric Co.* 25 Ky. L. Rep. 811, 76 S. W. 379; *Louisville & N. R. Co. v. Metcalf*, 29 Ky. L. Rep. 870, 96 S. W. 525; *Monongahela River Consol. Coal & Coke Co. v. Coleman*, 32 Ky. L. Rep. 1347, 108 S. W. 859; *Bonnin v. Crowley*, 112 La. 1025, 36 So. 842; *Stewart v. Texas & P. R. Co.* 113 La. 525, 37 So. 129; *James v. Rapides Lumber Co.* 50 La. Ann. 717, 44 L.R.A. 33, 23 So. 469; *Drapeau v. International Paper Co.* 96 Me. 299, 52 Atl. 647; *Patnode v. Warren Cotton Mills*, 157 Mass. 283, 34 Am. St. Rep. 275, 32 N. E. 161; *Austin v. Fitchburg R. Co.* 172 Mass. 484, 52 N. E. 527; *Bowes v. New York, N. H. & H. R. Co.* 181 Mass. 89, 62 N. E. 949; *Joyce v. American Writing Paper Co.* 184 Mass. 230, 68 N. E. 213; *Murphy v. New York, N. H. & H. R. Co.* 187 Mass. 18, 72 N. E. 330; *Edgar v. New York, N. H. & H. R. Co.* 188 Mass. 420, 74 N. E. 911; *Peterson v. Morgan Spring Co.* 189 Mass. 576, 76 N. E. 220; *Byrne v. Lennard*, 191 Mass. 269, 77 N. E. 316; *Hodde v. Attleboro Mfg. Co.* 193 Mass. 237, 79 N. E. 252; *Lammi v. Milford Pink Granite Quarries*, 196 Mass. 336, 82 N. E. 26; *Connolly v. Booth*, 198 Mass. 577, 84 N. E. 799; *Brosnan v. New York, N. H. & H. R. Co.*

200 Mass. 221, 85 N. E. 1050; Shannon v. Shaw, 201 Mass. 393, 87 N. E. 748; Berry v. New York C. & H. R. R. Co. 202 Mass. 197, 88 N. E. 588; Proulx v. J. W. Bishop Co. 204 Mass. 130, 90 N. E. 539; Igo v. Boston Elev. R. Co. 204 Mass. 197, 90 N. E. 574; Doe v. Boston & W. Street R. Co. 195 Mass. 168, 80 N. E. 814; Saures v. Stevens Mfg. Co. 196 Mass. 543, 82 N. E. 694; Bartley v. Boston & N. Street R. Co. 198 Mass. 163, 83 N. E. 1093; Hayes v. Frederick Stearns & Co. 130 Mich. 287, 89 N. W. 947; Pecard v. Menominee River Sugar Co. 153 Mich. 84, 116 N. W. 532; Sipes v. Michigan Starch Co. 137 Mich. 258, 100 N. W. 447; Bernard v. Pittsburg Coal Co. 137 Mich. 279, 100 N. W. 396; Belmer v. Boyne City Tanning Co. 160 Mich. 689, 125 N. W. 726; Perras v. A. Booth & Co. 82 Minn. 191, 84 N. W. 739, 85 N. W. 179; Gray v. Commutator Co. 85 Minn. 463, 89 N. W. 322; Clay v. Chicago, M. & St. P. R. Co. 104 Minn. 1, 115 N. W. 949; Bigum v. St. Paul Sash, Door & Lumber Co. 107 Minn. 567, 119 N. W. 481; Wickham v. Chicago, St. P. M. & O. R. Co. 110 Minn. 74, 124 N. W. 639, rehearing denied in 110 Minn. 78, 124 N. W. 994; Barrett v. Reardon, 95 Minn. 425, 104 N. W. 309; Bane v. Irwin, 172 Mo. 306, 72 S. W. 522; Franklin v. Missouri, K. & T. R. Co. 97 Mo. App. 473, 71 S. W. 540; Mitchell v. Chicago & A. R. Co. 108 Mo. App. 142, 83 S. W. 289; Riggsby v. Oil Well Supply Co. 115 Mo. App. 297, 91 S. W. 460; Norfolk Beet-Sugar Co. v. Hight, 59 Neb. 100, 80 N. W. 276; Parker v. Omaha Packing Co. 85 Neb. 515, 123 N. W. 1026; Rathjen v. Chicago, B. & Q. R. Co. 85 Neb. 808, 124 N. W. 473; Lintott v. Nashua Iron & Steel Co. 69 N. H. 628, 44 Atl. 98; Finn v. Cassidy, 165 N. Y. 584, 53 L.R.A. 877, 59 N. E. 311; Tully v. New York & T. S. S. Co. 10 App. Div. 463, 42 N. Y. Supp. 29, affirmed without opinion in 162 N. Y. 614, 57 N. E. 1127; Dzinbienski v. J. L. Mott Iron Works, 56 App. Div. 58, 67 N. Y. Supp. 256; Eichholz v. Niagara Falls Hydraulic Power & Mfg. Co. 68 App. Div. 441, 73 N. Y. Supp. 842, affirmed without opinion in 174 N. Y. 519, 66 N. E. 1107; Klein v. Garvey, 94 App. Div. 183, 87 N. Y. Supp. 998; Motzing v. Excelsior Brewing Co. 107 App. Div. 275, 94 N. Y. Supp. 1118, affirmed in 186 N. Y. 577, 79 N. E. 1111; Burke v. Manhattan R. Co. 109 App. Div. 722, 96 N. Y. Supp. 516; Perrotta v. Richmond Brick Co. 123 App. Div. 626, 108 N. Y. Supp. 10; McAleer v. Walter, 34 Misc. 474, 70 N. Y. Supp. 335; Laporte v. Cook, 21 R. I. 158, 42 Atl. 519; Cox v. American Agri. Chemical Co. 24 R. I. 503, 60 L.R.A. 629, 53 Atl. 871; Greenville Oil & Cotton Co. v. Harkey, 20 Tex. Civ. App. 225, 48 S. W. 1005; Waxahachie Cotton Oil Co. v. McLain, 27 Tex. Civ. App. 334, 66 S. W. 226; Missouri, K. & T. R. Co. v. Walden, 27 Tex. Civ. App. 567, 66 S. W. 584; Bering Mfg. Co. v. Femelat, 35 Tex. Civ. App. 36, 79 S. W. 869; San Antonio & A. P. R. Co. v. Stevens, 37 Tex. Civ. App. 80, 83 S. W. 235; Galveston, H. & S. A. R. Co. v. Bonn, 30 L.R.A. (N.S.)

44 Tex. Civ. App. 631, 99 S. W. 413; Hillsboro Oil Co. v. White (Tex. Civ. App.) 54 S. W. 432; Texarkana & Ft. S. R. Co. v. Preacher (Tex. Civ. App.) 50 S. W. 595; Bonn v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.) 82 S. W. 808; St. Louis & S. F. R. Co. v. Vestal, 38 Tex. Civ. App. 554, 86 S. W. 790; Texas & P. R. Co. v. Johnson (Tex. Civ. App.) 99 S. W. 738; Marshall v. St. Louis Southwestern R. Co. (Tex. Civ. App.) 107 S. W. 883; Gulf, C. & S. F. R. Co. v. Jackson, 49 Tex. Civ. App. 573, 109 S. W. 478; Galveston, H. & S. A. R. Co. v. Worth (Tex. Civ. App.) 116 S. W. 365; Houston & T. C. R. Co. v. Malloy (Tex. Civ. App.) 118 S. W. 721; Houston & T. C. R. Co. v. Johnson (Tex. Civ. App.) 118 S. W. 1150; St. Louis Southwestern R. Co. v. Marshall (Tex. Civ. App.) 120 S. W. 512; Missouri, K. & T. R. Co. v. Gray (Tex. Civ. App.) 120 S. W. 527; Gentry v. Stephenville Oilmill (Tex. Civ. App.) 127 S. W. 879; Tuckett v. American Steam & Hand Laundry, 30 Utah, 273, 4 L.R.A. (N.S.) 990, 116 Am. St. Rep. 832, 84 Pac. 500; La Flam v. Missisquoi Pulp Co. 74 Vt. 125, 52 Atl. 526; Virginia Portland Cement Co. v. Luck, 103 Va. 427, 49 S. E. 577; Morton v. Moran Bros. Co. 30 Wash. 362, 70 Pac. 968; Jancko v. West Coast Mfg. & Invest. Co. 34 Wash. 556, 76 Pac. 78; King v. Griffiths-Sprague Stevedoring Co. 45 Wash. 425, 88 Pac. 759; Ball v. Peterman Mfg. Co. 47 Wash. 653, 92 Pac. 425; Johnson v. Motor Shingle Co. 50 Wash. 154, 96 Pac. 962; Hilgar v. Walla Walla, 50 Wash. 470, 19 L.R.A. (N.S.) 367, 97 Pac. 498; Passage v. Stimson Mill Co. 52 Wash. 661, 101 Pac. 239; Well v. Moran Bros. Co. 55 Wash. 102, 104 Pac. 172; Forsman v. Seattle Electric Co. (Wash.) 109 Pac. 121; Horn v. La Crosse Box Co. 123 Wis. 399, 101 N. W. 935; Holloway v. H. W. Johns-Manville Co. 135 Wis. 629, 116 N. W. 635; Gray v. Northern P. R. Co. 139 Wis. 419, 121 N. W. 142.

Many of these cases state generally that a servant has a right to presume, in the absence of warning or notice to the contrary, that, in conforming to the order, he will not be subjected to injury. That is unquestionably the rule, but it is also the rule where there has been no specific order given. The servant always has a right to presume that the master will not subject him to injuries in performing his work, and will warn him of any dangers of which the master is aware, and which are not obvious to the servant, so that, in reality, the effect of the specific order to do the work is very slight, except, possibly, it may relieve the servant from any duty whatsoever of investigating the conditions surrounding the work before undertaking it; but the vast majority of the cases hold that a servant is under no obligation to investigate to discover dangers, especially those due to the master's negligence.

—illustrative cases.

A few cases of this character may be set out to show generally the conditions under

which a direct order of the master does not materially affect his liability.

A servant cannot be held guilty of contributory negligence where the facts and circumstances of the case render his knowledge of the danger uncertain and debatable. *Portland Gold Min. Co. v. Flaherty*, 49 C. C. A. 361, 111 Fed. 312, 21 Mor. Min. Rep. 555.

And in *American Brake Shoe & Foundry Co. v. Hank*, 129 Ill. App. 188, the court said it was not contributory negligence on the part of a servant to obey an order where he had no knowledge of the danger of so doing.

The servant may rely upon an assumption that the machine which he is directed to operate is in a reasonably safe condition, without any imputation of negligence, until such time as he shall discover, or, in the exercise of ordinary diligence, should discover, it to be to the contrary. *Hobbs v. Small*, 4 Ga. App. 627, 62 S. E. 91.

A servant unfamiliar with the work was not negligent in adopting the manner of hoisting heavy trusses which the superintendent ordered him to employ, where there was no apparent defect in the appliances. *Swain v. O'Loughlin*, 80 Conn. 200, 67 Atl. 480.

The act of an employee in letting down the weight of a building by means of jack-screws upon piers, with knowledge that the cement was yet soft, was held in *Nugent v. Cudahy Packing Co.* 126 Iowa, 517, 102 N. W. 422, not to be negligence, where he was a carpenter only, and the superintendent had told him to go ahead, as the cement was hard enough.

A common laborer, knowing nothing of electrical work, and unfamiliar with the perils attending it, who is sent by his employer to work on a wet and slippery roof, cannot be charged as a matter of law with contributory negligence in catching hold of a wire when he slipped, in an effort to save himself from falling. *Colusa Parrot Min. & Smelting Co. v. Monahan*, 89 C. C. A. 256, 162 Fed. 276.

An ignorant laborer injured by defects in a hammer which he was ordered by his boss to strike while it was being held by the boss himself, who could not see anything the matter with it, is not guilty of negligence as a matter of law in obeying the orders of the boss. *Pennsylvania R. Co. v. Garcia*, 81 C. C. A. 322, 152 Fed. 104.

A servant's jumping onto a railroad track immediately in front of a stationary car which is suddenly set in motion by a gripman who could not be seen by him is not contributory negligence, as a matter of law, when he never knew of cars being moved without warning, and had no reason to expect that this one would be,—especially when he had been ordered to go upon the track by his superior, who presumably knew whether there was peril. *Polaski v. Pittsburgh Coal Dock Co.* 134 Wis. 259, 14 L.R.A.(N.S.) 952, 114 N. W. 437.

Where the plaintiff was instructed to

clean a carding machine while in motion and to look out for the chain at the end of the shaft, and he avoided that danger, but pulled off the wool in such a manner that it became caught in the cylinder and drew his hand in, it was held in *Sauvageau v. River Spinning Co.* 129 Fed. 961, that it could not be said as a matter of law that the jury should have found the plaintiff guilty of contributory negligence.

A car repairer cannot be charged with contributory negligence in getting down under a car to repair it, where the injury was due solely to the negligence of the railroad company or its agents in running other cars into the one on which he was at work. *Pool v. Southern P. Co.* 20 Utah, 210, 58 Pac. 326.

A servant who has been in the employment but a month, and is injured while endeavoring, in obedience to an order given him by the foreman, to stop a car carrying a pile driver by inserting the beveled end of a crowbar in front of a wheel of the car, was held in *Southern R. Co. v. Shields*, 121 Ala. 460, 77 Am. St. Rep. 66, 25 So. 811, not to be guilty of contributory negligence as a matter of law, since the attempt did not, to his inexperience, involve obvious danger which a prudent man would not incur, and he had a right to rely to some extent upon the superintendent's greater knowledge and experience, and upon the assumption that the superintendent would not expose him to unnecessary peril.

Where a boy sixteen years of age went into an oat bin with which he was unfamiliar, pursuant to the orders of his superior, it was held in *Meier v. Way, J. L. & Co.* 136 Iowa, 302, 125 Am. St. Rep. 254, 111 N. W. 420, that the question of contributory negligence was for the jury.

Where the brakeman knows that loose cars are approaching his car, but, in obedience to an order to get his train out of the way, he takes a position upon the handholds upon the top of the car, to give signals ahead to carry out the orders he has received, he cannot be held to have assumed the risk or to be negligent, so as to preclude a recovery for injuries received because of the loose cars bumping into his train, where the immediate cause of the accident was the fact that the brakes upon the loose cars were defective, of which the brakeman was unaware. *International & G. N. R. Co. v. Owens* (Tex. Civ. App.) 124 S. W. 210.

The question of the contributory negligence and assumption of risk of a section hand who jumped off a car moving at the rate of 5 or 6 miles an hour, at the command of the foreman, is for the jury, where he was inexperienced in that line of work, and had seen other employees jump off the car with safety. *Galveston, H. & S. A. R. Co. v. Sanchez* (Tex. Civ. App.) 65 S. W. 893.

The question of assumption of risk in obeying an order of the master is for the jury, where the servant is not fully aware of the dangers of the situation. *Smith*

v. King, 74 App. Div. 1, 77 N. Y. Supp. 3.

Where the section foreman ordered the plaintiff and other members of the crew to drive a hand car with the rear end in front, and knew the peril of compliance with such an order, and the plaintiff did not know that the car was being run in an improper manner, the servant is not chargeable with either contributory negligence or assumption of risk. *A. L. Clark Lumber Co. v. Northcutt* (Ark.) 129 S. W. 88.

A servant whose regular work was at a machine, and who was directed by the foreman to put a belt on an overhead pulley for the first time, did not, while obeying the order, assume the risk of danger from protruding set screws, where they were not distinguishable from his place of work, and he did not know of them, and had not been warned thereof. *Daubert v. Western Meat Co.* 135 Cal. 144, 67 Pac. 133.

Whether a common miner, taken by the master's direction from that work in order to operate machinery about which he knew nothing and was told nothing, understood the dangers so as to assume the risk thereof, was held to be a question of fact for the jury in *Montana Coal & Coke Co. v. Kovac*, 99 C. C. A. 565, 176 Fed. 211.

Although the method of shifting a belt, from one pulley to another is clearly dangerous, nevertheless a servant who is inexperienced in regard to belts and pulleys will not assume the risk of such danger where he is obeying the commands of a foreman. *Koren v. National Conduit & Cable Co.* 82 App. Div. 527, 81 N. Y. Supp. 614, affirmed without opinion in 179 N. Y. 552, 71 N. E. 1132. W. M. G.

MICHIGAN SUPREME COURT.

JOSEPH BROWN, Plff. in Err.,
v.

WILLIAM E. LENNANE et al.

(155 Mich. 686, 118 N. W. 581.)

Master — assumption of risk — obvious danger — assurance of safety.

A servant does not, as matter of law, assume the risk of injury from working under an overhanging frozen crown in a sand pit, if he is commanded under pain of discharge to do so by his master's representative, with the assurance that the representative had tested it and found it was safe.

(Grant, Ch. J., and Hooker and Ostrander, JJ., dissent.)

(November 30, 1908.)

ERROR to the Circuit Court for Wayne County to review a judgment entered upon a directed verdict for defendants in personal injuries alleged to have been caused 30 L.R.A. (N.S.)

an action brought to recover damages for by defendants' negligence. Reversed.

The facts are stated in the opinion.

Mr. Washington I. Robinson for plaintiff in error.

Messrs. Brennan, Donnelly, & Van De Mark, for defendants in error:

The rule of safe place does not apply to a sand pile.

Livingstone v. Saginaw Plate Glass Co. 146 Mich. 236, 109 N. W. 431; *Dresser, Employers' Liability*, ¶ 90; *Hoar v. Merritt*, 62 Mich. 380, 29 N. W. 15; *Ritzema v. Valley City Brick Co.* 152 Mich. 75, 115 N. W. 705; *Welch v. Brainard*, 108 Mich. 38, 65 N. W. 667.

An employee assumes the risk when he voluntarily enters into danger apparent to him, notwithstanding an agent of his employer tells him there is no danger.

Toomey v. Eureka Iron & Steel Works, 89 Mich. 249, 50 N. W. 850; *Showalter v. Fairbanks, M. & Co.* 88 Wis. 376, 60 N. W. 257; *Anderson v. H. C. Akeley Lumber*

Note. — Servant's right of action for injuries received in obeying direct command accompanied by assurance of safety.

As to servant's right of action for injuries received in obeying a direct command, see notes to *Dallemand v. Saalfeldt*, 48 L.R.A. 753, and *Lowe Mfg. Co. v. Payne*, ante. As to effect of an assurance of safety given by the master, see note to *McKee v. Tourtellotte*, 48 L.R.A. 542. This note is supplemental to the above.

As is shown in the above-cited notes, the general effect, both of a direct command and of an assurance of safety, is to modify the rules as to assumption of risk and contributory negligence, and when the two are combined, as in *BROWN v. LENNANE*, of course, a much stronger case is presented.

So, a servant has more reason to rely upon a command of the master where it is accompanied with an assurance of safety. *Bush v. West Yellow Pine Co.* 2 Ga. App. 295, 58 S. E. 529.

But in a few cases it has been held that a servant's right of recovery is not affected by the fact that the servant is injured while obeying a direct command accompanied by an assurance of safety.

Thus, an employee of a laundry assumes the risk of injury from the operation of a mangle, by having her hand drawn into the machine, although she works reluctantly under pain of dismissal for refusal, and under the assurance by the foreman that it is safe, and a guard placed on the machine proves inadequate, where she is fully aware of the risk involved in the undertaking. *Burke v. Davis*, 191 Mass. 20, 4 L.R.A. (N.S.) 971, 114 Am. St. Rep. 591, 76 N. E. 1039.

So, where the work is within the servant's regular employment, and is obviously dangerous, the mere fact that a foreman

Co. 47 Minn. 128, 49 N. W. 664; Reese v. Clark, 146 Pa. 465, 23 Atl. 246; Perschke v. Hencken, 44 N. Y. Supp. 265; Hencke v. Ellis, 110 Wis. 532, 86 N. W. 171; Linch v. Sagamore Mfg. Co. 143 Mass. 206, 9 N. E. 728; Rohrabacher v. Woodward, 124 Mich. 125, 82 N. W. 797; Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; Soderstrom v. Holland-Emery Lumber Co. 114 Mich. 83, 72 N. W. 13; Kinzel v. Atlanta, K. & N. R. Co. 69 L.R.A. 757, 70 C. C. A. 73, 137 Fed. 489; Chicago G. W. R. Co. v. Crotty, 4 L.R.A.(N.S.) 832, 73 C. C. A. 147, 141 Fed. 913.

preemptorily ordered him to do it, and assured him that it was not dangerous, does not take the case out of the general rule that the servant must be held to have assumed the obvious risks of the work connected with his general employment. *Frangiose v. Horton*, 26 R. I. 291, 53 Atl. 949.

And a servant cannot relieve himself from the burden of exercising ordinary care for his own safety, by relying upon the assurances of a foreman in a matter regarding which he knew, or ought to have known, that the foreman had no superior knowledge. *McKane v. Marr*, 79 Vt. 13, 63 Atl. 944.

But for the most part, the cases hold that a servant obeying a direct command accompanied by an assurance of safety is not chargeable with assumption of risk or with contributory negligence in obeying the order, or, at least, he is not so chargeable as a master of law.

Thus, a servant in obeying the direct orders of his master, with an assurance upon the latter's part that there is no danger, does not assume the risk, unless it is such that a man of ordinary prudence would not assume it, which is a question for the jury. *Mergenthaler-Horton Basket Mach. Co. v. Lyon*, 28 Ky. L. Rep. 471, 89 S. W. 522; *Central Coal & I. Co. v. Thompson*, 31 Ky. L. Rep. 276, 102 S. W. 272.

So, where a servant is apprehensive that the place in which he is required to work is dangerous and unsafe, but relies upon the assurance of the foreman that it is safe, and is directed by him to proceed, and the servant is injured without any negligence upon his own part, the master is responsible. *Burkard v. A. Leschen & Sons Rope Co.* 217 Mo. 466, 117 S. W. 35.

And the mere fact that in an employee's judgment an act required by the employer is unsafe does not, as matter of law, render him guilty of negligence in performing it, if the employer assures him that there is no danger. *McKee v. Tourtellotte*, 167 Mass. 69, 48 L.R.A. 542, 44 N. E. 1071.

So, where an order of the master to do a certain work is accompanied by an assurance of safety, the servant cannot be deemed 30 L.R.A.(N.S.)

Blair, J., delivered the opinion of the court:

Plaintiff, a man of mature years, was injured by reason of the frozen crest or crown of a sand pile falling upon him, and brought this action to recover damages therefor.

Plaintiff testified, omitting the curses with which he claims Mr. Brennan's statements were interlarded, as follows: "I had a conversation with Mr. Brennan before the accident. It might be a minute before. I don't know what it was exactly. I don't remember it all. I remember part of it. He came rushing over. I was taking the sand from the side. Mr. Brennan came

guilty of contributory negligence, unless the danger is so manifest and glaring as to threaten immediate injury in case the plaintiff obeys the order. *Swearingen v. Consolidated Troup Min. Co.* 212 Mo. 524, 111 S. W. 545.

If the servant complains to the master that the instrumentality appears to be dangerous, and thereupon the master commands him to proceed with the work, and assures him there is no danger, the law implies a quasi new agreement whereby the master relieves the servant of his former assumption of the risk, and places responsibility for resulting injuries upon the master. *Bush v. West Yellow Pine Co.* supra.

Where the master, upon ordering a servant into a place of danger, assures him that he will guard him against a particular danger, and fails to do so, the master is liable for injuries resulting because of such failure. *Fleming v. Tuttle*, 98 App. Div. 222, 90 N. Y. Supp. 661.

Where a servant, after calling the master's attention to a possible danger, was told to go ahead, as it is all right, he is justified in assuming that there is no danger, where it could not have been discovered from any point where he was at work. *Starr v. Kreuzberger*, 129 Cal. 123, 79 Am. St. Rep. 92, 61 Pac. 787.

Where a servant is working under an assurance of safety and by the direction of his master, and is injured in a way not reasonably to have been anticipated by him, there can be no assumption of risk. *Industrial Lumber Co. v. Bivens*, 47 Tex. Civ. App. 396, 105 S. W. 831.

An order accompanied by an assurance of safety may properly be considered by the jury in connection with other evidence, in determining whether or not the employee at the time knew and appreciated the risk. *Anderson v. Pitt Iron Min. Co.* 103 Minn. 252, 114 N. W. 953.

Illustrative cases.

Although the danger to be incurred in going between cars was open to a brakeman's observation, and as well known to him as

rushing over, and he says, '—— — it, Brown, you are scraping there like an old woman. ——, why don't you come over here, and take it where it is plentiful?' And he started shoveling the sand from under this crown, and at the same time he motioned to the other man to come over with him to the center, and the man pulled his wheelbarrow over, and I says, 'Mr. Brennan, ain't that crown liable to cave in on us fellows?' He says, 'No, —— — it, no; that is as firm as masonry. That is as strong as stone. —— — that is perfectly safe. —— — it, I was up and around there. That is perfectly safe. I want the sand over, Brown.' And I lifted the shovel and was shoveling the sand, and Mr. Brennan comes towards me, and I says; 'Mr. Brennan, did you expect two men to do five

men's work?' And he says, '—— — you, Brown, I don't want any back talk. —— —, I want the sand over. I don't want any back talk at all. You will be the next one to get out of here. I will fire you.' I was working then, I was shoveling sand, and I didn't talk back any more. He was still digging in from the same place, and filling up his wheelbarrow. The other man was doing this. Brennan ordered him over. He swore at him, and told him to come over where the sand was plentiful. I started to dig there. I was digging only a few seconds after he told me about this being safe. I was shoveling the sand into the wheelbarrow. Brennan had shoveled about two thirds of the wheelbarrow full, and I shoveled probably three, four, five, or probably six shovelfuls of sand after that. My

to the conductor and superintendent, and he would have been held to have assumed the risk thereof if undertaken without express orders, yet if he acted upon the order of his superiors, coupled with an assurance of protection, or upon such orders as implied such an assurance of protection, against the danger of the car starting while he was in such a dangerous position, then he cannot, as a matter of law, be held to have assumed the risk, or to be guilty of negligence. *Louisiana Extension R. Co. v. Carstens*, 19 Tex. Civ. App. 190, 47 S. W. 36.

A servant is not guilty of contributory negligence in failing to look out for signals while working on the footboard between the tender of an engine and a car, when he was working directly under the orders of a superior who assured him that he would keep a lookout. *Missouri, K. & T. R. Co. v. Kellerman*, 39 Tex. Civ. App. 274, 87 S. W. 401.

An engineer who protested against taking out an engine with the sides of the cab boarded up does not assume the risk of injuries caused by the bursting of the water gauge while his head was held near it, as it was necessary for him to do because of the boards, in order to see the signals of the fireman, when he had been assured that the engine was all right, and that, if he did not take that one out, he would never take another one out for the company. *Cleveland, C. C. & St. L. R. Co. v. Patterson*, 37 Ind. App. 617, 75 N. E. 857.

Although employees were undoubtedly aware of the dangerous character of the work that they were doing,—using a long iron scoop to draw the tamping from blasting holes containing a charge of dynamite that had failed to explode,—nevertheless, they were justified in relying upon the positive assurance of the defendant's superintendent that they were in no danger after the electric battery had been "pulled" on the holes, and had failed to set the charges off. *Allen v. Gilman*, 127 Fed. 609.

Even if a plan or system of operating a mine was so imperfect that it would not be prudent to rely upon it in its general working, still if the miner, being uncertain

as to the safety of the system or plan in general, had called the attention of the mine manager to the conditions of safety or danger, and had been assured by him that the necessary investigation had been made, and that there was no danger in observing the system, and was directed by the mine manager to continue to perform the work as miner in accordance with the plan or system, then he would not be held to have assumed the risk of continuing in the performance, unless the danger was so great and imminent that no one but a reckless person would have continued at the work. *Consolidated Coal Co. v. Shepherd*, 220 Ill. 123, 77 N. E. 133.

A servant cannot be said to be guilty of contributory negligence as a matter of law, in going into a mine at the direction of the foreman, simply because he was told by a third person in the presence of the foreman that the mine was not safe, where he was immediately told by the foreman to go ahead, that everything was all right. *Alabama Consol. Coal & I. Co. v. Heald* (Ala.) 53 So. 162.

Where miners left a room because of the falling of something from overhead, and were ordered back by the foreman, and assured by him that there was no further danger, it was held in *Tennessee Coal, Iron & R. Co. v. George*, 161 Ala. 421, 49 So. 681, that the jury might find that the foreman was guilty of negligence in ordering the men back to work without first ascertaining that there was no more danger.

Where a superintendent had told a laborer in a quarry that a certain hole was not loaded, when in fact it was, and the laborer was injured in attempting to drill out the hole, it was held in *Lane Bros. v. Bott*, 104 Va. 615, 52 S. E. 259, that the plaintiff was not guilty of contributory negligence. The court said: "The superintendent had lulled the defendant in error into a delusive sense of security by the false statement that the hole was unloaded, and he had a right to rely upon that assurance without employing precautions which ordinary prudence might otherwise have suggested."

colaborer was still digging at the sand from the same place and throwing it into his own wheelbarrow. After I got through, I turned right around like this, and I caught the handles of the wheelbarrow, and lifted it up to run away with it, and the crash came right down on me. The frozen sand came down from this overhead, hanging over. This hung over probably 3 or 4 or 5 feet." The trial judge directed a verdict for the defendants upon the ground that plaintiff assumed the risk, and plaintiff brings the record to this court for review upon writ of error.

We think that the case is distinguishable from *Toomey v. Eureka Iron & Steel Works*, 89 Mich. 249, 50 N. W. 850; *Livingstone v. Saginaw Plate Glass Co.* 146 Mich. 236, 109 N. W. 431; and other Michigan cases cited

by counsel for defendants, in that, in the case at bar, defendants' vice principal vehemently and with oaths ordered plaintiff to do the work, on pain of losing his job, and at the same time informed him substantially that he had been up on top of the sand pile, and tested its safety, and that it was actually safe. This is more than the mere expression of an opinion, or than a statement apparently based upon facts equally open to plaintiff's visual observation. It was a representation that the superintendent had actually gone upon the sand pile, tested it, and found, as a matter of fact, that it was safe. We do not think it can be said, as a matter of law, that the plaintiff assumed the risk under such circumstances in obeying the orders for a reasonable time. Throughout the trial of the

Where a servant at work in a quarry refused to assume the risk of the presence of explosives in the stone, and was only induced to continue his work by positive orders coupled with authoritative assurance that his apprehension of danger was groundless, it was held in *Di Stefano v. Peekskill Lighting & R. Co.* 107 App. Div. 293, 95 N. Y. Supp. 179, that the plaintiff could not be logically regarded as having assumed the risk of such danger.

Where a complaint alleging that the plaintiff's intestate, a boy sixteen years of age, was sent by the defendant, his employer, to work at the foot of a vertical wall of clay about 50 feet high, which had near the top thereof an overhanging face of clay and earth which had several fissures running through it, and was in danger of falling any moment, and, upon the defendant's attention being called to the danger, the plaintiff's intestate was assured that it was safe for him to work under, and he was directed so to do, it was held in *Bacelli v. New England Brick Co.* 138 App. Div. 650, 122 N. Y. Supp. 856, that the complaint stated a cause of action, for it could not be said, as a matter of law, either that the servant was guilty of contributory negligence, or that he assumed the risk of the injuries.

A servant directed by his master to shovel dirt in a trench does not assume the risk of working in a confined space near a servant using a pick, where the servant had complained to the master, and been ordered to go ahead upon an assurance that the master would protect him against all injury by reason of obeying the command. *Manks v. Moore*, 108 Minn. 284, 122 N. W. 5.

Where the servant was injured while oiling machinery while in motion, at the command of the foreman, who assured him that there was no danger, it was held in *Southern Cotton Oil Co. v. Spotts*, 77 Ark. 458, 92 S. W. 249, that an instruction that the servant "is chargeable with knowledge of such dangers as he might have known and comprehended by the exercise of ordinary care" was improper, because ignoring the fact that he was acting under commands

in the face of a danger not incident to the service.

A seaman cannot be held to have assumed the risks of attaching a towline to the mainmast, when he has declared that he would not go if the mainmast was so used, and had been assured by the mate that a change would be made. *Keating v. Pacific Steam Whaling Co.* 21 Wash. 415, 58 Pac. 224.

An inexperienced lineman does not necessarily assume the risk of a pole falling, due to lack of guying, although he was apprehensive of danger if the pole was not guyed, where he had complained of the danger to the foreman, and, with an assurance of safety, was ordered to proceed with his work. *Lord v. Wakefield*, 185 Mass. 214, 70 N. E. 123.

An assurance by a superintendent that a dark bin in which the servant was at work was safe, and a direction to him to go into it, justifies a finding that the servant was acting with due care in going into it without examination. *O'Brien v. Nute-Hallett Co.* 177 Mass. 422, 59 N. E. 65.

A servant does not assume the risk of injury from the negligence of a fellow servant, where he had complained of such negligence, and been told to go to his work, as everything was all right. *La Salle County Carbon Coal Co. v. Offergeld*, 104 Ill. App. 494.

A servant cannot be deemed guilty of contributory negligence in failing to make certain repairs for his own safety, where, upon offering to do so, the foreman ordered him not to, as he himself would attend to that. *Miller v. White Bronze Monument Co.* 141 Iowa, 701, 118 N. W. 518.

A servant has the right to rely upon the safety of an appliance selected and adjusted by the master himself, accompanied with assurances as to its safety, the immediate placing and adjustment having been made while the respondent was otherwise engaged, and he being immediately thereafter called to action at that place. *Sullivan v. R. D. Wood & Co.* 43 Wash. 259, 117 Am. St. Rep. 1047, 86 Pac. 629.

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case, Mr. Brennan was apparently treated as defendants' superintendent and representative. And no claim appears to have been made that he was a fellow servant of plaintiff. The trial judge charged the jury: "That, for the purpose of this case, Mr. Brennan stood, upon that day, toward the plaintiff, in the position of the plaintiff's employer. He had the power to hire and discharge men and give directions, and was in control over them, so that whatever Mr. Brennan did upon that day may be taken to be the act of the defendants themselves." The correctness of the charge in this respect is not called in question by counsel for defendants, and in my opinion the record supports it. Plaintiff testified: "There were five of us wheeling sand, all to the same place, under the direction of Superintendent Brennan. Superintendent Brennan had charge of the cement work on the overhead crossing, the piers and abutments, and parapet walls that were put up out of concrete. . . . Mr. Brennan hired me, and he paid me. . . . Mr. Brennan had charge of the carpenters, and he directed them." Mr. Brennan testified: "I don't know that Brown claims that it was through my carelessness and negligence as superintendent of Lennane that he was injured. I don't think so. I had charge of 400 or 500 men. . . . The work was in two separate sections. I had charge of the concrete construction work, and Mr. Walker had charge of the grade work, and when I would want to borrow a few men, I would take them from his gang; and, if he wanted to borrow a few men, he would take them from my gang, and the men appear on both books. Sometimes they might appear on this for forty-five hours or on Mr. Walker's for the balance of the date, according to how we kept them, but the majority of these men were with me from the day I commenced the work till I ended it. I ended it some time in June, if I am not mistaken. I went to Des Moines, Iowa, to take charge of a construction job there. I haven't seen any of these men since I left. I hired these men, and Mr. Walker hired them. If I borrowed men from Mr. Walker, I had the men for the concreting. I had the men for the cement construction. They left it entirely to me, and sometimes they would come around and say, 'I want you to discharge a man,' and I had to go under their supervision."

Judgment reversed and new trial granted.

Montgomery, Moore, and McAlvay, JJ., concur.

Hooker, J., dissenting:

This case should be ruled by that of Liv-
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ingstone v. Saginaw Plate Glass Co., unless the fact that defendants' superintendent commanded plaintiff to go into a place of danger, and assured him of its safety, distinguished it from that case in principle. The plaintiff in the present case was a man forty-six years old, and of experience in mechanics. As was said in the Livingstone Case: "He must be held chargeable with the knowledge that a sand pile lying out of doors was frozen, and that digging into such a pile would remove the support from the frozen crust." He did know it, and objected to working under it for that reason; but the superintendent told him it was safe, and ordered him to get at work, and he did so. There is nothing to indicate that he did not know as much about the danger after as before. See *Welch v. Brainard*, 108 Mich. 38, 65 N. W. 667; *Ritzema v. Valley City Brick Co.* 152 Mich. 75, 115 N. W. 705. In such a case one assumes the risk of the dangerous employment which he undertakes. *Anderson v. Akeley Lumber Co.* 47 Minn. 128, 49 N. W. 664; *Kean v. Detroit Copper & Brass Rolling Mills*, 60 Mich. 277, 11 Am. St. Rep. 492, 33 N. W. 395; *Soderstrom v. Holland-Emery Lumber Co.* 114 Mich. 83, 72 N. W. 13; *Rohrabacher v. Woodward*, 124 Mich. 125, 82 N. W. 797. These cases hold: "One cannot continue to operate a machine which he knows is dangerous, simply upon the assurance of his employer that it is not, if he has just as much knowledge of the danger . . . as his principal has." See also *Reese v. Clark*, 146 Pa. 465, 23 Atl. 246; *Perschke v. Hencken*, 44 N. Y. Supp. 205; *Linch v. Sagamore Mfg. Co.* 143 Mass. 206, 9 N. E. 728; *Kinzel v. Atlanta, K. & N. R. Co.* 69 L.R.A. 757, 70 C. C. A. 73, 137 Fed. 491; *Chicago G. W. R. Co. v. Crotty*, 4 L.R.A. (N.S.) 832, 73 C. C. A. 147, 141 Fed. 913.

There is another reason for affirming this judgment. A right to recover was and is claimed upon the theory that Brennan was the vice principal or *alter ego* of the defendants. There is nothing in the case tending to show it. The testimony of plaintiff was that "there were five of us wheeling sand, all to the same place, under the direction of Superintendent Brennan. Superintendent Brennan had charge of the cement work on the overhead crossing, the piers and abutments, and parapet walls that were put up out of concrete. That was made up partially of this sand and crushed stone and cement and water. Mr. Brennan hired me, and paid me. . . . Brennan had shoveled about two thirds of the wheelbarrow full, and I shoveled probably three, four, five, or probably six shovelfuls of sand after that. . . . I don't know where Mr. Brennan was when this happened, probably

on the street. I know Mr. Walker, and have known him for probably sixteen or eighteen years. He was working for Lennane Brothers, too. Taking his word for it, he was manager." Brennan testified: "I was employed by Lennane Brothers in 1903 and in 1904, building the Michigan avenue subway track elevation, where they were separating the grade of Michigan avenue and another street, Park and Lovett." Duncan testified: "I had been working for Lennane Brothers before Mr. Brown. At that job that he went down to see Mr. Walker, and he introduced him to Mr. Brennan, the superintendent, and Mr. Brennan gave us a job dumping it in the mixer, not wheeling it. . . . Mr. Walker went and got an ambulance. I did not go in the ambulance. . . . I was there when they took him out to the ambulance. I helped to fetch him, when Dr. Milligan was there. Mr. Walker sent me after Dr. Milligan. Mr. Walker was working for Lennane. When Mr. Walker came down there, when Mr. Brown was carried in, was when he told me. This was at Brown's house. He told me to go and get the physician. I went over to the drug store to see if I could find out where he was. He was not home in the office, and I came back and told Mr. Walker that I could not find him. He was out, and he was down about the middle of the block on Congress street with a horse and buggy, and we happened to strike him, and then we called him in, or Mr. Walker did. Mr. Walker knew him, and went down. Mr. Walker brought Dr. Milligan. . . . I knew Mr. Walker had sent for Dr. Milligan to come and see him, and I followed his instructions. . . . Brown was hired just about at the same time I was. Mr. Brennan told us to come to work the next morning. . . . We went up there to Lennane Brothers together to get a job. We saw Mr. Walker first. Mr. Brown had known Mr. Walker. He had worked for him. Brown is a stonecutter. I am a stonecutter. We had worked in the same stone yard. Mr. Walker introduced us to Mr. Brennan. We were glad to get anything we could. He put us on the platform. . . . Mr. Walker went in the ambulance, but I went ahead of him to notify the sister. Mr. Walker told me to go and notify his sister." The plaintiff testified further: "I worked for Walker. I have worked on two streets in this city for Walker." From the foregoing, which is all of the testimony that we have found upon the subject, it is inferable that defendants had a contract for erecting overhead crossings in Detroit, that Walker was their manager, and that Brennan was the superintendent of the construction of the cement

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piers. Nothing indicates that he had general charge of defendants' work, or that he was more than a construction boss, and, if so, he was a fellow servant, under the rule laid down in many cases. *Guest v. Edison Illuminating Co.* 150 Mich. 438, 114 N. W. 226; *Younggren v. I. Stephenson Co.* 150 Mich. 488, 114 N. W. 341; *Corey v. Joliet Bridge & Iron Co.* 151 Mich. 558, 115 N. W. 737, where the authorities are collected. If it can be said that the testimony shows that Brennan was called a superintendent, it does not follow that he was a vice principal, and the jury should not have been allowed to so find upon this record. It would, at most, have been a guess. The burden of proving that he was a vice principal was upon the plaintiff, and he failed to prove it, the evidence being equally, if not more, consistent with the claim that he was a fellow servant.

The judgment should be affirmed.

Grant, Ch. J., and Ostrander, J., concur.

Petition for rehearing denied.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE OF CONNECTICUT

v.

THEODORE C. GOETZ, Appt.

(83 Conn. 437, 76 Atl. 1000.)

Evidence — homicide — character of accused.

1. Upon a trial of a chauffeur for homicide in running his car at a reckless rate on a city street, and striking and killing a pedestrian, evidence is not admissible as to the reputation of accused as a skilful chauffeur and careful driver.

Homicide — negligent driving of automobile.

2. One is guilty of homicide who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to strike and kill a pedestrian.

(July 12, 1910.)

Note. — Homicide by negligent operation of automobile.

Few cases involving criminal responsibility for homicide by the negligent operation of automobiles have been reported, but for the principles involved in such cases, see note "Negligent homicide," in 61 L.R.A. 277, covering criminal homicide resulting from some negligent act consisting of a breach of duty owed by one person to an-

APPEAL by defendant from a judgment of the Superior Court for Fairfield County convicting him of manslaughter. Affirmed.

The facts are stated in the opinion.

Messrs. **Nichols C. Downs** and **William H. Comley, Jr.**, for appellant:

Evidence of the defendant's good character as a careful driver of motor vehicles was admissible.

People v. Garbutt, 17 Mich. 26, 97 Am. Dec. 162; *Saye v. State*, 50 Tex. Crim. Rep. 569, 99 S. W. 551; *People v. Casey*, 53 Cal. 360; *State v. Kinley*, 43 Iowa, 294; *Wigmore*, Ev. § 59.

The unlawful act relied upon must be *malum in se*, and not merely *malum prohibitum*.

other or to the public, not constituting a crime or misdemeanor, or, if made criminal by statute because of the serious consequences liable to flow therefrom, not inherently criminal.

And see also subject note "Homicide by misadventure," in 3 L.R.A. (N.S.) 1153, for cases of accidental killing of another when the slayer is doing a lawful act, unaccompanied by any careless or reckless conduct.

Upon the principles set forth in the note first above cited, it was held in *State v. Campbell*, 82 Conn. 671, 74 Atl. 927, as in *State v. Goetz*, citing that case as authority, that one is guilty of criminal homicide, who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to strike and kill or fatally injure a pedestrian. In this case, it appeared that defendant, early in the afternoon, while driving a heavy touring car along a much-traveled business street in a city, at an excessive rate of speed, as he approached a crossing, saw deceased either on the curb or just leaving it to cross the roadway, and sounded his automobile horn. Deceased, when the horn was blown, jumped as though startled or frightened, and ran in the same direction across the street as he had been going, whereupon defendant, without attempting to stop or to diminish his speed, turned his automobile slightly to the left, so that each was apparently endeavoring to pass ahead of the other. The automobile struck deceased, and so injured him that he died the following day. Under these circumstances, it was further held that contributory negligence of the injured person, as such, is no defense in a criminal prosecution for the homicide, as it might be in a civil action. The state must clearly show that the decedent's death was the direct result of the defendant's negligence, and evidence of the injured person's conduct is material as bearing upon the question of such negligence of the accused; but if the culpable negligence of the accused was the cause of the death, the accused is responsible under the criminal law, whether deceased's failure to use due care contribut-

People v. Pearne, 118 Cal. 154, 50 Pac. 376; *Com. v. Adams*, 114 Mass. 323, 19 Am. Rep. 362; *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118, 8 Am. Crim. Rep. 514.

Mr. Stiles Judson, for the State:

Evidence of the reputation of defendant as a careful driver of an automobile is not admissible in his behalf in a prosecution for manslaughter, arising from his alleged reckless driving of an automobile.

State v. Jerome, 33 Conn. 265; *Morris v. East Haven*, 41 Conn. 252; *Budd v. Meriden Electric R. Co.* 69 Conn. 286, 37 Atl. 683; *Bassett v. Shares*, 63 Conn. 39, 27 Atl. 421; *Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379; *McDonald v. Savoy*, 110 Mass. 49; *Chase v. Maine C. R. Co.* 77 Me. 62, 52 Am. Rep.

ed to his injury or not. It is a question for the jury to decide upon the evidence, what the accused, under the circumstances in which he was placed, might reasonably have assumed would be the conduct of the deceased, and what inferences he might have been justified in drawing from the actions of the deceased, and the jury should judge the accused's conduct by the situation and circumstances as they appeared to him at the time.

So, in *People v. Scanlon*, *infra*, the court incidentally said, in discussing the evidence in that case, that "possibly the jerking of the horse was also an element which contributed to the accident, but that would not relieve the defendants if the defendants' negligence were the proximate and efficient cause thereof."

If the unlawful act of defendant in running his automobile at an excessive rate of speed, at and before the time when deceased placed himself in a position of danger, renders ineffectual his later best efforts to avoid collision, he is not entitled to an acquittal merely because he used such best efforts when the danger became imminent, and it was too late to avert it. *State v. Campbell*, *supra*.

One driving a large automobile along a much-traveled business street in a city has no right to assume that there will be no one else upon the highway who may be injured if he drives his automobile at an excessive speed. *Ibid*.

Where an automobile driver on trial for negligent homicide requests the court to state to the jury the provisions of a section of the automobile act forbidding excessive speed and stating what shall be prima facie evidence thereof as applicable to the question of what was an unlawful and dangerous rate of speed, it is not error for the court also to read a section providing that "upon approaching any person walking in the traveled portion of any highway, . . . and also in passing such person, . . . the person operating a motor vehicle shall have the same under control, and shall reduce its speed," and to explain to the jury the meaning and effect thereof

744; *Elliot v. Chicago*, M. & St. P. R. Co. 5 Dak. 523, 3 L.R.A. 363, 41 N. W. 758; 21 Cyc. Law & Proc. p. 906, note 85; 12 Cyc. Law & Proc. p. 413, note 37.

The defendant was properly convicted of involuntary manslaughter.

21 Cyc. Law & Proc. pp. 760, 761, 765, 766; 21 Am. & Eng. Enc. Law, 2d ed. pp. 189, 190; *People v. Pearne*, 118 Cal. 154, 50 Pac. 376; *Lee v. State*, 1 Coldw. 63; *Belk v. People*, 125 Ill. 584, 17 N. E. 744, 8 Am.

Crim. Rep. 507; *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118, 8 Am. Crim. Rep. 514; *State v. Stentz*, 33 Wash. 444, 74 Pac. 589; *State v. Underhill*, 6 Penn. (Del.) 491, 69 Atl. 880; *Com. v. Couch*, 62 Ky. L. Rep. 638, 16 L.R.A.(N.S.) 327, 106 S. W. 830; *Bruner v. State*, 58 Ind. 159; *R. v. Murray*, 5 Cox, C. C. 509; *R. v. Dalloway*, 2 Cox, C. C. 273; *Clark*, Crim. Law, pp. 173-175.

The court properly charged as to the

as applicable to the same question, in case the jury should find that the accused was passing deceased when the latter was walking in the traveled portion of the highway, if further instructions are given under which the jury must, before finding a verdict of guilty, find that deceased's death was the direct result of the gross carelessness of the defendant. *Ibid*.

On the trial of an automobile driver for negligent homicide, questions are properly excluded which are asked of the defendant for the manifest purpose of enabling him to say in effect that he did his best to avoid the collision, as such an answer would have been merely the expression of his opinion upon a question which it was the province of the jury to determine. *Ibid*.

Under a statute making the killing of a human being by the act, procurement, of culpable negligence of another, under certain circumstances, manslaughter in the fourth degree, an information predicated upon the negligent use and operation of an automobile is sufficient, if it charges that defendant, being in charge and control of, and operating and managing, a certain automobile, carelessly, recklessly, and with culpable negligence operated and propelled this automobile upon and along a public street in a city, at and upon deceased, etc., inflicting wounds and bruises upon her, by reason of such carelessness, recklessness, and culpable negligence, etc., from which wounds and bruises she died. It is not essential that the information set out in detail in what such recklessness and culpable negligence consists. *State v. Watson*, 216 Mo. 420, 115 S. W. 1011.

In that case, deceased, a girl twelve years old, while crossing an asphalt-paved street, about 10 o'clock at night, at a street crossing where the view was unobstructed and lights were going, was struck, knocked down, and run over by an automobile driven by defendant, and being run at a careless and reckless speed. The court said: "Individuals, as well as corporations, in the use and operation of dangerous machines, should have a due regard to the preservations of the rights of the public in the use of the public streets, as well as the protection of persons using such streets, from injury, and if they fail in this, and should, in the operation of a vehicle which is always attended with more or less danger, negligently, carelessly, and recklessly de-

stroy human life, it is but in keeping with the proper and impartial administration of justice that the penalties should be suffered for the commission of such acts." *Ibid*.

And it was also held, in this case, that in a prosecution for homicide by negligent operation of an automobile, the rate of speed at which the automobile was running is not matter exclusively for the testimony of experts, but witnesses who, at least, know what an automobile is, and have seen them operated, may give their opinion as to the rate of speed, and the weight to which such opinions are entitled is a matter for the jury. *Ibid*.

In *People v. Scanlon*, 132 App. Div. 528, 117 N. Y. Supp. 57, where defendants, while running an automobile on a public highway, in attempting to pass a buggy, ran into it, and caused the death of a boy riding therein, it was held that driving a motor vehicle at a rate prohibited by law is evidence of negligence, and on a trial for homicide by the negligent operation of an automobile, where there is testimony in the case that the automobile was running at the rate of 25 miles per hour, it was not error for the judge in his charge to the jury to call attention to the motor vehicle law which prohibited a person operating a motor vehicle at a greater speed than 20 miles per hour. The court said: "With a heavy machine weighing from three to four thousand pounds, going at a rate of 25 miles an hour, it is indefensible negligence to attempt to pass a buggy within a few inches."

But upon a joint indictment of the owner of an automobile and the chauffeur, for manslaughter committed by striking a buggy which they were attempting to pass upon a public highway, and thereby throwing out and causing the death of a boy riding therein, although the evidence sustains the conviction of the chauffeur, who was driving the car, the conviction of the owner, who was riding in the car at the time of the collision, but was not running the machine, and was only in general control of the chauffeur, and could not have done anything to prevent the collision, is not justified, where there is no evidence that it was the habit of the chauffeur to run dangerously close to other vehicles in passing, to the knowledge of the owner, without correction. *Ibid*. A. C. W.

unlawfulness of operating motor vehicles upon public highways at a dangerous rate of speed at the time in question.

Irwin v. Judge, 81 Conn. 492, 71 Atl. 572.

Hall, Ch. J., delivered the opinion of the court:

The information charges the defendant with manslaughter in having wilfully and feloniously assaulted and killed one Sarah Howe, at Stamford, on the 9th day of January, 1909, by running over her with an automobile to which he pleaded not guilty.

The state claimed to have proved these facts: At about 7 o'clock in the evening of the day alleged, the deceased, her daughter, and another person were standing at a place lighted by a street lamp, upon a crosswalk, on the north side of the trolley track on Main street, which runs east and west in the city of Stamford, waiting for a westerly bound trolley car. The accused, who is a chauffeur, was upon a pleasure trip in company with another person, and was driving or coasting an automobile at a reckless and dangerous rate of speed down a hill on Main street on the north side of said street, and going in a westerly direction. He saw the deceased and the persons with her, and believed they were waiting for the westerly bound trolley car which he had just passed; and in order to pass them, he, without reducing his speed, turned his automobile southerly and upon the trolley track, when the accused and her daughter, alarmed and confused by the rapidly approaching car and its glaring headlights, endeavored to cross the tracks to the south. The accused observing this movement of the deceased and her daughter, turned his car sharply to the left, endeavoring, as he said, "to beat them out," when his car skidded along the track, and turned about and overturned, striking the deceased and her daughter, and throwing the deceased forward some 40 feet and causing her death. The accused claimed to have proved that he was running down the hill from 18 to 20 miles an hour; that he turned his car to the left when he observed the deceased and those with her, because it was apparent that there was not sufficient room between them and the gutter to enable him to pass on the right; that Mrs. Howe and her daughter suddenly ran toward the south when the automobile was within 10 feet of the crosswalk, and that he thereupon turned sharply to the south, and applied the emergency brake; that he exercised his best judgment in attempting to avoid hitting them, and that the course which he pursued was the most prudent one which he could have taken under the circumstances.

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Upon the trial the defendant's counsel asked of several witnesses called by defendant, what the character and reputation of the accused was as an automobile driver, and whether he was a careful driver. These questions were excluded upon the state's objection, but these witnesses were permitted to testify to the general good character, reputation, and habits of the accused. The exclusion of these inquiries is among the reasons of appeal.

It is apparent from the language of the charge that the accused was permitted to testify to his experience and ability as a chauffeur, and that the state offered no evidence upon these subjects. But evidence of his reputation as a skilful chauffeur, or that he was considered to be a careful driver by those who had ridden with him, was inadmissible. Confessedly the accused was driving or running down the hill at some 20 miles an hour. Apparently he did not attempt to slacken his speed when he first saw the deceased upon the crosswalk on the same side of the trolley track upon which he was driving, nor until he was within 10 feet of the crosswalk, and the accused had suddenly run toward the south and upon the track. Apparently his principal claim was that it was the negligence of the deceased, and not his own, which caused the accident. Clearly, his car was going so rapidly when he was within 10 feet of the crosswalk that he could not stop it quickly enough to prevent running upon the people whom he had seen on the crosswalk when he was at a distance of about 250 feet from them. That the accused had theretofore had the reputation of being a careful driver, and had been so regarded by those who had ridden with him, did not tend to prove that he was not guilty of gross negligence in continuing to drive his car at the speed at which he did after he first saw the deceased on the crosswalk, nor excuse such action. *Morris v. East Haven*, 41 Conn. 252; *Bassett v. Shares*, 63 Conn. 39, 46, 27 Atl. 421; *Laufer v. Bridgeport Traction Co.* 68 Conn. 475, 37 L.R.A. 533, 37 Atl. 379; *Budd v. Meriden Electric R. Co.* 69 Conn. 272, 37 Atl. 683.

The accused complains of the following language of the court in its charge to the jury: "Unlawfulness is, of course, an essential element of all manslaughter. Where one assaults or attacks another without intending to kill, and causes the other's death, the killing, though unintentional, is unlawful, because of the unlawful act which produced it. The same would be true even if the act which produced the death was not consciously directed against him or her whose death resulted, if the act was in itself unlawful. So it is a general principle that

one who, without intention to take life, causes the death of another by his own unlawful act, is criminally responsible for the killing. It is a sufficiently accurate statement for any purpose of yours to say that when one causes the death of another without an intention to take life, and while engaged in doing some act in itself unlawful, the killing will be manslaughter. . . . At the time in question it was unlawful for any person to operate a motor vehicle in any public highway of this state recklessly or at a rate of speed greater than was reasonable and proper having regard to the width, traffic, and use of such highway, or to operate such motor vehicle so as to endanger the life or limb of any person."

This is but a small part of the charge given. The court clearly instructed the jury that the case of the state rested upon the claim "that the defendant at the time and place in question, in the operation of a motor vehicle,—an automobile,—was guilty of criminal negligence which caused or resulted in the death of Sarah Howe." "You will observe," said the court, "the expression 'criminal negligence,' which is recklessness of conduct, gross or wanton carelessness or negligence. . . . 'Gross negligence' imports a thoughtless disregard of consequences. . . . 'Wantonness,' in respect to human conduct, is doing a thing recklessly without regard to property or the rights of others." The court further said to the jury: "Do all the circumstances establish beyond a reasonable doubt a degree of carelessness amounting in itself to a culpable disregard of the rights and safety of others? If they do, they establish criminal negligence. If they do not, the homicide with which you are dealing is one that the law excuses as a misadventure. . . . Now, your ultimate inquiry will be, Was the defendant criminally negligent, and if so, did his criminal negligence cause the death of Mrs. Sarah Howe? If you are not satisfied beyond a reasonable doubt that the defendant at the time and place in question was criminally negligent in his conduct in the management of his auto car, and also that such negligence caused the death of Mrs. Howe as charged, you should acquit him."

The accused has no occasion to complain of the charge. It clearly required the jury, in order to convict, to find beyond a reasonable doubt that the accused, with reckless disregard for the safety of others, so negligently drove an automobile in a public street as to cause the death of Mrs. Howe. One who does such an act is not only liable civilly in damages (*Irwin v. Judge*, 81 Conn. 492-501, 71 Atl. 372), but is guilty 30 L.R.A. (N.S.)

of criminal homicide. *State v. Campbell*, 82 Conn. 671, 677, 74 Atl. 927.

There is no error.

The other Judges concur.

GEORGIA SUPREME COURT.

J. T. FUTCH, Impleaded, etc., Plff. in Err.,
v.

J. L. BOHANNON.

(134 Ga. 313, 67 S. E. 814.)

Ferry — operation.

1. Where one employs a flatboat or other means of transporting his employees and his wagons and teams across a stream, to and from his sawmill, and does not transport any part of the public for hire or compensation, he is not engaged in operating a ferry.

Same — public — infringement — personal conveyance.

2. Where one employs a flatboat or other vessel, not for the purpose of conveying any part of the public or freight for hire, but for the purposes indicated in the preceding leadnote, he does not infringe upon or violate the rights of the owner of a public ferry, though the right of the latter to maintain and operate a ferry is exclusive, and territorially extends beyond the point at which the former keeps and maintains a flatboat or other means for the purpose of conveying his employees and teams across the stream.

(April 13, 1910.)

Headnotes by BECK, J.

Note. — *What amounts to interference with ferry franchise.*

The early cases upon this question will be found in the note to *Sistersville Ferry Co. v. Russell*, 59 L.R.A. 513, and only cases decided since the writing of that note are here covered. Cases passing merely on the question of the exclusiveness of ferry franchises are not within the scope of this note.

A statute forbidding the establishment of a ferry within a mile of an existing ferry was held to be violated where merchants, carrying on a store within a mile of a ferry, operated a skiff whereby persons were carried across the river, the skiff being run by an employee of the merchants, and it appearing that persons who purchased goods at their store were given tickets for the price of the ferrying, which tickets were delivered to the operator of the skiff, who, in turn, gave them to the merchants, and received the compensation. *Hatten v. Turman*, 123 Ky. 844, 97 S. W. 770. Petition for rehearing overruled in 123 Ky. 851, 98 S. W. 1000.

So, a statute providing that if any person shall keep any ferry over any navigable

ERROR to the Superior Court for Wilcox County to review a judgment in plaintiffs favor as to defendant Futch in a suit to enjoin the operation of a certain alleged ferry which was alleged to infringe plaintiff's ferry rights. Modified.

The facts are stated in the opinion.

Mr. M. B. Cannon for plaintiff in error.

Mr. E. H. Williams for defendant in error.

Beck, J., delivered the opinion of the court:

The plaintiff filed his equitable petition, and sought an injunction against defendants, Futch and Hamilton, praying that they be enjoined from operating a ferry on the Ocmulgee river at a point less than 10½

stream, for which he shall charge any person any money or any other valuable thing, without obtaining a license, he shall be liable to a penalty, is violated by an arrangement whereby one agreed to ferry persons across the stream if they would assist him in repairing and launching an old ferryboat. *Shemwell v. Finley*, 88 Ark. 330, 114 S. W. 705.

And a merchant maintaining a store and storehouse on opposite sides of a river, at a point where a ferry is maintained by another person, infringes the latter's license by maintaining rowboats, of which he accords his customers free use in the transaction of business with him, where his customers consist of the public generally, and he receives what is a full equivalent for the ferrage in the profits of the sales, and his acts clearly diminish the profits of the ferry. *Peru v. Barrett*, 100 Me. 213, 70 L.R.A. 567, 109 Am. St. Rep. 494, 60 Atl. 968.

And an exclusive license for a ferry is infringed where another ferry is operated in the same territory by an unincorporated association of persons which issues tickets to members, to the amount of their shares. *Dinner v. Humberstone*, 26 Can. S. C. 252.

And in *Re Howell*, 36 Ark. 470, it was held that although the county court had power to establish free ferries where it could be done without interference with other franchises, it had no power to authorize the establishment of a free ferry within the prohibited distance of a ferry duly licensed.

So, in *New York v. Longstreet*, 64 How. Pr. 30, running a steamboat under a coasting license at regular intervals from 129th St., North river, to Fort Lee, New Jersey, was held an interference with a ferry already established between those points.

And a pontoon bridge, the subscription to which was open to the public, and which was operated without a license, was held in *Blanchard v. Abraham*, 115 La. 989, 40 So. 379, to be an infringement of the franchise of the lessee of a ferry authorized by the police jury.

In *Finley v. Shemwell* (Ark.) 126 S. W. 30 L.R.A. (N.S.)

miles from the place at which the plaintiff was operating a public ferry, in the exercise of a franchise alleged and admitted by the defendants to be exclusive as to the territory named, and to have been duly granted to petitioner by the proper authorities. There was some evidence to support the allegation that the defendants were preparing to operate a ferry, as alleged in the petition.

Futch (Hamilton having been dismissed from the case) denied that he was preparing or intended to establish or operate either a public or a private ferry, and contended that the preparations which he was making were exclusively for the purpose of transporting, for his own private use and benefit, employees, wagons, and teams employed

717, under a statute providing that persons owning land fronting on any public navigable stream should be entitled to the privilege of keeping a public ferry over such stream upon obtaining a license from the county court, and which further provided that such court should not permit any ferry to be established within 1 mile above or below any previously established ferry, except at or near cities, it was held that where one ferry, operated by a landowner, had been abandoned for a number of years, and no license had been issued to him during that time, an attempt by him after that time to operate a ferry, although under a license, was an infringement of the rights of another landowner, who had established a ferry within the mile limit after the field was opened for the opening of another ferry, through the abandonment of the one first established.

In *Brigham v. R.* 6 Can. Exch. 414, affirmed in 30 Can. S. C. 620, the court refused a recovery against the Crown where damages were sought for leasing land for, and licensing the building of, a bridge which was alleged to be a breach of the ferry license. But the court said, in passing, that it seemed that the petitioners would be entitled to a writ of scire facias to repeal the license and lease if their rights acquired under the ferry license were prejudiced.

But under a statute providing for a penalty if a person "shall keep a ferry over any navigable stream, for which he shall charge any person any money or any other valuable thing" without complying with the provisions of law relating to obtaining licenses, it was held in *Shinn v. Cotton*, 52 Ark. 90, 12 S. W. 157, that the penalty could not be recovered against one who ran a free skiff as an inducement to persons to trade at his store, where it appeared that those carried did not agree to purchase anything, and that no charge was made.

And a person may lawfully make use of his own boat within the limits of a ferry, in pursuit of his business or pleasure, without any necessity of showing the motive he

by him in moving lumber manufactured at his sawmill to a place at which the lumber was loaded for shipment, and that it was necessary for him to cross the river with his teams in taking them back and forth from the mill, and that it was nearer and more convenient for himself, his employees, and teams to cross the river at the point where he proposed transporting them than at the ferry operated by the petitioner. Defendant admitted that he did not own the land on either side of the stream. He introduced no evidence other than his sworn answer. Upon the interlocutory hearing, the court granted the injunction against Futch, as prayed for, and also adjudged that he "be further enjoined from using said attempted ferry, as prayed for by him in his answer."

Whether the petitioner, under the grant of a franchise, had the sole and exclusive privilege of maintaining and operating a ferry within the distance of 10½ miles on either side of the ferry established by him, is not presented in this record. The petitioner's exclusive right to operate a ferry charging toll within the designated distances was not challenged or questioned by the defendant, and the order of the judge, granting the interlocutory injunction, restraining the defendant from operating a public or private ferry,—that is, a ferry at which tolls are charged or any part of the public transported for hire,—is not excepted to; but the court's order is broad enough to operate as an injunction against the em-

ployment of flatboats to be used by the defendant as a means of transporting wagons and teams necessary in the operation and carrying on of his sawmill. In the defendant's answer it is distinctly alleged that he intended to run and operate "said ferry" exclusively for his own private use and benefit, and for the purpose of carrying his teams across the river, as stated above. The answer also negatives any idea of carrying or transporting the public or any part thereof, for hire or toll; and yet, in the interlocutory order, it is adjudged that the defendant "be further enjoined from using said attempted ferry, as prayed for by him in his answer."

Both in the answer and in the interlocutory injunction, the employment and use by the defendant of a means of transporting his teams across the river is spoken of as a ferry. The term "ferry" in itself imports, necessarily, the idea of charging or receiving toll for transportation. A ferry is the right of "carrying passengers across streams, or bodies of water, or arms of the sea, from one point to another, for a compensation paid by the way of toll." 2 Washb. Real Prop. 6th ed. § 1215. And this definition is substantially in accord with numerous definitions of the word found in the law dictionaries, text-books, and the decisions of courts. "A public ferry is open to all. Regular fare is established. The ferryman is a common carrier. He is bound to take over all who come, . . . and he is held to strict liability.

had for allowing others in his boat, providing the persons were not travelers and nothing was charged. *Ives v. Calvin*, 3 U. C. Q. B. 464.

And where an indenture gives a right to operate a ferry between two landing places, but not an exclusive right between any points on the two banks, the right conferred is not disturbed by the operation of steam launches, landing at a considerable distance from the landing places of the first ferry, the evidence showing a change of circumstances since the establishment of the latter, demanding other service. *Cowes Urban Dist. Council v. Southampton*, 1. W. & S. E. Royal Mail Steam Packet Co. [1905] 2 K. B. 287.

So, where a ferry franchise gives the exclusive right only to carry by means of a ferry, a bridge constructed by private enterprise to connect the same highways as the ferry is not a disturbance of the ferry right. *Dibden v. Skirrow* [1908] 1 Ch. 41, 12 A. & E. Ann. Cas. 252.

The dictum in *R. v. Cambrian R. Co. L. R.* 6 Q. B. 422, that recovery could be had by the proprietor of a ferry against a railway for damage sustained by reason of the construction of a railway and foot bridge, seems to be overruled in *Dibden v. Skirrow*, *supra*.

30 L.R.A. (N.S.)

Where a statute provides that the board of supervisors of counties shall have power to authorize and establish public ferries whenever they think proper, and to license any person to keep the same, but gives the owner of the soil the preference if he complies with the requirements of the act, a holder of a license enjoys his privilege subject to the power of the board to establish other ferries as near as, in their judgment, the public convenience requires. *Montjoy v. Pillow*, 64 Miss. 705, 2 So. 108.

So, where a statute provided that the county court "shall not permit any ferry to be established within 1 mile above or below any ferry previously established, except at or near cities and towns where the public convenience may require it, and satisfactory proof of the same shall be first adduced," the owner of one ferry cannot maintain a bill on the ground that another ferry, established under authority from the county court, is an illegal interference with his exclusive vested rights, since the decision of the county court that it is required for the public convenience is conclusive where not appealed from. *Lindsay v. Lindley*, 20 Ark. 573. J. T. W.

Such a right exists, not as appurtenant to his land, but is a franchise, which needs the grant of the proper public authority." *Greer v. Haugabook*, 47 Ga. 282. In the same case the court said: "A private ferry is mainly for the use of the owner; and, though he may take pay for ferriage, he does not follow it as a business. His ferry is not open to the public, at its demand. He may, or may not, keep it going," etc. In both expressions, "public ferry" and "private ferry," is involved the idea of a right to take compensation for transportation of freight or passengers by way of toll.

Consequently the operation of a boat by a person merely for the purpose of conveying his own teams and employees across a stream would be neither a public nor a private ferry; and the employment of proper means for transporting himself, his employees, and his teams by the defendant in no way interfered with nor violated any rights of the petitioner in this case to the maintenance and operation of a ferry, however exclusive those rights may have been within the territory designated. And while the court's order, so far as it operates to prevent the defendant from establishing and operating a ferry, whether public or private, is permitted to stand, direction is given that the injunction be so modified as to allow the defendant to employ a flatboat or other suitable means of conveying his employees and his wagons and teams across the stream where it is contended he was preparing to operate a ferry.

Judgment affirmed, with direction.

All the Justices concur.

IDAHO SUPREME COURT.

RE G. W. HULL.

(18 Idaho, 475, 110 Pac. 250.)

Sunday — public amusement — statutory regulation — construction.

1. Section 6825 of the Revised Codes provides that "it shall be unlawful for any person or persons in this state to keep open on Sunday . . . any theater, playhouse, dance house, race track, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling alley, variety hall, or any such place of public amusement. . . ."

Held that, in order to bring a public amusement not specifically enumerated by the statute (Rev. Codes, § 6825) under the general language of "any such place of public amusement," the likeness or similarity must exist in something other than

the mere fact that it is a "public amusement," and must in a general way correspond to the amusements specified.

Same — "scenic railway."

2. What is designated as a "scenic railway," being a railway constructed of rails, and on which cars are run for the purposes only of amusement, where the track is elevated a considerable distance above the ground at the place of beginning, and is built on an incline, with intervening elevations, and the cars are propelled by the force of gravity, is not "such place of public amusement" as a "merry-go-round," and is not prohibited from being kept open on Sunday by the provisions of § 6825 of the Revised Codes.

Same — statute — scope.

3. An amusement that is not *per se* unlawful or criminal, and is not in itself immoral or dangerous, or detrimental to the public health, will not be included within the provisions of the statute prohibiting certain specified public amusements and other like and similar amusements on Sunday, unless the same is forbidden by the statute either in direct terms or by clear implication.

(August 5, 1910.)

Note. — What amusements are prohibited by Sunday laws.

Cases involving theaters or baseball are not included in this note, as they are covered respectively by notes in 17 L.R.A. (N.S.) 1157, and 21 L.R.A. (N.S.) 23.

Moving pictures.

With the comparatively recent appearance and the rapid increase in the number and popularity of moving picture shows, numerous cases have arisen involving their legality under Sunday laws, depending upon whether or not they are included in the various forms of general expressions contained in the Sunday statutes. Some of these cases, mostly from New York, are included in the note in 17 L.R.A. (N.S.) 1157.

Of the later New York cases, *People v. Finn*, 57 Misc. 659, 110 N. Y. Supp. 22, holds that an exhibition of moving pictures on Sunday for the purpose of illustrating lectures upon the biblical story of Joseph and his brethren, and upon the lumber industry in California, is not within a statute prohibiting "all shooting, hunting, fishing, playing, horse racing, gaming, or other public sport, exercises, or shows, upon the first day of the week, and all noise disturbing the peace of the day." The court said: "The showing of moving pictures may, or may not, constitute violation of the statute in question. It all depends upon the method and the purpose of such show. Where they are given as an incident to and for the purpose of illustrating a lecture which, in itself, is permissible, their showing does not fall within the intention of the statute."

APPPLICATION for a writ of habeas corpus to secure the release of petitioner from custody to which he had been committed for alleged violation of the Sunday rest law. Petitioner discharged.

The facts are stated in the opinion.

Messrs. P. E. Cavaney and Richards & Haga, for petitioner:

Penal statutes should be strictly construed.

Chandler v. Lee, 1 Idaho, 349; Greathouse v. Heed, 1 Idaho, 494; Lamkin v. Sterling, 1 Idaho, 92; 2 Lewis's Sutherland, Stat. Constr. § 501, p. 963; Ex parte Bailey, 39 Fla. 734, 23 So. 552; State v. Woodruff, 68 N. J. L. 89, 52 Atl. 294; United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; 29 Am. & Eng. Enc. Law, p. 658.

In People v. Hemleb, 127 App. Div. 356, 111 N. Y. Supp. 690, the appellate division of the second department held that an indoor moving picture exhibition, accompanied by piano playing at intervals, is not within the prohibition of said statute, which applies only to out-of-door exhibitions.

Following People v. Hemleb, the court said in William Fox Amusement Co. v. McClellan, 62 Misc. 100, 114 N. Y. Supp. 594, that moving picture shows in a hall, for which admission is charged, are not within the prohibition of the statute, and further, that such shows are not within statutory provisions prohibiting certain theatrical exhibitions, nor are they "business" prohibited on Sunday by a statute providing that specified acts are prohibited as serious interruptions of the repose and religious liberty of the community, and specifying acts not including such shows.

And in Edwards v. McClellan, 118 N. Y. Supp. 181, it was held, on the authority of People v. Hemleb, that moving picture shows given indoors, accompanied by music, electric-light advertising, and posters, are not "public shows" within the above-mentioned statute.

Minnesota follows the New York cases, the Minnesota statute being taken from the New York Code, and State v. Chamberlain (Minn.) 127 N. W. 444, holds with the latest New York cases that, under the rule of *ejusdem generis*, the term "shows" in the statute refers to out-of-door amusements, and does not include a moving picture exhibition designed to illustrate moral subjects for the entertainment of the public, when conducted in an orderly and proper manner, within a building.

So, in Montana, it has been held that the operation of a moving picture show in which the pictures are all of a clean and moral character, accompanied by piano music, together with a vocal solo as a part of the performance, is not a violation of the statute prohibiting the keeping open or maintaining of a theater on Sunday, on the ground that the form of entertainment in 30 L.R.A. (N.S.)

All doubt as to the construction of a penal statute should be resolved in favor of the defendant.

State v. Walsh, 43 Minn. 444, 45 N. W. 721; State v. Krueger, 134 Mo. 263, 35 S. W. 604; State v. Beck, 21 R. I. 288, 45 L.R.A. 269, 43 Atl. 366; People v. Tanner, 128 N. Y. 416, 28 N. E. 364; State v. Prather, 79 Kan. 513, 21 L.R.A. (N.S.) 23, 131 Am. St. Rep. 339, 100 Pac. 57.

Where general words follow particular ones in a statute, the general words will be limited in their meaning, or restricted to things of like kind and nature with those specified.

State v. Prather, supra; Ex parte Neet, 157 Mo. 527, 80 Am. St. Rep. 638, 57 S. W. 1025; State v. Williams, 35 Mo. App. 541;

question does not affect the morals or good order of the community, for the preservation of which the statute was passed. State v. Penny (Mont.) — L.R.A. (N.S.) —, 111 Pac. 727.

In Idaho a different result is reached,—Ex parte Bossner (Idaho) 110 Pac. 502, holding that a moving picture show or exhibition comes within the inhibition of the statute involved in RE HULL, forbidding the opening or conducting upon Sunday of "any theater, playhouse . . . circus or show . . . or any such place of public amusement."

In R. v. Ouimet, 14 Can. Crim. Cas. 136, it was held that the opening of an amusement hall on Sunday, apparently a moving picture show, though "what was actually going on inside of it, however, has not been proved," the selling of tickets to the public, and the admission of the ticket holders to some unknown attraction in the hall, constituted an offense against the Quebec Sunday observance act, as being the pursuit of a proprietor's business or calling for gain, on Sunday, in contravention thereof.

But in R. v. Charron, 15 Can. Crim. Cas. 241, a different conclusion is reached, the latter case holding that the proprietor of a moving picture show, by carrying on such show on Sunday, and charging an admission fee therefor, does not violate said act, as the corresponding words of the French version of the statute (involved also in the former case) are restricted to the sale of goods, mercantile affairs, and the manual occupations. And further, that an exhibition of moving pictures showing events in the life of Napoleon Bonaparte, without verbal explanation or musical accompaniment, is not a theatrical performance within the prohibition of the same statute.

Exhibitions.

One who operates a "penny arcade," or place where a number of machines are kept, each of which, by a mechanical arrangement, exhibits pictures to a person who

State v. Bryant, 90 Mo. 534, 2 S. W. 836; St. Louis v. Laughlin, 49 Mo. 559; Com. v. Burrell, 7 Pa. 34; People v. Hochstim, 30 Misc. 562, 73 N. Y. Supp. 634; Re Hastings, 15 Phila. 420; Com. v. Mehler, 19 Phila. 529; Keith & P. Amusement Co. v. Bingham, 108 N. Y. Supp. 205; United States v. Buffalo Park, 16 Blatchf. 189, Fed. Cas. No. 14,681; Eden Musee American Co. v. Bingham, 58 Misc. 644, 108 N. Y. Supp. 200; St. Louis Agri. & Mechanics' Asso. v. Delano, 108 Mo. 217, 18 S. W. 1101; R. v. Whitmash, 7 Barn. & C. 596.

Messrs. D. C. McDougall, Attorney General, J. H. Peterson, O. M. Van Duyn, and C. P. McCarthy, for the State:

A "scenic railway" is included in the gen-

drops a penny in the slot, is held in Fichtenberg v. Atlanta, 126 Ga. 62, 54 S. E. 933, to be a "dealer" within the meaning of a municipal ordinance declaring that any "merchant, billiard table or ten-pin alley keeper, or other dealer, who shall keep open doors on the Sabbath day," shall be subject to a prescribed punishment, the word "dealer" being construed in connection with the words preceding it.

In New York, however, an exhibition of a stereopticon and pictures operated by an automatic slot machine device, together with certain other machines, which, on the insertion of money in the slot, communicated certain musical selections to the operator, audible to him alone, is not within the prohibition of the statute involved in the moving picture cases above, providing that "all shooting, hunting, fishing, playing, horse racing, gaming, or other public sports, exercises, or shows, upon the first day of the week, and all noise disturbing the peace of the day, are prohibited." People ex rel. Valensi v. Flynn, 108 N. Y. Supp. 208.

And the Sunday exhibition of paintings, statuary, wax figures, plaster groupings, and curios, unaccompanied by any musical or stage entertainment, has been held not to be a "public show" within the meaning of the same statute. Eden Musee American Co. v. Bingham, 58 Misc. 644, 108 N. Y. Supp. 200. But the injunction order there granted, restraining the police from interfering with such exhibition, was reversed in 125 App. Div. 780, 110 N. Y. Supp. 210, on the ground that equity is without jurisdiction to grant an injunction restraining the police from arresting a person for violation of the statute prohibiting shows on Sunday, on the ground that the plaintiff's exhibition of paintings, statuary, wax figures, plaster groupings, and curios is not in violation of that statute, and that the police were mistaken in their conclusion that it was.

An aquarium is a place of entertainment and amusement within a statute penalizing the keeping open of such a place on Sunday, where the building consists of a range

eral words of the statute reading, "or any such place of public amusement."

2 Lewis's Sutherland, Stat. Constr. 814, § 422; State v. Groves, 119 N. C. 822, 25 S. E. 819; Randolph v. State, 9 Tex. 521; Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; Misch v. Russell, 136 Ill. 22, 12 L.R.A. 125, 26 N. E. 528.

The intent of the legislature is to be found in the ordinary meaning of the words of the statute.

2 Lewis's Sutherland, Stat. Constr. 832, p. 437; Willis v. Mabon (Willis v. St. Paul Sanitation Co.) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; State v. Holman, 3 M'Cord, L. 306; R. v.

of chambers below the level of the ground, and a terrace above, bordered with a garden, the chief part being used as an aquarium, filled with glass tanks for the exhibition of marine fish and animals, and there being also a museum, a reading room, with newspapers, and a restaurant and dining hall and conservatories, etc.; it further appearing that a band plays sacred music on Sunday evenings, and that programs are issued, stating the music to be played, and the times when the fish will be fed, and that the whole is open to the public on Sunday, on the payment of an admission fee. Terry v. Brighton Aquarium Co. L. R. 10 Q. B. 306.

In Warner v. Brighton Aquarium Co. L. R. 10 Exch. 291,—a similar action, brought a little later, against the same defendant, where the same facts and circumstances appeared, except that it was stated that the reading room was used on week days only, and there was no statement as to the playing of sacred music on Sunday evenings, or as to newspapers and illuminated microscopes being provided in the building for the amusement and entertainment of visitors,—the court held "that having regard to the decision of the court of Queen's bench in Terry v. Brighton Aquarium Co., it was clear that the aquarium was a place of amusement within the meaning of the act. The facts that the band of music had been discontinued on Sunday, and that the reading room was no longer available except on week days, might make it not so much a place of amusement as before, but did not prevent it from being a place of amusement within the meaning of the act."

Lectures.

A hall used by a society formed for the purpose of giving lectures on Sunday evenings on art, science, literature, and other subjects, which were not instituted for profit, but for which a small admission fee was charged, the subjects including "Chicago, Past and Present," with a description of "The World's Fair," illustrated by lime-light representations of the places and per-

Edmundson, 2 El. & El. 77; R. v. Double-day, 3 El. & El. 501.

The doctrine of *ejusdem generis* yields to the rule that an act should be construed so as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed.

2 Lewis's Sutherland, Stat. Constr. 666; Hawke v. Dunn [1897] 1 Q. B. 579; Webber v. Chicago, 148 Ill. 313, 36 N. E. 70; Doggett v. Catterns, 17 C. B. N. S. 669, 19 C. & B. N. S. 765; Woodworth v. State, 26 Ohio St. 196.

In construing a penal statute, any interpretation that will defeat its own purposes must never be adopted if the statute will admit of any other reasonable construction.

sons described; and the characteristics of the three nations, England, Ireland, and Scotland,—was held in Reid v. Wilson [1895] 1 Q. B. 315, to be a place "used for public entertainment or amusements" within the meaning of the above-mentioned statute penalizing the keeping open on Sunday of any such place.

In Baxter v. Langley, L. R. 4 C. P. 21, under the same statute the proceedings at meetings held on Sunday evenings in a hall duly registered for that purpose as a place of public worship, consisting of sacred music and an address, sometimes of a religious tendency, sometimes neutral, but never profane, general admission to the body of the hall being free, but tickets being sold and money taken for admission to reserved seats,—were held not an amusement or entertainment within the act, the object of the persons who held the meetings not being pecuniary gain, and their honest intention being to introduce religious worship, though not according to any established or usual form.

Concerts.

In R. v. Barnes, 45 U. C. Q. B. 276, it is held that the same act prohibiting amusements and entertainments on the Lord's day is in force in Ontario, and an application was therefore refused to quash a conviction thereunder for giving on Sunday evening, in the Royal Opera House, a performance called a "Grand Sacred Concert," consisting of the singing of some sacred and secular songs, to which admission was by ticket for money, open to all comers, and it appearing that some hundreds were present, and that there were applause and encores.

In Stewart v. Thayer, 168 Mass. 519, 60 Am. St. Rep. 407, 47 N. E. 420, it was held that no concert of any kind could be licensed on Sunday, except a concert of sacred music on the evening of that day, under a statute then in force, providing that "no person shall be present at any game, sport, play, or public diversion, except concerts of sacred music, upon the evening fol-

The Emily, 9 Wheat. 381, 6 L. ed. 116; 2 Lewis's Sutherland, Stat. Constr. § 437, p. 834; Chandler v. Lee, 1 Idaho, 349.

Allshie, J., delivered the opinion of the court:

The petitioner was convicted in the justice's court of Boise precinct, Ada county, of violating § 6825 of the Revised Codes, known as the "Sunday rest law," and was sentenced to pay a fine of \$50 and to be imprisoned in the county jail for a term of ten days. The specific offense charged against the petitioner was that of unlawfully keeping open a place of public amusement known and designated as a "Scenic Railway."

This case was submitted on a stipulation

lowing the Lord's day . . . unless such game, sport, play, or public diversion shall have been duly licensed," etc.

Traveling.

In cases involving civil consequences, statutes against traveling on Sunday have been violated under the following circumstances:

—riding in horse car to visit a friend's friend. Stanton v. Metropolitan R. Co. 14 Allen, 485.

—riding on ferryboat for recreation and enjoyment of sea air. Carroll v. Staten Island R. Co. 58 N. Y. 126, 17 Am. Rep. 221.

—yachting for pleasure. Wallace v. Merimack River Nav. & Exp. Co. 134 Mass. 95, 45 Am. Rep. 301.

—mere use of horse to go from one place to another, under statute prohibiting all business, traveling, and recreation on Sunday. Hinckley v. Penobscot, 42 Me. 89.

—pleasure driving, under statute prohibiting unnecessary walking or riding. Wheel- den v. Lyford, 84 Me. 114, 24 Atl. 793; Parker v. Latner, 60 Me. 528, 11 Am. Rep. 210.

—walking with others to the house of a friend, for pleasure. Cratty v. Bangor, 57 Me. 423, 2 Am. Rep. 56.

—walking 12 or 14 miles, from town to town, to visit for pleasure. Duran v. Standard Life & Acci. Ins. Co. 63 Vt. 437, 13 L.R.A. 637, 25 Am. St. Rep. 773, 22 Atl. 530.

But in the same class of cases, the following circumstances have been held not to constitute violations of such statutes:

—riding in street car for pleasure, under statute against secular business or labor, and sport or recreation. Horton v. Norwalk Tramway Co. 66 Conn. 272, 33 Atl. 914.

—riding bicycle to attend funeral of friend, and returning by longer route for health and exercise, statute against unnecessary walking or riding. Eaton v. Atlas Acci. Ins. Co. 89 Me. 570, 36 Atl. 1048.

—riding in a carriage for exercise only,

of facts, from which it appears that on July 24th, the same being Sunday, the petitioner kept open his place of amusement, and admitted such persons as applied for admission, and operated his cars and furnished rides to those who paid the fee of 10 cents. It seems that the Natatorium Park Amusement Company, Limited, is a corporation organized under the laws of this state, and that the petitioner, G. W. Hull, is its general manager, and has control and management of its property. This so-called scenic railway consists of a track several hundred feet long, on which wooden cars are run at a high rate of speed. The cars are elevated by means of a cogwheel attachment, so that the track is a considerable distance from the ground at the high-

est place. It is built on a general incline, with slight elevations intervening from that point to the end of the track, where it comes to the surface of the ground near the place of starting. These cars run from the highest point by force of gravity, and are operated purely as a matter of amusement to those who take the rides, and incidentally for the pecuniary benefit of the proprietors of the park. Ten cents' worth of amusement *via* this scenic railway lasts about two minutes, so the record says. The tourist may then purchase a new ticket or forego a further view of the scenery.

The state contends that this comes within the provisions and purview of § 6825 of the Revised Codes. That statute provides among other things as follows: "It shall be

apparently held within exception, under statute against unnecessary walking or riding, but expressly excepting from its prohibition work of necessity or charity, the court saying: "And this exception may properly be said to cover everything which is morally fit and proper, under the particular circumstances of the case, to be done upon the Sabbath." *Sullivan v. Maine C. R. Co.* 82 Me. 196, 8 L.R.A. 427, 19 Atl. 169.

—invalid riding with companions for enjoyment of open air and benefit of her health, not "traveling." *Cleveland v. Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892.

—so, walking with a cousin, simply for exercise in the open air. *O'Connell v. Lewiston*, 65 Me. 34, 20 Am. Rep. 673.

—simply walking in the open air. *Davidson v. Portland*, 69 Me. 116, 31 Am. Rep. 253.

—and walking with a friend on Sunday evening, less than half a mile, with no purpose of going to or stopping at any place but one's own home, or of passing out of the city, and with no object of business or pleasure except the open air and gentle exercise. *Hamilton v. Boston*, 14 Allen, 475.

So, in New Hampshire, traveling on Sunday to make a social visit to one's parents is not within a statute which prohibits "any game, play, or recreation on that day." *Corey v. Bath*, 35 N. H. 531.

And in Ohio, pleasure driving on the public highways on Sunday is lawful, it not being "sporting" within the meaning of the statute. *Nagle v. Brown*, 37 Ohio St. 7.

Gaming.

Suffering persons to play cards and bet upon games at cards in his tavern on Sunday, by a licensed tavern keeper, is an offense prohibited by a statute providing "that no house keeper shall sell any strong liquor on Sunday, or suffer any drunkenness, gaming, or unlawful recreations in his or her house," the term "gaming," as there used, being synonymous with "betting on games." *State v. Fearson*, 2 Md. 310. 30 L.R.A. (N.S.)

In *Borders v. State* (Tex. Crim. Rep.) 66 S. W. 1102, it is held that under a statute imposing a fine on any person engaged in any species of gaming for money within the limits of any city on Sunday, the gaming with dice known as "shooting craps," not an offense when such statute was passed, but thereafter prohibited by a later statute, as soon as prohibited, became subject to the penalty imposed by the former statute.

And in *R. v. Yaldon*, 17 Ont. L. Rep. 179, a prosecution for perjury alleged to have been committed on a trial for gambling with dice on the Lord's day, it is said: "A charge of gambling with dice on the Lord's day was made against him. This was an offense which the police magistrate clearly had jurisdiction to try."

But gaming is not an act of "common labor" or a person's "usual avocation" within the meaning of a statute declaring that "if any person, etc., shall be found on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarreling, at common labor, or engaged in his usual avocations, works of charity and necessity excepted, etc., he shall be fined, etc." *State v. Conger*, 14 Ind. 396.

And playing at cards and dice on Sunday is not within the prohibition of a statute forbidding "farces or plays of any kind, or any games, tricks, juggling . . . or any such like show or exhibition," etc., on that day, as this refers to public exhibitions. *Rucker v. State*, 67 Miss. 328, 7 So. 223.

Dancing.

Dancing on Sunday to the accompaniment of a piano and two violins, not for the purpose of an exhibition, but for the amusement of the persons dancing, is not a violation of a statute prohibiting any theatrical or other performances, in which the only reference to dancing is in the words "negro or other dancing," which evidently refers to an exhibition or performance of dancing. *Re Allen*, 34 Misc. 698, 15 N. Y. Crim. Rep. 453, 70 N. Y. Supp. 1017.

unlawful for any person or persons in this state to keep open on Sunday . . . any theater, playhouse, dance house, race track, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling alley, variety hall, or any such place of public amusement. . . ." It is conceded that this does not come within the list of enumerated amusements. But the state insists that it is analogous and similar to a "merry-go-round," and is consequently prohibited by the phrase "or any such place of public amusement." It is argued on behalf of the state that under the doctrine of *ejusdem generis* a scenic railway such as above described is prohibited on the ground that it falls within the prohibition of like, similar, and kindred amusements to the one specifically prohibited. The petitioner, on the other hand, argues equally as earnestly and eloquently that, under the doctrine of the same rule, the amusement he is conducting is not included within the prohibition of the statute. We enter upon the consideration of this statute fully conscious of the duty which rests on the court to ascertain what the law is on the subject, and to declare it as we find it, rather than as we think it ought to have been. We have no right to add to or take from the law. The task is sometimes extremely difficult to ascertain the purpose or intent of the lawmakers, but that difficulty does not relieve a court of the undertaking.

It is useless to undertake to review or analyze the authorities cited by counsel in this case, for the reason that none of them

construe a statute in the language of ours, and the only benefit we derive from them is such as we have gathered from the analogy of reasoning employed. The following are the principal cases to which our attention has been called and that we have given examination: Cited by petitioner: *Ex parte Neet*, 157 Mo. 527, 80 Am. St. Rep. 638, 57 S. W. 1025; *Keith & P. Amusement Co. v. Bingham*, 108 N. Y. Supp. 205; *State v. Prather*, 79 Kan. 513, 21 L.R.A.(N.S.) 23, 131 Am. St. Rep. 339, 100 Pac. 57. By the state: *State v. Groves*, 119 N. C. 822, 25 S. E. 819; *Randolph v. State*, 9 Tex. 521; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 59 L.R.A. 631, 65 N. E. 451; *Willis v. Mabon* (Willis v. St. Paul Sanitation Co.) 48 Minn. 140, 16 L.R.A. 281, 31 Am. St. Rep. 626, 50 N. W. 1110; 2 *Lewis's Sutherland*, Stat. Constr. § 437; *State v. Dolan*, 13 Idaho, 693, 14 L.R.A.(N.S.) 1259, 92 Pac. 995.

It is difficult to tell the exact theory on which the lawmakers drafted this section of our statute. The amusements enumerated and prohibited are not similar or kindred amusements. There is apparently nothing common to all of them except that they are all public amusements. They are not all immoral amusements, nor are they all noisy and boisterous amusements. The race track may be said to be immoral in that it is a place of betting and gambling, and so it may be said that the "concert saloon" and the "variety hall" are classes of amusement at least suggestive of immorality. On the other hand, the merry-go-round

Surf bathing.

Sunday bathing in the surf, in a public manner, in the presence of church-going people, is not an offense within the vice and immorality act, prohibiting the use or practice of any kind of playing, sports, or pastimes or diversions on Sunday. *Lennig v. Newkirk*, 7 N. J. L. J. 87.

Hunting.

Under an act creating two offenses, first, hunting on the Sabbath with a dog or dogs; second, being found off one's premises on the Sabbath, having a shotgun, rifle, or pistol, it is held in *State v. Howard*, 67 N. C. 24, that a defendant should have been convicted under an indictment charging him with being "found off his premises on the Sabbath day, having with him a shotgun," etc., upon a finding "that he was carrying his gun off his premises on Sunday; but it is not proved that he was hunting."

In *Gunter v. State*, 1 Lea, 129, where plaintiffs had been convicted of violating the Sabbath by hunting and shooting through the woods and fields with guns and pistols, etc., it was held that a statute which prohibits hunting and fishing on Sun-

day, and empowers a justice of the peace to fine such offenders, does not hinder the criminal prosecution by indictment or presentment when such offenses are so committed as to amount to public nuisances.

State v. Sexton, 121 Tenn. 35, 114 S. W. 494, reversed a judgment quashing a warrant charging defendant with "having in possession in the open air implements for shooting on the first day of the week, called Sunday," holding the offense so charged and denounced by the one section of the statute to be embraced in the caption of the act providing for the protection of game in the state of Tennessee, and to regulate the shooting, etc., thereof, and to prohibit shooting on Sunday.

But hunting game is not "work of labor" within the meaning of a statute prohibiting work or labor on Sunday. *State v. Carpenter*, 62 Mo. 594.

Fishing.

The taking of fish from a weir after sunset on Saturday, although they entered the weir before that time, is within the prohibition of a statute forbidding all persons either to take fish or impede their passage in weirs from sunset on Saturday to sun-

is not an immoral amusement. It may also be said that there is nothing especially immoral about the circus or show, the billiard hall, nor the bowling alley, and yet these are prohibited on Sunday. When we come, therefore, to ascertain the moving purpose of the lawmakers in enumerating the amusements that should be prohibited, we fail to find a reason that is common to all of the amusements enumerated or that could be applied to each of them. It is patent that the legislature did not intend to absolutely forbid and prohibit all public amusements on Sunday. If they had so intended, they would undoubtedly have said so in so many words. On the contrary, they immediately follow the specific amusements enumerated with the words "or any such place of public amusement." The word "such" has a very definite and distinct meaning. It is defined by the lexicographers as: "Of that kind; of the same or like kind; identical with or similar to something specified or implied; . . . being the same as what has been mentioned or indicated; being the same in quality; having the quality specified, etc."

Now it is evident that the legislature intended to prohibit any other public amusement not enumerated which could be distinctly classed as like or similar to those specified; but, since all are alike in that they are public amusements, the similarity must exist in something else other than the mere fact of amusement. The merry-go-round needs no description, for, on account of its popularity, it must be known and understood by all. There is a similar-

ity between the merry-go-round and this scenic railway in that each furnishes a ride, but the character of the ride is apparently very different on the scenic railway from that of the merry-go-round. One of the distinguishing features of the merry-go-round is the inspiring and animating sacred and patriotic music which it furnishes and which tends to make it more public than it otherwise might be. This the scenic railway does not seem to have. The scenic railway is, by force of necessity, obliged to make up in scenery for the loss of horses, giraffes, zebras, elephants, and other beasts of burden that add interest and variety to the merry-go-round. Riders of animals of the same species are enabled to quietly converse together while they enjoy the music, but on the scenic railway there is nothing to be done but to hold on, exercise the muscles, and view the scenery. The merry-go-round was evidently prohibited on account of the noise it makes and the fact that it is usually located in the midst of the residence portion of the city, town, or village. So far as the record shows, this scenic railway is not attended by the noise that characterizes the merry-go-round. Again, the character of the amusement under consideration is such as to render it necessary that it have a great deal more room than the merry-go-round requires, and as a consequence it must be located outside of the principal residence portion of the community, and will therefore be farther removed from residences generally and from places of public worship. This class

rise on Monday. *Baker v. Wentworth*, 17 Me. 347.

Fishing with seines on Sunday in the channel of the Hudson river, between the city of New York and Baker's falls, was held in *Sickles v. Sharp*, 13 Johns. 497, to be a violation of a statute prohibiting fishing with set nets in the Hudson river between the city of New York and Baker's falls, but tolerating the use of nets in a certain manner along the flats and shores, and making it unlawful to fish with seines in "any other part" of said river, or in the waters of the state, at or below said city, on Sunday.

Fishing on Sunday is within a statute prohibiting "all shooting, hunting, fishing, playing, horse racing, gambling, or other public sport, exercises, pastimes, or shows," on Sunday, though done on private grounds, and without creating any commotion or disorder or disturbing the peace. *People v. Moses*, 65 Hun, 161, 8 N. Y. Crim. Rep. 396, 20 N. Y. Supp. 9, affirmed in 140 N. Y. 214, 35 N. E. 499. In this case, defendant was convicted for fishing on Sunday in a pond belonging to a club of which he was a member. The pond was in the vicinity of a public highway and of residences, and within the view of a number of people. 30 L.R.A. (N.S.)

A judgment of the lower court was affirmed by a vote of four to three,—three of the four judges holding that the prohibition of fishing on Sunday was absolute, irrespective of the given act being inoffensive to the sensibilities of anyone, and the fourth concurring in the result upon the ground that the evidence in the record was sufficient to support a finding by the trial court that the act complained of was committed under such circumstances as to constitute a serious interruption of the repose and religious liberty of the community.

Com. v. Rothermel, 27 Pa. Super. Ct. 648, affirmed a judgment of conviction of fishing on Sunday under a statute providing that "there shall be no hunting or shooting or fishing on the first day of the week, called Sunday."

But *Nelson v. Pyramid Harbor Packing Co.* 4 Wash. 689, 30 Pac. 1096, held that Sunday fishing in Alaska is legal since the act of Congress relating to the protection of salmon in the waters of Alaska repealed any and all laws of Oregon upon that subject which had been extended over Alaska by previous act of Congress, and which provided that it was illegal to fish on Sunday.

A. C. W.

of legislation is upheld solely as an exercise of the police power of the state. The prohibition of public amusements on Sunday must therefore rest on the theory that it is necessary either for the protection of the public morals, the public health, or the public peace and safety. *Mullen v. Moseley*, 13 Idaho, 457, 12 L.R.A. (N.S.) 394, 121 Am. St. Rep. 277, 90 Pac. 986, 13 A. & E. Ann. Cas. 450; *State v. Dolan*, 13 Idaho, 693, 14 L.R.A. (N.S.) 1259, 92 Pac. 995.

This amusement is not *per se* unlawful or criminal, nor is it immoral or dangerous or detrimental to the public health. It is apparently a wholesome, innocent outdoor amusement. In order to prohibit such an amusement we ought to find the prohibition within the statute, either in positive terms or by clear implication. No such means of amusement existed in this state at the time of the passage of this act, and if this is to be prohibited under the statute, it must be by reason of it being "such a place of amusement" as some one of those specifically enumerated. We do not feel that we would be justified in extending the statute to cover this means of amusement, and thereby make its maintenance and operation a crime. If we should do so, it would only be a short step to include the automobile or street car that is operated on Sunday for the accommodation of those who desire a pleasure ride. If the legislature should see fit to close such places of amusement as this on Sunday it may do so, but until that time we think no serious harm can be done to the morals or health of the people by permitting an amusement like the one in question to keep open on Sunday. The chief objection to most of the public amusements and resorts is not to the amusement feature itself, but to the habit of the proprietors of such places adding to them immoral, corrupting, or boisterous features or attendants until the public conscience rebels against them and demands a total cessation. That will be the result with this amusement if it is not run orderly and decently.

We conclude that a "scenic railway" such as that described in the record in this case does not come within the prohibition of the statute. The petitioner should be discharged, and it is so ordered.

Sullivan, Ch. J., concurs.
30 L.R.A. (N.S.)

MASSACHUSETTS SUPREME JUDICIAL COURT.

WILLIAM M. VERMILYE

v.

POSTAL TELEGRAPH-CABLE COMPANY.

(205 Mass. 598, 91 N. E. 904.)

Telegram — notice of probable injury — right to reject.

1. The attachment to a telegram tendered for transmission, of a notice of probable damage in case of negligence in its transmission or delivery, gives the company no right to refuse to receive and transmit it.

Same — wilful refusal.

2. A refusal to receive a telegram for transmission which is both intentional and unreasonable is wilful within the meaning of a statute imposing a penalty for wilfully refusing to accept a telegram for transmission.

(May 18, 1910.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover damages for alleged wrongful refusal to receive and transmit a telegram which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Messrs. G. Phillip Wardner and Arthur Lord, for defendant:

The refusal to receive the telegraph blank on which was written the message and to which was attached a sticker giving notice of probable damage in case of negligence in transmission, and to transmit the message, was not such a "wilful refusal" as under the provisions of the statute imposed a forfeiture.

Ellis v. American Teleg. Co. 13 Allen, 235; *Com. v. Kneeland*, 20 Pick. 220; *Com. v. Bradford*, 9 Met. 270; *Com. v. McLaughlin*, 105 Mass. 463; *Felton v. United States*, 96 U. S. 699, 24 L. ed. 875; *Potter v. United States*, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144.

Note. — The above decision seems to be one of first impression upon the question whether a telegraph company is justified in refusing a message because of the liability in which it might be involved in case of mistake or delay, as an extensive search has failed to disclose any other case in which that specific problem was presented for solution.

A telegraph company has a legal right to refuse to transmit, for the rates prescribed for the transmission of unrepeatable messages, a message of such a nature, or presented under such circumstances, as probably to impose on the company an extended liability beyond the cost of the message, in case of accident or mistake.

Ellis v. American Teleg. Co. 13 Allen, 226; *Redpath v. Western U. Teleg. Co.* 112 Mass. 71, 17 Am. Rep. 69; *Grinnell v. Western U. Teleg. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Clement v. Western U. Teleg. Co.* 137 Mass. 463; *Wheelock v. Postal Teleg. Cable Co.* 197 Mass. 119, 83 N. E. 313, 14 A. & E. Ann. Cas. 188.

If the defendant had accepted for transmission the plaintiff's message with the sticker on it, the defendant would, in case of failure to transmit or of delay, have been under an extended liability in excess of the amount of the tolls.

Wheelock v. Postal Teleg. Cable Co. supra.

Mr. Samuel F. Batchelder, with Mr. Olcott O. Partridge, for plaintiff:

The refusal to receive the telegram for transmission was a wilful refusal within a statute imposing a penalty on telegraph companies for wilful failure to receive and transmit messages.

2 Joyce, *Electric Law*, 2d ed. §§ 836, 843a, 845-847, 850; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679.

Any intentional refusal without sufficient cause is wilful.

Buchanan v. Cook, 70 Vt. 168, 40 Atl. 102; *Fuller v. Chicago & N. W. R. Co.* 31 Iowa, 187; *Odin Coal Co. v. Denman*, 185 Ill. 413, 76 Am. St. Rep. 45, 57 N. E. 192; *Leslie v. Rich Hill Coal Min. Co.* 110 Mo. 31, 19 S. W. 308; *Western U. Teleg. Co. v. Braxtan*, 165 Ind. 165, 74 N. E. 985; *Com. v. McLaughlin*, 105 Mass. 460; *People ex rel. Clingan v. Draper*, 63 Hun, 389, 18 N. Y. Supp. 282; *Tracy v. Com.* 25 Ky. L. Rep. 669, 76 S. W. 185; *Illinois C. R. Co. v. Leiner*, 202 Ill. 624, 95 Am. St. Rep. 266, 67 N. E. 398.

Where there is any question whether there is sufficient ground for refusing a message, if the company refuses it, it does so at its own risk.

Smith v. Western U. Teleg. Co. 84 Ky. 664, 2 S. W. 483; 2 Joyce, *Electric Law*, 2d ed. 1349, § 862.

A rule of a telegraph company that messages will not be received for transmission if accompanied by a notice that the message is a business message and that loss is likely to result, or that damages will be claimed if not promptly and accurately transmitted, is unreasonable, illegal, and void.

Wheelock v. Postal Teleg. Cable Co. 197 30 L.R.A. (N.S.)

Mass. 119, 83 N. E. 313, 14 A. & E. Ann. Cas. 188.

The telegraph company had no right to refuse messages because of the notice. The notice was not a term of the contract.

Bartlett v. Western U. Teleg. Co. 62 Me. 209, 16 Am. Rep. 437; *Webbe v. Western U. Teleg. Co.* 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670; *Croswell, Electricity*, 438, 440, §§ 493, 495; 1 Sedgw. *Damages*, 8th ed. §§ 159, 160; 2 Sedgw. *Damages*, 8th ed. § 892; *Daughtery v. American U. Teleg. Co.* 75 Ala. 168, 51 Am. Rep. 435.

Knowlton, Ch. J., delivered the opinion of the court:

The plaintiff, having occasion to use the telegraph frequently in his business, and desiring to give notice that would entitle him to recover special damages suffered from a neglect of the defendant to transmit promptly and correctly a message which he took to its office to be sent, put upon the blank on which the message was written a gum "sticker," on which a notice was printed as follows: "Notice is hereby given that this is a business message, and that failure to deliver it promptly and correctly is likely to cause the sender financial loss. Further particulars will be furnished, if desired, on application to the sender at 116 Bedford street, Boston." This he did for his protection under the rule stated in *Wheelock v. Postal Teleg. Cable Co.* 197 Mass. 119, 83 N. E. 313, 14 A. & E. Ann. Cas. 188, and *Squire v. Western U. Teleg. Co.* 98 Mass. 232, 235, 237, 93 Am. Dec. 157, that the damages to be recovered for a breach of contract in transmitting a telegraphic message are such as reasonably might have been expected to be within the contemplation of the parties, by reason of the contents of the message or the circumstances attending the transaction when the contract was made. At different times other messages, accompanied by similar notices in different forms, were offered by the plaintiff to the defendant for transmission, and refused, and one or more of this kind was sent. Seemingly, both parties were trying to do that which was thought best for the protection of their respective rights and interests in reference to the liabilities growing out of this kind of contract. The findings of the judge who tried the case without a jury have relieved the controversy of some of the questions which otherwise might arise. He found that there was an absolute refusal of the defendant to receive and transmit the message while it was accompanied by such a notice. Nothing was said by either party about having the message repeated or insured, as it might have been under the

regulations of the company upon payment of an additional price. He found that this refusal was without reference to the particular form in which the notice was presented, and that the form chosen by the plaintiff for the notice on this message had no tendency to confuse the operator, and did not increase the probability of error or delay in transmitting the message. These findings were well supported by the evidence.

The first count was at common law for a refusal to receive and forward the message, and the second was under Rev. Laws, chap. 122, §§ 9, 11, for the same cause of action. The defendant was engaged in a quasi public employment, to be carried on for the accommodation of the community, with a view to the general benefit. It had no right to refuse to receive a proper message for whose transmission payment was tendered. Rev. Laws, chap. 122, § 9; *Ellis v. American Teleg. Co.* 13 Allen, 226, 231. The only question raised is whether the giving of the notice by the plaintiff relieved the defendant of its obligation to transmit the message. It was certainly the right of the plaintiff to inform the defendant as to the nature of the message, and its importance from a financial point of view, in order that the nature and particulars of its undertaking might be understood by the defendant, and the obligation that it incurred in reference to damages for a breach of the contract. *Wheelock v. Postal Teleg. Cable Co.* *ubi supra*. Such a notice would furnish no justification for a refusal to send a message, whether it might or might not be a sufficient reason for charging something more than the lowest rate established for the transmission of messages. See *Bernard v. Adams Exp. Co.* 205 Mass. 254, 91 N. E. 325. It was intended to show that the damage for a failure properly to send and deliver the message would probably be substantial, and, under the statute and the rules and regulations of the company, to create a liability that might reach the sum of \$100. Such a liability might exist without a special notice if the language of the message sufficiently indicated the importance of a prompt delivery of it, and the loss that would result from a failure to deliver it promptly. Whatever negotiations or proposals or limitations on the part of the defendant might have been warranted by the giving of the notice, the absolute refusal to receive and send the message was unreasonable, and justified a finding for the plaintiff under the first or second count, either under the statute or at common law.

The other count was under Rev. Laws, chap. 122, §§ 9, 10, to recover the forfeiture provided by § 10. The question under this 30 L.R.A. (N.S.)

count is whether the refusal of the defendant was wilful, within the meaning of the section. It is conceded that it was intentional, and the judge found that it was unreasonable. He ruled that a refusal that was both intentional and unreasonable was wilful, within the meaning of the statute. This ruling was right.

The defendant's argument upon this branch of the case is chiefly in the nature of an assumption that the conduct of the defendant was reasonable, in reference to the different rates charged, depending upon whether the message was sent in the usual way or was repeated or insured, and in reference to the attempt to impose upon the defendant by the notice a liability that otherwise would not exist. This argument is answered by the findings of the judge that the refusal of the defendant was absolute, and without reference to the rates that might be charged in view of the different degrees of responsibility that might be assumed for a failure to transmit the message correctly and promptly.

We have already said that these findings were well warranted by the evidence.

Exceptions overruled.

MASSACHUSETTS SUPREME JUDICIAL COURT.

DELANVAN C. DELANO

v.

NATHAN B. SMITH et al.

(206 Mass. 305, 92 N. E. 500.)

Mortgage — right to protect property.

1. A mortgagee may maintain an action in his own name for injury to the mortgaged property.

Landlord — waste — infecting property with smallpox.

2. Infecting a building with smallpox, by a board of health which leases it from a mortgagor, may be found to be waste as against the mortgagee, if the jury finds that it is not reasonable and proper to let the building for this purpose, having reference to the probable effects upon its future, growing out of the presence of disease-producing conditions, in view of the existing

Note. — Infecting premises with contagious disease as waste.

No case bearing squarely upon this question has been found, but, in *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65, it was held that no recovery could be had by the landlord for the use of premises by the tenant, for a smallpox hospital, where all the receipts for the rent stated that the property was being so occupied and no objection to such an occupancy was ever

state of the art of disinfection or other means of rendering it healthful.

Damages — waste — reputation of property.

3. Injury to the reputation of an estate because of its use as a smallpox hospital is not an element of damages in an action against the lessee for waste.

(September 6, 1910.)

EXCEPTIONS by plaintiff to the direction by the Superior Court for Middlesex County of a verdict for defendants in an action brought to recover damages for alleged waste. Judgment for plaintiff on condition.

The jury was permitted to assess the damages, and defendants stipulated that if the direction of the verdict in their favor was erroneous judgment should be entered for the plaintiff.

Further facts appear in the opinion.

Mr. D. C. Delano for plaintiff.

Messrs. Nelson P. Brown and Stover & Sweetser, for defendants:

Until forfeiture the mortgagor is the owner of the legal estate.

Trowbridge, Readings on Mortgages, 8 Mass. 551; Ballard v. Carter, 5 Pick. 115, 16 Am. Dec. 377; Brigham v. Winchester, 1 Met. 390; Waltham Bank v. Waltham, 10 Met. 334.

The mortgagor is the actual, unconditional owner of mortgaged premises before possession taken.

Brigham v. Winchester and Waltham Bank v. Waltham, supra; Dolliver v. St. Joseph F. & M. Ins. Co. 128 Mass. 315, 35 Am. Rep. 378.

The board of health of a city may use premises as a contagious hospital without a warrant issued, under Pub. Stat. chap. 80, § 43, if it has the consent of the owner.

Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442; Spring v. Hyde Park, 137 Mass. 554, 50 Am. Rep. 334.

If any right of action inures to the plaintiff from the execution of the lease by his mortgagor, and the use of the premises by the mortgagor's privies, it can only be upon allegation and proof that the remainder of the mortgage security, and, furthermore, the personal responsibility of

the mortgagor, are insufficient to afford him complete indemnity.

Thomas, Mortg. pp. 54, 55.

Rugg, J., delivered the opinion of the court:

This is an action of tort in the nature of waste. The defendants constituted the board of health in the city of Everett. The plaintiff was the mortgagee of certain real estate in that city, the buildings upon which consisted of one house of three tenements, and a store and a stable. On or about the 21st day of December, 1901, the defendants, acting as members of the board of health, leased of the mortgagor said premises "to be used as a contagious hospital." Occupation for that purpose began at once and continued until December 22, 1902, during which period forty-two persons sick with smallpox were treated, six of whom died. The plaintiff did not know of the lease, nor of such occupation, until after it had continued for several months. The defense is that the acts complained of were done under the authority of the lease given by the mortgagor.

It is to be noted that the defendants did not proceed under Pub. Stat. chap. 80, § 43, then in force (now Rev. Laws, chap. 75, § 46, as amended by Stat. 1906, chap. 365, § 2). They undertook to perform the public duty incumbent upon them of providing a proper place for the treatment of persons suffering from smallpox, by agreement with the mortgagor, and not by any exercise of the power delegated by the commonwealth. Whatever may be the law in other jurisdictions, by statute or otherwise, "it has long been settled in this commonwealth that as to all the world except the mortgagee the mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for possession." Dolliver v. St. Joseph F. & M. Ins. Co. 128 Mass. 315, 35 Am. Rep. 378. Whether the mortgagee is in possession of the mortgaged premises or not, or whether his right to possession begins only with the breach of condition, and there has been no breach, nevertheless he has such an interest in the property and its preservation as enables him to maintain an action in his own name

made. It would seem to be a fair inference that it was only the landlord's knowledge and acquiescence in such use of his premises that prevented him from recovering.

In Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442, it was held that a tenant in possession could not, as against the rights of the owner, authorize the members of 30 L.R.A. (N.S.)

the municipal board of health to establish a hospital for patients afflicted with an infectious disease in the owner's house, and to maintain such hospital there to the damage of the reversion; an attempt to do that would have been a violation of the owner's right, which would have justified him in treating the tenant as a trespasser.

W. M. G.

for injury to it. Such right of action is founded not upon the right to present possession, but on title to the estate. He may maintain such an action, although he is a junior mortgagee and although the security remains ample for his protection. He has a right to his security unimpaired. The leading principles by which the rights of mortgagor and mortgagee may be worked out are clearly explained by Wells, J., in *Gooding v. Shea*, 103 Mass. 360, 4 Am. Rep. 563. Cases which recognize a right of action in the mortgagee to recover damages for injury to his security are numerous. See for example *James v. Worcester*, 141 Mass. 361, 5 N. E. 820; *Wilbur v. Moulton*, 127 Mass. 509; *Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 425; *Byrom v. Chapin*, 113 Mass. 308-311; *Stewart v. Finkelstone*, 206 Mass. 30, 28 L.R.A.(N.S.) 634, 92 N. E. 37; *Ocean Acci. & G. Corp. v. Ilford Gas Co.* [1905] 2 K. B. 493; *Fidelity Trust Co. v. Hoboken & M. R. Co.* 71 N. J. Eq. 14, 63 Atl. 273. An action for such injury lies as well against the mortgagor, although rightfully in possession. The mortgagor is liable to the mortgagee for waste. The mortgagor in this respect stands to the mortgagee as a tenant to a landlord, or a tenant for life to a reversioner. *Goodman v. Kine*, 8 Beav. 379; *King v. Smith*, 2 Hare, 239, 18 Eng. Rul. Cas. 98; *Page v. Robinson*, 10 Cush. 99; *Hutchins v. King*, 1 Wall. 53, 17 L. ed. 544. A lease made by the mortgagor after the rights of the mortgagee have become fixed cannot affect the latter in any way without his consent. *Tilden v. Greenwood*, 149 Mass. 567, 22 N. E. 45; *Elmore v. Symonds*, 183 Mass. 321, 67 N. E. 314.

The fundamental question, therefore, is whether upon the facts agreed it was permissible for the jury to find that waste had been committed. Under the conditions prevailing in this commonwealth waste is an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury. It is the violation of an obligation to treat the premises in such manner that no harm be done to them, and that the estate may revert to those having an underlying interest undeteriorated by any wilful or negligent act. *Pyncheon v. Stearns*, 11 Met. 304, 45 Am. Dec. 207; *United States v. Bostwick*, 94 U. S. 53, 65, 24 L. ed. 65, 66; *Townshend v. Moore*, 33 N. J. L. 284; *Turner v. Wright*, 2 De G. F. & J. 234, 246; 30 Am. & Eng. Enc. 30 L.R.A.(N.S.)

Law, 2d ed. p. 255, and cases cited. Waste does not necessarily mean a subtraction of something from the corporal substance of the estate. Perhaps it may not always include change in material condition, though it is not necessary to decide that point in this case. Its early and frequent application was in an agricultural sense, where it means a damaging use not in accordance with good husbandry. *Pratt v. Brett*, 2 Madd. Ch. 62; *Patterson v. Central Canada Loan & Sav. Co.* 29 Ont. Rep. 134-137. It generally consists in some definite physical injury. This is shown by reference to the earlier definitions, as for instance that of Blackstone, who calls it a "spoil or destruction in houses, gardens, trees, and other corporeal hereditaments." 2 Bl. Com. Sharswood's ed. 281. On principle it follows that mere injury to the reputation of real estate or the supposed diminution of its value resting on whimsical or emotional grounds, or arising from dictates of custom or taste, do not constitute waste. These considerations have nothing to do with material substance, but depend upon evanescent or intangible preferences or prejudices. It is the commonly accepted view that smallpox is a contagious disease, spread through the instrumentality of germs, which although invisible to the naked eye are perniciously active and capable of causing loathsome and often fatal sickness. In *Com. v. Pear*, 183 Mass. 242, 67 L.R.A. 935, 66 N. E. 719, is a statement of the judicial notice which the court will take of the horrors of smallpox. From the agreed facts the jury would have been warranted in finding that this building was filled in every nook and crevice with the microscopic germs of this dreaded disease. This might have been found to constitute an essential alteration in the qualities and condition of the house with reference to the purposes for which it was intended to be used, such as to constitute a definite injury. Inoculation with germs of glanders was held to be a "bodily injury" in *H. P. Hood & Sons v. Maryland Casualty Co.* 206 Mass. 223, — L.R.A.(N.S.) —, 92 N. E. 329. Sowing the seeds of noxious weeds was restrained as waste in *Pratt v. Brett*, supra. Impregnation of a building with the indiscernible but vital germs of a dangerous malady is closely analogous to the sowing of seeds of deleterious plants, and may be in its effect far more detrimental. It may be in fact even more harmful than to tear down or remove a part of the building. It is in principle the same general

kind of damage as the more familiar instances of waste. The possibility of germination of the disease germs which, it might have been found, were deposited through the action of the defendants within the house in question, was or might have been found to be waste, unless it is shown that they can be removed by disinfection or otherwise without material physical change in the building, so as to make it as safe for residence as before. Whether this can be done or not depends upon evidence. *Hersey v. Chapin*, 162 Mass. 176, 38 N. E. 442, while not decisive of the present case, seems to go upon the ground that the use of a building as a smallpox hospital might be an injury to the reversion. See also *United States v. Bostwick*, 94 U. S. 53, 24 L. ed. 65.

A case like the present should be submitted to the jury under instructions which would permit the plaintiff to recover the diminution in the value of his property for every valuable use among ordinarily intelligent men, arising from the occupancy for a smallpox hospital, provided the jury were satisfied that it was not reasonable and proper to let the building for this purpose, having reference to the probable effects upon its future, growing out of the presence of disease-producing conditions, in view of the existing state of the art of disinfection or other way of rendering it healthful, and excluding all sentimental or fanciful notions affecting only its reputation.

From an examination of the record there appears to be ground for the view that the case was tried throughout upon the theory that recovery was sought and could be had for injury to the reputation of the estate, apart from any physical waste, and that the stipulation and agreement, that in the event of the ruling to the effect that the plaintiff could not recover being wrong, judgment should be entered for the plaintiff, was made and entered into under such a misapprehension as to render what has taken place a mistrial, or to make it unjust to hold the parties to it, in view of the present opinion. The declaration is broad enough to include damages of the nature which we have held may be recovered. Hence the entry should be: Judgment for the plaintiff for the sum found by the jury, unless within sixty days from the filing of the rescript the justice of the superior court before whom the trial occurred shall decide, after hearing, that under these circumstances justice requires a new trial, and enter an order to that effect.

So ordered.

30 L.R.A.(N.S.)

NEW HAMPSHIRE SUPREME COURT.

FREEMAN C. WILLIS, Admr., etc., of
Frank B. Willis, Deceased,
v.

PLYMOUTH & CAMPTON TELEPHONE
EXCHANGE COMPANY.

(75 N. H. 453, 75 Atl. 877.)

Master — unsafe telephone pole — duty of inspection.

1. A telephone company sending a man to straighten an angle pole which is leaning because of the strain of the wires owes him the duty of doing what an ordinary man would do under the circumstances to ascertain whether or not the pole was originally set the proper depth into the ground, or whether it had pulled out, it being unsafe to climb a leaning pole subject to the angle strain if it is not sufficiently deep in the ground.

Same — notification of danger — duty.

2. A telephone company which sends a man to straighten an angle pole, knowing that it is less than the usual depth in the ground, of which fact or of the danger of straightening such poles he is ignorant, must use ordinary care to notify him of the dangers peculiar to the service because of it.

Same — sufficiency of instruction — question of law.

3. It cannot be said as matter of law that a telephone company acting as the ordinary man should not, when sending a lineman to straighten an angle pole, which it knows had pulled out of the ground, but with nothing to indicate that fact to the employee, who might have reached the conclusion that it had merely driven its brace into the ground, give him further notice of the danger, than simply to tell him to use a guy rope if the pole leaned badly.

Same — effect of furnishing sufficient implements.

4. A master cannot escape liability for injury to his servant, because he furnished him with proper implements with which to do his work the use of which would have prevented the accident, if the master did not tell him to use them in the particular case, and he did not know, and was not in fault in not knowing, that he ought to have done so.

On Rehearing.

Same — servant's negligence — violation of orders — effect.

5. A master cannot escape liability for injury to his servant, because the servant neglects in the particular case to follow any instructions which had ever been given him, and such failure contributed in some way

Note. — Upon the subject, "Injury to electric lineman through defect in pole or its appurtenances," see note to *Lynch v. Saginaw Valley Traction Co.* 21 L.R.A.(N.S.) 774.

to the accident,—especially where some of them were habitually violated not only by the ordinary workmen, but by their superiors also.

(October 5, 1909.)

EXCEPTIONS by defendant to rulings of the Superior Court for Grafton County made during the trial of an action brought to recover damages for the alleged negligent killing of plaintiff's intestate which resulted in a verdict for plaintiff. Overruled.

Plaintiff's intestate, Frank B. Willis, was employed by defendant as a telephone lineman, it being his duty, among others, to straighten leaning poles. Deceased, with two assistants, was sent by defendant's superintendent to straighten an angle pole which was leaning.

The evidence tended to show that angle poles, because of the side strain of the wires, are set 4 feet in the ground and supported by a guy, or a brace, or both, but that when one is supported by a short brace only the strain tends to lift it out of the ground; and that if this happens after the pole has been set for some time an easily discernible earth stain will show on the pole, but that if a pole is pulled up shortly after having been set no such stain is apparent. The pole in question, which had been erected some ten years, was 28 feet long and supported by a 10-foot brace, and at the time of the accident was but 2½ feet in the ground, although there were no surface indications that it was not set at the usual depth.

Plaintiff's evidence also tended to show that Willis was not given any special instructions as to how the work should be done, but had general instructions to inspect the poles when doing such work, and not to climb one that leaned badly without using a guy rope; that he had never seen a pole pulled up without there being some surface indications of the displacement, and that he thought the pole had been set at the usual depth, and that if it had been it would have been safe for climbing.

Deceased climbed the pole to attach a guy wire. His added weight raised the pole free from the ground, causing a fall to his death.

Further facts appear in the opinion.

Mr. Fred C. Demond, with Messrs. Streeter & Hollis and Alvin F. Wentworth, for defendant:

The condition of the pole was not a breach of any duty owing from the defendant to the deceased. It was under no obligation to furnish him a safe pole to repair.

Gibbons v. Brush Electric Illuminating 30 L.R.A. (N.S.)

Co. 36 App. Div. 140, 55 N. Y. Supp. 378; Ewald v. Michigan C. R. Co. 107 Ill. App. 294; Broderick v. St. Paul City R. Co. 74 Minn. 163, 77 N. W. 28; Saxton v. Northwestern Teleph. Exch. Co. 81 Minn. 314, 84 N. W. 109; Kellogg v. Denver City Tramway Co. 18 Colo. App. 475, 72 Pac. 609.

Having no actual knowledge of the shallow setting of the pole, the defendant was under no obligation to the deceased to take measures to discover it, even if any method of inspection short of digging up the pole would have disclosed it.

Dartmouth Spinning Co. v. Achord, 84 Ga. 14, 6 L.R.A. 190, 10 S. E. 449.

A company sending out a gang of men to repair its lines is not required to send other men before them to inspect the poles, and determine which could safely be climbed without the taking of precautions.

Sias v. Consolidated Lighting Co. 73 Vt. 35, 50 Atl. 554; McIsaac v. Northampton Electric Light Co. 172 Mass. 89, 70 Am. St. Rep. 244, 51 N. E. 524; McGorty v. Southern New England Teleph. Co. 69 Conn. 635, 61 Am. St. Rep. 62, 38 Atl. 359; Krimmel v. Edison Illuminating Co. 130 Mich. 613, 90 N. W. 336; Kanz v. Page, 168 Mass. 217, 46 N. E. 620; Kelley v. Chicago, St. P. M. & O. R. Co. 35 Minn. 490, 29 N. W. 173; Dartmouth Spinning Co. v. Achord, supra.

On Rehearing.

Contributory negligence should be inferred, as a matter of law, whenever the injury resulted from the servant's non-compliance with a specific order given by the master or his representative; and the mere fact that the servant was not warned that the prohibited act was dangerous does not render the doing of that act any the less culpable.

1 Labatt, Mast. & S. § 363; Louisville & N. R. Co. v. Mothershed, 110 Ala. 143, 20 So. 67; Lendberg v. Brotherton Iron Min. Co. 97 Mich. 443, 56 N. W. 846; Prather v. Richmond & D. R. Co. 80 Ga. 427, 12 Am. St. Rep. 263, 9 S. E. 530; Pilkinton v. Gulf C. & S. F. R. Co. 70 Tex. 226, 7 S. W. 805; La Croy v. New York, L. E. & W. R. Co. 132 N. Y. 570, 30 N. E. 391; Freeman v. Glens Falls Paper Mill Co. 70 Hun, 530, 24 N. Y. Supp. 403; Louisville & N. R. Co. v. Wilson, 88 Tenn. 316, 12 S. W. 720; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380; Connors v. Burlington, C. R. & N. R. Co. 74 Iowa, 383, 37 N. W. 966; Lockwood v. Chicago & N. W. R. Co. 55 Wis. 50, 12 N. W. 401; Lake Erie & W. R. Co. v. Craig, 25 C. C. A. 585, 47 U. S. App. 647, 80 Fed. 488; Shanny v. Androscoggin Mills, 66 Me. 420.

Mr. Oliver W. Branch, for plaintiff:

Willis did not assume the extraordinary risk of an improperly set pole.

Kelly v. Erie Teleg. & Teleph. Co. 34 Minn. 321, 25 N. W. 706; McDonald v. Postal Teleg. Co. 22 R. I. 131, 46 Atl. 407; Riker v. New York, O. & W. R. Co. 64 App. Div. 357, 72 N. Y. Supp. 168; Essex County Electric Co. v. Kelly, 57 N. J. L. 100, 29 Atl. 427, s. c. 60 N. J. L. 306, 37 Atl. 619.

Messrs. Oliver E. Branch and Ira A. Chase also for plaintiff.

Young, J., delivered the opinion of the court:

The defendants' contention, that their motion for a nonsuit should have been granted, is based on the proposition that a master owes the servants he employs to repair his instrumentalities no duty of inspection. Is this an accurate statement of the rule to be applied in this case to determine the rights and duties of the parties?

In this jurisdiction, in so far as instrumentalities are concerned, the only duty the law imposes on the master for the benefit of experienced servants is that of notifying them of the dangers peculiar to the service because of any abnormal or unusual condition of his instrumentalities, of which he either knows or would have known if he had used ordinary care for their safety, and of which they neither know nor are in fault for not knowing, intending by "notifying," not merely calling their attention to the peculiar physical condition of his instrumentalities, but giving them all the information necessary to enable them to appreciate fully the dangers peculiar to the service because of any abnormal or defective condition of his instrumentalities.

Since a master performs his full duty, in so far as experienced servants are concerned, when he notifies them of the extraordinary or abnormal dangers of the service, it is true that he owes servants employed to make repairs no duty to notify them of the dangers of the service which are not caused by some unusual or abnormal condition of the instrumentalities to be repaired; for risks not created in that way are the usual or ordinary dangers of the service, and as to such risks the master owes his servants no duty, no matter what they are employed to do. But when, as in this case, the dangers incident to making the repairs arise from the master's failure to maintain his instrumentalities in the usual or ordinary way, he is in fault as to servants injured while making repairs, if he did, and they did not, know of the abnormal risk caused by the unusual con-

dition of his instrumentalities (Aldrich v. Concord & M. R. Co. 67 N. H. 380, 36 Atl. 252); for such risks are not the usual or ordinary hazards of the service, but are among the extraordinary or unusual risks, of which it is the duty of the master to notify his servants when he does, and they do not, appreciate the peculiar dangers of the service incident thereto.

Although the defendants owed the intestate no duty to notify him of the dangers ordinarily incident to straightening up poles the usual depth in the ground, still it was their duty to do whatever the ordinary man would have done for his safety. It is not intended by this that it was the defendants' duty to furnish the intestate with poles safe for him to climb, or even with poles maintained 4 feet in the ground; but it was their duty to do what the ordinary man would have done to ascertain whether their poles were originally set the proper depth in the ground, or whether they had been pulled up since they were set. It is not, therefore, an accurate statement of the master's duty to say that he owes the servants he employs to make repairs no duty of inspection. He owes such servants, as well as those whom he employs to use his instrumentalities, the duty of doing whatever the ordinary man would do to discover the abnormal or extraordinary dangers of the service, and to notify them of those dangers of which he does, and they do not, know. Since this was the defendants' duty, the test to determine whether they were in fault for the intestate's death is to inquire whether (1) they did, and (2) he did not, know that the pole in question was less than the usual depth in the ground, and fully appreciate the risk peculiar to the work of straightening it up because of this fact; if it is found that they did, and he did not, appreciate that risk (3), whether the fact the pole was in the ground but 2½ feet was an abnormal condition; and if it was (4) whether they used ordinary care to notify him of the dangers peculiar to the service because of it. Wood, Mast. & S. §§ 414, 415.

The defendants' manager thought the pole leaned because the wires had pulled it out of the ground. It can be found from the testimony in respect to the intestate's habit never to climb a pole, or to permit others to climb it, unless he thought it was safe to do so, that he did not know the pole had been pulled up, or, in any event, did not appreciate the risk incident thereto. It is conceded that the pole ought to have been at least 4 feet in the ground; consequently the only question to be considered on this branch of the case is whether it can be said that the defendants did all

the ordinary man would have done to notify the intestate of the danger peculiar to his work because the pole was less than the usual depth in the ground. All they did for that purpose was to tell him to use a guy rope if the pole leaned badly. As the defendants' servants were in the habit of construing that instruction, it meant that he was to use a guy rope whenever he thought, all things considered, it was not safe to climb a pole without it. But if it is conceded that the intestate understood it was not safe to climb any pole that leaned badly without using a rope, it can still be found that the defendants did nothing to notify him of the danger they knew was peculiar to climbing this pole, for it can be found that this pole did not lean badly. In short, it can be found that they sent him out to do this work without giving him any information whatever in respect to the extraordinary danger incident thereto, although they either knew or ought to have known of it, and also knew or ought to have known that there was no ground stain or other surface indication to show that the pole was less than the usual depth in the ground, and that in that situation a man of the intestate's experience would be as likely to attribute the leaning of the pole to the fact that the brace had sunk into the soft sand as to the fact that the wires had pulled the pole out of the ground. It cannot be said that under these circumstances the ordinary man would not have done something more than the defendants did to notify the intestate of the abnormal danger incident to straightening up this pole.

2. Concede that the defendants' first request should not have been refused because it assumed that the intestate was instructed to inspect poles for himself, and not to climb one that leaned badly without using a guy rope, and it does not follow that the court erred in refusing it. As has been seen, it is not an accurate statement of the law as applied to the facts of this case to say that the defendants were under no duty to the intestate "to inspect the pole in question." It was their duty to do what the ordinary man would have done to ascertain whether this pole was originally set at the usual depth, or whether since then the wires had pulled it up; and, if they found either that it was not set at the usual depth, or that it had been pulled out of the ground, to notify the intestate of it.

3. The defendants' second request was also properly refused. It cannot be said, as a matter of law, that if the defendants furnished the intestate "with suitable tools and apparatus with which to do his work,

and Willis failed to use them, and if this failure in any way contributed to the accident, the plaintiff is not entitled to recover." If it is conceded that the defendants provided the guy rope for use on this pole, and that it was a suitable rope for that purpose and would have prevented the accident, the plaintiff could still recover if they failed to tell the intestate to use it, and he did not know, and was not in fault for not knowing, that he ought to use it. In that case, the fact that the rope would have prevented the accident is simply immaterial to the issue of the plaintiff's right to recover.

4. Neither can the defendants complain because the court refused to instruct the jury that if the intestate "failed to follow the instructions which were given him, and if the accident was in any way caused by his failure to follow them, the plaintiff is not entitled to recover."

Exceptions overruled.

All concur.

A petition for rehearing having been filed, further argument in writing was invited upon the exception to the refusal to give the instruction set out in paragraph 4 above.

In response thereto, Peaslee, J., on March 1, 1910, handed down the following additional opinion:

The question concerning the refusal to give the third instruction requested by the defendant has been argued as though it referred only to one express, unequivocal order given for this particular piece of work. If the request had been so framed as to relate to this order, and this alone, there might be force in the arguments advanced. But the request is broader than that. It includes all instructions ever given Willis, and demands a verdict for the defendant if failure to follow any of these instructions in any way caused the accident.

There was evidence not only of the specific instruction for this day's work, but also of general instructions along similar lines. There was also evidence that these general instructions were habitually disregarded not only by the ordinary workmen, but also by their superior, who gave the orders to them. From this it might be found that there was no intention on the part of the master that the instructions should be followed. After he has made a rule or given an instruction, "a practical invitation to violate it may be inferred from habitual usage which is known to him." *McNee v. Coburn Trolley Track Co.* 170 Mass. 283, 49 N. E. 437. Fair-minded men might conclude that the general instructions were to be followed only in cases where

there seemed to be occasion to do so. The jury might conclude that no special instruction was given, and that the general ones were properly interpreted as above indicated. If they so found, they might return a verdict for the plaintiff if it seemed that Willis reasonably concluded that this was one of the occasions when the instructions were not to be followed. 1 Labatt, Mast. & S. 514, 945, 961. It was the plaintiff's right to have the case considered upon this theory, as well as upon those more favorable to the defendant. The requested instruction would deprive him of this right, and was properly refused. *Ordway v. Sanders*, 58 N. H. 132; *Chase v. Chase*, 66 N. H. 592, 29 Atl. 553; *Smith v. Bank of New England*, 70 N. H. 187, 193, 46 Atl. 230; *Smith v. Bank of New England*, 72 N. H. 4, 10, 54 Atl. 385; *Minot v. Boston & M. R. Co.* 74 N. H. 230, 237, 66 Atl. 825.

Rehearing denied.

All concur.

**UNITED STATES CIRCUIT COURT
OF APPEALS, SECOND CIRCUIT.**

PENNSYLVANIA RAILROAD COMPANY,
Plff. in Err.,
v.
JOHN KELLY.

(101 C. C. A. 359, 177 Fed. 189.)

**Master — special policeman — assault —
liability.**

A railroad company is not liable for an assault committed in a public street, 50 feet from its pier, by a special policeman employed and paid by it to regulate the traffic on the pier, but commissioned by the police department, upon a truckman who, in approaching the pier to secure a load, failed promptly to obey his signal to halt.

(March 7, 1910.)

ERROR to the Circuit Court for the United States for the Southern District of New York to review a judgment in plaintiff's favor in an action brought to recover damages for an assault alleged to have been made by defendant's servant upon plaintiff. Reversed.

The facts are stated in the opinion.

Argued before Lacombe, Coxe, and Noyes, Circuit Judges.

Mr. Norman B. Beecher with Messrs. Robinson, Biddle, & Benedict, for plaintiff in error.

Messrs. Louis J. Vorhaus and Charles Goldzier, with Messrs. House, Grossman, & Vorhaus, for defendant in error.
30 L.R.A. (N.S.)

Coxe, Circuit Judge, delivered the opinion of the court:

On the morning of November 9, 1906, the plaintiff, who was a truckman and piano mover, started with a two-horse team and two helpers to the pier of the defendant at the foot of West Thirty-Seventh street, New York, to receive and move a Tiffany grand piano. When the plaintiff, who was driving, reached the foot of the street, Michael Gunn, a policeman of the city of New York, assigned to special duty on the defendant's pier, and paid by the defendant, raised his hand as a warning signal to the plaintiff to halt. This he did not do immediately, and an altercation arose which culminated in his receiving a severe blow from the policeman's club, which caused the injuries complained of.

The version of the occurrence given by Gunn is to the effect that the plaintiff was contumacious and insulting, and that the blow was struck to prevent an assault by

Note. — Liability of private person or corporation for acts of special police officer appointed by public authority.

Since the preparation of the note on this subject appended to the case of *McKain v. Baltimore & O. R. Co.* 23 L.R.A. (N.S.) 280, the court that decided that case has in *Layne v. Chesapeake & O. R. Co.* 66 W. Va. 607, 69 S. E. 1103, reaffirmed and restated the rules there laid down for determining the responsibility of the defendant for the acts of a special police officer, appointed by public authority. After repeating verbatim the first headnote in the former case, to the effect that prima facie the special officer is a public officer, for whose acts the company procuring his appointment and paying him for his services, directly or indirectly, is not liable, the court in the latter case declares that a public officer specially employed by a common carrier to perform certain duties and services for it is a servant of such carrier, while acting within the scope of such employment; and if such servant, in the performance of such duties, wrongfully inflict injury upon a passenger, the carrier is liable therefor, although the injurious act so done was wilful and malicious, and prompted by motives and purposes personal to the servant (officer), such as resentment of insults or punishment for other wrongs perpetrated upon himself. It should be observed that the question whether a carrier or other employer is liable for injuries inflicted by one who sustains the relation of servant, out of his personal malice, is not within the scope of these notes. That is a general question which arises only after the relation of master and servant is established. (See, on that subject, note in 4 L.R.A. (N.S.) 485.) The *Layne* Case is in point in this note because of its bearing on the point, preliminary to that question, whether the special of-

the plaintiff and his companions. It is, of course, unnecessary for us to consider the question of fact thus presented. The basic question is, Should the court have submitted the facts to the jury? and, in such circumstances, the plaintiff is entitled to the most favorable view of the testimony.

The complaint alleges that on the day in question, "the defendant had in its employ as a special officer, one Michael Gunn, whose duty it was, as such special officer, to regulate the traffic on the defendant's pier at the foot of West Thirty-Seventh street." This appointment was made pursuant to the provisions of the city's charter which provides, in substance, that when the necessity therefor is shown, the police commissioner may appoint and swear in any number of special patrolmen to do special duty at any place in the city, the applicant paying for such services in advance. Such special patrolmen shall be subject to the orders of the chief of police, shall obey the rules and regulations of the police department of the city, and conform to the general discipline and such special regulations as may be made. They shall "possess all the powers and discharge all the duties of the police force, applicable to regular patrolmen."

ficer is to be regarded as a servant of the defendant. In this connection, the court declared the general proposition that when the capacity in which a person occupying the dual position of public officer and servant of a carrier of passengers acted in a transaction in which he inflicts wrong and injury upon third persons is uncertain, and dependent upon conflicting oral testimony and inconclusive facts and circumstances, the question is one for jury determination; and held that, upon the evidence, that question was for the jury in the instant case, although it conceded that in some cases the court can say as a matter of law in which capacity such officer and servant acted.

In *Rand v. Butte Electric R. Co.* 40 Mont. 398, 107 Pac. 87, involving the liability of a carrier for an alleged assault committed upon a passenger by persons in its employment, and paid by it, but who had, at its request, been appointed as deputy sheriffs and peace officers, the court thus states the rule for determining the carrier's responsibility: "We understand the rule of law to be that a public officer cannot engage as such to guard the property of a private individual or corporation, and that the latter cannot claim freedom from liability for his wrongful acts while engaged as its train man or in other like capacity, on the ground that he is a public officer. If the wrong was done by the officer as such, his employer is not liable, even if he exceeds his authority; but if it is done during the course of his duty as employee, then the employer is liable, 30 L.R.A. (N.S.)

In short, for the purposes of this controversy, it may be stated that Gunn possessed all the powers of a regular patrolman. His salary was, it is true, paid by the defendant for special services upon its pier, but any act which a regular officer could do lawfully, Gunn could do. The converse of this proposition is also true. An act unlawful for the regular was unlawful for him; he had no immunity not possessed by the ordinary officer.

The question, then, for us to determine, may be stated as follows: Is a corporation which pays for the services of a policeman to guard its property and preserve order upon its premises liable for an unprovoked and wholly unjustifiable assault committed by him upon a public street? We are constrained to answer this question in the negative.

The witnesses all agree as to location of the assault. It was not on the pier, but at the foot of West Thirty-Seventh street, at least 50 feet from the entrance to the pier. We may take judicial notice of the fact that West Thirty-Seventh street is a public highway in no way under private control, and that it is the duty of police officers to control the movement of teams and regulate traffic at the point in question.

even if it is done in excess of authority; and it is generally a question for the jury to determine, upon all the evidence, the capacity in which the wrongdoer was acting at the particular time." Upon the evidence in the case, it was held that it was a question for the jury whether the persons who committed the assault were acting as public officers, or, under the order of the general manager of the company, as employees.

In *Adler v. White City Constr. Co.* 147 Ill. App. 20, the proprietor of an amusement park was held not responsible for an assault, committed in ejecting a person previously employed as a waiter, by one of a number of special patrolmen, designated by the general superintendent of police of the city for special duty at the park, notwithstanding that they were paid by the defendant, and that one of them was designated by the defendant's general manager as chief of the park police force, there being no evidence that such patrolmen were employed by the defendant in any other capacity than as policemen, or that the defendant had or exercised any control over them as policemen or otherwise, or that they were charged with or had ever performed, while in the service of defendant, any duties other than those pertaining to the office of policeman, or that, in doing what they did, they were enforcing or attempting to enforce any regulation or by-law of the defendant, or any order of any officer or agent of the defendant.

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The testimony of the plaintiff indicates that he was doing nothing unlawful or unusual at the time in question. He says he was proceeding towards the pier when he received the signal to stop. He immediately reined in his team, but because he did not stop soon enough, Gunn drew his club, jumped upon the wagon, and dealt him a blow which rendered him unconscious.

To hold the person who pays a policeman's wages for keeping order upon his premises liable for such a malicious assault as this, committed upon a public highway, goes far beyond the doctrine of any well-considered case with which we are familiar. If the plaintiff tells the truth, there was no justification for the brutal assault made upon him, but the defendant has done no act of omission or commission which renders it liable therefor.

The judgment is reversed, with costs.

NORTH CAROLINA SUPREME COURT.

HARPER FURNITURE COMPANY, Appt.,
v.
SOUTHERN EXPRESS COMPANY.

(148 N. C. 87, 62 S. E. 145.)

Damages — idleness of factory — profits.

1. The damages to be allowed for the enforced idleness of a mill because of a carrier's neglect to transport machinery to it will not include lost profits.

Carrier — prompt transportation — notice.

2. The carrier has notice of the likelihood of special injury in case it fails to perform its contract upon receiving for transportation by express an engine shaft to be delivered to a furniture manufacturing company.

Same — stoppage of business — damages.

3. A carrier will be liable for compensatory damages in case it stops the operation of a factory through neglect promptly to transport repairs needed by it, where it has notice that special injury will result from its neglect.

(Walker and Brown, JJ., dissent.)

(May 29, 1908.)

APPEAL by plaintiff from a judgment of the Superior Court for Caldwell County in defendant's favor in an action brought to recover damages for loss alleged to have resulted from defendant's failure promptly to transport repairs needed for plaintiff's factory. Reversed.
30 L.R.A. (N.S.)

Statement by Hoke, J.:

There was evidence tending to show: That plaintiff was a firm engaged in the manufacture of furniture, having its mill at Lenoir, North Carolina; that on or about the 21st of October, 1905, the Erie City Iron Works, of Erie City, Pennsylvania, shipped to plaintiff, as consignee, at Lenoir, North Carolina, an engine shaft, of a given kind, weighing something like 650 pounds; that, pursuant to the order of plaintiff company, the shipment was made by express over a line of connecting carriers, between the two points, including the defendant, and the shaft was delivered at Lenoir, North Carolina, by defendant company on November 9, 1905, indicating

Note. — Liability of carrier for loss of profits incident to delay in the delivery of articles intended for use, and not for sale.

The early cases are collected in the note appended to Wells v. National Life Asso. 53 L.R.A. 33, and the later cases are herein presented in further illustration of the principles deduced and enunciated in that note.

Remoteness and contingency.

The actual saving which the manufacturer of cotton-seed products would have effected by the operation of two presses instead of one is a form of loss of profits, and is too remote and speculative to be recoverable from a carrier whose failure promptly to transport materials for a second press prevented its operation. Chicago, R. I. & P. R. Co. v. Planters' Gin & Oil Co. 88 Ark. 77, 113 S. W. 352.

And the profits lost by the proprietor of a public cotton ginnery during its enforced idleness resulting from a carrier's delay in transporting a part of the machinery for repairs are too speculative to be recovered in an action against the carrier, where there is no basis for determining the number of bales of cotton brought to the ginnery while it was idle, and the charge for ginning a bale depended on many contingencies. Southern R. Co. v. Coleman, 153 Ala. 266, 44 So. 837.

Loss of profits which would have accrued to the plaintiffs upon the fulfillment of a collateral contract are not recoverable in an action against a carrier for damages for delay in delivering machinery, where the contract from the fulfillment of which profits would have accrued was not in the contemplation of the parties at the time the carrier received the machinery for transportation. Goodin v. Southern R. Co. 125 Ga. 630, 6 L.R.A. (N.S.) 1054, 54 S. E. 720, 5 A. & E. Ann. Cas. 573.

Recovery by a traveling salesman for loss of earnings during a carrier's delay in delivering his sample trunk was denied in Palmer v. Louisville & N. R. Co. 123 N. Y. Supp. 47, upon the ground that they were not such as would naturally follow from de-

a wrongful delay in the shipment of something like two weeks. There was further evidence tending to show that the furniture factory of plaintiff company, for which the engine shaft had been ordered, was necessarily closed down during the time of wrongful delay, and that by reason of this loss of time in operating the factory the plaintiff company suffered damages to the amount of \$200 and more, arising from wages paid idle hands and other costs incident to the delay, and interest on the amount of capital invested in the mill, and unproductive during said time. The character, capacity, and amount invested in the mill were shown as *data* for estimating the damage suffered, and it was proved that the full product of the mill had been already sold for the period and at a profit. It was further shown that, as soon as it was disclosed that the shipment was delayed, plaintiff company im-

mediately duplicated the order, and both shafts were delivered at the same time, November 9th. Plaintiff offered to show the amount of profit which the mill could have realized during the time of delay, but the evidence was held to be incompetent, and the plaintiff excepted. At the close of the testimony, the court intimated an opinion that on the evidence, if believed, only nominal damages could be recovered, and, in deference to this intimation, plaintiff submitted to a nonsuit and appealed.

Messrs. Jones & Whisnaut for appellant.

Mr. W. C. Newland for appellee.

Hoke, J., delivered the opinion of the court:

The decisions of this state are to the effect that the current profits of a going manufacturing enterprise, which are de-

lay in delivering a trunk, and that they were not shown to have been within the contemplation of the parties.

In order to recover special damages for a carrier's breach of contract promptly to transport freight, the plaintiff must show that, at the date of the contract, the defendant had notice of the special conditions rendering such damages the natural and probable result of such breach. *Pacific Exp. Co. v. Jones* (Tex. Civ. App.) 113 S. W. 952; *Towles v. Atlantic Coast Line R. Co.* 83 S. C. 501, 65 S. E. 638; *Moore v. Atlantic Coast Line R. Co.* 85 S. C. 19, 67 S. E. 11.

Therefore a carrier's delay in the delivery of ginning machinery that it undertook to carry without notice of the special circumstances cannot be held to render it liable for profits lost by the consignee by reason of being unable to operate his public ginnery. *Kolb v. Southern R. Co.* 81 S. C. 536, 62 S. E. 872.

And the "reasonable value" of a cotton gin for a period of enforced idleness cannot be recovered from a carrier as damages for its failure to deliver a part of the necessary machinery, which it undertook to carry without being informed of the necessity for prompt delivery. *American Exp. Co. v. Jennings*, 86 Miss. 329, 109 Am. St. Rep. 708, 38 So. 374.

So, the profits that would have been realized from the operation of a flour mill during the period of a carrier's delay in the transportation of parts of the machinery necessary to its operation cannot be recovered from the carrier, where it had no notice of the conditions, and sufficient *data* are not produced from which a reasonably accurate estimate of such profits can be made. *Sharpe v. Southern R. Co.* 130 N. C. 613, 41 S. E. 799.

And profits lost by one engaged in milling for the public, by reason of a carrier's delay in delivering a rice huller, cannot be recovered from the carrier, where it had no 30 L.R.A. (N.S.)

notice that the huller was to be used for the purpose of making profit. *Traywick v. Southern R. Co.* 71 S. C. 82, 110 Am. St. Rep. 563, 50 S. E. 549.

And where the carrier which transported a portion of the machinery of a sawmill for repairs and return had no notice at the time of undertaking the carriage that the machinery was necessary to the operation of the mill, the loss of a customer in case of delay was not a probability in the minds of the parties, so that the carrier cannot be held liable for loss of profits on sales of lumber to such customer, in an action for damages for the delay. *Louisville & N. R. Co. v. Mink*, 126 Ky. 337, 103 S. W. 294.

Profits that would have been realized under a time contract for the boring of a well, but for a carrier's delay in delivering a part of the contractor's equipment, cannot be recovered from the carrier, where it undertook the transportation without knowledge of the circumstance requiring prompt delivery. *Illinois C. R. Co. v. Johnson*, 110 Tenn. 624, 94 S. W. 600.

And a carrier undertaking the transportation of a horse power without notice of such facts as would inform it of the results of delay is not liable in an action for damages for delay, for the loss of fodder and cow manure through the consignee's inability to operate a fodder shredder without the horse power. *Hoffman v. Delaware, L. & W. R. Co.* 39 Pa. Super. Ct. 47.

The usable value of log wagons during the period of delay in delivery by a carrier engaged to transport them cannot be recovered from the carrier, where no notice was given to it that delay would cause special damages. *Chicago, R. I. & P. R. Co. v. Newhouse Mill & Lumber Co.* 90 Ark. 452, 119 S. W. 646.

And a carrier undertaking the transportation of fuel oil without knowledge that the continued operation of the consignee's ice plant depended upon prompt delivery cannot be held responsible for profits that

pendent on the varying cost of labor and material and the fluctuations of the market value of the product, as a general rule, are too uncertain to form the basis of an award of damages in breaches of contract affecting the operation of the plant, and the better rule in such cases, when it appears that substantial damages are recoverable, is that such damages shall be ascertained on the basis of interest on the capital invested, which is unproductive for the time, with the addition, under certain circumstances, of the pay of hands idle and necessarily unemployed, and some other incidental expenses reasonably referable to the defendant's wrong, which may at times include an outlay in the reasonable effort to reduce or minimize the loss. No doubt, there are cases where the average rental value of a business building or a given machine may afford data for a correct admeasurement of damages; but, in plants

of the kind indicated, this rental value is so connected with or dependent upon the fluctuation of the markets that it has been considered with us as the safer rule in enterprises of the kind stated to adopt the interest on the capital invested and unproductive for the time, with other incidental costs, as the correct method of adjustment. The judge below, therefore, made a correct ruling in rejecting the evidence offered tending to show the current profits of the plaintiff's mill. *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. C. 584, 41 S. E. 797; *Sharpe v. Southern R. Co.* 130 N. C. 613, 41 S. E. 799; *Rocky Mount Mills v. Wilmington & W. R. Co.* 119 N. C. 693, 56 Am. St. Rep. 682, 25 S. E. 854; *Foard v. Atlantic & N. C. R. Co.* 53 N. C. (8 Jones, L.) 235, 78 Am. Dec. 277; *Boyle v. Reeder*, 23 N. C. (1 Ired. L.) 607.

We are of opinion, however, that there

the consignee would have realized under contracts for the sale of ice but for the carrier's delay, resulting in the closing down of the plant. *Habertzette v. Trinity & B. Valley R. Co.* 46 Tex. Civ. App. 527, 103 S. W. 219.

And the amount of decrease of the yield of land, occurring by reason of the failure of fertilizer to arrive before the planting of the crops, is not recoverable from the carrier that delayed the delivery of the fertilizer, where it did not have notice of the special use to which the fertilizer was to be applied, or that there was such a scarcity of fertilizer that the consignee would not be able to purchase more. *Matheson v. Southern R. Co.* 79 S. C. 155, 60 S. E. 437.

So, loss on fish to preserve which a shipment of ice was ordered is not recoverable in an action against a carrier for damages for failure to deliver the ice, in the absence of proof that the carrier knew, or, from facts and circumstances connected with the shipment, should have known, that the ice was intended for packing fish. *Lewark v. Norfolk & S. R. Co.* 137 N. C. 383, 49 S. E. 882.

And the freezing of plaintiff's oranges on the trees is not so direct, natural, and proximate a result of the failure of a railroad company to deliver to the plaintiff within a reasonable time orange boxes accepted by it for transportation as to make the company liable therefor by reason of such delay, where the contract of carriage did not fix any specific time for the transportation and delivery of the boxes, and the company was not informed that the plaintiff would leave the oranges on the trees, exposed to the danger of the cold, until the boxes were delivered. *Williams v. Atlantic Coast Line R. Co.* 56 Fla. 735, 24 L.R.A. (N.S.) 134, 131 Am. St. Rep. 169, 48 So. 209.

Loss that may have been sustained by reason of inability to keep racing engagements cannot be recovered from a carrier in an action for damages for delay in the transportation of the kind indicated, this rental value is so connected with or dependent upon the fluctuation of the markets that it has been considered with us as the safer rule in enterprises of the kind stated to adopt the interest on the capital invested and unproductive for the time, with other incidental costs, as the correct method of adjustment. The judge below, therefore, made a correct ruling in rejecting the evidence offered tending to show the current profits of the plaintiff's mill. *Pender Lumber Co. v. Wilmington Iron Works*, 130 N. C. 584, 41 S. E. 797; *Sharpe v. Southern R. Co.* 130 N. C. 613, 41 S. E. 799; *Rocky Mount Mills v. Wilmington & W. R. Co.* 119 N. C. 693, 56 Am. St. Rep. 682, 25 S. E. 854; *Foard v. Atlantic & N. C. R. Co.* 53 N. C. (8 Jones, L.) 235, 78 Am. Dec. 277; *Boyle v. Reeder*, 23 N. C. (1 Ired. L.) 607.

portation of, or injury to, a race horse. *Louisville & N. R. Co. v. Gormley*, 33 Ky. L. Rep. 802, 111 S. W. 289.

Cotton-seed meal and hulls are not of such a character that a carrier undertaking their transportation will be held to have contemplated that the prompt delivery thereof was necessary to avoid loss of weight in the cattle for the feeding of which the consignment was intended. *Illinois C. R. Co. v. Nelson*, 30 Ky. L. Rep. 114, 97 S. W. 757. Therefore, to hold the carrier responsible for such loss, notice at the time the shipment is made must be given to the carrier, as to the use for which the consignment is intended, and the circumstances which make prompt transportation necessary. *Ibid.*; *Patterson v. Illinois C. R. Co.* 30 Ky. L. Rep. 78, 97 S. W. 426.

And notice necessary to hold a carrier liable for loss of profits that would have been realized but for the idleness of an electric lighting plant during the delay in returning to the plant a repaired shaft necessary to its operation was brought home to the carrier neither by the fact that the article transported was a shaft, where its appearance did not indicate the special use that was to be made of it, nor by the fact that the electric lights in the carrier's office, which were furnished with current from the plant, were not burning while the shaft was away for repairs; and the carrier is not liable for the lost profits, where express notice of its proposed special use was not given to it at the time the contract for transporting the shaft was made. *Stone v. Adams Exp. Co.* (Ky.) 122 S. W. 200.

And it is fair to presume that a carrier undertaking to transport a passenger's trunk without knowledge that it contained butcher's tools did not contemplate that its loss would entail damages in the form of "usual rental or usage value" of the tools, especially where it is provided by statute that the detriment caused by a carrier's delay in the delivery of freight shall be the

was error in holding that, on the facts appearing from the evidence, the plaintiff could, in any event, recover only nominal damages. The plaintiff complains of, and offers evidence tending to show, a breach of contract of carriage; and, as in other cases of breach of contract, it should ordinarily be allowed to recover the damages naturally incident to the breach, and which may be reasonably supposed to have been in the mind of the parties at the time the contract was made. Where the goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, these damages are usually the difference in the market value of the goods at the time fixed for delivery and that when they were in

fact delivered. We have so held in the case of *Davidson Development Co. v. Southern R. Co.* 147 N. C. 503, 61 S. E. 381, and *Lee v. St. Louis, I. M. & S. R. Co.* 136 N. C. 533, 48 S. E. 809, is to the same effect. When, however, the goods are ordered for a special purpose, or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated, and it is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract; but, when they are known to the carrier, under such circumstances, or they are of such a character that the parties may be fairly sup-

depreciation of its intrinsic value during the delay, and also the depreciation of its market value, otherwise than by a depreciation of its intrinsic value. *Choctaw, O. & G. R. Co. v. Zwirtz*, 13 Okla. 411, 73 Pac. 941.

Notice that a trunk belongs to an actress, who cannot keep her engagements without it, must be given to a carrier when it undertakes to transport the trunk, in order to hold it responsible for losses resulting from inability to keep the engagements. *Brown v. Weir*, 95 App. Div. 78, 88 N. Y. Supp. 479.

The value to a traveling salesman working on a commission basis, of the use of his trunk of samples in a certain town, cannot be determined with sufficient certainty to warrant the recovery thereof as damages for a carrier's failure promptly to transport the trunk, where it does not appear that he had any customers in the town, or that there was any reasonable probability that he would make any sales there, and the amount of his expenses, although conceded to have been paid by his employer, was not established. *Conheim v. Chicago G. W. R. Co.* 104 Minn. 312, 17 L.R.A. (N.S.) 1091, 124 Am. St. Rep. 623, 116 N. W. 581, 15 A. & E. Ann. Cas. 389.

And a traveling salesman whose compensation is based on the orders secured by him and accepted by his employer cannot recover from the railroad company, as damages for delay in transporting his trunks, which he had shipped over its line, the profits from orders which, tested by experience, he would have secured while deprived of his trunks, since they are too remote and speculative, and are not such as the parties contemplated as the proximate result of the breach of the contract. *Seaboard Air Line R. Co. v. Harris*, 121 Ga. 707, 49 S. E. 703.

So, losses suffered by reason of the inability of a member of a mercantile firm to keep engagements with prospective customers without his samples are not recoverable from a carrier which undertook to carry his sample trunk without notice of the circumstances. *Katz v. Cleveland, C. C. & St. L. R. Co.* 46 Misc. 250, 91 N. Y. Supp. 720.

On the other hand, it was held in *Webb* 30 L.R.A. (N.S.)

v. Atlantic Coast Line R. Co. 76 S. C. 193, 9 L.R.A. (N.S.) 1218, 56 S. E. 954, 11 A. & E. Ann. Cas. 834, that loss from inability to sell goods because of delay in receiving the samples must be regarded as having been within the contemplation of a carrier when it checked a salesman's samples as baggage, so as to entitle him to recover damages therefor in case of such delay.

It was held in *Yazoo & M. Valley R. Co. v. Christmas*, 89 Miss. 686, 42 So. 160, that the usable value of cotton-gin machinery during the period that its delivery was delayed by a carrier was recoverable in an action against the carrier.

And in *Louisville & C. Packet Co. v. Bottorff*, 25 Ky. L. Rep. 1324, 77 S. W. 920, it was held that the measure of damages for a carrier's delay in transporting a "self-feeder" for a grain thrasher was such a sum as was the natural and proximate result of the delay; and although it did not appear that the carrier was notified of the circumstances requiring prompt delivery, the court held that, in arriving at the amount of damages, the jury could take into consideration the loss of profits on contracts made by the consignee for the threshing of wheat.

Effect of notice.

It has been held that a plaintiff can recover more than nominal damages for unreasonable delay in the transportation of a shipment when the special purpose or present use of the article is expressly made a part of the contract, or enters into the negotiations of the parties, or when the article shipped is of such a character that the parties may be fairly supposed to have had in contemplation its special use. *Storey Lumber Co. v. Southern R. Co.* 151 N. C. 23, 65 S. E. 460.

A railroad company inducing the proprietor of coal lands to open up the mines, and to contract to ship the coal, by its line exclusively, and incidentally supplementing its duty to supply cars by promising to furnish transportation, and knowing that fixed charges had to be met at the mine,

posed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages. Moore, Carr. p. 425; Hutchinson, Carr. § 1367.

In the citation from Hutchinson, after stating the general rule to be the difference in the market value of the goods, the author says: "But there may be circumstances under which the application of this rule would be inequitable. There may be, and frequently are, cases in which, for special reasons, the shipper may desire that the transportation of his goods shall be hastened; and if, with a knowledge of these circumstances, the carrier should unreasonably delay the carriage, or if, having expressly contracted to carry them within

a given time, or for a given purpose, he should negligently delay them beyond that time, or so as to defeat that purpose, the difference in the value of the goods at the time of their actual arrival and at the time when they should have been delivered may prove a very inadequate recompense to their owner."

The same principle is well stated by Bramwell, L. J., in the case of Hydraulic Engineering Co. v. McHaffie (1878-79) L. R. 4 Q. B. Div. 670, 23 Eng. Rul. Cas. 558, an action for damages for delay in constructing a machine, as follows: "The fact that a binding agreement has been arrived at does not of itself create a responsibility for all the injury flowing from a breach of it: the wrongdoer is *prima facie* only

whether it was active or idle, and that the only practical way to handle mined coal was to place it in cars rather than to store it,—may fairly be said to have contemplated the loss of net profits as damages flowing from a breach of the contract, so that, where the business has been established, and the profits are therefore ascertainable, it may be held liable for the loss thereof. Midland Valley R. Co. v. Hoffman Coal Co. 91 Ark. 180, 120 S. W. 380.

A carrier who fails to perform promptly his contract to transport the scenery and properties of a traveling show, knowing that their absence will prevent a performance, is liable for the value of the ordinary earnings of the properties during the time the owner is deprived of their use, less the expenses which he is saved by inability to exhibit; and the fact that such damages are not provided for in the shipping articles is immaterial. Weston v. Boston & M. R. Co. 190 Mass. 298, 4 L.R.A.(N.S.) 569, 112 Am. St. Rep. 330, 76 N. E. 1050, 5 A. & E. Ann. Cas. 825.

So, in estimating the losses suffered by a theatrical company through its inability to keep an engagement by reason of a carrier's failure to transport its carload of scenery, as agreed, the jury may, if the carrier was notified of the purpose of the consignment and the date of the engagement, take into consideration the nature of the plaintiff's business and his profits for a reasonable period next preceding the time when the contract was violated. Illinois C. R. Co. v. Byrne, 205 Ill. 9, 68 N. E. 720.

Where the carrier was given express notice that delay in the delivery of samples shipped to agents would cause loss of business, and it contracted to make prompt delivery and to take extra precautions to effect the same, it may be held liable for special damages resulting from delay, although it was not able to estimate their precise amount at the time. Gledhill Wall Paper Co. v. Baltimore & O. R. Co. 119 N. Y. Supp. 623.

A contractor who, due to the breaking of machinery, is forced temporarily to sus-

pend the execution of a grading contract, may recover from a carrier which, having notice of the conditions, delays the delivery of substitute machinery, the rental value for the period of delay, not only of that part of his equipment which was leased to him, but of that part owned by him, although the latter has no market rental value, together with wages paid the crew. Elzy v. Adams Exp. Co. 141 Iowa, 407, 119 N. W. 705.

The sum representing the net earning capacity of a grading outfit whose delivery was delayed by a carrier engaged to transport it may be recovered from the carrier, where it was put upon notice at the time of accepting the shipment that such special damage would result if delivery should be delayed. St. Louis, I. M. & S. R. Co. v. Lamb (Ark.) 128 S. W. 1030.

And a carrier which undertook the transportation of a grain thresher with notice that the consignee had made contracts for threshing wheat is liable for profits lost by him by reason of the facts that the thresher was damaged in transportation, and the consignee was delayed in performing his contract while repairing the damage. Chicago, R. I. & G. R. Co. v. Calvert, 41 Tex. Civ. App. 236, 91 S. W. 825.

Profits that would have been earned but for the enforced idleness of a mill, due to negligent delay in the carriage of a portion of its machinery, sent for repairs, may be recovered from the carrier, where it had notice at the time of its undertaking that loss would result from the impossibility of operating the mill without the machinery. Morrow v. Missouri P. R. Co. 140 Mo. App. 200, 123 S. W. 1034.

And a carrier which negligently delays the delivery of a merry-go-round accepted for transportation with notice that it was being shipped for use at picnics between certain dates cannot be held liable for profits lost beyond the reasonable time in which it could have been set up for operation after its arrival; and where, after its arrival, additional delay is caused by the failure, because of other engagements, of the drayman to perform his contract to haul

liable for the natural and ordinary consequences of the breach; but where, at the time of entering into the contract, both parties know and contemplate that, if a breach of the contract is committed, some injury will accrue in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation in damages upon the occurrence of that injury." This limitation on the general rule as to the amount of damages recoverable for wrongful delay in the shipment of goods, being itself an application of the third rule laid down in the case of *Hadley v. Baxendale*, 9 Exch. 341, 5 Eng. Rul. Cas. 502; *Wood's Mayne on Damages*, p. 21, is frequently presented in cases involving the making and shipment of machinery. In fact, these are the cases which usually call for the application of the principle stated. Many instances of such application are afforded in the decisions in our own state; as in *Boyle v. Reeder*; *Foard*

v. Atlantic & N. C. R. Co.; *Rocky Mount Mills v. Wilmington & W. R. Co.*; and *Sharpe v. Southern R. Co.*,—*supra*. See also *Mace v. Ramsey*, 74 N. C. 11; *Neal v. Pender-Hyman Hardware Co.* 122 N. C. 104, 65 Am. St. Rep. 697, 29 S. E. 96. And well-considered cases in other jurisdictions are to like effect. *Simpson v. London & N. W. R. Co.* (1875-76) L. R. 1 Q. B. Div. 274; *Cory v. Thames Ironworks & Ship Bldg. Co.* (1867-68) L. R. 3 Q. B. 181; *Gee v. Lancashire & Y. R. Co.* (1860) 6 Hurlst. & N. 210; *Die Elbinger Actien-Gesellschaft v. Armstrong* (1873-74) L. R. 9 Q. B. 473, 23 Eng. Rul. Cas. 551; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 460; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Priestly v. Northern Indiana & C. R. Co.* 26 Ill. 205, 79 Am. Dec. 369; *Savannah, F. & W. R. Co. v. Pritchard*, 77 Ga. 412, 4 Am. St. Rep. 92, 1 S. E. 261.

In *Simpson's Case*, *supra*, it appeared that plaintiff, a manufacturer of cattle

the machine, the carrier cannot be held responsible therefor as the proximate result of its negligence, although prompt transportation might have brought the machine to its destination at a time when the drayman would not have been prevented by other engagements from immediately removing it. *Texas C. R. Co. v. Shropshire* (Tex. Civ. App.) 125 S. W. 369.

And a carrier who was given notice that a series of proposed shipments of cotton-seed meal and hulls were intended for feeding the consignee's cattle, and that transportation and delivery without delay was necessary, may be held liable for the proximately consequent injury to the cattle, including the loss of weight of the cattle for want of feed, and the decrease in the market price which they will bring because of their reduced weight. *Illinois C. R. Co. v. Mossbarger*, 28 Ky. L. Rep. 1217, 91 S. W. 1121.

It was held in *Bourland v. Choctaw, O. & G. R. Co.* 99 Tex. 407, 3 L.R.A. (N.S.) 1111, 122 Am. St. Rep. 647, 90 S. W. 483, that notice that failure to deliver cattle food in a carrier's possession for transportation would result in injury to the cattle, to warrant a recovery of damages for such injury, was sufficient when given to the carrier after the food had reached its destination, and was not required to be given when the contract for transportation was made.

So, the carrier was held to have sufficient notice to render it liable for special damages resulting from loss of business, where it was notified by the consignee of a car of coke which had reached its destination that failure promptly to deliver it would necessitate the shutting down of the latter's plant. *Texarkana & Ft. S. R. Co. v. Neches Iron Works* (Tex. Civ. App.) 122 S. W. 64.

But the Texas court holds that it is not 30 L.R.A. (N.S.)

sufficient to give notice of loss of earnings after the shipment has been temporarily lost in transportation. *Gulf, C. & S. F. R. Co. v. Cherry* (Tex. Civ. App.) 129 S. W. 152. Here the carrier undertook to carry cooerage tools without notice that the owner had contracts for the making of barrels. Probably, if there had been additional negligent delay after the notice, recovery would have been allowed for the loss of such profits as resulted from the additional delay.

The fact that notice was given to a carrier of damages that would result from its failure promptly to transport machinery does not warrant the recovery of damages of such a speculative nature as the profits that would have resulted from the launching of a new business, which was delayed until the arrival of the machinery. *McMeekin v. Southern R. Co.* 82 S. C. 468, 64 S. E. 413.

And profits that would have been realized by the manufacturer of cotton-seed products from seed contracted for subsequently to the carrier's default in the delivery of the materials for a press cannot be recovered from the carrier on the theory that the possible loss of such profits must have been within the contemplation of the parties because notice was given to the carrier at the time the machinery was shipped that delay would cause deterioration in the quality of the seed, and therefore of the products, and might cause loss under time contracts for sale of products. *Chicago, R. I. & P. R. Co. v. Planters' Gin & Oil Co.* 88 Ark. 77, 113 S. W. 352.

As to time of notice to warrant recovery of special damages for failure of carrier to deliver property, see note to *Bourland v. Choctaw, O. & G. R. Co.* 3 L.R.A. (N.S.) 1111.

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spice and other substances, was in the habit of making an exhibit of samples of his goods in the grounds of certain cattle shows going on in different sections of the country. On the trial before Cockburn, Ch. J., at Spring Assizes, 1875, it was proved: "On the 18th of July, the Bedford show being about to end, and a similar show at Newcastle being about to be held on the 22d, 23d, and 24th of July, where the plaintiff desired to exhibit his goods, the plaintiff, by his son, who was in charge of the show tent and samples, made with the defendants' agent a contract for the carriage of the samples. The evidence as to the terms of the contract was that a consignment note was filled up by the plaintiff's son, consigning the goods as 'boxes of sundries,' to 'Simpson & Company, the show ground, Newcastle-on-Tyne,' and that he indorsed the note, 'must be at Newcastle on Monday certain,' meaning the next Monday, the 20th of July. Nothing was expressly said as to the plaintiff's intention to exhibit the goods at Newcastle, or as to the goods being samples. The goods did not arrive till several days after time, and when the show was over." On the trial the undisputed damages were paid into court, with verdict for £20 additional to cover special damages, should the court be of opinion that such damages were recoverable. Rule No. 51, argued before Queen's bench division before Cockburn, Ch. J., and Mellor and Field, JJ. The reported case proceeds as follows:

"[Field, J., referred to *Watson v. Amburgeat R. Co.* 15 Jur. 448.]

"Gates, Q. C., and C. H. Anderson, in support of the rule: The argument for the plaintiff goes farther than any decided case. The defendants ought to have been told that the goods were samples. *Woodger v. Great Western R. Co.* L. R. 2 C. P. 318.

"[Field, J.: Must we not infer as a matter of fact that notice of their being samples was given?]

"[Counsel:] *Great Western R. Co. v. Redmayne*, L. R. 1 C. P. 329, shows that distinct notice must be given.

"[Cockburn, Ch. J.: Knowledge of circumstances from which the purpose would naturally be inferred is sufficient without express notice of the purpose itself.]

"[Counsel:] As to the loss of profits, such profits as these have never been held recoverable.

"[Cockburn, Ch. J.: Can it be disputed that these profits would have been recoverable, if an express stipulation had been made that the goods should be delivered by a particular day, and the defendants

had been told what the result of nondelivery would be?]

"[Counsel:] That might be disputed.

"Cockburn, Ch. J.: I am of opinion that this rule must be discharged. The law, as it is to be found in the reported cases, has fluctuated; but the principle is now settled that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object. The plaintiff in the present case is in the habit of going about the country exhibiting his cattle spice at shows, to attract purchasers. The defendants had an agent on the ground at the Bedford agricultural show, where this contract was made, for the purpose of drawing custom to their line; and their agent must have known that the plaintiff had been exhibiting these goods, and that they were being sent to Newcastle for the same purpose. I therefore cannot doubt that there was in this case common knowledge of the object in view. As to the supposed impossibility of ascertaining the damages, I think there is no such impossibility; to some extent, no doubt, they must be matter of speculation, but that is no reason for not awarding any damages at all.

"Mellor, J.: I am of the same opinion. As a jurymen I come to the conclusion that the clerk to the defendants had notice of the object for which the goods were being sent. As to the difficulty of ascertaining the amount of profits which the plaintiff can be supposed to have lost, that is not a matter upon which we have to trouble ourselves.

"Field, J.: I am of the same opinion. I apprehend that, for a breach of contract, a plaintiff is entitled to recover for damages naturally following under circumstances known to both the parties. In this case, inasmuch as railway companies do not often bind themselves to deliver by a particular day, the defendants' attention would be attracted by the stipulation which was made to that effect. Then, where was the contract made? Upon a show ground. To what place was it the goods were to be sent? To a similar show ground. The inference from which would naturally be that the goods were being sent for the purpose of being shewn there. Further, if the defendants' agent did not so understand the matter, he might have been called to say so, but that was not done. Therefore I infer, as judge of fact,

that both parties were aware of the circumstances with a view to which the plaintiff was contracting, and that they were made the basis of the contract."

In the case of *Gee v. Lancashire & Y. R. Co.*,—shipment of cotton for use in a mill,—special damages were disallowed; but court held that if it had appeared that defendant had knowledge of the purpose for which cotton was required, and that stopping the mill would follow from delay, the special damages could be recovered.

In *Priestly's Case*, supra, damages were allowed for the use of machinery during the time it was wrongfully delayed in shipment. On the trial below, only nominal damages had been allowed. On appeal, Breese, J., for the appellate court, said: "The principle announced by the court in its instruction, and which determined the case, the jury finding nominal damages only, is not the law. The proposition cannot be entertained for a moment that, under a contract to deliver in a reasonable time valuable machinery such as described in the declaration, that the difference in the market value of such machinery at the time it was in fact delivered, and when it should have been delivered, is all the damage the owner of the machinery is entitled to claim. If this was the measure, there could be no great incentive to carriers to perform promptly a contract for the delivery of such articles, as they are not liable to deteriorate in a few days or months. As to perishable articles of fluctuating value, as grain, live stock, and such like, this rule is doubtless the true one, and has been recognized by this court in the case of *Sangamon & M. R. Co. v. Henry*, 14 Ill. 156. Where the property to be carried and delivered is not of a perishable nature, and is not a common or ordinary object of sale in market, and subject to its fluctuations, but is designed for a special purpose in a special business, the rule is very different; but in both cases adequate indemnity should be offered the plaintiff for the loss he has sustained."

In *Savannah, F. & W. R. Co. v. Pritchard*, 77 Ga. 412, 4 Am. St. Rep. 92, 1 S. E. 261, damages were allowed for injury caused by wrongful delay in shipping a still worm for a turpentine distillery. The elements of damages recovered in this case are thus stated in the opinion: "During all the time [of the delay] their machinery and hands employed in running it were idle, and the tree boxes from which the crude gum was gathered had run over, and much of it was wasted for the want of barrels in which to deposit it; and such loss would not have occurred had the worm come to hand at the proper time, and the

plaintiffs been enabled to use their still. The principal loss was in the crude turpentine, estimated at eighty-six barrels, worth \$4 a barrel." There was verdict for the entire amount of damages, less \$10.

In *Ragsdale's Case*, supra, wrongful delay in shipping a boiler required for the operation of certain machinery, profits of the enterprise were disallowed as proper basis of damages, and it was held that the cost of hands necessarily kept unemployed by reason of delay, with interest on capital, unproductive for the time, was the correct rule for award of the damages.

And in the case of our own court (*Neal v. Pender-Hyman Hardware Co.*) damages were allowed for loss of a tobacco crop, on failure to furnish, as per contract, at the stipulated time, certain flues to use in curing tobacco. It was contended that no special damages could be recovered, inasmuch as plaintiff failed to show that defendant had knowledge that such damages would result from a failure to deliver the flues; but the court held that it was a matter of common knowledge in localities where tobacco is cultivated, that if it is not cut and cured in apt time serious loss is the necessary consequence, and such knowledge would be assumed against defendant, engaged in manufacturing the flues, and his agent, engaged in selling the same. A proper application of the doctrine declared and approved by these authorities will establish the position that, on the facts appearing in evidence, if the defendant's responsibility for this delay should be established, the plaintiff is entitled to recover compensatory damages, and the question of the amount should be referred to the jury, on the principles heretofore indicated.

The plaintiffs were a firm engaged in the manufacture and sale of furniture. Of this the title of the firm, consignee in the bill of lading, taken in connection with the character of the implement ordered and shipped, would give reasonable notice. In this day and time, certainly it is a matter of common knowledge that an engine shaft is the part by which the power of the engine is applied to the operating machinery. That it is essential and necessary for the purpose, and without it the engine itself and the machinery dependent upon it are for the time out of action. The kind and size and weight of the shaft would give notice of at least the maximum capacity of the engine. As we said on the former appeal of this cause: "We can safely assume further that express companies are agencies organized for the purpose, at a higher price, of providing greater security and despatch in the

delivery of freight." And it would assuredly occur to any and every one that a shaft consisting of a piece of metal weighing not less than 650 pounds, which, under ordinary circumstances, could and would be shipped with perfect safety and at a much lower charge by railway, would not have been shipped in this unusual way and at a much higher price, unless the call was urgent, and some unusual result would follow by reason of delay. The facts, we think, were such as to give clear indication that the shaft was designed for present use in the mill, and that some injury of the kind alleged would likely follow from breach of the contract of shipment, and require that the amount of plaintiffs' damages should be considered and determined by the jury in that aspect of the matter.

It is not practicable, within the compass of this opinion, already extended to an undesirable length, to refer to the numerous authorities relied upon to sustain the defendant's position. There is no substantial difference in the general principles established by any of these decisions, and the question of ever recurring perplexity for the courts is the correct application of these principles to the varying facts of the different cases. To illustrate, in *Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. R. Co.* 62 Wis. 642, 51 Am. Rep. 725, 22 N. W. 827, where special damages were disallowed for delay in shipping a machine, for the reason that the machine was designed for present use and for a purpose that would afford data for allowance of such damage, there was not only no evidence indicating knowledge on the part of the carrier of the special purpose alleged to have caused the loss, but there was testimony tending to show notice of an entirely different purpose. *Cole, Ch. J.*, in delivering the opinion disallowing the claim, said: "The defendant certainly had no notice of the business in which the plaintiff was engaged, and did not know that this machine had been procured for fitting pipe and making nipples. Should we presume—as we have no right to do—that the defendant had knowledge of plaintiff's business, surely we could not presume that this machine was ordered by it for immediate use."

As we have endeavored to show in the case before us, the style and title of the plaintiff firm, taken in connection with the nature and description of the implement ordered, together with the unusual mode by which the shipment was provided for, and the nature of defendant's business, by 30 L.R.A. (N.S.)

which they undertook, for a greater wage, to give additional assurance both of safety and despatch, all give notice that damages beyond the ordinary amount might be reasonably expected in case there was delay in breach of defendant's contract. So, in case of *British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499*, shipment of lot of machinery from Liverpool to Vancouver's island. The machinery was in different boxes, and one of these, containing a portion of machinery, was lost, preventing operations until it could be replaced by sending to England for another piece, causing a delay in operations for something like twelve months. Damages for cost of procuring another piece were allowed, including cost of additional freight, but profits during the period of delay were disallowed. This was put, in part, on the fact that the machinery was boxed, and the carrier had no knowledge of the relative importance of that contained in the box lost, nor that stopping of the mill would likely follow from such loss. Some stress was laid, too, on the fact that, owing to the length and uncertainty of a voyage of that kind, it would be unreasonable to suppose that the parties, in that mode of shipment, contemplated that the additional damages could be recovered, and the case in both of these respects suggested is clearly distinguished from the one we are considering.

We are not inadvertent to the fact that in the case of *Hadley v. Baxendale*, itself, the implement was the crank shaft of an engine, for lack of which the plaintiff's mill was stopped for the time. Without advertent to the distinctions that could be suggested between the two cases, it may be observed that this great case is important rather as laying down the general principles by which damages for breach of contract may be correctly ascertained, than as a decision on the facts of the particular case. In evidence of this, it may be noted that, as a matter of fact, the proof showed that defendant's clerk was notified that plaintiff's mill would be stopped while the shaft was being repaired. Just why this fact was ignored in the opinion of the judges does not appear; possibly because the notice referred to was given the day before the shaft was delivered for shipment,—which is not, it seems, a very satisfactory explanation. While this does not at all impair the value of the case as making notable declaration of the general rules applicable to such causes, it does, perhaps, weaken it to some extent as a decision on

any given state of facts. In any event, we are of opinion that, on the facts presented here, the case comes within the third rule of *Hadley v. Baxendale*: "That where the special circumstances are known, or have been communicated, to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract under those special circumstances, then such special damage must be supposed to have been contemplated by the parties to the contract, and is recoverable." [Wood's *Mayne, Damages*, p. 21.]

It may be well to note that the cases of *Foard v. Atlantic & N. C. R. Co.* 53 N. C. (8 Jones. L.) 235, 78 Am. Dec. 277, and *Sharpe v. Southern R. Co.* 130 N. C. 613, 41 S. E. 799, go farther, perhaps, than the facts as they are made to appear in the cases on appeal would seem to justify in holding the carrier liable for unusual damages by reason of special circumstances. Certainly, they go much farther than is required to support the disposition we make of the present appeal. It is more than likely—as the question chiefly presented in those appeals was as to the correct rule for ascertaining compensatory damages as between current profits and interest on the amount of capital unemployed—that some of the evidence tending to fix the carrier with notice was omitted, as no point was made as to notice. This is certainly true in the case of *Rocky Mount Mills v. Wilmington & W. R. Co.* 119 N. C. 693, 56 Am. St. Rep. 682, 25 S. E. 854. The writer presided at that trial, and there was evidence both direct, and, from the character and quality of machinery shipped, tending to show notice, and it was omitted in the statement of case on appeal for the reason suggested,—that no point as to notice was made on the trial.

On the former appeal of this cause (144 N. C. 639, 57 S. E. 458, 12 A. & E. Ann. Cas. 924), we held that there was evidence to be considered by the jury on the issue as to defendant's responsibility, and in this appeal we hold that, in case such responsibility is properly and correctly established, on the testimony there is evidence which requires that the question of the amount of compensatory damages shall be referred to the jury; and there was error in the ruling that, on the facts as they now appear, only nominal damages can be recovered.

Judgment below reversed, and new trial awarded.

Walker and Brown, JJ., dissent.
30 L.R.A. (N.S.)

WASHINGTON SUPREME COURT.

STATE OF WASHINGTON EX REL.
FRED N. HALLETT et al., Appts.,
v.
SEATTLE LIGHTING COMPANY, Respt.

(— Wash. —; 110 Pac. 799.)

Appeal — jurisdiction — termination of controversy.

1. The installation by a gas company of a single meter in an apartment house, and the connection of the building with its mains, after the dismissal of a petition for mandamus to compel it to install a meter in each apartment, is not a termination of the controversy, which will destroy the jurisdiction of the appellate court.

Same — mandamus — affidavit — pleading.

2. Relators cannot on appeal raise the objection for the first time that an affidavit of defense in a mandamus proceeding should not have been treated as a pleading, where it was in fact an answer in all but name.

Gas — rule — apartment house — reasonableness.

3. A rule of a gas company that, in all buildings where more than one meter shall be required, a separate meter room shall be provided, where all can be placed, is reasonable, where such arrangement would be more sanitary, less dangerous, more convenient for finding leaks, making repairs, and making collections from prepayment meters, than would the other, while the high pressure of the mains would be confined to the main service pipe.

Claim — enforcement — discrimination.

4. A gas company is not prevented from enforcing a rule against consumers generally, by making an exception in a few cases where buildings were erected in such manner as to make the enforcement of the rule impossible, before notice of the adoption of the rule was given.

Appeal — mandamus — reversal — technical rights.

5. A relator is not entitled to reversal of a decree refusing a mandamus, for the purpose of avoiding costs, because it did not award that portion of the relief demanded to which he was entitled, where he rejected respondent's offer to furnish such portion.

(September 10, 1910.)

Note. — Rules of gas company respecting meters.

It seems to be a well-settled rule that a gas company may make reasonable and necessary rules and regulations in connection with its business, and while there are few reported cases involving rules with respect to meters, it seems clear, as assumed in *STATE EX REL. HALLETT v. SEATTLE LIGHTING Co.*, that such rules may be made for the convenience and security of the company and the public, provided only they

A PPEAL by relators from a judgment of the Superior Court for King County dismissing a petition for a writ of mandamus to compel defendant to connect relators' building with its gas main, and to install meters. Affirmed.

• The facts are stated in the opinion.

Messrs. Keenan & Hardinger, for appellants.

The rules and regulations of a gas company must be applicable to all customers.

20 Cyc. Law & Proc. p. 1163.

If plaintiff in mandamus demands more than he is entitled to, he is not thereby precluded from obtaining what he is entitled to under the evidence.

Ellsworth v. Dorwart, 95 Iowa, 108, 58 Am. St. Rep. 427, 63 N. W. 588; State ex rel. Currie v. Weld, 39 Minn. 426, 40 N. W. 561; Smith v. Lawrence, 2 S. D. 185, 49 N. W. 7; Osage Valley & S. K. R. Co. v. County Ct. 53 Mo. 156.

The gas company has no right capriciously and arbitrarily to dictate to the customer how he shall construct and use his own building.

State ex rel. Milsted v. Butte City Water Co. 18 Mont. 199, 32 L.R.A. 697, 56 Am. St. Rep. 574, 44 Pac. 966; Vanderberg v. Kansas City Missouri Gas Co. 126 Mo. App. 600, 105 S. W. 17.

Messrs. H. R. Chase and C. K. Poe for respondent.

are reasonable and just. Shepard v. Milwaukee Gaslight Co. 6 Wis. 539, 70 Am. Dec. 479; Foster v. Philadelphia Gas Works, 12 Phila. 511.

A question of somewhat greater difficulty is whether any particular rule is of this character; and each case involving this question must depend largely upon the particular circumstances involved.

This is well illustrated by STATE EX REL. HALLETT v. SEATTLE LIGHTING CO.

In Ferguson v. Metropolitan Gaslight Co. 37 How. Pr. 189, holding that a gas company, under the statute involved, was not required to furnish a meter at all, the court further said that, even if this were otherwise, the company might adopt reasonable rules with reference to the introduction of gas into a building, and that a rule would be reasonable whereby a gas company required, as a condition precedent to its putting in separate meters for each floor of a house, that the owner or occupants put in separate or independent service pipes, to connect with the meters.

And in Foster v. Philadelphia Gas Works, supra, it was held that a regulation of the company that all governors should be connected with the gas pipes at least 1 foot from the meter, and upon a by-pass, was reasonable and just with regard to the 30 L.R.A. (N.S.)

Crow, J., delivered the opinion of the court:

Fred Hallett, Delia Hallett, and Samuel A. Martin, the relators, are the owners of a three-story building in the city of Seattle, containing twenty-seven apartments, each apartment consisting of a living room, kitchen, bath room, and two closets. The building was piped for gas so that each apartment would have a separate service through a meter to be installed in a closet connecting with each bath room, thus requiring twenty-seven meters. A main service pipe was installed in the basement, from which separate supply pipes extended throughout the building. The Seattle Lighting Company is a public service corporation engaged in selling illuminating and heating gas to the citizens of Seattle. When the building was about completed, the relators demanded of the lighting company that it connect the building with its mains, that it install a separate meter in each apartment, and that it furnish gas for the use of tenants. The defendant, contending that the building was not equipped with pipes in accordance with its rules for the installation of meters, refused to make the connections. Thereupon the relators applied to the superior court of King county for a writ of mandamus to compel a compliance with their demand. An alternative writ was issued and served. Upon trial

use and treatment of the company's gas meters.

On the other hand, a rule of a gas company (*inter alia*) which authorizes it, by its inspector, to have free access at all times to building and dwellings, to remove the meter and service pipe at its pleasure, "is too general, and cannot be upheld, or at least a party cannot be required to subscribe to it, to entitle him to be furnished with gas." Shepard v. Milwaukee Gaslight Co. supra.

In Capital Gas & Electric Light Co. v. Gaines, 20 Ky. L. Rep. 1464, 49 S. W. 462, it was held that, under a contract between a city and a gas company, whereby the company agreed to supply gas to private consumers at a rate not exceeding \$2 per 1,000 cubic feet, the company had no right to require consumers to pay meter rent in addition thereto, although there was a usage at the time the contract was entered into, to charge meter rent,—such usage being inconsistent with the terms of the contract.

For other cases as to the right of a gas company whose rates are fixed by public authorities, to make a rule as to a minimum charge or meter rent, see Montgomery Light & P. Co. v. Watts, 26 L.R.A. (N.S.) 1109, and note.

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a peremptory writ was denied, the action was dismissed, and a judgment for costs was entered in defendant's favor. The relators have appealed.

The respondent has moved to dismiss the appeal for the reason that the controversy has ceased. It is shown that since the entry of the final judgment the respondent has connected the building with its mains; that it has installed a single meter in the basement through which the entire building is served; and that the appellants and their tenants are being supplied with gas. The appellants on the trial contended that they were entitled to a separate meter in each apartment, and make the same contention in this court. The installation of a single meter does not afford them all the relief to which they claim they are entitled, and which they demand in this action. It is evident that the controversy has not ceased. The motion to dismiss is denied.

Appellants insist that, after the alternative writ was issued and served, the defendant failed to interpose any proper answer or return, which they insist it was required to do under § 1018, Rem. & Bal. Code; that, no answer having been made, the averments of their complaint and the alternative writ were admitted, and that their motion for a peremptory writ should have been sustained. The record shows that one Silas Hutchinson, respondent's manager, made and filed an affidavit in answer to the complaint, in which he admitted and denied certain of its allegations, and also pleaded an affirmative defense. This instrument, although entitled an affidavit, was in its substance and effect an answer. It was so construed and regarded by the trial judge. Appellants made no motion to strike the affidavit, but demurred to it orally, and moved for judgment. Their demurrer and motion were both denied, and the cause was tried upon the merits. The appellants now contend that the affidavit should not have been considered as a pleading, in the absence of any formal answer. In support of this contention they cite *State ex rel. State Ins. Co. v. Superior Ct.* 14 Wash. 203, 44 Pac. 131, in which this court said: "It seems very clear that respondent has not answered in the manner required by the statute. For that reason, we are not authorized to consider the affidavits so admitted. It follows that the writ must issue, if the facts set up in the petition are sufficient to authorize it." We have examined the record in the case cited. It shows that an original application was made to this court for a writ of prohibition, that the respondent demurred to the relator's affidavit, and that no other appearance was made. No affidavit was interposed on

respondent's behalf purporting to be an answer. The affidavits mentioned in the opinion were made by third parties in support of facts not alleged and not in issue. The only issue before this court was one of law. The affidavits in the absence of any issue of fact, or any instrument purporting to be an answer, were properly ignored. The affidavit now before us is an answer in its substance and effect. Were it to be amended by striking the word "affidavit," and inserting in lieu thereof the word "answer," it would be, as we think it is now, a sufficient answer to the relators' affidavit or complaint. It was so regarded by the trial judge. The cause was tried upon the issues of fact thus raised, and there is no merit in appellants' present contention.

The affidavit which we hold to be an answer alleged that the respondent, in the conduct of its business, has adopted a rule requiring its customers, owners of apartment houses, or other buildings in which it is necessary to install more than one meter, to provide a separate meter room on each floor or in the basement, where all meters may be installed. It insists that this is a reasonable rule, and that the appellants have refused to comply with it. We find that the appellants were notified of this rule before they commenced the erection of their building; that they refused to comply with it; that they so installed their plumbing as to prohibit the use of more than one meter without its violation; and that, prior to the commencement of this action, the respondent offered to install a single meter in the basement, and supply gas to appellants and their tenants, but that they insisted upon the instalment of twenty-seven separate meters, located in the several apartments. There is a sharp conflict in the evidence, but the oral opinion of the trial judge, which is incorporated in the statement of facts, and the recitals of the judgment, show that he also found the facts as above stated. "A gas company may, in the discharge of its duties to the consumer, govern its action by reasonable rules and regulations, and, when it has done so, all persons dealing with it, as well as the company itself, must yield obedience thereto. Since, however, the business of supplying gas to consumers as generally conducted is affected with a public interest, the rules and regulations of a gas company must be applicable to all consumers alike." 20 Cyc. Law & Proc. p. 1162.

The controlling question on this appeal is whether the rule adopted by the respondent is a reasonable one. The trial court found that it is, and from all the evidence we

conclude that the finding must be sustained. Evidence was introduced by the respondent sufficient to show that it would be a much more sanitary arrangement to locate the meters in one inclosed room, than to distribute them throughout the various apartments, as demanded by appellants; that there would be less danger of explosions in case of fire; that leaks in the various pipes located in partitions throughout the building could be more readily found; that repairs in pipes serving the separate apartments could be made without interrupting the supply of gas to any apartment other than the one where the repair might be needed, thus avoiding unnecessary inconvenience to tenants; that collections from prepayment meters could be more readily and easily made; and that the high city pressure, which would not extend beyond the meters when installed, could be confined to the main service pipes. Although the evidence on these various points was in sharp conflict, the trial judge accepted and credited that offered on behalf of the respondent, and we cannot conclude that he erred in so doing. His conclusion that the rule was a reasonable one, and should be enforced, must be sustained.

Appellants contend that the respondent has not uniformly enforced the rule in question, that it has waived compliance in a number of cases, and that it cannot enforce it against one consumer unless it does so against all. The evidence does not sustain this contention. The rule has been in existence only one or two years. Some consumers had piped their buildings for meters in separate apartments before being informed of its adoption by respondent, or having any knowledge thereof. Under these circumstances, the respondent did in a few instances waive the rule, but it has invariably refused to do so where the consumer had notice of the regulation before piping his building, as the appellants undoubtedly did in this case. The rule is being strictly enforced. Appellants now insist that, in any event, they were entitled to a writ of mandamus compelling the respondent to make a connection with its mains, to install a single meter, and to supply appellants and their tenants with gas; that the trial court erred in dismissing the action; and that a peremptory writ should have been issued affording relief to this extent, although not all the relief demanded. There is no doubt but that less relief can be awarded by writ of mandate than was originally demanded, where the relator is entitled to such partial relief. *State ex rel. Maltbie v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797. The record before us shows, and the trial court found, that prior to the commence-

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ment of this action, and again on its trial, the respondent offered to connect the building with its mains, to install a single meter, and to furnish gas. The appellants in effect rejected this offer by proceeding with the trial upon the theory that they were entitled to a writ compelling the installation of twenty-seven separate meters in the manner demanded. They are in no position to now insist upon a reversal for the purpose of avoiding costs. Upon the filing of the remittitur, they may, if they so desire, but without costs to respondent, have an order entered requiring a continuance of the service and supply through the single meter which is now installed.

The judgment is affirmed.

Rudkin, Ch. J., and Parker, Mount, and Dunbar, JJ., concur.

WISCONSIN SUPREME COURT.

OSCAR LOEHR, Appt.,

v.

DAVID DICKSON, Respt.

(141 Wis. 332, 124 N. W. 293.)

Tort — evasion of tender — damages.

1. Malicious evasion of a tender of money necessary to prevent a foreclosure of a land contract, by reason of which the purchaser loses the profits on a resale which he had negotiated, does not give a right of action for tort.

Judgment — contract — breach — damages.

2. One in whose favor foreclosure of a land contract is decreed, unless the purchaser pay him a specified sum of money, is guilty of breach of contract which will support an action in case he evades a tender of the money for the purpose of preventing the purchaser from acquiring the property, which results in damages to him which the parties might reasonably have contemplated as a natural consequence of the breach.

Contract — evading performance — damages.

3. One who is required by judgment to deed property upon receiving a certain sum in payment of the amount due cannot escape liability for evading tender, to the injury of the other party, on the theory that tender might have been made to the attorney of record, or the money paid into

Note. — The question whether the malicious or intentional evasion of a tender furnishes a basis of action for tort by the debtor against the creditor seems to be an altogether novel one, since an extensive search has failed to disclose any other case involving that specific point.

court, if there is nothing to show that such tender or payment would have secured a conveyance.

(Timlin and Kerwin, JJ., dissent from proposition 2.)

(January 11, 1910.)

APPEAL by plaintiff from an order of the Circuit Court for Milwaukee County sustaining a demurrer to the complaint in an action brought to recover damages alleged to have been caused by malicious evasion of a tender of money the payment of which was necessary to prevent foreclosure of a land contract given by defendant to plaintiff. Reversed.

Statement by Dodge, J.:

Appeal from order sustaining a general demurrer to plaintiff's complaint, which alleged that defendant is the owner of certain real estate in Waukesha county; that on February 23, 1906, a judgment was entered of strict foreclosure of a land contract which had previously been given by defendant to plaintiff; that such strict foreclosure was subject to the condition that plaintiff pay to defendant, on or before August 23, 1906, certain sums of money aggregating on that date approximately \$60,000; that plaintiff, prior to August 23d, to wit, in the latter part of the month of July, made various attempts to pay said money to the defendant, repeatedly going to his house with money and sending him letters which he is alleged to have received, notifying him of the wish to make payment, and that on August 23d a messenger or agent of the plaintiff found defendant, and notified him of plaintiff's desire and readiness to make such payment, whereupon defendant appointed an hour on the following day at his attorney's office, at which he would be present and would receive the money; that plaintiff attended at that time with the money, and defendant did not appear; and that he has been unable to physically tender the payment to him. The plaintiff alleges that the acts of defendant in evading such tender were wilful, and with the intention of preventing plaintiff from saving his rights under the land contract, and to impose upon him the forfeiture of such rights; further, that on February 24th, plaintiff, in reliance upon said judgment, had granted to one Smith an option for the sale of the property involved for \$70,000 on or before August 21, 1906, wherein time was of the essence of the contract, and failure by plaintiff to make conveyance on or before August 21st released said Smith; that on said August 21st, plaintiff sold and by warranty deed conveyed said property to said Smith, in pursuance of said option, for \$70,000, subject to the condition that, if 30 L.R.A. (N.S.)

plaintiff failed to secure proper releases and conveyances from the defendant or his assigns by August 30th, said deed should be void, and plaintiff must repay said \$70,000; that, by reason of defendant's wilful evasion of plaintiff's tender, the latter was unable to comply, and was obliged to refund, and to lose the profit of said sale, together with certain other opportunities for sale, whereby he suffered damage in the sum of \$12,068.76, and certain other amounts, for which plaintiff demands judgment.

Messrs. Harper & McMynn for appellant.

Mr. J. E. Wildish for respondent.

Dodge, J., delivered the opinion of the court:

Plaintiff assures us in advance that his attempt is to state a cause of action in tort. Examining the complaint in that aspect, then, it is at once obvious that none of the acts alleged against defendant is, in and of itself, prohibited by any law. At most, it is alleged that he did not stay at his home through several days during which plaintiff desired to make tender, or inferentially, that he went somewhere else; also, that he refrained from going to his attorney's office on a certain day promised. Obviously all such acts were entirely lawful in and of themselves. No law prohibited him from leaving home nor commanded his attendance at his attorney's office. If he owed any duty in those respects, it was one imposed by his own promise or contract, and not by law. The fact that inconvenience or actual pecuniary injury results to another from such lawful acts does not transform them into torts. It is but a case of damage without legal wrong,—*damnum absque injuria*. Whalon v. Blackburn, 14 Wis. 432. But the complaint alleges that these acts, lawful in themselves, were done maliciously,—that is, with the express purpose of causing plaintiff damage,—and therefore liability results. Very little aid is given by either counsel on this essential question whether a lawful act becomes a tort by reason of malice or intent to injure.

Upon this question there is a sharp conflict of authority throughout the courts of the country. The principle is asserted by perhaps the majority of those authorities that "malicious motives make a bad act worse, but they cannot make that wrong which, in its own essence, is lawful." Dawson v. Kemper, 32 Ohio L. J. 15; Jenkins v. Fowler, 24 Pa. 308. A copious collection of authorities on both sides will be found in the note to Letts v. Kessler, 40 L.R.A. 177. However, that subject was presented to this court in Metzger v. Hochrein, 107 Wis. 267, 50 L.R.A. 305, 81 Am. St. Rep.

841, 83 N. W. 308, under the aspect of a "spite fence" impairing plaintiff's enjoyment of his residence property. The conflicting authorities were carefully considered, and from that conflict this court allied itself with those holding that mere malice or motive to injure could not impose liability for a lawful act. That case has been treated as final authority for that proposition in *Sullivan v. Collins*, 107 Wis. 291, 83 N. W. 310; *Marshfield Land & Lumber Co. v. John Week Lumber Co.* 108 Wis. 268, 274, 84 N. W. 434; *Huber v. Merkel*, 117 Wis. 355, 363, 62 L.R.A. 589, 93 Am. St. Rep. 933, 94 N. W. 354. We deem the rule of *Metzger v. Hochrein* now settled in Wisconsin, and that malicious intent to injure cannot transmute a lawful act into a tort, and hence, that the complaint fails to state a cause of action *ex delicto*.

2. The conclusion reached in response to plaintiff's own construction of his complaint is, however, not conclusive. A demurrer challenges the sufficiency of the complaint to state any cause of action, and must not be sustained in face of one which does, by liberal construction, state facts from which any liability results, although not for some or all of the damages sought to be recovered. *Bieri v. Fonger*, 139 Wis. 150, 120 N. W. 862. From the present complaint it clearly appears that defendant was under a contractual duty to the plaintiff none the less because such duty had been declared and defined by the judgment of a court. That contract required defendant to convey to the plaintiff certain land upon payment of certain money within a defined time. It imposed upon the plaintiff a duty to the defendant to make such payment, or at least tender to him personally, for the conveyance was to be contemporaneous, and such contemporaneousness was doubtless necessary to the raising of the money to be paid. From a contract imposing such duty on the plaintiff there resulted by necessary implication the agreement on defendant's part to do no act which would render such payment or tender impossible. This upon the general principle that he who, by mutual contract, confers on another a right or imposes a duty, impliedly agrees not to defeat that right or make impossible the performance of that duty by any affirmative acts of his own. *Manning v. Galland-Henning Pneumatic Maltng Drum Mfg. Co.* 141 Wis. 199, 124 N. W. 291; *Eliot Nat. Bank v. Beal*, 141 Mass. 569, 6 N. E. 742. By this complaint it is alleged that the acts of defendant were in fact done for the express purpose of preventing the plaintiff from tendering or paying the money and acquiring his rights; that they were effective to that end; and that damages of vari-

ous sorts resulted to him. These facts of themselves are sufficient to show a breach of contract and resulting damages, unless, indeed, it appears by other allegations of the complaint, either that damages did not necessarily result from the defendant's breach of his contract duty, or that they were not such as were within reasonable contemplation of the parties at the time of making the contract. *Hadley v. Baxendale*, 9 Exch. 341, 5 Eng. Rul. Cas. 502; *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 219, 52 L.R.A. 209, 53 Am. St. Rep. 909, 66 N. W. 119; *Lippert v. Saginaw Mill Co.* 108 Wis. 512, 84 N. W. 831.

It is contended by respondent that even wilful evasion by defendant of payment or tender could not make the damages alleged unavoidable, for the reason that plaintiff might have tendered directly to the attorney of record in the suit adjudging these contract duties. It does not expressly appear that there was such an attorney accessible to plaintiff; but, apart from that consideration, it might well develop by proof to be offered in support of this complaint that the inability of the attorney to respond to such tender by the delivery of a conveyance rendered that method practically inefficient to protect plaintiff's rights, by reason of the necessity of a conveyance of the property contemporaneously with the payment, to enable security for the money needing to be borrowed in order to make legal tender. We do not in this connection decide, however, that the general authority of an attorney of record, which is held in some cases to extend to the collection of a debt, and by statute extends to the release of a mere money judgment (*Stat.* 1898, § 2908; *Flanders v. Sherman*, 18 Wis. 575, also extends to the acceptance or refusal of a tender or payment under such a judgment as this. Again, it is suggested, though not argued, that plaintiff might have paid the money into court and fixed his rights. No statute or authority is cited to support the proposition that one commanded by a judgment to pay money to his adversary can fully satisfy that command by payment to any court officer, sheriff, or clerk, in absence of some further action by the court authorizing such payment or tender upon grounds arising subsequent to the judgment, and we have found none. Further, however, the same considerations as those we have mentioned in the case of tender to the attorney might render such a privilege, if it existed, ineffective in avoidance of damages.

It is also suggested that plaintiff, instead of suffering the loss of his bargain and alleged consequent damage of some \$9,000, might have applied to the court to prescribe

some means of payment and tender irrespective of defendant's conduct. We have no doubt that, when defendant breached his contract, a court might, upon a showing of such fact, either on the foot of the existing judgment or in a new suit in equity, have protected plaintiff against the forfeiture, and prescribed some equivalent method for making payment of the purchase price; but the facts upon which to base such an application could not, under the circumstances of this complaint, affirmatively appear until the period for payment expired; and although the complaint alleges that plaintiff had a period of some six or seven days within which the full performance of the judgment on both sides might have saved him from the alleged loss of his bargain, it is a question of fact whether it was then possible to seek and obtain relief from a court so as to avert that loss. In any event, however, the breach of the contract, when completed, gave rise to a right of action for at least nominal damages, and it is apparent that, even if plaintiff might have avoided the larger damages by some court procedure, he could not take that court procedure without expense; so that he must suffer some actual damages in the effort to avoid still more. Of course, we do not decide as a matter of law that the loss of the profits of plaintiff's alleged resale of the land were themselves proper measure of the damages recoverable upon breach of contract. That question involves doubtful rules of law, and its answer might well depend upon facts provable under the complaint, significant of the contemplation of the parties at the time of the making of their contract. We, however, deem it clear that the complaint does state a breach of contract by the defendant, with a showing of some damages unavoidably suffered by the plaintiff as a result, which may appear by proof to have been within the reasonable contemplation of the parties at the time the respective contract duties were assumed.

Order sustaining the demurrer is reversed, and cause remanded for further proceedings according to law.

Timlin, J., dissenting:

The complaint shows that on February 23, 1906, in a suit for strict foreclosure, a decree nisi was given and rendered whereby, if the plaintiff herein, defendant in the foreclosure suit, paid to the defendant herein and to defendant's wife, plaintiffs in the foreclosure suit, within six months from notice of entry of said decree, \$2,000, the plaintiffs in the foreclosure suit should be required to deed a tract of land therein described to this plaintiff, but, in case this 30 L.R.A. (N.S.)

plaintiff failed to pay said sum within said time, he should convey said tract to the defendant herein. This decree with reference to another piece of property "provided further that if the defendant, Dr. Oscar Loehr, pays to the plaintiffs the sum of \$56,664.42 in addition to the \$2,000 aforesaid, within six months from the notice of entry of judgment, together with the costs and disbursements of this action, with interest on above amounts at the rate of 5 per cent per annum to the time of payment, then and in that case all the conditions of said land contract shall be deemed fulfilled; but, in default of such payments within said time, this judgment shall be absolute." This foreclosure decree also contained a provision divesting Dr. Loehr of all right, title, and interest in and to the property affected by the above-quoted paragraphs, except as reserved in these paragraphs. The complaint in the instant case then avers that the defendant Dickson, during the latter month or more of this six-month period of redemption, absented himself from his usual place of abode, concealed himself, and kept out of plaintiff's way, so that plaintiff, although able and willing to pay, and desirous of paying the amounts fixed by such decree, was unable to do so, or to make tender thereof, whereby he lost his opportunity for redemption within the time limited, and also lost a sale of the property which he might or could have made within that time. It is averred that this conduct of Dickson was wilful and deliberate, and with the purpose and intent and design of preventing redemption by plaintiff.

The pleader intended to state a cause of action in tort, and he has stoutly contended before this court that the complaint states such cause of action. But the majority of this court holds that the complaint shows a contract obligation resting upon Dickson, and a breach thereof by the latter. I concur in the view that the complaint states no cause of action in tort, for it shows no breach by Dickson of any duty imposed upon him by law. I think the original contract stipulations which were the subject of the foreclosure suit are merged in the decree there given. No doubt a judgment is, for certain purposes, considered a contract. But this is a legal fiction, referable to certain remedies therein, or necessary to meet the requirements of statutes or constitutions which might otherwise include the contract until judgment was entered thereon, and fail to cover it thereafter. Bishop, Contr. §§ 141, 566; 1 Black, Judgm. §§ 7-11; 17 Am. & Eng. Enc. Law, 2d ed. pp. 763, 764, and cases cited.

If this decree creates, expressly or by implication, a contract obligation of the kind

suggested, resting upon Dickson, then every decree of specific performance or similar relief creates such contract obligation, and may be the basis of an action at law. On the other hand, if we consider the original contract stipulations to be in force notwithstanding the decree, or if we consider that the decree continues the stipulations in force unmodified, there is no covenant, express or implied, in the original contract, that Dickson shall be at any particular place, or hold himself in readiness to receive this money. It is the duty of the debtor, where no place of payment is fixed, to seek out, find, and pay to his creditor. If a mortgagee leaves the state or changes his place of residence, and his whereabouts are unknown to the mortgagor for ten or fifteen years, is he liable at law upon contract for damages if a wrongful or malicious intent be found? In the case at bar I think the only effect of this absence of Dickson, whatever his motive, would be to entitle the defendant in the strict foreclosure judgment, upon application to the court, to have the time of payment extended, or to pay the money into court. The weakness of the decision, I think, is that it finds a contract obligation resting upon the defendant where none exists, either expressly or by implication, and finds a breach thereof consisting of lawful and usual acts, not by any obligation prohibited.

Kerwin, J.:

I concur in the foregoing dissenting opinion of Mr. Justice Timlin.

ALABAMA SUPREME COURT.

R. E. WHALEY, Appt.,

v.

STATE OF ALABAMA.

(— Ala. —, 52 So. 941.)

Legislature—delegation of power—making violation of street car rules an offense.

A statute making it a crime fraudulently or wilfully to violate the rules made by street car companies with respect to the issuance and use of their transfers is not unconstitutional as a delegation to such companies of the right to create or suspend the law.

(Sayre, Mayfield, and Evans, JJ., dissent.)

(December 16, 1909.)

A PPEAL by defendant from a judgment of the Criminal Court for Jefferson 30 L.R.A. (N.S.)

County convicting him of violating a rule of a street car company. Affirmed.

The facts are stated in the opinion.

Messrs. Gaston & Pettus and John F. Knight, for appellant:

The act in question created a new offense, and makes that a misdemeanor which was no violation of the common law. It is a penal statute, and must be strictly construed.

26 Am. & Eng. Enc. Law, 2d ed. p. 658.

The offense sought to be created should be defined in the act itself.

United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764.

The law is unconstitutional.

Sutherland, Stat. Constr. § 69; Jannin v. State, 42 Tex. Crim. Rep. 361, 53 L.R.A. 352, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419; Anderson v. Manchester F.

Note.—Constitutionality of statute making violation of transfer rules established by carrier criminal.

The case of WHALEY v. STATE seems to be the first which has considered the question of the constitutionality of statutes making a violation of transfer rules established by a carrier criminal. The question as stated by the court is a close one.

Statutes merely making it unlawful for any persons other than the authorized agents of carriers issuing tickets, to sell them, have been held not unconstitutional as an unlawful delegation of the legislative power.

Thus, it was held in Re O'Neill, 41 Wash. 174, 3 L.R.A. (N.S.) 558, 83 Pac. 104, 6 A. & E. Ann. Cas. 869, that an act empowering railroad companies to appoint their ticket agents, and forbidding all other persons to sell their tickets, under penalty, did not give them power to create crimes, and say who are criminals, so as to constitute an unlawful delegation of legislative authority. The court here said: "It is also urged that the act delegates to railroad companies the power to create crimes, and to say who are criminals. It is argued that the companies may issue or withhold the certificates of authority at their own will, and that, by withholding the certificate, they are thereby empowered to make one a criminal who sells transportation without it. We do not think there is force in this argument. The statute simply says to the companies: You must appoint your own agents and certify as to their authority. This, as we have seen, is a reasonable regulation, and intended for the interest of the traveling public. It is true that the power to appoint the agents is in the railway company; but, for reasons already stated, the legislature has the undoubted power to say it shall be a misdemeanor for all others to engage in the sale of transportation. The railway companies must have agents to sell their transportation, and they cannot in reason be expected to appoint all who may

Assur. Co. 59 Minn. 182, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; Dowling v. Lancashire Ins. Co. 92 Wis. 63, 31 L.R.A. 112, 65 N. W. 738; Mitchell v. State, 134 Ala. 411, 32 So. 687.

The legislative power cannot be delegated except to counties and municipal corporations to a limited extent.

Haley v. Clark, 26 Ala. 439; 6 Am. & Eng. Enc. Law, 2d ed. p. 1021; 8 Cyc. Law & Proc. p. 831; Clark v. Mobile, 67 Ala. 220; Schultes v. Eberly, 82 Ala. 247, 2 So. 345; Cooley, Const. Lim. 7th ed. 164, 165; O'Neil v. American F. Ins. Co. 166 Pa. 72, 26 L.R.A. 716, 45 Am. St. Rep. 650, 30 Atl. 945; United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; Dent v. United States, 8 Ariz. 138, 71 Pac. 922; United States v. Grimaud, 170 Fed. 214; Barto v. Himrod, 8 N. Y. 483, 59 Am. Dec. 506; Rice v. Foster, 4 Harr. (Del.) 479; Ex parte Wall, 48 Cal. 279, 17 Am. Rep. 428.

Messrs. Alexander M. Garber, Attorney

apply. The mere fact that they may not appoint all applicants does not make any of the latter guilty of crime. If they become guilty, it is because, of their own volition, they persist in engaging in an act which the legislature says shall constitute a crime."

And in Samuelson v. State, 116 Tenn. 470, 115 Am. St. Rep. 805, 95 S. W. 1012, an act providing that it should be unlawful for any person other than the authorized agent of the common carrier issuing the same, to sell or otherwise deal in or offer to sell any ticket which showed that it was issued and sold below the standard schedule rate, under contract with the original purchaser entered upon the ticket and signed by the original purchaser, to the effect that such ticket was nontransferable, and void in the hands of any person other than the original purchaser; and fixing a penalty for a violation of the provisions, was held not unconstitutional as a delegation to the carrier of legislative authority to create an offense by the issuance or non-issuance of nontransferable tickets to the original purchaser below the standard rate schedule.

But in Jannin v. State, 42 Tex. Crim. Rep. 631, 53 L. R. A. 349, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419, where a statute making the sale of railroad tickets by others than agents of the company a penal offense, contained a further condition: "Provided that the provisions of this act shall not apply to any person holding a ticket upon which is not plainly printed that it is a penal offense for him or her to sell, barter, or transfer said ticket for a consideration," it was held invalid under a constitutional provision forbidding the legislature to suspend the laws, as giving the railroad company an option as to the creation of the offense; and it was held immaterial that the statute required the company

General, and Tillman, Bradley, & Morrow, for the State.

The act does not attempt to delegate to the carrier legislative power,—the power to make laws.

Alabama G. S. R. Co. v. Carmichael, 90 Ala. 19, 9 L.R.A. 388, 8 So. 87; Armstrong v. Montgomery Street R. Co. 123 Ala. 233, 26 So. 349; Evans v. Memphis & C. R. Co. 56 Ala. 246, 28 Am. Rep. 771; Louisville & N. R. Co. v. Hine, 121 Ala. 234, 25 So. 857; Rapalje & M. Dig. of Railway Law, pp. 329-331; Shortsleeves v. Capital Traction Co. 28 App. D. C. 365, 8 L.R.A. (N.S.) 287; Percy v. Metropolitan Street R. Co. 58 Mo. App. 79; Crowley v. Fitchburg & L. Street R. Co. 185 Mass. 280, 70 N. E. 56; Pullman Car Co. v. Krauss, 145 Ala. 395, 4 L.R.A. (N.S.) 103, 40 So. 398, 8 A. & E. Ann. Cas. 218; 1 Cook, Corp. 6th ed. § 4a; 1 Thomp. Corp. § 955; Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716; 1 Lewis's Sutherland, Stat. Constr. § 88; Brodbine v. Revere, 182 Mass. 598,

to print such a condition on the tickets, there being no penalty affixed in case the companies refused to comply with this condition. The court said: "While it is true the act in this section requires this, yet it is a sufficient answer to the proposition that it is still optional with the railroad company to make the sale of passage tickets a penal offense. It will be observed that no penalty is attached to the failure of the railroad company to print across the face of its ticket said proviso. It is merely made a duty which they may comply with or not, as they see fit. It would have been a very easy matter for the legislature to have confined the sale of all passage tickets to the agents of the railroad companies, without any requirement as to the form of the ticket. But this course was not pursued. As it is, every railroad company has the option to issue a passage ticket with this proviso or not, as it may see proper. If it issues a ticket without this proviso, it is not a penal offense, and in every such case scalpers and all others may deal in such passage tickets without any violation of the law. We accordingly hold that because the legislature left it optional with the railroad companies whether or not, in the issuance of tickets, they would create a penal offense, that the act of the legislature is without authority of law, is violative of the law, in that it does not define with certainty an offense; does not itself create an offense, but delegates its authority to another agency to make the sale of railroad tickets a violation of the law."

For notes on the constitutionality of anti-scalping statutes, see Ex parte O'Neill, 3 L.R.A. (N.S.) 558, and the supplemental note thereto accompanying State v. Thompson, 4 L.R.A. (N.S.) 480. J. T. W.

66 N. E. 607; *Blue v. Beach*, 155 Ind. 121, 50 L.R.A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; *Harber Comrs. v. Excelsior Redwood Co.* 88 Cal. 491, 22 Am. St. Rep. 321, 26 Pac. 375; *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253; *Re Griner*, 16 Wis. 433; *Georgia R. & Bkg. Co. v. Smith*, 70 Ga. 694; *Morrison v. State*, 116 Tenn. 534, 95 S. W. 494; *Samuelson v. State*, 116 Tenn. 470, 115 Am. St. Rep. 805, 95 S. W. 1012; *Re Flaherty*, 105 Cal. 558, 27 L.R.A. 529, 38 Pac. 981; *Re O'Neill*, 41 Wash. 174, 3 L.R.A.(N.S.) 558, 83 Pac. 104, 6 A. & E. Ann. Cas. 809; *Martin v. Witherspoon*, 135 Mass. 175; *Hurst v. Warner*, 102 Mich. 238, 26 L.R.A. 484, 47 Am. St. Rep. 525, 60 N. W. 440; *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782; *Dunn v. County Revenues Ct.* 85 Ala. 144, 4 So. 661; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77; *Cooley*, Const. Lim. 7th ed. p. 264.

Anderson, J., delivered the opinion of the court:

It first appeared to this court that the act in question (Sp. Sess. Laws 1907, p. 89) was violative of the Constitution, because it delegated to officials of street railroad companies, not only the right to legislate, but to, in effect, suspend the law by a suspension or abolition of the rules. The question is still a close one, but all doubts should be resolved in favor of the constitutionality of a law, and it should be upheld when it is capable of being construed so as to harmonize with the Constitution without doing violence to the legislative intent. The right to make reasonable rules by street car companies, through its officers and servants, exists independent of the act, and the authority thereby given is not the delegation of authority to legislate, but merely reiterates the right of the officers to make reasonable rules in and about the conducting of the business of the public service utility, and, in addition thereto, prohibits under penalty, a violation of said rules. This statute makes it unlawful to fraudulently or wilfully violate said rules. A party cannot be guilty of violating this law unless he violates the rules fraudulently or wilfully and knowingly. The rules must be reasonable, and must be known to him at the time of the violation of same. The fact that the rules may be changed or suspended is no delegation of authority to make, change, or suspend the law, but merely relates to the subject upon which the law operates. The law is made by the legislature, and cannot be repealed or suspended except by said body, and the fact that the rules may be changed or suspended in no

wise changes or suspends the law. It is on the statute books, and there it remains until repealed or amended by the legislature, and the abolition or suspension of the rules only removes the subject, for the time being, upon which the law operates. Whether the rules are made or not, or are repealed or suspended after being made, we still have the law remaining in force, and ready to apply to the subject whenever it comes into existence. There might be but one street car company in the state, and it might suspend operation, and there would therefore be no subject upon which the law would presently operate, but this fact would not repeal or suspend the law itself, for later we might have many street car companies, or the existing one might resume operation, and, as soon as any of them formulated reasonable rules, there would be a subject upon which this existing law can operate, notwithstanding it was not in being when the law was enacted, or may have not existed at all times after the passage of same.

The act in question being valid, and there being no reversible error disclosed by the record, the judgment of the criminal court is affirmed.

Dowdell, Ch. J., and Simpson and McClellan, JJ., concur.

Sayre, J., dissenting:

I do not doubt that the legislature may, in the proper exercise of the police power, regulate every business in the state. Nor do I doubt that the legislature may confer upon railroad companies, or individuals operating railroads, the power to provide proper regulations for the protection of their property, the property of those with whom they deal, and for the enforcement of their mutual rights. Indeed, they have that right without express legislative grant, and there are circumstances in which a failure to adopt a proper system of rules and regulations would amount to a dereliction of duty. But it has never been supposed, so far as I am informed, that rules adopted in pursuance of this general power amounted to more than rules of prudence binding only upon those who have notice of them. Here, the proposition is to punish criminally persons who may violate the rules a certain class of private business corporations may see fit to adopt from time to time, and commits the power also to their managing agents. It seems obvious to me that no peculiar merit to save the statute is to be found in the fact that the enterprises concerned are railways, or that the agents upon whom the power is conferred are managing agents. If the

act is to be sustained as a valid exercise of legislative power, a similar power may be conferred on any corporation or person doing business in this state, and may as well have been conferred upon a motorman or conductor. But I do not agree that any private corporation or person can have the power to define the elements of a criminal act. The citizen can be required to look only to the common law, to legislative enactments, or to the ordinances and rules of a certain class of public corporations, and perhaps to some public officers acting under responsibility as the representatives of the people, to which quasi legislative powers are delegated for limited and most generally local purposes, to know what acts of his may be punished under the criminal laws of the state. Mr. Cooley thus speaks of the doctrine: "It has already been seen that the legislature cannot delegate its power to make laws; but, fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation usual with such corporations, would always pass unchallenged." Const. Lim. 264. In *Dunn v. County Revenues Ct.* 85 Ala. 144, 4 So. 661, speaking of a stock law, it was said: "These laws are complete within themselves, providing, as they do, in detail, for regulating the running of stock at large, and the enforcement of the rights of all parties to be affected by them in the particular locality to which they are made applicable. None of their terms or provisions are made to rest in the legislative discretion of the county authorities. As to this feature, the general assembly has not abdicated any of that constitutional and prerogative power which is peculiarly its own. The only power conferred or delegated is to determine the contingency on which the laws, or certain designated portions of them, may go into effect. It is no objection to a statute that it is conditional, or that its taking effect is to depend upon some specified subsequent event. 'Affirmative legislation may, in some cases, be adopted, of which the parties interested are at liberty to avail themselves or not at their option'—citing *Cooley*, Const. Lim. 117. In *Brodhine v. Revere*, 182 Mass. 598, 66 N. E. 607, it was held that a statute giving the board of metropolitan park commissioners authority to "make rules and regulations for the government and use of the roadways or boulevards under its care," 30 L.R.A. (N.S.)

breaches whereof shall be breaches of the peace, punishable as such in any court having jurisdiction of the same," was constitutional. But observe the reasoning upon which that decision was placed. After noting that there is a well-known exception to the rule which forbids the delegation of the power to make laws, resting upon conditions which existed from ancient times in most of the older states of the Union, which the Constitutions of those states generally recognize, namely, the existence of towns or other local governmental organizations which had always been accustomed to exercise self-government in regard to local police regulations and other matters affecting peculiarly the interest of their own inhabitants, and that, on this account, the determination of matters of this character had been held to be a proper exercise of local self-government, which the legislature might commit to a city or town, the court expressed itself as follows: "How far this principle may be extended in the proper application of it is a subject on which there is much difference of opinion among judges. Whether it will justify the creation of a tribunal other than the voters or their usual representatives, where they have a representative government for the management of municipal affairs, seems not to have been much considered by the courts. It is very clear, where the people of a city or town have become so numerous that the management of their municipal affairs can be conducted conveniently only by a representative body like a city council, that municipal legislation, such as making ordinances and regulations as to local matters affecting the health, safety, and convenience of the people, may be intrusted to the people's chosen representatives in a city government. . . . In this commonwealth legislation has gone further than this. Apparently on grounds of expediency amounting almost to necessity, the making of rules and regulations for the preservation of the public health has been intrusted to boards of health, . . . and a violation of the rules established by city or town boards has long been and is now punishable by the courts." And it was said that those statutes were to be justified upon one or both of two grounds: The board of health was treated as properly representing the people in making regulations; the work of the board of health was treated as only a determination of details in the nature of administration. In my judgment the concurrence of both grounds is necessary to support legislation of that character. And penal rules made by boards of harbor and land commissioners were said to be sustained upon these grounds. On

these principles, also, was based the decision in *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782.

The Massachusetts case from which I have just quoted states, as well as it can be stated, the theory of penal rules and the justification for them. Chief Justice Marshall had before that used this language, which, in my judgment, points out, by inference at least, an exceedingly important limitation upon the delegated power of establishing such rules: "It will not be contended that Congress can delegate to the courts or to any other tribunals powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself. . . . The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes, the law. But the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not enter unnecessarily." *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253. And he instances the power conferred upon courts to make rules, which was the subject of inquiry in that case. I am not disposed to aid in the extension of this doctrine of delegated powers to private corporations and persons, which are not any part of the scheme of government, and which are without responsibility for the manner in which the power may be exercised. Certainly this court has never gone to any such extent. Certain, also, it is that in each of the cases cited to support this statute, the legislature had conferred power to make necessary rules upon coordinate branches of the government, and not upon private persons. In the case at hand we are requested to put the citizen who may desire to conduct himself in conformity to all the laws of his country in a situation where he cannot go to the legislature nor to his local government nor even to any official bureau or public officer, but must have recourse to such information as may be vouchsafed by a private business corporation or a private person, to know what he may, and what he may not, lawfully do. The private files of a business concern are to be the sole memorials of penal rules under which every citizen of the state may suffer. Without such rules enacted by street railway companies or their agents, the statute means absolutely nothing. A more complete surrender of the legislative power, a more decided step towards a bureaucratic scheme of government, cannot be imagined. Such rules, in my judgment, 30 L.R.A. (N.S.)

are not called for by any necessity of government, lack legislative authority, lack that promulgation which is an essential of constitutional legislation, and are absolutely void. For these reasons, I dissent.

Mayfield and Evans, JJ., concur in these views.

Mayfield, J., dissenting:

I concur in all that is said by Justice Sayre in his dissenting opinion, and in addition thereto I feel constrained to add the following, as expressive of my views of the unconstitutionality and invalidity of the statute in question, and which is upheld by the court in the majority opinion:

If the statute in question only declared that any person who, with intent to defraud or injure another, issues transfers or otherwise disposes thereof, in wilful violation of any reasonable rules of any common carrier, shall be guilty of a misdemeanor, and, on conviction, shall be punished by a fine of \$100, and may also be sentenced to imprisonment in the county jail, etc., I concede that it would be within the power of the legislature, and might be valid if constitutionally enacted. The statute in question, however, does not do this, but in my opinion it has attempted to authorize any person or corporation operating a street railroad within this state, acting through a president or other authorized managing officer, to make any and all rules and regulations for the issue and use of transfer tickets, commonly called "transfers," which may be necessary for the protection of the person or corporation making the rules. The statute does not at all limit it to rules which are reasonable, but permits it to make any rules for the issue or use of transfers which the carrier deems necessary for its protection. If it does not mean this, what is the use or sense of the 1st section of the statute? The power and right to make all such reasonable rules as to transfers already existed. The act is certainly not merely declaratory of the common law; it was clearly not so intended.

The 2d section of the act makes it unlawful for any person not authorized by the rules (not the statute) to issue or dispose of such transfers.

The 3d section makes it unlawful for any person to use a transfer not issued in accordance with such rules, or to use one properly issued for any other purpose than that for which the rule authorizes it to be used.

Section 5 attempts to make it a crime for any conductor or other agent of the corporation to issue or dispose of such transfers in violation of any existing rules, or of

any that might thereafter be adopted by the common carrier, and to fix a penalty for the violation.

Section 5 makes it a crime for any person, other than the conductor or agent of the common carrier, to issue or dispose of any transfer in violation of any rule or regulation that might be adopted by the person or corporation operating a street railroad; and also makes it a crime for any person to buy or receive, for the purpose of using, or to use or attempt to use, any such transfer as fare, on any car operated upon such street railroad, wilfully in violation of such rules, and prescribes a penalty by fine and imprisonment or hard labor.

The act, in addition to the foregoing, does make it a crime to issue, dispose of, or use such transfers in violation of the rules and with the intent to defraud. This provision I think is proper, if the act was otherwise valid. In short, the act is, in my opinion, nothing more nor less than an attempt on the part of the legislature, to authorize any and all persons in this state who operate a street railroad, or the president or managing officer of a corporation which operates such a street railroad, to make and unmake the criminal laws of the state pertaining to the issue, use, or disposition of transfers used in connection with street railroads.

The act does not attempt to authorize, regulate, or prohibit anything except the issuance, use, or disposition of these transfers. It neither makes nor attempts to make any law relating to the subject-matter. It merely attempts to authorize certain private individuals to make or unmake any law they may desire, relative to the matter, without let or hindrance, and attempts to make all persons guilty of a crime who violate such individual-made laws and prescribes a rather severe punishment of fine, imprisonment, or hard labor. If these favored persons authorized to make the laws on this subject make no rules or regulations thereon, then there can be no crime under this act. If they make rules on this subject, there will be just that many laws, and no more, under this act; if they make rules on the subject to-day, there are that many laws on the subject to-day; if they repeal or abolish all these rules to-morrow, there will be no laws on the subject, until they make some more rules and regulations. If two or more of these persons make different and inconsistent rules, no matter how inconsistent, they are all law. The criminal law on the subject of transfers may and will be one thing to-day, and another to-morrow; one thing in one town or city, and another in other towns or cities. A given act will be a crime in Montgomery, and not in Birmingham; it will be a crime on one street car in Mont-

gomery, and not on another; it will be a crime on one car, and not on another of the same train.

The act does not attempt to provide that all street car companies shall make the same rules, but authorizes entirely different ones, and makes all the criminal law on the subject,—whether they be reasonable or unreasonable, consistent or inconsistent. That is, if this statute is valid, the criminal law on the subject of transfers for street railroads depends solely upon the *ipse dixit* of those individuals authorized to make the rules and regulations. In my judgment there is no escape from this conclusion. If I am right in my construction of the statute, it cannot be a valid or constitutional enactment. Such acts are clearly not within legislative competency, because attempting an unwarranted delegation of the law-making power, because authorizing private individuals to make and suspend the laws, in violation of § 21 of our Bill of Rights.

Mr. Cooley, in his work on Constitutional Limitations (page 163), says: "One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone, the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust;" and he there, as well as in other places in his book, cites approvingly what Mr. Locke, in his work on Civil Government, says as follows: "These are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every commonwealth, in all forms of government: First. They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plow. Secondly. These laws also ought to be designed for no other end ultimately but the good of the people. Thirdly. They must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies. to be

from time to time chosen by themselves. Fourthly. The legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have. Locke, *Civil Government*, § 142."

While there are certain delegations of the law-making power which have been upheld, such as are pointed out and referred to by Justice Sayre in his dissenting opinion, and there may be others, which are exceptions to or qualifications of the general rule denying the delegability of the law-making power, I do not believe that any like the one in question has ever before been upheld. The Massachusetts court held, in the recent case of *Welch v. Swasey*, 193 Mass. 364, 23 L.R.A.(N.S.) 1160, 118 Am. St. Rep. 523, 79 N. E. 745, that matters of local self-government might always be intrusted to the inhabitants of the town, and that the legislature might delegate to a commission the power to fix the heights to which buildings might be erected; but that court has never held that the legislature could delegate to private individuals the power to make criminal laws, though the laws did pertain to public service corporations.

It is likewise true that the legislature, in the exercise of the police power, may regulate the issuance and transfer of railroad or street car tickets, or prevent the transfer thereof, or provide that no one but the carrier or his agent shall sell or deal in such tickets; and may make it a crime for any other person to sell such tickets. But a statute which made it a crime for any person other than the agent of a common carrier to sell tickets which contained on their face a statement that such sale is penal, but left it optional with the carrier whether or not the ticket should contain such statement, was held void, as an unwarranted delegation of the legislative authority to make or suspend a law; and also because it failed to define with certainty an offense, and not of itself creating an offense, and as giving to the carrier the option to create an offense. See *Jannin v. State*, 42 Tex. Crim. Rep. 631, 53 L.R.A. 349, 96 Am. St. Rep. 821, 51 S. W. 1126, 62 S. W. 419.

A statute which authorized an insurance commissioner to prepare a standard policy of insurance, and prohibited the use of any other form, was held void as an unauthorized delegation of legislative power, and because the law was not complete in all its terms when it left that branch of the law-making power of the government. *O'Neil v. American F. Ins. Co.* 166 Pa. 72, 26 L.R.A. 715, 45 Am. St. Rep. 650, 30 Atl. 943. In speaking of the power thus delegated to the insurance commissioner, the court said: "Take out the form prepared by the insur-

ance commissioner and to be found in some pigeonhole in his office, and the act is without meaning or effect. It is completely eviscerated. . . . By its provisions the legislature says in effect to its appointee: 'Prepare just such a policy or contract as you please; we do not care to know what it is. The governor shall have no opportunity to veto it. File it in your own office, and we will compel its adoption, whether it is right or wrong, by the punishment of every company, officer, or agent who hesitates to use it.' . . . We do not see how a case could be stated that would show a more complete and unconstitutional surrender of the legislative function to an appointee."

Is not the case at bar a more radical, if not a more complete, surrender of the legislative function? In this case the legislature does not even select or appoint the law-maker, but authorizes any and all who operate a street railroad to become such. It does not even require that the law be in writing, and allows as many laws as there may be persons operating street railroads; it does not limit each to one law,—each such person may make and unmake as many as he desires.

If this law is valid, how can this court, or any citizen desiring to observe or enforce the criminal law relating to these transfers, know or find it? Only by interrogating every person who by this act is authorized to make the law. And if you could reach all while you were interrogating one, the others might be making other laws or repealing those then existing. It is true that under our system of government, a state legislature, as a law-making power, is well-nigh omnipotent. There are no limits to its power for this purpose, except those written in or implied from the state and Federal Constitutions. The entire lawmaking function of the state sovereign is vested in the legislature, subject only to the above exceptions or restrictions. Without these, the power would be as that of the whole people from whom it is derived. But this power almost unlimited, as it is, must be exercised in the manner and mode pointed out by the Constitution. This much is necessary to the preservation of the Constitution or of the government itself; for the Constitution is the sole instrument by which this lawmaking power is created, and it defines and limits the power of the legislature, and prescribes the principles by which alone the affairs of the government are to be administered.

Justice Patterson, speaking of the important and almost sacred character of the Constitution, in the case of *Vanhorne v. Dorrance*, 2 Dall. 308, 1 L. ed. 393, Fed. Cas. No. 16,857, says: "It is the form of gov-

ernment delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand."

Justice Bell in the case of *Parker v. Com.* 6 Pa. 507, 47 Am. Dec. 480, after quoting the above from Justice Patterson, adds: "Until altered or destroyed by this authority, it is obligatory on the people themselves; and legislatures, which are merely its creatures, must conform to it, or their acts will be void. Everything done in contravention of its principles is an act of usurpation, which, uncorrected, tends directly to its overthrow." And in the same opinion the learned justice adds: "As has been well remarked, the constituent is entitled not only to the industry and fidelity of his representative, but to his judgment, also, in all that relates to the business of public legislation. Among the primal axioms of jurisprudence, political and municipal, is to be found the principle that an agent, unless expressly empowered, cannot transfer his delegated authority to another, more especially when it rests in a confidence, partaking the nature of a trust, and requiring for its due discharge understanding, knowledge, and rectitude. The maxim is, *Delegata potestas non potest delegari*. And what shall be said to be a higher trust, based upon a broader confidence, than the possession of the legislative function? What task can be imposed on a man, as a member of society, requiring a deeper knowledge and a purer honesty? It is a duty which cannot, therefore, be transferred by the representative; no, not even to the people themselves; for they have forbidden it by the solemn expression of their will that the legislative power shall be vested in the general assembly; much less can it be relinquished to a portion of the people, who cannot even claim to be the exclusive depositories of that part of the sovereignty retained by the whole community. An attempt to do so would be not only to disregard the constitutional inhibition, but tend directly to impress upon the body of the state those social diseases that have always resulted in the death of republics, and to avoid which the scheme of a representative democracy was devised and is to be fostered."

30 L.R.A. (N.S.)

Mr. Justice Chase, in the case of *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648, says: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the state."

Chief Justice Marshall said, in the famous case of *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, that "courts are not bound by mere pretenses, nor are they to be misled by mere pretenses. They are at liberty—indeed, they are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature had transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or public safety has no real or substantial relations to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudicate, and thereby give effect to the Constitution."

The act in question is no doubt attempted to be adjudicated on the ground that it protects and promotes the public safety; but in effect it attempts to make it a public crime to violate any rule or regulation of a street car company as to transfers, whether the rule is reasonable or unreasonable, whether it would tend to promote or to destroy the public safety. It merely invokes the criminal machinery of the state to enforce the rules and regulations of street railroads.

I know that the majority of this court do not think the laws means what I construe it to mean, if they did, they would strike it down. They, of course, believe and hold that it is a proper police regulation of the issue, use, and disposition of street railroad transfers, and, if they are correct, of course, the enactment would be valid. But in my opinion the act is, in effect, an attempt to authorize those who operate street cars to make criminal laws as regards street railway transfers, and to make it a crime to violate the laws thus made by such street car operators. This, the legislature has no power to do.

My conclusion is that the act is in violation of the Constitution (1) because it is an unwarranted delegation of legislative power to individuals; (2) because it is an attempt to authorize individuals to suspend the laws at pleasure.

Petition for rehearing denied June 30, 1910.

COLORADO SUPREME COURT.

GEORGE R. WILSON et al., Plffs. in Err.,
v.

JUNE V. B. MITCHELL.

(— Colo. —, 111 Pac. 21.)

Parent — custody of child — divorce — death.

1. Upon the death of the parent to which a child was awarded by a decree of divorce, the other parent becomes entitled to its custody, unless, in a contest therefor, it is shown that such parent is disqualified, or the interests of the child require some other disposition of its person.

Evidence — judgment — strangers.

2. A decree for divorce is not admissible as evidence of the grounds upon which it was granted in a suit by the divorcee against a stranger, to secure the custody of her child.

Judgment — failure to defend — effect.

3. That one who has denied the charges upon which a suit for divorce was based made no effort to disprove them at the trial does not amount to an admission of their truth where she did not know the exact charges made against her, and there is evidence tending to show that the divorce decree was procured by perjured testimony.

Evidence — letter — addressee.

4. A letter written to a party to a suit is not admissible in evidence against him if it was never received by him, and has never been in his possession.

Parent — divorcee — right to child.

5. That a divorce was granted against the mother of a child for wrongdoing is not conclusive against her right to the custody of the child many years afterwards, where the father is dead, and she has remarried, has a good home and social standing, and there is not the slightest intimation or suspicion of wrongdoing subsequent to the divorce.

Same — affection for grandparents — effect.

6. That the grandparents of a child in whose custody it was placed have acquired an affection for it and it for them is not sufficient reason for refusal to return it to the custody of its mother, who surrendered possession of it merely for the benefit of its health, and always manifested her interest in and love for it, and contributed to its support.

Same — expatriation.

7. The mere fact that a mother intends, if she secures possession of her son, to take him to England for residence, is not sufficient to cause the courts to deny her the right to such possession as against the claims of its grandparents, with whom it

had been placed by its father, who has since deceased.

Same — desire of child.

8. The preference of a nine-year-old boy to remain with his grandparents rather than return to his mother will not control the decision of the court, where he had always manifested affection for her until the institution of the proceedings for his custody, when he manifested an unexplained aversion to her.

(July 5, 1910.)

ERROR to the District Court for the City and County of Denver to review a judgment granting a writ of habeas corpus to secure possession of plaintiff's minor child, George Russell Wilson. Affirmed.

Statement by White, J.:

This is a habeas corpus proceeding instituted in the lower court by June V. B. Mitchell, defendant in error here, against George R. and Linda Wilson, plaintiffs in error, to obtain the custody of her infant son, George Russell Wilson. The writ was duly issued and a return thereto made. The court, upon hearing the evidence, held "that the welfare and best interests of this child demand that he be brought up in the care of his mother, and in the companionship of his sister," and accordingly ordered plaintiffs in error to deliver the child to the custody of its mother. The case is brought her for review.

In 1898 June Van Buskirk, seventeen years of age, a student of the American School of Dramatic Art, married Francis Sedgwick Wilson, aged about twenty-one years, a graduate of the same school, engaged in the theatrical profession. From this marriage, and on March 17, 1900, George Russell Wilson, the subject of this controversy, was born. George and Linda Wilson, plaintiffs in error, are the paternal grandparents of Russell. The married life of the parents of this child was not congenial. From the time the child was four weeks old the young mother alone took care of it, and for seven months it was nourished from her breast. The relations of husband and wife became more estranged as time passed, until December, 1900, at which time Francis sent June and the baby to her relatives in Indiana, neither writing her, nor contributing anything to the support of herself or child. In March, 1901, learning that Francis was in Philadelphia, June borrowed money from her relatives, and, with Russell, joined her husband, where a reconciliation took place, and they thereafter lived together until the spring of 1902. In July, 1901, Francis, taking his wife and baby, visited his brother's family

Note. — As to effect of death of parent to whom custody of child was awarded, upon right of surviving parent, see note to *Clarke v. Lyon*, 20 L.R.A.(N.S.) 171, 30 L.R.A.(N.S.)

in Nevada, where they remained for six weeks. Linda Wilson was also there. Francis, in the presence of his wife, suggested to Linda that the latter take Russell, and care for him, as it was inconvenient for the parents to do so, giving as his reason their theatrical work, though June at that time had never filed a theatrical engagement. Linda Wilson declined to take the child unless it should be given to her for all time, but to this condition the parents refused to give their consent, and returned to New York. In December, 1901, a second child—a girl—was born to Francis and June. When this child was about two months old, and seriously sick, Francis, in anger, took Russell, and, going out in a severe storm, remained away with him all night. The father's absence with the boy and the serious illness of the girl alarmed the mother greatly, and, leaving the baby in charge of a friend, the mother went out in the storm, searched for and found her husband and son, taking the latter home. Upon the return of Francis, he advised his wife that he had previously been in correspondence with his father, George Wilson, and had determined to place the boy with the latter; that June must support herself, as he could not and would not longer do so. Within a few days thereafter Russell was taken ill with pneumonia, and while he was convalescent the little girl died. Francis thereupon insisted that Russell be placed with the parents of the former, at least temporarily, threatening to run off with the child and so place him if the mother did not consent. The mother persistently refused to surrender her boy, but finally, upon the representation that the child's welfare, on account of the slow recovery from the pneumonia, and the heat in New York in summer, and the necessity that she support herself, consented to place the child with such grandparents temporarily, as she claims.

Francis S. Wilson, the father of Russell, achieved considerable success in his profession, earning even in his early career from \$75 to \$100 per week. He seemed, however, wholly lacking in financial judgment, or ability to conserve his resources. During the time he and June lived together, notwithstanding his salary and many hundreds of dollars from time to time advanced to him by George R. Wilson, he was never able to meet his obligations, and the environments of their home life were miserable poverty and domestic infelicity. June was frequently without food, and was under the necessity of borrowing small sums of money from her friend, Mrs. Cook, with which to buy food and medicine for Russell. In April, 1902, June borrowed money from

her friends, with which she paid her expenses from New York to Sioux City, Iowa, where she took Russell, and left him with his grandmother, Linda Wilson. Nothing was said by or to her about the permanent surrender of the child, though plaintiffs in error claim that their son assured them that they should have the boy permanently. Shortly thereafter the parents of Russell ceased to live together, and the mother secured a position on the stage, and from her salary contributed regularly to the support of Russell. She also visited the child in 1902, and the following winter, at her expense, the child and its grandmother visited her in Minneapolis. In the spring of 1903 defendant in error was advised that the grandmother had deserted her intention of permanently keeping Russell. The mother thereupon induced the grandmother, at the former's expense, to take the child to Chicago, ostensibly for a visit with the mother. The latter secured possession of Russell, and fled with him to New York, thence to England, and later to the continent. The father of the child, financed by the grandfather,—one of the respondents here,—pursued, and finally at St. Gallens, Switzerland, overtook, the fleeing mother with her child. A conference was had and the mother assented—as she now claims, by reason of threats and pleas concerning the child's welfare, and the fact that she had exhausted her finances—to return to America and surrender the child to the grandfather, which she did in August, 1903. Upon this trip she was accompanied by the child's father, and, arriving in New York, was met at the pier by George R. Wilson, who took possession of the child, and thereafter told its mother that she should never again have possession of her son. Within a few days George R. Wilson conveyed Russell to Sioux City, Iowa, and delivered him to Linda Wilson, who has retained him in her custody from that time to the present. In her flight to Europe defendant in error had expended the money she had saved, that which she had borrowed from friends, and raised from pawning some of her clothing and jewelry. After Russell was taken from her, she was alone in New York, had no lawyer or anyone with whom to advise, was greatly in debt, and had no employment. She was, however, soon thereafter engaged to play in London, and left for that point October 9th. Just previous to her departure for England, her husband instituted a divorce proceeding, charging her with serious offenses against the marital obligations, committed between August, 1902, and the summer of 1903, and praying for the custody of Russell. In that suit summons were duly served, and the defend-

ant in error employed counsel, filed an answer, denied any wrongdoing, and likewise asked for the custody of the child. Upon arrival in England, defendant in error was taken ill underwent a serious operation, and was unable to resume her theatrical engagements until May, 1904. After leaving the hospital, defendant in error was cared for by Mrs. Clemow, with whom she lived until 1906. In June, 1904, the divorce suit came on for trial, and defendant therein failing to appear other than by attorney, a decree of divorce was granted in favor of the plaintiff, with a rule that defendant show cause on or before September 23d following why the decree should not be made absolute. Though advised of the decree nisi, no further appearance was made on behalf of the defendant, and the decree was made absolute in accordance with the rule, and the custody of Russell was awarded to the father. At that time Russell was not within the jurisdiction of the court in which the decree was entered, nor has he since been. In July, 1904, Francis visited England, and there met the defendant in error, and told her that, if she did not give him or send him \$500 by the first of October, he would never permit her to hear from Russell, or see him again. He stated that the money was not for himself, but for George R. Wilson, who had advanced money on the divorce case, and had expended large sums in having her followed to Europe and repossessing himself of the child. The defendant in error was desirous of seeing her son, and expressed an intention of visiting America for that purpose, but was assured by Francis that it was unnecessary, as he would bring Russell to England during the summer.

September 30th June wrote to Francis, advising him that she had been ill, unable to earn money, and could not send the \$500 demanded. Previous to this time, Linda Wilson had written regularly to June, giving news of the child's health and progress, but in November she ceased writing, and, notwithstanding frequent letters and cablegrams for news of her son, June had not a word until March, 1905, except an anonymous letter, and a letter written at the request of Linda Wilson by her nephew. About the middle of March, June received a letter from Francis demanding \$1,000 to pay the expenses of Linda Wilson bringing Russell to England. Frantic with the desire to see her child, June borrowed from friends, and cabled to Francis the sum of £80 sterling. About three weeks later she received a letter demanding an additional amount in order for his mother, Linda Wilson, to make the trip with the boy. Not complying with this last request, she 30 L.R.A.(N.S.)

later received a cable signed by Francis, reading: "My will or none; will bring mother." April 24, 1905, June had a letter from Francis, saying that he had tried to get his mother to come with the boy to New York, so that he might take the child to England, but that his mother had taken Russell and gone to California. Two days after the receipt of this letter, Francis arrived in London, and immediately communicated with June, making an appointment, and expressing his sorrow that he had not been able to bring Russell. April 27th he called, and, in the presence of Mrs. Clemow, broke down, cried, and expressed his regret to his divorced wife for all the wrong he had done and his wish to atone therefor. After leaving, he wrote and sent to June the following letter:

Dear June:—

After leaving you I have been thinking how I could arrange the best possible plan for all concerned of solving this most regrettable muddle. Their round-trip passage must be booked, which will incur an outlay of at least \$300. You can inquire—their trip from San Francisco to New York will require the best part of \$150, and she should have at least \$150 given her in New York for incidental and many little expenses which will arise—this totals \$600—and you can give her the balance, \$400, when she arrives. I feel positive that there will be no hitch, as I wrote her a very forceful letter, telling her if she did not come—if I sent for her—I should take Russell away from her on my return to America. Furthermore, I will give you this promise: that if my mother should fail to do as I ask in this instance, I will immediately on my return to America get Russell and bring him to you, leaving him in your charge to educate and in a refined atmosphere. He bids fair to be too brilliant a man to raise in a half-way manner. I am telling you just how I feel. It has been on my mind for some time. After seeing you to-day in your surroundings I feel that you are the proper one to have him in charge. Don't think me ungrateful in expressing myself this way in regard to my mother; we owe her much, and I wish to try and atone for some of the wrong I have done you; you were far from being wholly to blame—we were equally at fault. This letter you may keep. Am so sorry I am not able to advance the \$200 at the present time and show my good faith, but my money is so placed that I cannot get at it, excepting were I in New York. If you care to advance £40 more, do it immediately, so I will be able to get it off on Saturday morning's boat; have it here by noon

to-morrow if you can. Believe me, I am as anxious to have Russell with me as you are.

Sincerely,

Francis S. Wilson.

Thereupon June borrowed from her friend Mrs. Clemow the sum of £40 sterling, which was transmitted to, and received by, Francis. May 8th and 15th Francis wrote June, conveying the idea that he was making an effort to carry out his promise. The child was not brought, however, nor did June have further word from Francis. Soon thereafter June advised Linda Wilson of the advancement of this money to Francis and the purpose thereof, and subsequently discussed the matter with both George and Linda Wilson.

By strict economy, defendant in error discharged a portion of her indebtedness, and in the summer of 1906 made the trip from London to California, and visited for six weeks with her son at the home of Linda Wilson. Russell is very affectionate, and at that time manifested great love and affection for his mother, and has ever done so until the institution of this suit, since which he has exhibited toward her an aversion. George Wilson testified that this aversion was caused by the fact that June had caused the Wilsons to be shadowed by detectives. Russell, in physical appearance and temperament, is like his father, and has characteristics very much the same, and the grandparents are pursuing the same methods with him as they did in rearing his father. On her visit to the Wilsons in California in 1906, June said and did nothing relative to a change of Russell's custody, being, as she explains, still in debt, and without a home. During all these years the mother, almost every month, and sometimes oftener, transmitted for her boy to Linda Wilson money, packages of clothing, and presents, continuing practically until the institution of this suit. Defendant in error returned to London in the fall of 1906, and there continued her theatrical career until December, 1907, when she married Percy J. Mitchell, her present husband, and retired permanently from the stage. In June, 1908, Mr. Mitchell endeavored to induce Linda Wilson, with Russell, to visit the Mitchells during the summer in England, offering to pay all the expenses, basing this request upon the great affection Mrs. Mitchell had for her son and her longing for the boy. This request was denied by a letter from George Wilson. Before her marriage to Mr. Mitchell, June acquainted him with the divorce proceedings, the result thereof, and the whereabouts of her child, and her great desire to again possess him. Mr. Mitchell himself testified that

he was advised of these matters; that his sympathies were at once enlisted; and that he held himself ready to assist his wife, financially and otherwise, to obtain the custody of the child, and so advised her, but, before arrangements could be made for mother and son to be reunited, Mrs. Mitchell became a prospective mother, and a daughter was born of her second marriage early in December, 1908. After the daughter's birth, defendant in error planned to come to America as soon as possible, and arrange for taking Russell to London, but the serious illness of her husband and the tender infancy of the little girl delayed the matter.

Francis Sedgwick Wilson died February 22, 1909, and in May Mrs. Mitchell came to this country with a determination of obtaining the custody of Russell. Linda Wilson, with Russell, was residing in Alameda county, California, and it was there Mrs. Mitchell first instituted habeas corpus proceedings to regain the custody of the child. Before the service of the writ, Linda Wilson learned that defendant in error was in this country, and, suspecting her mission, gave Russell into the custody of his uncle, and sent him to his grandfather, George R. Wilson, at Lamar, Colorado. Defendant in error, following here, instituted these proceedings June 17, 1909.

George R. Wilson is in his sixty-first year, and Linda Wilson is past sixty years of age. From 1902 to 1905 Linda Wilson lived with the child, in three different families, in three different homes in Sioux City, while her husband lived in Colorado. Being unable to live in Colorado on account of her health, Linda Wilson, with the child, went to California; George R. Wilson making his home in this state, with the exception of about one year and nine months, which he spent with his wife and Russell in California. He intends, however, as soon as he can dispose of his business interests in Colorado, to take up his abode with his family in California, and there build a permanent home. Prior to June, 1909, he had not seen either his wife or Russell for nearly two years. George R. Wilson has property of the approximate value of \$75,000, and it is the desire of the plaintiffs in error to adopt Russell as their own and make him their heir equally with their only living child, a son. Plaintiffs in error are members of the Congregational Church, and have the respect and esteem of those who know them. Mr. Mitchell, the present husband of defendant in error, is an educated Englishman, a graduate of the London Technical College, an engineer by profession, at present engaged in profitable contracting, carries life insurance in the sum of \$100,000, has

made a substantial marriage settlement upon his wife, and allows her \$5,000 per annum for household expenses and clothing, is thirty years of age, a member of the Church of England, and is anxious that his wife shall have the custody of her son Russell, promises to treat the boy as his own child, bring him up with his own daughter, sending him to the best schools in England. Reference will hereinafter be made to other evidence necessary to a proper consideration of this case.

Messrs. Northcut & McHendrie and John A. Gordon, for plaintiffs in error:

In proceedings affecting the custody of an infant child, the paramount and controlling question by which the court must be guided is the interest and welfare of the child.

Mercein v. People, 25 Wend. 103, 35 Am. Dec. 653; *Schleuter v. Canatsy*, 148 Ind. 384, 47 N. E. 825; *Hochheimer, Custody of Infants*, p. 28; *United States v. Green*, 3 Mason, 482, Fed. Cas. No. 15,256; *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321; *Clark v. Bayer*, 32 Ohio St. 299, 30 Am. Rep. 593; *Bonnett ex rel. Newmeyer v. Bonnett*, 61 Iowa, 202, 47 Am. Rep. 810, 16 N. W. 91; *Pool v. Gott*, 4 Month. L. Rep. 269; *Hoxsie v. Potter*, 16 R. I. 374, 17 Atl. 129; *Re O'Neal*, 3 Am. L. Rev. 578; *Kelsey v. Green*, 69 Conn. 291, 38 L. R. A. 471, 37 Atl. 682; *United States ex rel. Schneider v. Sauvage*, 91 Fed. 490; *Richards v. Collins*, 45 N. J. Eq. 287, 14 Am. St. Rep. 726, 17 Atl. 831; *Stringfellow v. Somerville*, 95 Va. 701, 40 L.R.A. 623, 29 S. E. 687; *Green v. Campbell*, 35 W. Va. 704, 29 Am. St. Rep. 843, 14 S. E. 214; *Re Gates*, 95 Cal. 461, 30 Pac. 596; *Verser v. Ford*, 37 Ark. 27; *Bently v. Terry*, 59 Ga. 555, 27 Am. Rep. 399; *Re Murphy*, 12 How. Pr. 513; *McDonald v. Stitt*, 118 Iowa, 199, 91 N. W. 1031; *Fletcher v. Hickman*, 50 W. Va. 244, 55 L.R.A. 896, 88 Am. St. Rep. 862, 40 S. E. 371; *Berkshire v. Caley*, 157 Ind. 1, 60 N. E. 696; *Jones v. Darnall*, 103 Ind. 574, 53 Am. Rep. 545, 2 N. E. 229; *Peese v. Gellerman* (Tex. Civ. App.) 110 S. W. 196; *State ex rel. Lynch v. Bratton* (Del.) 15 Am. Law Reg. N. S. 359; *Fields v. Dening*, 56 Wash. 259, 105 Pac. 466.

If there be no objection to the child's choice of a custodian, his wishes should have great weight with the court, and no age limit is or can be fixed at which such choice will be considered.

Richards v. Collins, 45 N. J. Eq. 287, 14 Am. St. Rep. 726, 17 Atl. 831; *Com. v. Hammond*, 10 Pick. 274; *Re McDowle*, 8 Johns. 328; *People ex rel. Ordronaux v. Chegarey*, 18 Wend. 637; *State v. Scott*, 30 N. H. 274.

The unauthorized separation of the wife 30 L.R.A. (N.S.)

from her husband, without any apparent justifiable cause, is a strong reason why the child should not be restored to her.

Com. v. Briggs, 16 Pick. 205.

Messrs. Bickeler, Bennett, & Nye, for defendant in error:

The presumption is that the parent is a fit and suitable person to be intrusted with the care of his children; that courts must not be tempted to interfere with the natural order of family life except in special cases of extreme urgency; and that the legal right of the parent will not be disregarded, merely because the child's interest would be as well, if not better, subserved by remaining where it is, than by awarding its custody to the natural parent.

McKercher v. Green, 13 Colo. App. 270, 58 Pac. 406; *State ex rel. Lehman v. Martin*, 95 Minn. 121, 103 N. W. 888; *Miller v. Wallace*, 76 Ga. 487, 2 Am. St. Rep. 48; *Com. v. Briggs*, 16 Pick. 205; *State ex rel. Wood v. Deaton*, 93 Tex. 243, 54 S. W. 901; *Cormack v. Marshall*, 122 Ill. App. 208; *Re Salter*, 142 Cal. 415, 76 Pac. 51; *Stapleton v. Poynter*, 111 Ky. 264, 53 L.R.A. 784, 98 Am. St. Rep. 411, 62 S. W. 730; *Gilmore v. Kitson*, 165 Ind. 402, 74 N. E. 1083; *People ex rel. Barbour v. Gates*, 57 Barb. 297; *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375; *Re Scarritt*, 76 Mo. 565, 43 Am. Rep. 768.

The father being dead, the mother is entitled to the custody as of right, and she does not lose this right by a second marriage.

Armstrong v. Stone, 9 Gratt. 102.

The burden of proof of the showing of unfitness of the parents to have the custody of their children is upon those who allege it.

Giffin v. Gascoigne, 60 N. J. Eq. 256, 47 Atl. 25; *State ex rel. Lehman v. Martin*, supra; *Looney v. Martin*, 123 Ga. 209, 51 S. E. 304.

A divorce decree awarding minor children to one parent, and finding that the other parent was unfit to be given their custody, is temporary in its nature, and does not prevent the latter obtaining their custody and control after the former's death.

Re Neff, 20 Wash. 652, 56 Pac. 383; *Schammel v. Schammel*, 105 Cal. 258, 38 Pac. 729.

The matter of financial advantage is not a reason to be urged.

Cormack v. Marshall and Re Salter, supra.

The question of expatriation is not controlling.

Re Bullen, 28 Kan. 781.

The facts that the mother is happily married to a noble man, who is a devoted hus-

band, and has a comfortable home and a social position, in and of themselves are sufficient to refute the charge of present unfitness.

Re Wilson (N. J. Eq.) 55 Atl. 160; Cocke v. Hannum, 39 Miss. 423.

White, J., delivered the opinion of the court:

In controversies affecting the custody of an infant, the interest and welfare of the child is the primary and controlling question by which the court must be guided. This rule is based upon the theory that the state must perpetuate itself, and good citizenship is essential to that end. Though nature gives to parents the right to the custody of their own children, and such right is scarcely less sacred than the right to life and liberty, and is manifested in all animal life, yet among mankind the necessity for government has forced the recognition or the rule that the perpetuity of the state is the first consideration, and parental authority itself is subordinate to this supreme power. It is recognized that "the moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to the protection of that government. And such government is obligated, by its duty of protection, to consult the welfare, comfort, and interest of such child in regulating its custody during the period of its minority." *Mercein v. People*, 25 Wend. 64, 103, 35 Am. Dec. 653; *McKercher v. Green*, 13 Colo. App. 271, 58 Pac. 406. But as government should never interfere with the natural rights of man, except only when it is essential for the good of society, the state recognizes and enforces the right which nature gives to parents to the custody of their own children, and only supervenes with its sovereign power when the necessities of the case require it. The experience of man has demonstrated that the best development of a young life is within the sacred precincts of a home, the members of which are bound together by ties entwined through "bone of their bone and flesh of their flesh;" that it is in such homes and under such influences that the sweetest, purest, noblest, and most attractive qualities of human nature, so essential to good citizenship, are best nurtured and grow to wholesome fruition; that, when a state is based and builded upon such homes, it is strong in patriotism, courage, and all the elements of the best civilization. Accordingly these recurring facts in the experience of man resulted in a presumption establishing *prima facie* that parents are in every way qualified to have the care, custody, and control of their own offspring, and that their welfare

and interests are best subserved under such control. Thus, by natural law, by common law, and, likewise, the statutes of this state, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be intrusted with their care, control, and education, or when some exceptional circumstances appear which render such custody inimicable to the best interests of the child. While the right of a parent to the custody of its infant child is therefore, in a sense, contingent, the right can never be lost or taken away so long as the parent properly nurtures, maintains, and cares for the child.

In *Re Neff*, 20 Wash. 652, 56 Pac. 383, 384, it is said: The father "has the natural and legal right to the custody and control of the children, unless so completely unfit for such duties that the welfare of the children themselves imperatively demanded another disposition of their custody." In *Miller v. Wallace*, 76 Ga. 479, 486, 2 Am. St. Rep. 48, it is said: "Prima facie, the right of custody of an infant is in the father; and when this right is resisted, upon the ground of his unfitness for the trust, or other cause, a proper regard to the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs. 'A clear and strong case' must be made to sustain an objection to the father's right." And in *McKercher v. Green*, supra, the doctrine is announced that, save in exceptional cases, where it is clear the welfare of the child demands otherwise, the parent's right to the custody is paramount, and should be recognized. In *United States v. Green*, 3 Mason, 482, 485, Fed. Cas. No. 15,256, the court, speaking through Justice Story, after declaring that, in a general sense, the right of the father to have the custody of his infant child is certain, continues: "But this is not on account of any absolute right of the father, but, for the benefit of the infant, the law presumes it to be for its interest to be under the nurture and care of his natural protector, both for maintenance and education." The rule announced in 29 Cyc. Law & Proc. p. 1603, is that "the existence of circumstances which would deprive the parent of the right to custody of the child, such as unfitness, inability to care for it, or relinquishment of the parental right of custody, will not be presumed, but must be proved by the person opposing the parent's right." It is also there announced that the place selected by a parent for the care and support of his children is presumed suitable, and a person claiming otherwise has the burden of proof.

We are firmly of the opinion that in all

cases of this character the presumption is that the parents are fit and suitable persons to be intrusted with the care of their minor children, and that the interests and welfare of such children are best subserved when under such care and control; that such presumption is like unto the presumption of innocence in a criminal case,—ever present, throughout the controversy, until overcome by the most solid and substantial reasons, established by plain and certain proofs. Indeed, this presumption is essential to the maintenance of society, for without it man would be denaturalized, the ties of family broken, the instincts of humanity stifled, and one of the strongest incentives to the propagation and continuance of the human race destroyed. Unquestionably, when the power of the court is invoked to place an infant into the custody of its parents, and to withdraw such child from other persons, the court will scrutinize all the circumstances, and ascertain "if a change of custody would be disadvantageous to the infant." If so, the change will not be made, "and it matters not whether it is through the fault or the mere misfortune of the legal guardian that the infant has come to be out of his custody." Hochheimer, Custody of Infants, p. 29. But mere speculation as to the probability of benefit to the child by leaving or returning it should have but little weight, and the courts should, and will, enforce the parent's right to the custody of the child, unless it clearly appears that the welfare and interest of such child will be best subserved by denying it. The award in the decree of divorce of the custody of Russell to the father, if legally effective, at all, under the circumstances of this case, was necessarily temporary in its nature. In such proceedings the power to make orders touching the care and custody of minor children must be held to be limited to the conditions and circumstances existing at the time such orders are made. The court cannot then anticipate what may possibly thereafter happen, and provide for such future contingencies. Notwithstanding a divorce decree awarding the care and custody of minor children to one of the parents, upon the death of such parent, the other parent becomes entitled to the custody of such children, unless in a contest therefor it be shown that such parent is disqualified, or the interests of the children require some other disposition of their persons. Mills's Anno. Stat. § 2090; Schammel v. Schammel, 105 Cal. 258, 38 Pac. 729; Re Neff, supra.

Plaintiffs in error, however, contend that the evidence establishes the unfitness and disqualification of defendant in error to have charge and control of this child. They 30 L.R.A. (N.S.)

assert that the decree of divorce in favor of the father, and against the mother, solemnly adjudged her guilty of acts that show her unfitted for the custody of Russell; that the testimony of one Mills, who was also a witness in the divorce suit, brought before the trial court the particular acts upon which the divorce decree was based; that Mills's testimony is corroborated by a letter written to defendant in error by one Britton just after the mother fled to Europe with Russell, and also by a letter written by defendant in error to plaintiff in error George R. Wilson from St. Gallens, Switzerland, when overtaken by her husband. The trial court held that the decree of divorce was admissible in evidence for the sole purpose of showing that the parties were, in fact, divorced, but could not be considered as proof of the truth of the grounds for the decree. In this we think the court was right. Mutuality is essential in the application of the rule of *res judicata*. A party will not be concluded by a former judgment unless he could have used it to his advantage and to the disadvantage of the other litigant, had the judgment been the other way. Both the litigants must be alike concluded or the proceedings cannot be set up as conclusive upon either. Greenl. Ev. § 524. Had the decree in the divorce suit been in favor of the wife, plaintiffs in error would not, and could not, have been estopped by it. Unquestionably, matters determined in a divorce suit are conclusive between the parties thereto, and, as between such parties, a decree fixing the custody of children within the jurisdiction of the court is *res judicata* until modified or annulled in some appropriate proceeding, but the death of Francis rendered that portion of the decree in question, fixing the custody of Russell, inoperative. Plaintiffs in error say that they do not contend that the divorce decree is conclusive of the proof of the facts upon which it was based, but that it is evidence to be considered by the court; that the circumstances under which it was rendered amount to an admission of the truth of the charges. We do not think that such significance can be deduced from the decree and the circumstances under which it was entered. The defendant in that suit therein denied the charges alleged, and while she made no effort to controvert or disprove them at the time of the trial, she was hardly in a position to do so. She testified that she never knew what the exact charges made against her in the divorce suit were until during the trial of the suit for the possession of her son. Moreover, long after the divorce decree was granted, it appears that one Woods, a witness therein, who testified in the divorce 33

suit, as did Mills, to support the charges therein, made a dying confession to the effect that, in the presence of the witness Mills, a plot was entered into to obtain a decree by perjured testimony in favor of Francis in the divorce case. We think defendant in error should have undertaken in that case an investigation of the facts in her own behalf, and, as was said by the lower court, "is to be criticized for not defending more vigorously her rights to the custody of the child in the divorce proceedings." But it is not what might have been, or what should have been, but what was and is, with which we are concerned.

The Britton letter was in no wise admissible in evidence for any purpose whatever. Witness Mills testified that he received it from Francis, but as to how it came into the possession of the latter is not disclosed. It is certain that it was never received by, nor has it ever been in the possession of, defendant in error. The letter written by June to George R. Wilson from St. Gallens is sought to be impressed with the character of a confession of the wrongdoing subsequently set forth in the divorce proceeding. We are of the opinion that the letter is capable of a far more innocent construction, and, under the circumstances of this case, such meaning cannot be justly ascribed to it. The witness Mills testified that in June, 1903, he related to George R. Wilson all of the alleged facts concerning June's wrongdoing, and George R. Wilson testified that when he talked with June in New York, after her return from Europe with Russell, and after the receipt of the letter in question, she asked him to forgive her for taking the child away, and that he did so, and nothing else was discussed between them; that the running away with the child was all that the letter written from St. Gallens referred to; and that his only purpose in preserving that letter was as a protection against further effort upon the part of the mother to take the child. Subjecting Mills's testimony to the test of probability, but few of the elements entitling it to belief remain. He admitted that he was employed by the man Britton as private secretary; that his duties consisted principally in doing his "messenger business," and acting the part of "procurer;" that he falsely assumed the role of "Charles Huntley, Private Secretary to Francis Wilson," in corresponding with Woods to secure him as a witness in the divorce suit; that he accompanied Francis Wilson to Europe, and assisted him, without compensation, in his chase after defendant in error and her child; that he in other ways busied himself in behalf of Francis Wilson in procuring the divorce,

and finally came from New York, and appeared and testified in the case at bar, in answer to a newspaper advertisement, without promise of compensation, but in hope of reward, for the sole purpose of giving testimony which, if true, any man with decency, respectability, manhood, or honor would have refrained from reciting, except in obedience to the law's imperative demand. Moreover, the testimony of this witness is flatly contradicted by defendant in error, is in no wise corroborated, and is wholly insufficient, under the circumstances, to establish any wrongdoing on the part of the mother of this child. But, were we to assume the truth of the charges in the divorce proceeding, and testified to herein by witness Mills, that would not of itself constitute a present disqualification of defendant in error as the proper custodian of her child. The matters therein and thereby charged are said to have taken place in 1902 and 1903. There is not the slightest intimation or suspicion of subsequent wrongdoing. On the contrary, the evidence clearly shows that in point of respectability and morals at the present time no objections can be urged. We cannot assume that, because objections did exist or were charged against her at that remote period, they still exist, when the evidence shows that she is now happily married, is the mother of another child, has a good home, dear friends, an enviable social standing, and a reputation for charitable work that has earned, and received, the commendation and approval of those high in authority. We are fortified in this view by the voice of Francis, declaring to the mother of this child, "That after seeing you to-day, in your surroundings, I feel that you are the proper one to have him in charge. . . . I wish to try and atone for some of the wrong I have done you." Here is the father, to whose custody Russell had been given by a judicial decree, solemnly declaring the defendant in error to be the proper person to have Russell, to "educate in a refined atmosphere." Either Francis was at that time absolutely and irretrievably lost to every sense of honor, right, decency, and manhood, or he knew and felt in his own consciousness that the mother, in her then surroundings, was a fit and proper person to have the care and custody of their child, and that whatever wrongs had previously existed were not wholly hers. The evidence discloses that Francis requested his mother to take Russell to Europe; that he also testified in bankruptcy proceeding that he had fully repaid the money advanced him by June for that purpose. This evidence is not controverted. We are justified, therefore, in assuming that Francis secured the

money in good faith to have Russell sent to England, and, failing in his purpose, returned the money. We are persuaded that the hearts of these plaintiffs in error will be gladdened by the mantle of charity which we thus place over the acts of their dead son, and by the memory of their love for him, acquiesce in his judgment, and ours, that Russell's mother is a fit and proper person to have his care and custody.

Counsel, however, contend that defendant in error voluntarily committed Russell to the care of plaintiffs in error, and has permitted him to so remain until his affections have become centered in them, as well as theirs in him, and that, therefore, this is one of those exceptional cases where it is clear the welfare of the child demands that its custody be not changed. The great love and affection which the grandparents have for this child, and the care they have bestowed upon it, is clearly evident and must necessarily be considered; but the sorrow that must come to them when deprived of its custody is not a sufficient reason to justify a court in denying the right which naturally belongs to a parent, much as that sorrow must appeal to every sympathetic mind; nor is it a sufficient reason that the child has learned to love another. In the heart of every child there is usually love and affection for all, and the feeling of attachment to those with whom Russell has most recently been associated will soon yield to that affection, regard, and love which none but a mother can feel and manifest toward her own offspring. In the case of *Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321, cited by counsel for plaintiffs in error, a little girl was taken at birth by her aunt, who had thereafter always cared for the child and performed towards it the duties of a mother. The mother was too ill to care for the child, and the father was too shiftless to care for either. When the child was five and a half years of age, and the mother was dead, the father sought the court to take the child from the loving care of the aunt,—the foster mother,—and deliver her into the custody of the father, then residing in the home of his parents. This the court, and in our judgment very properly, refused to do. In that case the father, through shiftlessness and coldness of disposition, failed to manifest any affection for his offspring until it pleased him to seek its custody. He had in effect abandoned it, and the rule applied there is similar to *McKercher v. Green*, 13 Colo. App. 271, 58 Pac. 406, where the child was not born until after the separation of father and mother, and the parent invoking the power of the court had never seen the child until about the time he sought its custody, 30 L.R.A. (N.S.)

when it was almost four years old. In the case at bar the mother had the sole care of Russell for at least the first two years of his life, and only gave him up when the one whose duty it was to provide sustenance refused longer to do so, and when the health of the child required a change of climate; that she thereafter contributed to his support, and during all the time remained constant in her love. Her affection for and interest in her child was continuously manifested. Fearing that it was losing its affection for her, and that the grandmother was planning to permanently keep it, the mother abducted the child and fled to Europe. It was only surrendered when the mother was frantic with fright, when her funds were exhausted, and her health broken, and then only under pressure from her husband. In 1904 she pleaded with the father to bring the child to her. Again in 1905 she borrowed money and sent it to the father, under the promise and the hope that she might repossess her son, and in 1906, undismayed by frequent disappointments she crossed the ocean and the western continent, that she might be with and near her boy. She was constantly writing of, and sending small presents to, him, and the letters of Linda Wilson, covering a period of seven years, show that the writer believed the mother to be deeply interested in the slightest detail in the life of the child. The evidence clearly establishes that defendant in error has a strong, deep, and abiding love and affection for her child; that he has always, up to the institution of this suit, manifested a like love and affection for her. Notwithstanding plaintiffs in error are people of good character, able and willing to properly support and educate this child, intend to make him their heir equally with their own son, and have for him great love and affection, which he reciprocates, and that his preference is to stay with them, these matters are insufficient, under the evidence and circumstances of this case, to overcome the presumption that his welfare and interests would be best subserved in the care and custody of his own mother. As said in *Cormack v. Marshall*, 122 Ill. App. 208, 216: "The mere fact that some other person may have more money or property in any form is not one that appeals to us. The divine injunction to multiply and replenish the species was not confined to the rich, nor was it intended that the poor should beget the children and the rich should rear them."

Mr. Mitchell, the present husband of defendant in error, was present at the trial and gave his testimony, from which it appears that from hearing his wife talk of

Russell, and observing her affection for the boy, his own love for his wife had engendered in him a feeling of parental regard for Russell, and that he would welcome the boy into his own home as his own offspring. We requested Mr. Mitchell, to appear before us, and personally questioned him concerning these matters. He appears to be a man of education, refinement, and more than ordinary business ability. He not only testified, and was supported by other testimony, but also assured us, that, if the custody of Russell was given to the mother, he had the financial ability to carry out the plans and desires of both himself and the mother, would give the boy every educational advantage, start him in business of his own selection, and would treat him in all respects as his own child. Moreover, plaintiffs in error are well past middle life, are now in their declining years, have no young children in their family; whereas, defendant in error, by her second marriage, has become the mother of another child,—a girl. The refining and ennobling influence of a happy home where young children are growing together to manhood and womanhood is generally recognized and conceded. It is under such influences that traits of manly and womanly character are first manifested and best developed. Plaintiffs in error assert that, where other things are equal, this court should "choose to make of an American-born boy an American citizen rather than a British subject," and "that he be educated as an American, and not as an Englishman." Permitting him to be taken to England will not necessarily change his citizenship. He is American born, and must remain an American citizen until he reaches an age of maturity, and determines for himself that he shall make a change of his allegiance, or, at least, until such change occurs by some procedure recognized by the courts. If this child were to be taken to some country governed by a despot, or where liberty, under the law, was not an inalienable right of a citizen, or where there were no educational advantages, or where its education would be contrary to Anglo-Saxon traditions, the objections to expatriation would require grave and serious consideration and might be insurmountable. But we take judicial notice of the fact that the Kingdom of Great Britain is a government of liberty and law, and its people accustomed to receive educational and social advantages equal to those obtainable in the United States. Upon this feature of the case we will adopt the language of the late Mr. Justice Brewer of the Supreme Court of the United States, when, as a member of the Supreme Court of Kansas, he said, in Re 30 L.R.A.(N.S.)

Bullen, 28 Kan. 781, 786: "I cannot agree with counsel that it is never the province of the court to expatriate a citizen. In some cases I think the duty so to do is clear and absolute. As, for instance, where parents moving to a foreign country, and leaving their little child here for a while, come back to claim it, and are hindered by those who have it in possession. Nevertheless, it is a matter always to be considered. With pardonable partiality, we look upon our own land, its laws, institutions, and social life, as the best; and not lightly should a child be deprived of the benefit of them. Yet we may not ignore the fact that the mother country is a land of liberty and law, of education and social refinement, of morality and religion; and it would be wrong to make the matter of expatriation an excuse for depriving this little girl of that which would promote her welfare."

It is urged that as the trial court found that Russell's preference was to stay with his grandparents, and observed a "marked aversion to his mother, as shown by his manner in the court room," which was confirmed by a personal interview with the child, we should recognize that preference, and let the child remain where it is. There are many cases reported where the court, in the exercise of its authority, has accepted the wish of the infant as to its custody. It is certain that, if the child be of an age and capacity to form a rational judgment, its wish and choice should be consulted and given weight; but, as was well said by a distinguished judge: "It seems to be but a mockery to ask a child of nine years of age whether it should remain with the person who brought it up, or go with a stranger." In considering the aversion to his mother, it must be remembered that prior to this contest there was no aversion, but the tenderest love and affection. We concur in the opinion of the trial court that the explanation that the aversion is the result of certain measures taken by the mother to ascertain and know the whereabouts of the child is far from satisfactory, and that the bitterness aroused by this contest has been to some extent instilled in the child, and that, if plaintiffs in error retain possession of him, the estrangement will be still further increased. Under such circumstances, it is of prime importance to protect, as far as possible, the welfare and happiness of this child of tender years from the effects of the loss of respect and affection for his mother.

We recognize that in giving up Russell these grandparents will suffer keen disappointment and sorrow; but in this case, if the instincts of filial and paternal af-

fection are of any value, or if the voice of nature, that makes the parent the natural guardian of his child, that caused Rachel to weep for her first born and refuse to be comforted, is worth anything, they furnish the only proper solution of this question. In the calm and peaceful solitude that must come to the hearts of these grandparents when Russell is gone, let them remember the love and affection they had for their own son, and realize that as they would have had it done for them, in a contest for their son, we now do for the mother of this child,—give unto her her own.

The judgment is therefore affirmed.

Steele, Ch. J., and Bailey, J., concur.

Petition for rehearing denied October 11, 1910.

IOWA SUPREME COURT.

SMITH, Appt.,
v.

SANBORN STATE BANK.

(— Iowa, —, 126 N. W. 779.)

Damages — mental suffering — refusal to return deposit.

1. The liability of a bank which refuses to return a fund deposited with it to defray the expenses of the sick wife of the depositor, by which treatment is delayed, does not include compensation for the mental suffering of the depositor.

Bank — special deposit — application on general account.

2. A bank which accepts a deposit of money needed by the depositor for a special purpose, under the agreement that it will pay the amount when needed for that purpose, cannot apply it upon the depositor's general indebtedness to it.

(June 14, 1910.)

APPEAL by plaintiff from a judgment of the District Court for O'Brien County entered upon a directed verdict for defendant in an action brought to recover the balance of a certain deposit account and damages for the alleged wrongful detention thereof. Reversed.

The facts are stated in the opinion.

Mr. C. A. Babcock for appellant.

Weaver, J., delivered the opinion of the court:

Stated as briefly as practicable, the plaintiff's petition alleges that in October, 1908, he became the owner of a certain check or bill of exchange payable to himself for the sum of \$200, and took the paper to the de-

fendant bank, and sought to obtain the money thereon. In so doing he expressly informed the officer in charge that he desired to use the money in paying a rent claim of \$40 held by said bank for collection, and the remainder in defraying the expenses of immediate medical and surgical treatment of his wife, whom he expected to remove to a hospital in the city of St. Paul, in the state of Minnesota, on the following day, and that the money represented by said check was necessary to enable him to do so. Thereupon said bank officer told plaintiff that the safe in which the funds of the bank were kept had been locked for the night, but that plaintiff could leave the draft as a deposit, together with a check for \$43, to cover both the rent claimed and an item of \$3 which he was owing the bank, and the remainder could be drawn by him, as the money might be needed in the treatment of his sick wife. On the following day, having given checks to others to an amount which reduced the deposit to \$101.50, he called at the bank to obtain the same for the purpose of taking his wife to the hospital, but defendant re-

Note. — Right of bank to apply special deposit to an indebtedness of a depositor.

All the authorities are agreed upon the rule of law declared in the above case, that a bank which accepts a deposit of money made by a depositor for a special purpose, under an agreement that it will pay the amount when needed for that purpose, cannot rightly appropriate such deposit to discharge the depositor's indebtedness to it. *Re Davis*, 119 Fed. 956; *Bank of Commerce v. Franklin*, 90 Ill. App. 91; *Carter v. Martin*, 22 Ind. App. 445, 53 N. E. 1066; *Winfield Nat. Bank v. Railroad Loan & Sav. Asso.* 71 Kan. 584, 81 Pac. 202; *Murdock v. Citizens' Bank*, 23 La. Ann. 113; *Lynam v. Belfast Nat. Bank*, 98 Me. 448, 57 Atl. 799; *Judy v. Farmers' & T. Bank*, 81 Mo. 404; *Deal v. Mississippi County Bank*, 79 Mo. App. 202; *Straus v. Tradesmen's Nat. Bank*, 122 N. Y. 379, 25 N. E. 372, affirming 13 N. Y. S. R. 407; *Straus v. Tradesmen's Nat. Bank*, 36 Hun. 451; *Shawnee Nat. Bank v. Wootten* (Okla.) 103 Pac. 714; *Bank of United States v. Macalester*, 9 Pa. 475; *Parker v. Hartley*, 91 Pa. 465; *Wagner v. Citizens' Bank & T. Co.* (Tenn.) 28 L.R.A. (N.S.) 484, 122 S. W. 245.

Thus, in *Wilson v. Dawson*, 52 Ind. 513, it was held to be the general rule that funds deposited in a bank for a special purpose known to the bank could not be withheld from that purpose by the bank, and appropriated to pay a debt due the bank from the depositor.

And in *First Nat. Bank v. Barger* (Ky.) 115 S. W. 726, it was declared to be the

fused to pay it over, informing him that it had applied the deposit upon a promissory note which it held against him. Upon this showing plaintiff asks to recover judgment for the sum of money so withheld, with interest. In a second count of the petition the same facts are set forth; and it is further alleged that the money represented by said check constituted the only means he had with which to secure the necessary treatment of his sick wife, and that, being poor and without property on which to secure a loan, he was delayed several days in obtaining the necessary assistance to aid him in carrying out his purpose to take his wife to the hospital, and that as a result thereof he was put to great labor and trouble and made to suffer great humiliation, anxiety, and distress of mind, for which he asks damages in the sum of \$500. The defendant admits the receipt of the check for \$200, alleges that it paid therefrom on plaintiff's checks the sum of \$98.50, and that it applied and now asserts the right to retain the remainder in payment of a promissory note which it then held against the plaintiff. The evidence fairly tends to sustain the allegations of the petition.

At the close of plaintiff's case defendant moved for a directed verdict in its favor on the grounds: (1) That it is shown without controversy that plaintiff's deposit being on open account subject to check, the bank had the legal right and authority to apply it in payment of plaintiff's note. (2) That the law allows no recovery of damages for mental suffering occasioned by breach of contract, and that the damages which plaintiff seeks to recover are too remote, indirect, and speculative to sustain a verdict in his favor on the second count of the petition. This motion was sustained by the court, verdict returned as ordered, and judgment for costs entered against plaintiff, who appeals.

Actuated, perhaps, by the same spirit of saving which led it to violate its agreement with plaintiff to receive and hold the money for his use in the treatment of

his sick wife, the appellee has employed no counsel to represent it in this court, and we are therefore deprived of the benefit of a brief in support of the judgment which it obtained below, and there is nothing in the record to equitably incline this court to seek for reasons to sustain it. We may assume, perhaps, that the appellee's view of the law governing the cause, as well as the view of the trial court thereon, is epitomized in the grounds of the motion for a directed verdict, to which we have already called attention.

Referring first to the second proposition of the motion, we are obliged to hold that the damages for which recovery is demanded in the second count of the petition are too remote, and that the trial court correctly held that no case for the jury had been made on this branch of the case. That such damages have been held recoverable in certain cases growing out of contract rights and relations must be admitted, but these are to be found almost entirely in that class of contracts upon breach of which the injured party may, if he so elect, bring an action sounding in tort. Familiar examples of this nature are found in cases upholding the recovery of such damages for negligence in the transmission and delivery of telegrams. *Mentzer v. Western U. Tele. Co.* 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1; *Cowan v. Western U. Tele. Co.* 122 Iowa, 379, 64 L.R.A. 545, 101 Am. St. Rep. 268, 98 N. W. 281. Of the same character are certain cases against common carriers. *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, 11 N. W. 356, 911; *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 320. But no case has been called to our attention, nor do we think one can be found, which holds that damages are recoverable for mental anguish growing out of the violation of a contract for the payment of money. To so hold would be to open the door to a ruinous flood of litigation. Occasions will arise when it would seem that such a recovery is demanded in

law that while a bank had the right to appropriate a general deposit to discharge the indebtedness of the depositor to it, it had no right to make such appropriation of a deposit which it had received with notice that it was made for the purpose of meeting certain checks drawn by the depositor, so as to defeat the holder of such checks in the collection of same. The court added that this rule applied only when the bank had notice of the previous appropriation of the sum deposited.

In *Masonic Sav. Bank v. Bangs*, 84 Ky. 135, 4 Am. St. Rep. 197, cited by the court in *SMITH v. SANBORN STATE BANK*, the 30 L.R.A. (N.S.)

specific holding was that where securities were pledged to a bank for the payment of a particular debt, it had no lien on the securities for a general balance or for the payment of other claims. This question, however, it is not aimed to include within the scope of this note.

For a discussion of the question whether the fact that a bank has, by an agreement invalid as against a trustee in bankruptcy, undertaken to hold the bankrupt's deposit as a fund for creditors, prevents it from setting off the deposit against its own claim, see note to *Wagner v. Citizens' Bank & T. Co.* 28 L.R.A. (N.S.) 484. J. A. C.

the interests of justice, but it is better that the exceptional wrong should sometimes go unrequited than to abrogate a rule which in the vast majority of cases has a salutary effect. Generally speaking, failure to pay or deliver money according to agreement gives rise to no recoverable damages beyond the sum wrongfully withheld, with interest, during the time payment is delayed. Special circumstances may sometimes justify the recovery of special damages, but these do not include compensation for mental suffering.

As to the first ground of the motion for the directed verdict, which is, in substance, that under the undisputed facts of the case the defendant bank had the right to apply the deposit to the payment of the note, we are of the opinion that it cannot be sustained, and that the trial court erred in directing a verdict against plaintiff thereon. Of the general rule that a bank to whom a depositor is owing a matured indebtedness may appropriate the general deposit of its debtor to the discharge of the obligation, there can be no doubt. *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Knapp v. Cowell*, 77 Iowa, 528, 42 N. W. 434. But it is no less certain that a deposit made for a special purpose, or under a special agreement, cannot rightfully be so appropriated. *Wilson v. Dawson*, 52 Ind. 513; *Straus v. Tradesmen's Nat. Bank*, 36 Hun, 451; *Straus v. Tradesmen's Nat. Bank*, 122 N. Y. 379, 25 N. E. 372; *Judy v. Farmers' & T. Bank*, 81 Mo. 404; *Bank of United States v. Macalester*, 9 Pa. 475; *Masonic Sav. Bank v. Bangs*, 84 Ky. 135, 4 Am. St. Rep. 197. Indeed, the proposition that a bank enjoys no exemption from the general rule by which every party to a business transaction or agreement is legally bound to respect the obligation of his contract is one which ought to require neither argument nor citation of authority. The evidence shows without dispute that the check for \$200 was placed with the defendant upon the express agreement and understanding that, after paying certain specifically named debts, the remainder would be repaid to the plaintiff on the following day, or whenever called for, to enable him to take his wife to the hospital for needed treatment. Upon money so received, no lien attached in favor of the bank, and its attempt to appropriate the same was wholly without right or authority. Upon such a record plaintiff was clearly entitled to recover.

It follows that the direction of a verdict in defendant's favor upon the first count of the petition cannot be sustained, and the judgment of the trial court is therefore reversed.

30 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

H. KATZMAN, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

(— Ky. —, 130 S. W. 990.)

Statute — sale of poisons — definiteness.

1. A statute forbidding druggists to sell poisons at retail except under certain conditions, one of which is that they shall satisfy themselves that they are to be used for legitimate purposes, is not invalid for not defining the meaning of the words "retail" and "legitimate purposes."

Trial — jury question — care of druggists.

2. Whether or not a druggist, in selling opium without a prescription, used reasonable care to satisfy himself that it was obtained for a legitimate purpose, as required by statute, is a question for the jury.

Evidence — expert — purpose of sale.

3. Upon a prosecution for selling opium to an habitual user, under a statute requiring persons selling it at retail to satisfy themselves that it is desired for legitimate

Note. — Constitutionality, construction, and effect of statute prohibiting or regulating the sale of poisons.

Constitutionality.

The constitutionality of statutes of this nature has generally been unquestioned, and it seems to be clearly within the police power of the states to regulate or to prohibit, under proper circumstances, the sale of poisons, for the protection of the lives and health of the public.

Thus, a statute prohibiting the sale of opium, its compounds and preparations, except upon prescription, was upheld in *Re Hallawell*, 8 Cal. App. 563, 97 Pac. 320, affirmed in 155 Cal. 112, 99 Pac. 490, as a legitimate exercise of the police power.

And in *State v. Ah Chew*, 16 Nev. 60, 40 Am. Rep. 488, a similar statute with reference to opium was upheld against objections that it interfered with existing rights of property, impaired the obligation of contracts, and was special legislation in the interest of a designated class; and in *Ex parte Yung Jon*, 28 Fed. 308, against an objection that, as applied to opium in the hands of persons within the state at the date of the passage of the act, it deprived them of property without compensation or due process of law. In the latter case, the court said: "The use of the article is not thereby restrained, so as to destroy its value as a medicine or remedial agent, the only use of which is generally considered and accepted as a proper one in this country."

So, the constitutional power to make possession of opium without a license there-

purposes, physicians and druggists may testify that, in their opinion, such sale is not for a legitimate purpose.

Same — interpretation of statute.

4. When it is shown by evidence that words used in a penal statute are susceptible of two meanings, depending on the state of facts to which they are alleged to be applicable, the court may instruct the jury in the words of the statute, and leave to it the determination of the question whether or not the statute has been violated.

Constitutional law — discrimination — wholesale and retail dealers.

5. No unconstitutional discrimination against retail druggists is made by a statute requiring them, when selling poisons without a physician's prescription, to satisfy themselves that they are to be used

for a legitimate purpose, although the same requirement is not imposed upon wholesalers.

Same — due process of law — purpose of purchase.

6. A druggist is not deprived of his liberty or property without due process of law by a statute requiring him, when selling poisons at retail, without a physician's prescription, to satisfy himself that they are to be used for a legitimate purpose.

(October 6, 1910.)

A PPEAL by defendant from a judgment of the Criminal Division of the Circuit Court for Jefferson County, convicting him of selling opium in violation of law. Affirmed.

The facts are stated in the opinion.

for, or without having obtained it on prescription of a physician or pharmacist, for medical purposes, a criminal offense, is upheld in *Ex parte Mon Luck*, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693.

Nor is such an act invalid on the ground of unreasonableness because it in terms prohibits merely the sale, and not the giving away, of poisons. Re *Hallawell*, supra.

The prohibition by the body of the act, of the sale of opium except upon a physician's certificate, is sufficiently covered by the title, "An Act to Regulate the Sale of Poisons in the State of California, and Providing a Penalty for the Violation Thereof." *Ibid*.

And such a provision is sufficiently comprehended by the title, "An Act to Regulate the Sale of Opium, and Suppress Opium Dens." *Ex parte Yung Jon*, supra.

Construction—what are "poisons."

The definition of "poisons" by § 2 of the English pharmacy act as the several articles named in a certain schedule, which includes, *inter alia*, opium and all preparations of opium, is not confined to poisons in their simple state, or the preparations of such poisons, but includes preparations containing a scheduled poison as one of their ingredients; and accordingly "*ehlorodyne*," a medicine containing 1 grain of morphine to the half-ounce bottle, is a poison within the meaning of the act, and therefore within the prohibition against keeping open shop for the retailing of poisons by unlicensed persons. *Pharmaceutical Soc. v. Piper* [1893] 1 Q. B. 686.

To the same effect is *Pharmaceutical Soc. v. Arnson* [1894] 2 Q. B. 720, where the preparation involved was an article called, "*Powell's Balsam of Aniseed*," which contained, among other ingredients, only one tenth of a grain of morphine to the ounce bottle.

But in *Pharmaceutical Soc. v. Delve* [1894] 1 Q. B. 71, it was held that the sale of a compound containing only a minute quantity of poison was not a violation of the pharmacy act, the preparation in question being "*licoricine*," as to which the analyst, called as a witness, said: "It was not a trace; it was more; I was not instructed to take quantity; it might be that the quantity is one fiftieth of a grain per ounce."

And in *Wise v. Morgan*, 101 Tenn. 273, 44 L.R.A. 548, 48 S. W. 971, it was held that a statute requiring druggists to label all poisonous substances as "poison" does not apply to medicines compounded by druggists upon the prescription of physicians, though they contain poisons.

In *Brown v. Leggett* [1906] 1 K. B. 330, under an act prohibiting the sale to unknown persons of any poisons included in the first part of schedule A, or added thereto under a section providing that any article declared by the Pharmaceutical Society to be a poison shall be deemed such, it was held that a vermin killer labeled "poison," and containing 1 per cent of "*veratrine*," a poisonous alkaloid within part 1, was in effect taken out of that part, and placed in part 2, by a resolution of the society, declaring that every compound containing poison, sold for the destruction of vermin, ought to be deemed a poison, but at the same time declaring that certain other articles ought to be deemed poisons in the first part of schedule A.

—patent medicines.

The exception in § 16 of the English pharmacy act, in favor of patent medicines, was held, in *Pharmaceutical Soc. v. Piper*, supra, to extend only to medicines which were the subject of letters patent, and not to proprietary medicines.

But the sale of patent or proprietary medicines by anyone has been held not within the prohibition of the Kentucky pharmacy act, prohibiting the sale of poisons by one not a registered pharmacist, and requiring an owner of a drug store, not a registered pharmacist, to keep a registered pharmacist in charge, but permitting such owner to himself sell patent and proprietary medicines, and providing that the act shall not interfere with the sale of such medicines by country stores. *Kentucky Bd.*

Mr. Alfred C. Krieger, for appellant:

The statute is indefinite, uncertain, and ambiguous, in that no complete offense or crime is defined or fixed by its terms, and no crime or offense is or can be charged in the information, which purports to be based upon the statute.

Lewis's Sutherland, Stat. Constr. p. 964; Todd v. United States, 158 U. S. 282, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; United States v. Sheldon, 2 Wheat. 119, 4 L. ed. 109; Ex parte McNulty, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237; State v. Woodruff, 68 N. J. L. 89, 52 Atl. 294; State v. Walsh, 43 Minn. 444, 45 N. W. 721; State v. Krueger, 134 Mo. 262, 35 S. W. 604; United States v. Louisville & N. R. Co. 176 Fed. 942; Renfroe v. Colquitt, 74 Ga.

619; McMasters v. Burnett, 92 Ky. 358, 17 S. W. 1021; Com. v. Louisville & N. R. Co. 112 Ky. 787, 66 S. W. 753; Jacob v. Clark, 115 Ky. 250, 72 S. W. 1095; Com. v. Trent, 117 Ky. 44, 77 S. W. 390, 4 A. & E. Ann. Cas. 209.

The statute is discriminatory and lacks uniformity in that it excludes manufacturing chemists and druggists selling by wholesale from its provisions.

Com. v. Payne Medicine Co. 138 Ky. 164, 127 S. W. 760; Standard Oil Co. v. Com. 119 Ky. 1, 82 S. W. 970, 83 S. W. 557; Com. v. Fowler, 96 Ky. 167, 33 L.R.A. 839, 28 S. W. 786.

The effect of the statute is and will be to deprive the defendant of his liberty and property without due process of law.

of Pharmacy v. Cassidy, 115 Ky. 690, 74 S. W. 730.

Where, however, a statute regulating the sale of drugs and medicines excepted from its provisions patent or proprietary medicines, but an amendatory act prohibited the sale or giving away of cocaine or any salts or compounds thereof, it is no defense to a prosecution for violation of the latter act that the compound of cocaine sold was a patent or proprietary preparation. People v. Zito, 237 Ill. 434, 86 N. E. 1041.

—who are "sellers."

The owner of a department store, not a duly qualified and registered chemist, who opens a drug department, from which poisons are sold in his name, "keeps an open shop for retailing, dispensing, and compounding poisons," in violation of the English pharmacy act, though such department is under the sole control of a duly qualified and registered chemist. R. ex rel. Warner v. Simpson, 27 Ont. Rep. 603.

But one who merely acts as agent to receive at his shop orders for a preparation containing a poison, the orders to be transmitted to the manufacturer, and the preparation to be sent by the latter to the purchaser direct, is not a "seller" within the meaning of the act, although he receives the price on account of the manufacturer, giving a receipt on a bill headed with the manufacturer's name. Pharmaceutical Soc. v. White [1901] 1 K. B. 601.

A sale of cocaine without a prescription, as required by statute, by a clerk employed by the proprietors of a drug store, and who was authorized generally to sell anything in the store, constitutes a sale by the proprietors themselves, although they did not in express words authorize the clerk to sell cocaine. Zito v. People, 140 Ill. App. 611, affirmed in 237 Ill. 434, 86 N. E. 1041.

A druggist does not "sell and deliver" a poison without a label, in violation of the law, when he is induced to deliver to a person a package containing a poison, by representations of such person that it is

his, and without knowing its character. Hackett v. Pratt, 52 Ill. App. 346.

And a conviction of a statutory offense of having in possession cocaine "with intent to sell, give away, or otherwise dispense the same," cannot be sustained in Virginia when it appears that the cocaine was never ordered to be sent to that state, and only came into her borders as the result of a mistake made by the consignors; that the defendant positively refused to receive the same, and never for a moment had any such possession of it as would have enabled him to do any one of the acts forbidden by the statute; and that he had no intention of selling, giving away, or otherwise dispensing the cocaine in that state. Taylor v. Com. 109 Va. 825, 63 S. E. 1079.

—allegations and proofs.

In a prosecution for the unlawful sale of cocaine, it is not necessary to allege the name of the person to whom the sale was made, or that the name is unknown. People v. Zito, 237 Ill. 434, 86 N. E. 1041.

In Holmes v. State, 7 Ga. App. 570, 67 S. E. 693, it is held that on a prosecution for unlawfully selling or furnishing cocaine, "the state may prove as many separate sales as it can, provided such sale or furnishing occurred within two years before the filing of the accusation."

Under a statute prohibiting the sale or giving away of certain drugs, except on prescription, and requiring that "physicians or pharmacists who prescribe opium, or any of the drugs above named, shall keep a record," etc., it is no defense to the prosecution of a regularly qualified and practicing physician for unlawfully giving away and selling morphine without a prescription, that he orally prescribed the drug in question to his patient in his regular practice at the time of the sale, unless he further proves that he made and kept the record required by the statute. State v. Jones, 18 Or. 256, 22 Pac. 840.

Effect.

Where a pharmacist has been convicted

McGehee, Due Process of Law, p. 311; Harding v. People, 160 Ill. 459, 32 L.R.A. 445, 52 Am. St. Rep. 344, 43 N. E. 624; Frorer v. People, 141 Ill. 171, 16 L.R.A. 492, 31 N. E. 395; Millett v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; Ramsey v. People, 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285; Kentucky Bd. of Pharmacy v. Cassidy, 115 Ky. 690, 74 S. W. 730; Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257.

Mr. Edward Bloomfield, with Messrs. James Breathitt, Attorney General, Tom B. McGregor, and Loraine Mix, for appellee:

The court has judicial knowledge that opium is *per se* a poison and dangerous habit-forming drug.

Ex parte Mon Luck, 29 Or. 421, 32 L.R.A. 738, 54 Am. St. Rep. 804, 44 Pac. 693.

The Kentucky pharmacy act is constitutional.

Wilson v. Com. 119 Ky. 769, 82 S. W. 427; Kentucky Bd. of Pharmacy v. Cassidy, 115 Ky. 690, 74 S. W. 730; Com. v. Ward, 136 Ky. 146, 123 S. W. 673; Com. v. Payne Medicine Co. 138 Ky. 164, 127 S. W. 761.

The statute is neither discriminatory nor does it lack uniformity because it excludes

manufacturing chemists and druggists selling by wholesale from its provisions.

Com. v. Payne Medicine Co. supra; State v. Forcier, 65 N. H. 42, 17 Atl. 577; Standard Oil Co. v. Com. 119 Ky. 1, 82 S. W. 970, 83 S. W. 557; Com. v. Fowler, 96 Ky. 167, 33 L.R.A. 839, 28 S. W. 786; Stickrod v. Com. 86 Ky. 293, 5 S. W. 580; Com. ex rel. Barth, v. McCann, 123 Ky. 247, 94 S. W. 645; Hagar v. Com. 128 Ky. 1, 15 L.R.A. (N.S.) 195, 129 Am. St. Rep. 238, 107 S. W. 254; Com. v. Ward, supra.

The statute does not deprive or attempt to deprive defendant of his liberty or property without due process of law, in violation of the 14th Amendment.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; Austin v. Tennessee, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; Sanders v. Com. 117 Ky. 1, 1 L.R.A. (N.S.) 932, 111 Am. St. Rep. 219, 77 S. W. 358.

Carroll, J., delivered the opinion of the court:

The information filed by the commonwealth against the appellant, who is a druggist, charged that he unlawfully sold at retail, not on a physician's prescription, to Will Frazier, a certain quantity of poison,

under a statute prohibiting the sale of cocaine except upon prescription, and providing that the license of a pharmacist convicted of the unlawful sale of cocaine shall be revoked, the board of pharmacy is not authorized to renew a license which has been thus revoked, and a mandamus will not lie to compel them to do so. Thomas v. Board of Pharmacy, 152 N. C. 373, 67 S. E. 925.

—violations as civil negligence.

In Burk v. Creamery Package Mfg. Co. 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793, it was held that it was negligence *per se* to fail to comply with the statute making it a misdemeanor to deliver or sell to another any poisonous liquor or substance without having the receptacles labeled "poison." The court said: "Violation of such statutes is universally held to be negligence."

So, in Sutton v. Wood, 120 Ky. 23, 85 S. W. 201, 8 A. & E. Ann. Cas. 844, under the statute involved and quoted from in KATZMAN v. COM., it was held that a druggist's failure to observe the statutory precautions in selling poison is *per se* a neglect of duty from which, when special damage flows, there exists *prima facie* a case of actionable negligence. The court said: "As the legislation was to enhance the public's protection, the duties imposed on the druggists were intended as statutory tests of care, in so far as the statutes went. 30 L.R.A. (N.S.)

Their nonobservance is *per se* neglect of duty, as well as neglect of care."

In Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350, where it was alleged that defendant carelessly sold and delivered to plaintiff a deadly poison instead of the harmless medicine he called for, it was held that the omission to label the drug sold "poison," as required by statute, was evidence of negligence in the sale and delivery thereof. The court said: "Such omission was certainly none the less a negligent act because it is denounced as a crime by the statute." And it was further held proper for the trial court, in such a case, to call the jury's attention to such statute.

And in Campbell v. Brown, 81 Kan. 480, 26 L.R.A. (N.S.) 1142, 106 Pac. 37, an action for damages for alleged negligence of the defendant in selling and delivering wood alcohol, instead of grain alcohol, the article called for, and in failing to label the bottle to indicate its poisonous contents, it was said, incidentally to the holding of the case, that the neglect of the statutory requirement that a druggist, in selling a poisonous substance, must properly label the bottle containing it, was within the issues presented, and that "the statute does not except from its operations sales of poisons to be used externally, whether upon animal or man."

For other cases as to the right of private party to maintain action for violation of statute regulating sales of poisons,—see note in 9 L.R.A. (N.S.) 382. A. C. W.

to wit, opium, without satisfying himself that such poison was to be used for legitimate purposes, and with the knowledge that it was intended for smoking purposes or for habitual use. It was returned under § 2630 of the Kentucky Statutes (Russell's Stat. § 5057), reading in part: "No person shall sell at retail any poisons except as herein provided, without affixing to the bottle, box, vessel, or package containing same, a label printed or plainly written, containing the name of the article, the word 'poison,' and the name and place of the business of the seller, with the common name of two or more readily accessible antidotes; nor shall he deliver poison to any person without satisfying himself that such poison is to be used for legitimate purposes. A poison, in the meaning of this act, shall be any drug, chemical, or preparation which, according to standard works on medicine or *materia medica*, is liable to be destructive to adult human life, in quantities of 60 grains or less. It shall be the further duty of anyone selling or dispensing poisons which are known to be destructive to adult human life in quantities of 5 grains or less, before delivering them, to enter in a book kept for that purpose the name of the seller, the name and residence of the buyer, the name of the article, the quantity sold or disposed of, and the purpose for which it is said to be intended. . . . The provisions of this section shall not apply to the dispensing of poisons in not unusual quantities or doses, on physicians' prescriptions, nor to the sale to agriculturists or horticulturists of such articles as are commonly used by them as insecticides. . . ."

It is agreed that the appellant is a retail druggist; that he sold the opium charged in the information to the purchaser for the purpose of allowing the purchaser to smoke the same; that he knew before making the sale that the purchaser was addicted to the use of opium; that it was not sold on a physician's prescription; that it is a poison, destructive to adult human life in quantities of 5 grains or less. It is further agreed that there was affixed to the bottle or package containing the opium a printed label, giving the name of the article, the word "poison," and the name and place of the seller, with the common name of two readily accessible antidotes, and that, before delivering the poison, appellant entered in a book kept for that purpose, as required by the statute, the name of the seller, the name and residence of the buyer, the name of the article, the quantity sold, and the purpose for which it was said to be intended. It will thus be observed that the offending charged against the appellant consisted in selling the drug by retail with-

out a prescription, to a person addicted to the use of it; and this being so, the sale was not made for a legitimate purpose. The law and facts were submitted to the court without the intervention of a jury, and the appellant was found guilty of violating the statute.

A reversal is asked upon the ground that the statute is invalid upon the ground of uncertainty, because it does not define with sufficient precision the words "retail" and "legitimate purposes," and because it makes an arbitrary and unreasonable discrimination in excluding from its provisions manufacturing chemists and druggists selling by wholesale, and has the effect of depriving the appellant of his liberty and property without due process of law. That it is competent for the legislature to impose reasonable restrictions upon the sale of drugs and poisons there is no room to doubt. It has been so often held that laws controlling and regulating the sale of these articles come within the police power of the state that we do not deem it necessary to do more than cite the case of the Kentucky Bd. of Pharmacy v. Cassidy, 115 Ky. 690, 74 S. W. 730, and call attention to the numerous authorities therein cited. Indeed, counsel for the appellant does not attack the statute upon the ground that it was not within the power of the legislature to enact a law regulating the sale of opium or other drugs or poisons, but upon the theory that this power was not properly exercised. If this statute is so uncertain and indefinite in describing what will constitute the offense denounced by the statute that persons of ordinary understanding cannot comprehend its meaning or determine when they have violated its provisions, then it is open to the objection urged against it. The law is well settled that a penal statute creating an offense must be sufficiently plain and exact to enable persons of ordinary intelligence to understand its provisions. As said by Justice Brewer in *Chicago & N. W. R. Co. v. Dey* (C. C.) 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866: "No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it." And this principle, which was fully approved by this court in *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129, we have no disposition to modify or depart from.

In the argument in support of the objection mentioned, it is said that the legislature should have defined the meaning of the words "retail" and "legitimate purposes," so that a druggist might know what quantity would constitute a sale by retail and

what would or would not be considered a sale for legitimate purposes; and so that there could not be two opinions as to what these words mean when different courts or juries came to pass upon questions involving a violation of the statute. It may be admitted that, although the meaning of the words "retail" and "legitimate purposes," as used in the statute, are reasonably well understood, it is nevertheless possible that there might be difference of opinion as to whether in a given state of case the sale of a drug was by retail or for a legitimate purpose, and it is possible that, in administering this statute, it may occasionally happen that a druggist will be accused who claims not to know what constitutes a sale by retail or what is a legitimate use of opium; and it is also possible that different trial courts and juries may not always be harmonious in the conclusions reached upon this point. But the fact that there may be occasional doubt or want of agreement on this question cannot be allowed to invalidate the statute. If this rule obtained, many penal statutes that have stood unquestioned for years and have been often enforced would be held invalid. There are numerous statutes in existence, creating and describing offenses, the enforcement of which often brings into prominent notice a question concerning the meaning of words in the law about which different persons might reach a different conclusion. In the trial of many criminal cases there are, of necessity, submitted to the jury issues involving the meaning of certain words upon which depends the guilt or innocence of the accused; and with the court or jury, as the case may be, is left the decision whether or not the law under which the prosecution is pending has been violated. It would, of course, be extremely desirable if every penal statute could be made so plain as not to leave any doubt as to its meaning, and so intelligible as that every person could by reading it at once decide what he might with safety do under it. But this ideal condition is not attainable. It would not be at all practicable to define in every statute the meaning of controlling words in it that there may be difference of opinion concerning, when it is attempted to apply them to a given state of facts. To do this would extend to unreasonable length almost every statute that creates and describes an offense, and would also complicate and confuse the administration of the criminal law, as the definitions would often be as uncertain as the thing defined. Every penal statute should be given a reasonable construction,—one that will effectuate the legislative intent in its enactment,—and, if it describes the offense in language that

can be understood by persons of ordinary intelligence, it will not be declared invalid on the ground of uncertainty. The established rules of construction do not require that the sufficiency of penal statutes should be measured by a technical standard that would impair their efficiency and make their enforcement difficult, if not impossible. A little common sense, as well as legal learning, must be used in the practical administration of the law; and it is not essential that a statute shall be so elaborate in its detail as to attempt to meet every possible state of fact that may arise under it. As said in *Com. v. Trent*, 117 Ky. 34, 77 S. W. 390: "Penal enactments must be construed as other statutes, with the view to carry out the intention of the legislature. . . . The intention of the legislature is to be collected from the words employed; but in construing a statute . . . the court will look to the whole act, and the purpose of its makers in its enactment. The court cannot depart from the plain meaning of the words in a penal act, and adjudge that punishable under the statute which its language does not fairly cover. . . . But, in determining what may be punished under the words of a statute, the court must apply the rule that every statute shall be construed liberally, with a view to carry out the intention of the legislature and promote its objects, taking all ordinary words and phrases according to the common and approved use of language." The purpose of the statute, in so far as it refers to opium and kindred drugs, was to prevent, without a physician's prescription, their sale in small quantities to persons who intended to use them, not for medical or legitimate purposes, but to satisfy a depraved habit; and its purpose ought not to be weakened by an interpretation that would impair, if not destroy, its usefulness.

The word "retail" is defined by Webster to be "the sale of commodities in small quantities or parcels." This is the definition given by Bouvier in his law dictionary, and the one recognized as correct by law writers generally. 24 Cyc. Law & Proc. p. 1684; 24 Am. & Eng. Enc. Law, 2d ed. p. 876. There are few persons of ordinary intelligence who do not understand the meaning of the word "retail," or who would not be able to decide with reasonable certainty whether the sale of a given article or commodity was a sale by retail or wholesale. In the common everyday affairs of life, people are constantly buying and selling things by wholesale and retail, and it would be absurd to say that a person who had intelligence enough to conduct a drug store did not know when he was selling a drug by retail, or did not know that the

purchase of a small quantity of opium was a retail transaction; and there ought not to be any difficulty in the mind of a druggist in understanding the meaning of the words "legitimate purpose," as used in the statute. It is provided that the druggist who sells by retail, without a prescription, the poisons mentioned, must first satisfy himself that it is for a legitimate purpose; and it is to be presumed that the druggist knows the legitimate purposes for which these poisons may be used; but, if he does not know, or has doubt about it, then he must in good faith exercise reasonable care to find out the purpose for which the drug or poison is bought. The statute does not impose any harsh or unreasonable duty on druggists, because, if the person desiring to purchase has not a prescription, the druggist can save himself from violating its provisions by in good faith exercising reasonable care to satisfy himself that it is intended for a legitimate purpose. But if he makes a sale by retail in the absence of a prescription, without first in good faith exercising reasonable care to satisfy himself that the purchaser intends to use the drug for a legitimate purpose, and it appears in the prosecution against him that the purchase was not made for a legitimate purpose, he subjects himself to the penalty denounced by the statute. In other words, whenever a druggist sells by retail the poisons mentioned, without being protected by the prescription of a physician, he takes the risk of violating the law, unless, before making the sale, he in good faith uses reasonable care to satisfy himself that it is intended for legitimate purposes. And whether or not this degree of care is used is a question of fact, to be determined, if put in issue, from the evidence.

On the trial of this case, a number of physicians were introduced for the commonwealth, for the purpose of showing that the sale of opium for smoking purposes, or to an habitual user of the drug, was not a sale for legitimate purposes. These physicians graphically described the ruinous effects of opium, physically, mentally, and morally, when used habitually in any manner, and declared in emphatic terms the habit to be the most degrading and destructive that any person can acquire. Their testimony was objected to, but we think that, in a prosecution under the statute, if the accused should make the defense that the sale of opium to a person for smoking purposes, or who was an habitual user of the drug, was legitimate, it would be competent to introduce as witnesses upon this point physicians or druggists to give an opinion whether or not the sale, under the described circumstances and conditions, was for a 30 L.R.A. (N.S.)

legitimate purpose. The statute was intended to regulate sales by druggists, and, when it is sought to apply the words "legitimate purposes" to a sale of drugs or poisons by druggists, they have a technical meaning that may not be clearly known or understood by courts or jurors, and so it is permissible to allow experts to give evidence as to what is regarded by qualified druggists and physicians legitimate purposes for which sales may be made, so that the trial court and jury may be informed as to what is recognized as a legitimate purpose for which these drugs may be sold by those intrusted with their sale, and to whom, in a measure, is confined the knowledge as to what constitutes a sale for legitimate purposes. When words are used in a penal statute that have both a popular and a trade or technical meaning, and, as used in the statute, they have reference to a trade or profession, these words, in construing the statute, should be given their meaning as understood by the trade or profession to which they apply. 2 Lewis's Sutherland, Stat. Constr. §§ 389-396. This is the rule given for the construction of statutes in § 460 of the Kentucky Statutes (Russell's Stat. § 4174), providing in part that "all words and phrases shall be construed and understood according to the common and approved usage of language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such meaning."

The question is further suggested that the construction of words and phrases in a statute is usually for the court. Generally this is true. But, if it is shown by evidence that words and phrases are susceptible of two meanings, depending on the state of facts it is attempted to apply them to, the court may instruct the jury in the words of the statute, and leave them to find from the evidence whether it has been violated. To illustrate, if there should be difference of opinion on the part of witnesses as to whether or not the sale being inquired into was made for a legitimate purpose, the court should leave it to the jury to find the fact and make their verdict accordingly.

In reference to the criticism that the statute makes an arbitrary and unreasonable discrimination against retail dealers in drugs, and in favor of wholesalers, it is sufficient to say that it was the evil of selling by retail that the legislature intended to prohibit. If a wholesaler should sell by retail in violation of the statute, he would, of course, be liable to the same extent as would the retail dealer. But there is a reasonable and well-defined distinction be-

tween the sale of goods by wholesale and by retail, and it was entirely competent for the legislature, in the exercise of the police power, and to accomplish the purpose intended, to make it a penalty to sell the prohibited article by retail without mentioning its sale in wholesale quantities. The legislature did not deem it necessary, in an effort to correct the evil following the illegitimate use of opium and other drugs, to extend the law so as to embrace wholesale dealers. It is a well-known fact that persons who purchase opium for illegitimate purposes, as a rule, obtain it in small quantities; and to place restrictions around its sale in the quantities in which it is usually obtained was the motive in the mind of the legislature. It was dealing with a condition that existed. This legislation was not intended to reach or touch all persons or conditions, but only those that the lawmakers, in the exercise of their wisdom and discretion, deemed it necessary to regulate for the safety and protection of the unfortunate class who have acquired the drug habit. If hereafter it becomes necessary to do so, the legislature may place such restrictions as are reasonably necessary around the sale of this or other drugs by wholesale; but the failure to do so in the act we are considering does not leave it open to the objection that it is discriminatory, arbitrary, or unreasonable.

The classification made by the statute is a reasonable and natural one, and all persons within its scope are treated exactly alike. An offense is created and defined in appropriate words, capable of being understood and applied with reasonable certainty; and, viewed from any standpoint, the penalty imposed upon the appellant did not deprive him of his liberty or property without due process of law. The statute does not violate either the state or Federal Constitution, and, as under the evidence and agreed facts there can be no question as to appellant's guilt, the judgment of the lower court is affirmed.

MAINE SUPREME JUDICIAL COURT.

INHABITANTS OF MILFORD

v.

BANGOR RAILWAY & ELECTRIC COMPANY.

(106 Me. 316, 76 Atl. 696.)

Water company — contract to furnish supply — construction.

1. A provision in a contract by a water company to furnish service as efficient as that furnished to another city is modified 30 L.R.A. (N.S.)

by the act of the municipality in installing smaller mains which make the rendering of the service of equal efficiency impossible, and the company's duty is to use reasonable care to furnish a service as nearly efficient as that of the other municipality, as the difference in size of mains will permit.

Same — liability for fire loss.

2. A water company which, in consideration of the payment of a hydrant rental, undertakes to furnish water to a municipality, is not liable for loss of municipal property through its failure to maintain a sufficient pressure to extinguish fires, where its contract does not require it to furnish any particular water pressure, or place it under any obligation with respect to the extinguishment of fires.

(December 20, 1909.)

Note. — Liability of water company for destruction of property of municipality by fire in consequence of failure to maintain sufficient pressure.

While there are many decisions as to the liability of water companies to individuals for losses sustained by fire owing to the inadequacy of the water supply, the liability of such companies for losses sustained by municipalities from that source has been touched upon in but few cases.

The liability in such cases must depend largely upon the nature of the contract entered into between the municipality and the company undertaking to furnish a water supply.

Where the undertaking on the part of the water company is merely to establish a plant and supply water, without any stipulation to afford protection from fire, it would seem that such companies should not be held liable for losses sustained by municipalities through the destruction of their property by fire.

In *Farnham on Waters*, p. 848, the author, in dealing with the liability of water companies to citizens whose property has been destroyed by fire because of the failure of the water companies to fulfil their contracts, says: "The nonliability of the water company depends not on the inability of the taxpayer to maintain the action, but on the failure of the water company's contract to cover the liability sued for. As said in *Wainwright v. Queens County Water Co.* 78 Hun, 146, 28 N. Y. Supp. 987, the company does not agree to extinguish fires. Its agreement is to furnish water. In most cases it would be impossible to say that failure to furnish water was the cause of the loss. Fires occur constantly in which not only buildings and their contents, but whole sections of cities, are consumed, although all the water that can be used is at hand and turned upon the flames. With all the uncertainty which exists as to what is the particular cause responsible for a fire loss, a water company cannot be held liable for the loss, unless it is held

MOTION by defendant for a new trial after verdict for plaintiffs on a trial before the Supreme Judicial Court for Penobscot County of an action brought to recover damages for the loss of certain property by fire alleged to have been the result of defendant's negligent failure to maintain a certain water pressure. Sustained.

The facts are stated in the opinion.

Mr. E. C. Ryder, for defendant:

An action cannot be maintained against a water company for loss of property by fire, unless it has failed to do certain specific things by way of protection which it agreed

to assume the responsibility of an insurer. Mere breach of a contract to furnish water for the extinguishment of a fire cannot be said to be the cause of the loss, because such cause may have been the negligence of the owner, the criminal act of a stranger, the atmospheric conditions, or any one of numerous other things which might be mentioned. Unless the loss can be said to be the result of the breach of the water company's contract (which could never be said, because the influence of other unknown quantities could not be determined), it is not liable for the loss caused by the fire. Keeping in mind the fact that the contract of the water company is to furnish water, and not to extinguish the fire, the rule with respect to damages precludes holding the company liable. Damages must be such as were within the contemplation of the parties; and it certainly cannot be claimed that, for the meager remuneration received, a water company undertakes to make good the loss which would result from the destruction of a modern city by fire. And the principle applies equally to the destruction of any part of it. For there is no place to draw a line short of absolute nonliability, if liability for loss of the entire city is denied. The great weight of authority agrees with this conclusion although the decisions are not placed on this ground."

It is always open to the parties to expressly enter into contracts whereby water companies may be held liable for damage resulting to municipal property by fire because of the failure of the water company to furnish a sufficient supply of water, and where such a contract exists, and it is clear that the lack of water caused the loss, there can be no doubt of the municipality's right to recover.

This was recognized upon the first appeal in *MILFORD v. BANGOR R. & ELECTRIC Co.* ante, 526, where a demurrer was overruled to a declaration alleging that the water company had expressly engaged to furnish water of sufficient pressure and volume to extinguish fires, "and especially and particularly fires originating in, or communicated to, the plaintiffs' said building and property."

The case of *Ukiah City v. Ukiah Water & Improv. Co.* relied upon by the court upon the last appeal in *MILFORD v. BANGOR* 30 L.R.A. (N.S.)

to do, or unless there has been a breach of an express covenant in the contract to do so.

Farnham, Waters, pp. 848, 849; Wainwright v. Queen's County Water Co. 78 Hun, 149, 28 N. Y. Supp. 987; Foster v. Lookout Water Co. 3 Lea, 46; Hadley v. Baxendale, 9 Exch. 341, 5 Eng. Rul. Cas. 502.

In making a contract with a water company for the protection of property against fire, the town acts for the general public good, and not for the purpose of protecting any particular property.

R. & ELECTRIC Co. and sufficiently set out in the foregoing opinion was distinguished on the ground that the *Ukiah Case* contained no express contract respecting the quantity of water to be furnished, or the manner or means of furnishing it.

And in *Galena v. Galena Water Co.* 132 Ill. App. 332, where an action on the case was brought against a water company by the city and board of school directors to recover damages for the loss of a public school building which was destroyed by fire owing to insufficient pressure of water, and the contract between the city and the water company provided that a standpipe should be erected at a sufficient elevation to give reliable pressure for the use of the water in extinguishing fires in buildings on hills, the court said: "If, as alleged in the declaration, the water company failed to perform these provisions of the contract, and if that failure caused a loss by fire to property owned by the city, we see no good reason why the water company should not be responsible to the city, one of the parties to the contract, for the proximate results of such breach of contract." The declaration did not allege any connection between the city and the school board, and no basis for a recovery by such board was shown by the declaration, and a demurrer was sustained because of a misjoinder of parties, and this ruling was affirmed in 229 Ill. 128, 82 N. E. 421.

In *Houck v. Cape Girardeau Waterworks & Electric Light Co.* (Mo. App.) 114 S. W. 1099, which was an action by a property owner, it was held under an ordinance granting the right to furnish water to a city and its inhabitants at a pressure adequate for fire protection without the use of fire engines, that the palpable meaning was that sufficient pressure should be maintained to afford reasonable protection to all buildings, whether owned by the city itself or its inhabitants.

The question of the right of a property owner to maintain an action against a water company for failure to supply sufficient water for fire purposes, as required by its contract with the municipality, is covered in the note to *Howsmon v. Trenton Water Co.* 23 L.R.A. 146, and the supplemental note to *Hone v. Presque Isle Water Co.* 21 L.R.A. (N.S.) 1021. J. T. W.

Ukiah City v. Ukiah Water & Improv. Co. 142 Cal. 176; 64 L.R.A. 231, 100 Am. St. Rep. 107, 75 Pac. 773.

No action either *ex contractu* or *ex delicto* can be maintained by these plaintiffs to recover the value of the municipal property destroyed. The action cannot be maintained by giving it the form of an action *ex delicto*.

Farnham, Waters, pp. 849, 850; Fowler v. Athens City Waterworks Co. 83 Ga. 219, 20 Am. St. Rep. 313, 9 S. E. 673; House v. Houston Waterworks Co. 88 Tex. 233, 28 L.R.A. 532, 31 S. W. 179.

Messrs. Louis C. Stearns, Louis C. Stearns, Jr., and Taber D. Bailey for plaintiffs.

Whitehouse, J., delivered the opinion of the court:

This is an action on the case brought by the inhabitants of the town of Milford against the defendant corporation to recover the value of the town hall and certain sidewalks and hose, which were the property of the municipality and were destroyed by fire in April, 1905. It is alleged that this loss was caused by the negligence of the defendant in failing to perform its contract to supply through its pipes water of sufficient current, pressure, and volume to extinguish fires within the range of its hydrants.

A general demurrer to the declaration was filed by the defendant; and it was stipulated by the parties that the cause should be heard by the law court on the amended declaration, demurrer, and joinder; that if the demurrer was overruled the defendant should have the right to plead anew, and if sustained the plaintiff should be nonsuited.

The count in the declaration especially relied upon by the plaintiffs was the "amended count," which is as follows:

"In a plea of the case, for that on the 28th day of April, A. D. 1905, the said inhabitants of Milford were the owners of a certain public building called a 'town hall,' of the value of \$5,000, and certain planks and timbers constituting a sidewalk of the value of \$250, and certain fire hose of the value of \$250; and the plaintiffs aver that on the said 28th day of April, 1905, the defendant had engaged and was bound and obliged to furnish through its mains, conduits, pipes, and hydrants, the same being laid and placed in the streets of said plaintiffs' town, water of sufficient current, pressure, and volume to extinguish fire within range of said hydrants, and especially and particularly fires originating in or communicated to plaintiffs' said building or property, in consideration of the sum of \$800 per annum paid to it by said plaintiffs—
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now the plaintiffs say that on said 28th day of April a fire started in a board pile at a considerable distance, to wit, a quarter of a mile, from the plaintiffs' said buildings and property, which said fire might easily have been extinguished and put out had there been any pressure and volume of water in said mains and hydrants, but, the defendant, unmindful of the duty and obligations in this behalf, wrongfully, carelessly, and negligently suffered and allowed said mains, pipes, and hydrants to be destitute of any current of water of sufficient pressure, force, and volume to be of any value or utility in extinguishing said fire or any fire, so that the plaintiffs were unable by the use of the greatest diligence and the strongest efforts to quench the fire in said pile of boards, although they were in the use of due care in this behalf. And the plaintiffs aver that said fire in said board pile was communicated to the said buildings and property of plaintiffs by sparks, firebrands, or cinders, so that the same were utterly burned and consumed, although hydrants were at hand and in close proximity to said buildings and property, and competent and capable men were at hand with suitable hose and appliances ready to extinguish the fires started by said cinders and firebrands upon plaintiffs' said building and property, and were prevented from doing so solely by the lack and want of water in said hydrants, which it was the duty and obligation of said defendant to furnish. And the plaintiffs aver that the sole cause of the said loss and damage was the wrongful neglect of duty of said defendant, to the damage of said plaintiffs (as they say) the sum of \$6,000."

It has been seen that the declaration, as amended in the new count relied upon, alleged that "the defendant had engaged and was bound and obliged to furnish through its mains, conduits, pipes, and hydrants, the same being laid and placed in the streets of said plaintiff town, water of sufficient pressure and volume to extinguish fires within the range of said hydrants, and especially and particularly fires originating in or communicated to plaintiffs' said building and property." Upon the strength of these allegations, admitted by the demurrer to be true, the sufficiency of the declaration was determined, and the demurrer overruled. The opinion of the court is reported in *Milford v. Bangor R. & Electric Co.* 104 Me. 233, 71 Atl. 759. To the doctrine of that opinion founded upon the definite and specific allegations of the plaintiffs' amended declaration, the court still adheres.

The cause came on for trial before the jury at the January term, 1909, upon the defendant's plea of the general issue, and it

was then discovered that the written contract between the parties, introduced in support of the declaration, did not contain the peculiar stipulations above quoted upon which the opinion of the court was based in overruling the demurrer. But the cause was submitted to the jury under instructions, to which no exceptions were taken, and a verdict was returned in favor of the plaintiffs for \$4,101. The case now comes to this court upon the defendant's motion to set aside the verdict as against the law and the evidence.

By the terms of the contract introduced in evidence and actually made by the parties, the defendant agrees that it will provide said town with sixteen post hydrants and water for the same; that these hydrants shall be so placed that they will afford proper protection against fire; that each hydrant shall have two nozzles and be supplied by pipes at least 4 inches in diameter; that the "waterworks to be established under the contract shall be supplied by a pump or pumps of a capacity of not less than 1,000,000 gallons per day; that they may be operated by direct pressure or by reservoirs or by standard system; that the main pipe as far as the first branches shall be not less than 6 inches in diameter . . . and shall be equal in all respects and afford as effective service as that furnished to the city of Old Town."

There is no specific averment, either in the original declaration or the amended count, that these special stipulations in the contract were not performed, and the uncontradicted evidence at the trial shows that all of them, with the possible exception of that last named, were unquestionably fully performed by the defendant. With respect to the last stipulation, that the main pipe shall afford as effective service as that furnished to the city of Old Town, it appears that the plaintiffs were advised to have the main pipe 8 inches in diameter, but they were unwilling to incur the additional expense, and, in consideration that the annual rental should be reduced to \$800, agreed that the main pipe should be 6 inches in diameter. The presiding justice therefore properly instructed the jury upon this branch of the case as follows:

"The defendant company was only bound to use reasonable care, reasonable diligence to furnish a fire service as near the efficiency of the Old Town service as the 6-inch plant named in the contract would enable them to do; that they were not bound to furnish the same efficiency as the Old Town plant furnished, but only such efficiency as could be reasonably obtained with the plant put in at Milford."

The defendant, accordingly, insists that

the contract actually made between the parties was in effect only such as is ordinarily made by a water company to establish a plant and supply water, without any stipulation to do any specific thing or to afford protection to any particular property.

In support of the motion, the defendant earnestly contends that, in making this contract with the water company for the protection of property against fire, the town acted for the general public good; that, in the absence of an express covenant to do a particular thing, the contract does not protect any particular property, but is for the benefit of all and that the town as a property owner derives the same benefit that every other property owner does, and no other or different advantage or protection; that, since there is no express covenant in the contract, the security afforded to the plaintiff's property was only the same security which, in the exercise of its governmental functions, the plaintiff had obtained for the whole town; that the defendant simply agreed to furnish a water system and supply it with water, and did not agree to extinguish fires or to insure property against loss by fire; and that, consequently, in the absence of any special agreement to furnish a certain pressure, or a certain amount of water, or specifically to protect the plaintiffs' property, no action can be maintained to recover for the loss of property by fire. It is confidently claimed that, since the reasoning adopted and the authorities adduced in support of the conclusion reached in the former opinion on the demurrer had reference solely to the averment of the specific stipulations which it was discovered at the trial were not contained in the contract, that opinion is not authority upon the questions raised under the pending motion now before the court.

In *Home v. Presque Isle Water Co.* 104 Me. 217, 21 L.R.A.(N.S.) 1021, 71 Atl. 769, it was held that where a public service water company makes such a contract with a municipality to furnish a supply of water for general fire purposes, without a specification of any particular thing to be done to that end, and without any stipulation respecting liability for losses by fire, or where the duty of such a water company to furnish water arises solely from an accepted service for general fire purposes, individual owners of property destroyed by fire cannot maintain an action on the case against a water company for a loss resulting from the negligent failure of the company to furnish a sufficient supply of water. In that case the court said in the opinion: "But the proposition advanced by the plaintiffs would require water companies to assume, to some extent, the responsibility of insurers,

and it does not satisfactorily appear that such a doctrine would be more in harmony with considerations of public policy, or more consonant with reason and justice, than the established rule. Ample opportunities are already afforded for all property owners to obtain insurance against losses by fire, and the assumption of such risks by water companies, even in a modified degree, would result in double insurance and largely increased water rates. Furthermore, capital would not readily seek investments in enterprises involving a public service exposed to incalculable hazards and constant litigation. In the practical administration of the law the established rule has not been found the cause of extraordinary hardships or the occasion for exceptional complaints."

It is contended in behalf of the defendant that these general observations are equally pertinent in the case at bar. As before intimated, the question now raised upon the defendant's motion has never before been presented to this court, and no case has been cited by the learned counsel which can be deemed a direct authority for the plaintiffs' contention. The only case to which the attention of the court has been called, tending directly to support the defendant's contention, is that of *Ukiah City v. Ukiah Water & Improv. Co.* 142 Cal. 173, 64 L.R.A. 231, 100 Am. St. Rep. 107, 75 Pac. 773. In that case it was held that "where a municipal corporation enters into a contract with a company to supply water for the extinguishment of fires through hydrants, connected with its mains, such contract being entered into for general purposes and for the benefit of all its inhabitants, no protection to any specified property being contemplated, the relation of the water company is not different as to the property of the municipality from the relation of any of its citizens to such company, and it cannot recover for the loss of its property from the failure of the water company to furnish an adequate supply of water as provided for in such contract."

In the opinion the court, adopting the language of the trial judge, said: "It is true that no written contract covering the time of the fire is shown; but no particular form is prescribed by the statute for such contracts, and the evidence forces the conclusion that, at the time of the fire, the same relations existed between the town and the defendant as to the furnishing of water for general fire purposes, as ordinarily exist between the private consumer and the water company, as to water for domestic purposes. . . .

"No formal written contract seems to be required by our statute to establish this relationship between the municipality and the company. . . .
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"The evidence clearly shows that whatever the relationship between plaintiff and defendant was, so far as the furnishing of water for fire purposes is concerned, it was entered into by the town in the execution of the power conferred upon it to provide protection against fire for the benefit of all the inhabitants, and there is nothing to indicate that the protection of any specific property was contemplated.

"In providing for a water supply for general fire purposes, a municipality exercises the same character of functions that it does when it provides fire engines and other apparatus for the extinguishment of fires, or when it employs policemen or watchmen for the protection of its inhabitants against crime.

"Where, in the exercise of this power, it establishes or acquires its own system of waterworks, and undertakes to itself provide an adequate supply, it is settled beyond controversy that the city is not liable to its citizens whose property is destroyed by fire for failure to provide an adequate supply; the power vested in the city being in its nature legislative and governmental, requiring the exercise of judgment and discretion. . . .

"Where, instead of acquiring its own system and attempting to itself provide the water for such purpose, it contracts with water company to furnish such service, thus making such company practically the agent or employee of the city, the many decisions of the appellate courts of other states are practically unanimous in holding, upon apparently the soundest reasoning, that the water company is not liable at the suit of a third person whose property was destroyed by fire, by reason of its failure to supply sufficient water to the town for such purpose. . . .

"Doubtless a water company may so bind itself by contract with a person to furnish him water for the extinguishment of fires, as to render itself liable for the value of property of such person destroyed by fire, by reason of its failure to furnish him a sufficient supply of water. . . .

"It may be assumed here that it is within the power of a municipality, as a property owner, to enter into such a contract with a water company for the protection of the property which it owns as a legal individual; but it certainly needs something more than evidence showing an accepted service for general fire purposes to establish such a contract, and the evidence here shows nothing more. . . .

"In providing protection against fire to its inhabitants, the municipality exercises a power conferred solely for the general public good, and from the exercise of which

the municipality, as a property owner, derives the same incidental benefit that every other property owner does,—no more, no less.

"Yet in each there is a contractual relation.

"The bar to such a recovery in each case is that the contract was not for the protection of any particular property or person, but was for general benefit of all the property and persons within the municipal limits, and was entered into by the town as a public agency, solely for that purpose, and in the exercise of its power to furnish such general protection.

"I cannot escape the conclusion that the relations between plaintiff and defendant, as shown by the evidence, are susceptible of no other construction; that the defendant assumed no obligation regarding plaintiff's property different from that assumed by it regarding all of the other property within the town; and that the plaintiff, as a property owner, is without right of action."

The opinion proceeds to show that *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L.R.A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249, and *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L.R.A. 513, 70 Am. St. Rep. 598, 32 S. E. 720, in which the opposite conclusion was reached, are to be distinguished from the California case against the Ukiah Water Company by reason of the fact that in the case of the *Paducah Lumber Company* and in the *Gorrell Case* there was an express contract to do certain specific things, which appear to have been equivalent to the stipulations alleged in the plaintiffs' declaration in the case at bar. The court then further say: "In each of these cases it will be observed that the court was dealing with contracts whereby the water companies, for valuable concessions and exclusive privileges, had agreed to do and to maintain certain specific things by way of protection from fire, and the gravamen of the charge against each and all of the companies was that they had violated their contract in failing to do the particular things for the doing of which they had expressly contracted. The broad distinction between those cases and the one at bar is, as pointed out in the opinion of the trial judge, that there is no express covenant in the contract between this plaintiff and this defendant, and the security to plaintiff's property was only the same security which in the exercise of its governmental functions, the plaintiff had obtained for the whole town."

In the leading case of *Hadley v. Baxendale*, 9 Exch. 353, 5 Eng. Rul. Cas. 502, so often cited as authority in this country, 30 L.R.A. (N.S.)

the familiar rule was enunciated, that the damages which a party ought to recover as a result of a breach of contract "should be either such as may fairly and substantially be considered as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. See also *Farnham, Waters*, 848. It certainly cannot be reasonably claimed that, for the moderate consideration received by a water company under such a contract as the one actually made in the case at bar, it was within the contemplation of both parties that the water company had undertaken to make good the loss which would result from the destruction of the plaintiffs' property by fire.

It is the opinion of the court that the legal effect of the contract in this case cannot be distinguished in any essential particular from that considered in *Ukiah City v. Ukiah Water & Improv. Co.* *supra*, and that the verdict of the jury in this case, being against the law, cannot be sustained.

Motion sustained.

Verdict set aside.

MAINE SUPREME JUDICIAL COURT.

INHABITANTS OF MILFORD

v.

BANGOR RAILWAY & ELECTRIC COMPANY.

(104 Me. 233, 71 Atl. 759.)

Water company — negligence — liability.

1. To avoid liability in tort for loss of municipal property through fire because of its neglect to comply with its contract, a water company which has undertaken to furnish a pressure sufficient to extinguish fires must show that it used ordinary care to comply with the contract according to the exigencies of the situation, having due regard to the nature and importance of the contract, the rights and interests of those to be affected by it, and the manifest consequences of a failure to perform it.

Same — damages.

2. A water company which has contracted with a municipal corporation to furnish sufficient pressure through its hydrants to extinguish fire within reach of them cannot, in case it negligently fails to maintain

Note.—See note, ante, 526, appended to report of this case on appeal after a trial following the overruling of the demurrer to the declaration.

the necessary pressure, escape liability for the value of municipal property destroyed through such negligence, on the theory that it did not agree to extinguish fire, or to insure property against loss by fire, or that such damages were not in contemplation when the contract was made.

Same — remedy.

3. A municipal corporation which has contracted with a water company for a supply of water for the extinguishment of fire may sue in tort to recover damages for negligent breach of the contract, which results in the destruction of property of the municipality.

(June 11, 1908.)

REPORT by the Supreme Judicial Court for Penobscot County for the opinion of the full bench after demurrer to the declaration of an action brought to recover damages for the loss of certain property by fire alleged to have been the result of defendant's negligent failure to maintain a certain water pressure. Demurrer overruled.

The facts are stated in the opinion.

Mr. Taber D. Bailey for plaintiff:

The town can sue for breach of the contract.

Bienville Water Suply Co. v. Mobile, 112 Ala. 260, 33 L.R.A. 59, 57 Am. St. Rep. 28, 20 So. 742.

Mr. Louis C. Stearns also for plaintiff.

Mr. E. C. Ryder for defendant.

Whitehouse, J., delivered the opinion of the court:

This is an action on the case, brought by the inhabitants of the town of Milford against the defendant corporation, to recover the value of the town hall and certain sidewalks and hose, which were the property of the municipality, and were destroyed by fire in April, 1905. It is alleged that this loss was caused by the negligence of the defendant in failing to perform its contract to supply through its pipes water of sufficient current, pressure, and volume to extinguish fires within the range of its hydrants.

A general demurrer to the declaration was filed by the defendant, and it was stipulated by the parties that the cause should be heard by the law court on the amended declaration, demurrer, and joinder; that if the demurrer was overruled, the defendant should have the right to plead anew, and, if sustained, the plaintiff should be nonsuited.

The two counts especially relied upon by the plaintiffs are the second count in the original declaration and the "amended count." The second count is as follows:

"Also, for that there was on the 23d day

of July, A. D. 1891, a corporation called the Penobscot Water & Power Company, organized under the laws of Maine, among other things, for the purpose of supplying towns and communities with water for domestic use and the extinguishment of fires, and said corporation then and there entered into a contract with the plaintiffs, whereby, for the sum of \$800 per year, it agreed, among other things, to supply the plaintiff with sixteen post hydrants, and water for the same, before the 1st day of August, 1892. It was also agreed that said hydrants would have two nozzles, and should be supplied with pipes at least 4 inches in diameter, and that said hydrants should be so placed that proper protection against fire should be secured. It was also agreed that the waterworks to be established under the contract should be supplied by a pump or pumps of a capacity of not less than 1,000,000 gallons per day, and the plaintiffs say that said hydrants were erected according to contract, and that they ever paid the sum of \$800 per annum to the said Penobscot Water & Power Company; and the plaintiffs say that said Penobscot Water & Power Company assigned said contract, by its deed in writing, with all its property and franchises, to a corporation called Public Works Company, organized under the laws of Maine, and having its principal place of business in Bangor in said county, whereupon the Public Works Company maintained said hydrants and supplied them with water, and the plaintiffs paid them by and after the same rate of \$800 per year for the use of the same, until the 7th day of April, 1905. On said 7th day of April, the Public Works Company, by its deed in writing duly executed, assigned and delivered to a corporation called Bangor Railway & Electric Company, the defendant, all its property and franchises, including said contract, whereupon the said Bangor Railway & Electric Company undertook to maintain said mains and hydrants, and assume control thereof, and to supply the same with water, and the plaintiffs say that they paid the said company up to and beyond the 28th day of April, 1905, for the use of said hydrants by and after the rate of \$800 per year, in accordance with the terms of their contract with the Penobscot Water & Power Company; and now the plaintiffs say that, by reason of the premises and the matters hereinbefore stated, the defendant was bound and obliged and owed the duty to maintain said hydrants with a supply of water therein for extinguishment of fires in the town of Milford, and particularly for the extinguishment of fires communicated to the property of the inhabitants of said town

as a corporation; and the plaintiffs further say that on said 28th day of April they were the owners of a certain public building called a town hall, of the value of \$5,000, and of a certain large number of planks constituting a sidewalk of the value of \$250, and a hose pipe of the value of \$250. Now, on said 28th day of April, the defendant did not fulfill its duty and obligation to furnish water in said hydrants; but, on the contrary, wrongfully and negligently failed to supply said hydrants with water capable of use for the extinguishment of fires, and left the same empty and useless, and on said 28th day of April said building of the plaintiffs took fire, and, although the defendant's hydrants were in easy reach of said building, they supplied no water, and albeit the plaintiffs used their utmost endeavor to extinguish said fire, they failed because of the lack of water, and pressure of water, in said hydrants, and the building and the sidewalk and the hose aforesaid were utterly consumed,—all which results were entirely due to the wrongful conduct of the defendant in not supplying water in said hydrants according to its obligation and duty."

The amended count is as follows:

"In a plea of the case, for that, on the 28th day of April, A. D. 1905, the said inhabitants of Milford were the owners of a certain public building called a town hall, of the value of \$5,000, and certain planks and timbers constituting a sidewalk of the value of \$250, and certain fire hose of the value of \$250; and the plaintiffs aver that on said 28th day of April, 1905, the defendant had engaged, and was bound and obliged, to furnish through its mains, conduits, pipes, and hydrants, the same being laid and placed in the streets of said plaintiffs' town, water of sufficient current, pressure, and volume to extinguish fire within range of said hydrants, and especially and particularly fires originating in, or communicated to, plaintiffs' said building and property, in consideration of the sum of \$800 per annum paid to it by said plaintiffs. Now the plaintiffs say that on said 28th day of April a fire started in a board pile at a considerable distance, to wit, a quarter of a mile, from plaintiffs' said building and property, which said fire might easily have been extinguished and put out, had there been any pressure and volume of water in said mains and hydrants; but the defendant, unmindful of the duty and obligations in this behalf, wrongfully, carelessly, and negligently suffered and allowed said mains, pipes, and hydrants to be destitute of any current of water of sufficient pressure, force, and volume to be of any value or utility in extinguishing said fire, or any fire, so
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that the plaintiffs were unable, by the use of the greatest diligence and the strongest efforts, to quench the fire in said pile of boards, although they were in the use of due care in this behalf; and the plaintiffs aver that said fire in said board pile was communicated to the said buildings and property of plaintiffs by sparks, firebrands, or cinders, so that the same were utterly burned and consumed, although hydrants were at hand and in close proximity to said buildings and property, and competent and capable men were at hand with suitable hose and appliances, ready to extinguish the fires started by said cinders and firebrands upon plaintiffs' said building and property, and were prevented from doing so solely by the lack and want of water in said hydrants, which it was the duty and obligation of said defendant to furnish; and the plaintiffs aver that the sole cause of the said loss and damage was the wrongful neglect of duty of said defendant, to the damage of said plaintiffs (as they say) the sum of \$6,000."

In support of the demurrer, the following statement of the defendant's claims was presented as the basis of the argument in its behalf, *viz.*:

"(1) The company does not agree to extinguish fires, or to insure property against loss by fire. Its agreement is simply to furnish a water system and supply it with water. It is impossible to say that failure to furnish water was the proximate cause of the loss, and consequently no action can be maintained to recover for the loss of property by fire. The cause of the loss is too remote, and the damages too uncertain, to allow of a recovery.

"(2) Damages must be such as were in contemplation at the time the contract was made. It cannot be claimed that it was the intention of the company to make good loss by fire for the small compensation which it received for installing its plant.

"(3) In making a contract with the water company for the protection of property against fire, the town acts for the general public good. The town as a property owner derives the same benefit that every other property owner does. The contract does not protect any particular property, but is for the benefit of all.

"(4) If an action can be maintained, it must be an action of assumpsit. There is no statute or common-law duty imposed upon the defendant to furnish water to the municipality. The duty imposed grows out of the contract itself. Recovery, if any there be, must be by virtue of the contract, and not on account of any legal duty independent of the contract."

The important question thus raised by

the pleadings and contentions of the parties has never before been presented to this court, nor, so far as appears, has the precise question ever been directly involved and expressly determined in any jurisdiction, state or Federal, in this country; the only analogous case cited by counsel being distinguishable from this in essential particulars. There is no prevailing American doctrine upon the question, and no precedent in this state, that can in any way embarrass this court in its efforts to reach a solution of the problem that shall appear to be warranted by the well-established and fundamental law of contracts, consonant with the principles of justice and sound reason, and in harmony with the considerations of public policy involved in the inquiry.

The plaintiffs are a municipal corporation, and, by § 76, chap. 4, of the Revised Statutes, such corporations are empowered to "contract for a supply of water, gas, and electric light for municipal uses, . . . upon such terms as may be mutually agreed, . . . and may raise money therefor." The plaintiff town of Milford was also specially authorized by chapter 331, p. 484, of the Private and Special Laws of 1891, "to contract with the Penobscot Water & Power Company for a supply of water for municipal and sanitary purposes and for the extinguishment of fires," and it appears from the averments in the plaintiffs' declaration that the defendant corporation acquired all the powers, privileges, and franchises, and assumed all of the obligations, of the Penobscot Water & Power Company.

It is provided by chapter 46, p. 53, of the Private and Special Laws of 1905, that the defendant corporation "shall have, possess, and enjoy all of the powers of a corporation formed under the provisions of chapter 47 of the Revised Statutes" of Maine, and it thus appears to have been invested with full power to make contracts and to sue and be sued.

It is not in controversy, therefore, that both of the parties to this suit were competent to enter into the contract set out in the plaintiffs' declaration. According to the allegations therein contained, the defendant entered into a contract with the plaintiffs, whereby, for the sum of \$800 per year, it agreed to supply the plaintiffs with sixteen post hydrants, and water for the same, before the 1st day of August, 1892. It also agreed that said hydrants should have two nozzles, and should be supplied with pipes at least 4 inches in diameter, and that said hydrants should be so placed that proper protection against fire should be secured. It was also agreed

that the waterworks should be supplied by a pump or pumps of a capacity of not less than 1,000,000 gallons per day. The defendant also engaged, and became bound and obliged, to furnish through its pipes and hydrants, water of sufficient current, pressure, and volume to extinguish fire within range of such hydrants, and especially and particularly fires originating in, or communicated to, the plaintiffs' said building and property. The hydrants were duly erected, and the plaintiffs paid to the defendant corporation the sum of \$800 per annum, in accordance with the terms of the contract, up to and beyond the time of the fire in which the plaintiffs' property was destroyed.

Here, then, is a formal written contract, entered into by parties competent to make it. It is not in controversy that it was complete, definite, and certain; that it was free from misapprehension, fraud, or mistake, and entirely fair and reasonable in all its parts. It was not characterized by any lack of mutuality, either in the terms of the contract when made, or in the remedies available to both parties. The plaintiffs had fully performed the contract on their part, and it contains no clause or phrase that would afford the defendant any reasonable ground for claiming exemption, either from the legal obligation or the moral duty of performing on its part a contract so manifestly indispensable to the protection of the plaintiffs' property, and so vitally important to the welfare of the people. With respect to the issue presented in this action for negligence, the defendant was required to use ordinary care to maintain the pipes and hydrants, and furnish water of the current, pressure, and volume as stipulated in its written contract. It was only required to exercise such prudence, vigilance, and precaution as would meet the requirement of ordinary care, according to the exigencies of the situation, having due regard to the nature and importance of the contract, the rights and interests of those to be affected by it, and the manifest consequences of a failure to perform it. There is nothing in the contract to indicate, and nothing in the situation of the parties to suggest, that the performance of its duty would have been attended with any oppression or hardship on the defendant.

But the demurrer admits the truth of the plaintiffs' allegations that the defendant "wrongfully, carelessly, and negligently suffered and allowed the mains, pipes, and hydrants to be destitute of any current of water of sufficient pressure, force, and volume to be of any value or utility in extinguishing said fire, or any fire." And the

plaintiffs aver that the "sole cause of the said loss and damage was the wrongful neglect of duty of said defendant."

But it is suggested, in behalf of the defendant, that the corporation does not agree to extinguish fires, or to insure property against loss by fire; that its agreement is simply to furnish a water system; that it is impossible to say that failure to furnish water was the proximate cause of the loss; and that damages can only be such as were in contemplation at the time the contract was made.

That the defendant did not agree to extinguish fires or to insure property against fire is unquestioned. The statement is true, but the argument is fallacious. The conclusion which is evidently sought to be deduced, that the defendant is not liable for the damages resulting solely from a breach of its contract to furnish water to extinguish fires, does not necessarily follow. A corresponding statement directing attention to the particular thing which the defendant agreed to do, or not do, could with equal propriety be made respecting every cause of indirect damages. This method of reasoning obviously excludes from consideration the distinctive character of consequential damages for the breach of a contract, and hence affords no aid in determining the question of liability. In the leading English case of *Hadley v. Baxendale*, 9 Exch. 353, 5 Eng. Rul. Cas. 502, so often cited as authority in this country, the plaintiffs gave the broken shaft of their mill to the defendant carrier to be forwarded immediately to an engineer, to serve as a model for a new one. The delivery was delayed, and the mill remained idle for want of the new shaft. The plaintiffs claimed damages for loss of profits while the mill was idle. The carrier only undertook to deliver the broken shaft immediately. He did not contract to provide a new shaft, or to furnish business for the mill. But the familiar rule was then enunciated that when "two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." So, in what has been termed "the leading American case" of *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, it was held that the plaintiff was entitled to damages for the loss of the ordinary rental of his mill, re-

sulting from the breach of the defendants' contract to deliver a steam engine built for the purpose of running the mill. But the defendant did not contract to run the mill, or to supply business for it. He only agreed to deliver a steam engine to furnish power for it. The statement of the rule of damages is substantially identical with that in the English case of *Hadley v. Baxendale*, supra.

Equally pertinent illustrations are readily found in our own state. In *Grindle v. Eastern Exp. Co.* 67 Me. 317, 24 Am. Rep. 31, the plaintiff's intestate delivered \$24.90 to the defendant express company, at Castine, to be sent to Belfast to pay a premium on his life policy, which by its terms would lapse in eight days if the premium was not paid. It was held that, for failure to deliver the money according to its undertaking, the defendant was liable for the net value of the policy on the day it lapsed, on the ground that both parties must be presumed to have contemplated such damages from a knowledge of the circumstances. But the defendant's only undertaking was to carry a package of money. See also *Frye v. Maine C. R. Co.* 67 Me. 414, and *McPheters v. Moose River Log Driving Co.* 78 Me. 329, 5 Atl. 270.

Further apposite illustrations are found in numerous cases involving facts more closely analogous to those at bar. In *Watson v. Needham*, 161 Mass. 404, 24 L.R.A. 287, 37 N. E. 204, the defendant town, acting through its water commissioners, undertook to furnish the plaintiff with water for use in a boiler to generate steam to heat his greenhouse, but omitted to use proper diligence to discover a leak in the main pipe, and the plaintiff failed to receive a sufficient supply of water, whereby his plants were damaged by freezing to the extent of \$400. Here, the defendant had not contracted to heat the plaintiff's greenhouse, or to insure his plants against freezing. It had only contracted to furnish water to make steam. But the court held that, subject to the right to shut off the water when necessary to make extensions and repairs, which had been expressly reserved, "the town was bound to use reasonable care and diligence to have ready for delivery a sufficient supply of water for the plaintiff's use, so long as the contract remained in force." The plaintiff was accordingly allowed to recover the full amount of his damage by freezing.

In *Stock v. Boston*, 149 Mass. 410, 14 Am. St. Rep. 430, 21 N. E. 871, a similar contract existed between the parties, and the plaintiff sustained damage by the freezing of his plants, caused by the neglect of the defendant to furnish water according

to the contract. It was contended in behalf of the defendant that the damage was too remote, but the court said that the defendant was "liable not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. . . . The true inquiry is whether the injury sustained was such as, according to common experience and the usual course of events, might reasonably be anticipated." See also *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689; *Hand v. Brookline*, 126 Mass. 324.

The same doctrine is exemplified in the circuit court of appeals in *New Orleans & N. E. R. Co. v. Meridian Waterworks Co.* 18 C. C. A. 519, 30 U. S. App. 749, 72 Fed. 227. This case is precisely analogous to the case at bar, being distinguishable only by the fact that the plaintiff in this case is a railroad company instead of a municipal corporation. In the Federal case, the water company, in consideration of \$1,200 per year, contracted to furnish the tanks and shops of the railroad company with a full and sufficient supply of water, "not less than 60 pounds pressure, for all purposes for which water may be needed or used at said shops," and, as a part of this agreement, the defendant water company laid its pipes to the plaintiff's premises, and attached hydrants thereto, to enable the plaintiff to run the water as a protection against fire, knowing that the railroad company had no other available source of water supply, and no other means of extinguishing fires on its premises; but it was alleged in the declaration that the plaintiff's shops and tanks were destroyed by fire in consequence of the defendant's failure to furnish water at 60 pounds pressure. It was held upon these facts the plaintiff was entitled to recover. In the opinion the court say: "The breach of contract 'occurred when the defendant failed to furnish the plaintiff's servants with an adequate supply of water at not less than 60 pounds pressure. . . . [The] plaintiff's declaration alleges that the proximate cause of its damages was not the fire, but was in the fact of defendant's failure to furnish water at 60 pounds pressure. If such be the case plaintiff's damages were not remote or too consequential to be sustained by the law applicable to the facts,'"—quoting *in extenso* the rule in *Hadley v. Baxendale*, 9 Exch. 341, 5 Eng. Rul. Cas. 502.

In *Middlesex Water Co. v. Knappmann Whiting Co.* 64 N. J. L. 240, 49 L.R.A. 572, 81 Am. St. Rep. 467, 45 Atl. 692, the supreme court of New Jersey, on a claim for

recoupment set up in an action of contract, rigidly enforced the obligations of the plaintiff's contract. In that case the water company, in consideration of \$600 per year, agreed to furnish the defendant company with water "suitable for use in steam boilers, and with a pressure sufficient for fire purposes," but, by reason of a leak in the water main, and the consequent failure of the company to furnish water according to the contract, the defendant's factory was destroyed by fire, causing damage to the extent of \$20,000. In an action of contract by the water company, to recover the amount due for water supplied, the plaintiff in error presented its claim for recoupment, based on the failure of the water company to perform its agreement to supply water of sufficient pressure for fire purposes, and it was held that, under such a clear and unqualified contract, the water company was liable for the damages sustained by the consumer from fire, in consequence of a failure in the water pressure, though the failure was due to a break in its pipes without the water company's fault. In the opinion the court say, *inter alia*: "The principle underlying all these cases is that where the contract is express, as it is in this case, to furnish water with a pressure sufficient for fire purposes, to do a thing not unlawful, the contractor must perform it; and if, by some unforeseen accident, the performance is prevented, he must pay damages for not doing it. No distinction is made between accidents that could be foreseen when the contract was entered into, and those that could not have been foreseen. Where, from the result of such an accident, one of two innocent persons must sustain a loss, the law . . . casts it upon him who has agreed to sustain it, or rather leaves it where the agreement of the parties has put it, and will not insert, for the benefit of one of the parties, by construction, an exception which the parties have, either by design or neglect, omitted to insert in their agreement."

It will be perceived that in this action of contract the exercise of reasonable care and diligence by the water company was not made the criterion of its liability.

In *Skowhegan Water Co. v. Skowhegan Village Corp.* 102 Me. 323, 66 Atl. 714, the competency of the parties to make a contract for a constant and ample supply of water "under sufficient pressure for the extinguishment of fires," and the obligation of the defendant to perform its contract, were distinctly recognized. The water company brought suit to recover the rental stipulated in the contract, but the defendant contended that the plaintiff had failed to furnish water of sufficient pressure for

the extinguishment of fires, and was therefore not entitled to recover the rental specified. The court sustained a verdict in favor of the defendant, saying in the opinion: The plaintiff was entitled to recover the fair value of the service, having regard to the contract price, and considering how much less the service was worth to the corporation by reason of the plaintiff's breach of the contract. "The question of recoupment, properly so termed, is not involved. But if the plaintiff's breach of the contract be such as to subject the defendant to consequential damage, that may be the foundation for a legitimate claim in recoupment, with respect to which the burden of proof would be upon the defendant."

The case of *Ukiah City v. Ukiah Water & Improv. Co.* 142 Cal. 173, 64 L.R.A. 231, 100 Am. St. Rep. 107, 75 Pac. 773, is cited by counsel for the defendant as a "case on all fours" with the principal case, and as a direct authority against the plaintiffs' contention. But, as already suggested, that case differs materially from this, and is legally distinguishable from it. In that case there was no express contract, written or oral, between the defendant water company and the plaintiff town, respecting the quantity of water to be furnished, or the manner and means of furnishing it. As stated by the court in the opinion: "The same relations existed between the town and the defendant, as to the furnishing of water for general purposes, as ordinarily exist between the private consumer and the water company as to water for domestic purposes." The water company had not agreed to supply the town with any definite number of hydrants, or specified the number of nozzles for the hydrants, the diameter of the pipes with which they should be supplied, or the manner in which the hydrants should be placed to afford protection against fire. It had not agreed that its works should be supplied by pumps of any stated capacity, or become bound to furnish through its pipes and hydrants water of "sufficient current, pressure, and volume to extinguish fire within the range of such hydrants," or made any special reference to "fires originating in, or communicated to," property of the municipality. It was principally for want of a contract on the part of the defendant water company to do any specific thing that judgment was given for the defendant. After enumerating the many cases in different jurisdictions in which it has been held that a water company is not liable to individual owners of property destroyed by fire, by reason of its failure to perform its contract to supply the town with sufficient water to extinguish fires, 30 L.R.A. (N.S.)

the opinion proceeds to show that *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L.R.A. 77, 25 Am. St. Rep. 536, 12 S. W. 554, 13 S. W. 249, and *Gorrell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L.R.A. 513, 70 Am. St. Rep. 598, 32 S. E. 720, in which the opposite conclusion was reached, are to be distinguished from the California case against the *Ukiah Water Company*, by reason of the fact that in the case of the *Paducah Lumber Company* and in the *Gorrell Case*, there was an express contract to do certain specific things, which appears to have been equivalent to the stipulations in the plaintiffs' contract in the case at bar. The court further say: "In each of these cases it will be observed that the court was dealing with contracts whereby the water companies, for valuable concessions and exclusive privileges, had agreed to do and to maintain certain specific things by way of protection from fire, and the gravamen of the charge against each and all of the companies was that they had violated their contract in failing to do the particular things for the doing of which they had expressly contracted. The broad distinction between those cases and the one at bar is, as pointed out in the opinion of the trial judge, that there is no express covenant in the contract between this plaintiff and this defendant, and the security to plaintiff's property was only the same security which, in the exercise of its governmental functions, the plaintiff had obtained for the whole town."

"Doubtless a water company may so bind itself by contract with a person to furnish him water for the extinguishment of fires as to render itself liable for the value of property of such person destroyed by fire, by reason of its failure to furnish him a sufficient supply of water. . . . It may be assumed here that it is within the power of a municipality, as a property owner, to enter into such a contract with a water company, for the protection of the property which it owns, as a legal individual; but it certainly needs something more than evidence showing an accepted service for general fire purposes to establish such a contract, and the evidence here shows nothing more."

It has been seen that in the written contract as set out in the plaintiffs' declaration in the case at bar, the defendant water company, in consideration of \$300 per annum, did expressly agree to furnish water for sixteen post hydrants which should have two nozzles each, and be supplied with pipes 4 inches in diameter, and that its works should be supplied with pumps of a capacity of 1,000,000 gallons a day. It

also expressly "engaged" to furnish, through its pipes and hydrants, water of sufficient pressure and volume to extinguish fire within range of its hydrants, "and especially and particularly fires originating in, or communicated to, the plaintiffs' said building and property." But instead of the pressure and volume specified, the plaintiffs allege that, by reason of the defendant's negligence, these pipes and hydrants had become destitute of any current of water of sufficient pressure and volume to be of any utility in extinguishing fires, and that this negligence on the part of the defendant was the sole cause of the plaintiffs' loss and damage.

The defendant corporation proceeded to construct and operate its plant, and entered upon its public service and the performance of its contract. It well knew that the plaintiff town, relying upon its express contract with the defendant, would omit to make any other arrangements for the supply of water, or provide any other means for the extinguishment of fires. The defendant's servants did not need to be informed that the elaborate provisions of the contract respecting the supply of water through its hydrants were for the purpose of affording protection against the destruction of property by fire. They well knew the disastrous results likely to flow from any neglect on their part to perform the contract to furnish water of sufficient volume and pressure to extinguish fires. Under such circumstances damages from loss of property by fire are not only the natural consequences of the defendant's wrongful neglect, but "such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it." The injuries sustained are manifestly such as, according to common experience and the usual course of events, might reasonably be anticipated. Indeed, it is impossible to conceive of any class of contracts, or of contracts relating to any subject-matter, with respect to which the consequences of a breach are more palpably natural or more readily anticipated.

Under the stipulation in the report, the defendant is entitled to plead anew in the event that the demurrer is overruled. All of the other objections interposed by the defendant to the maintenance of the action involve a question of fact to be heard upon the trial of the cause. Whether the defendant's breach of duty in connection with the performance of its contract was culpable negligence, and, if so, whether such breach of duty on its part, or "the negligence of the plaintiffs themselves, or the criminal act of a stranger, or an atmospheric con-

dition," was the proximate cause of the plaintiffs' loss, are questions not raised by the demurrer, but are determinable by the trial court. The solution of them may often be attended with difficulty, but there is no reasonable ground for apprehending that such difficulty will be essentially different from that experienced in numerous other cases of a similar character.

When, therefore, the established principles of law are applied to this case as to all others, and the contract between these parties is held to possess the binding force and efficacy of all other analogous contracts, the conclusion is irresistible that, upon proof of the facts stated in the declaration, the defendant would be liable to the plaintiffs, in an appropriate action, for the damages caused by its negligence, in failing to perform a duty arising from its contractual relations with the plaintiffs.

2. But the defendant further contends that the plaintiffs have misconceived their remedy, and that, if any action can be maintained, it must be an action of assumpsit, and not of tort.

It is the opinion of the court that this contention is not sustainable, either upon reason or authority. As observed by the court in *Ashley v. Root*, 4 Allen, 504: "This is one of the numerous classes of cases where a party may elect to sue either in contract or tort. At common law he might sue in assumpsit for breach of contract, or in case for breach of duty." In that action a principal was allowed to recover in an action of tort against his agent for all the damage caused by a breach of duty by the agent, including his neglect to pay over on demand money which he had collected as agent. Either case or assumpsit may also be supported for a false warranty in the sale of goods. *Mahurin v. Harding*, 28 N. H. 128, 59 Am. Dec. 401. In the opinion the court say: "The warranty is none the less a contract because it is the means by which a fraud is accomplished, and the fraud is in no way diminished because the seller has at the same time bound himself by a warranty."

In 28 Am. & Eng. Enc. Law, 2d ed. p. 625, it is said: "Case will also lie for violation of the duty which the contractual relations between the parties involve, in many cases where assumpsit is a concurrent remedy. . . . Although assumpsit will also usually lie for breach of the contract, action on the case for the breach of the common-law duty is often the better remedy. . . . It will also lie concurrently with assumpsit for a breach of duty arising out of an express or implied contract." *Burnett v. Lynch*, 5 Barn. & C. 589, is cited in support of the last statement. In that case

the defendant had taken an assignment of a lease subject, not only to the payment of rent, but to the performance of the covenants, and had thereby made it his duty to pay the rent and perform the covenants. It was held by Abbott, Ch. J., that either assumpsit or case was maintainable for a breach of that duty, citing *Kinlyside v. Thornton*, 2 W. Bl. 1111. In the opinion of Bayley, J., it is said: "It is unnecessary to go through the cases in which it has been decided that, although there be an express contract, a party is not bound to resort to that contract as the gist of the action, but he may declare on the tort, and say that the party has neglected to perform his duty. In *Dickson v. Clifton*, 2 Wils. 319, . . . there can be no doubt that an action of assumpsit might have been maintained against the captain for not receiving and carrying the corn or for not taking care of the cargo; but there the plaintiff described the contract in specific terms, and brought case against the defendant for negligence in the performance of his duty. That could only be because the express contract between the parties created a duty, for the breach of which an action of tort might be maintained." See also 1 Chitty, Pl. 16th ed. p. 162, with the observations of Lord Ellenborough on *Govett v. Radnidge*, 3 East, 70, there cited, and *Broom, Legal Maxims*, 201, 202, and cases cited.

In the case at bar an action on the case is brought to recover damages for the consequential injuries resulting from the negligent manner in which the defendant company performed a duty created by an express contract between the parties. It is not, properly speaking, an action based on the nonfeasance of the defendant. It is not brought to recover damages for the refusal of the defendant to perform the contract. It sufficiently appears that the defendant laid the pipes, erected the hydrants, and fully established its plant, and for a time operated it to the satisfaction of the plaintiffs. The action is based on the defendant's negligence in the operation and management of the plant, negligence which would be exemplified by a want of vigilance and attention in discovering a leak or adjusting a shut off. An action *ex contractu* might have been maintainable, as in *Midlesex Water Co. v. Knappmann Whiting Co.* 64 N. J. L. 240, 49 L.R.A. 572, 81 Am. St. Rep. 467, 45 Atl. 692, where the obligation of the contract was enforced, and the water company held liable for a loss by fire resulting from a failure in the water pressure which was not due to any negligence of the company. But here the plaintiffs elected to bring case, as they were legally

entitled to do, a form of action obviously more favorable to the defendant, since it imposes upon the plaintiffs the burden of proving negligence on the part of the defendant respecting the duty which it engaged to perform.

According to the stipulations in the report, the entry must therefore be

Demurrer overruled.

Defendant to plead anew.

NORTH DAKOTA SUPREME COURT.

JOHN LEISEN, Resp't.,

v.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, App't.

(— N. D. —, 127 N. W. 837.)

Insurance — invalidity at inception — estoppel.

1. Plaintiff, whose sole interest in the property insured was that of a holder of a sheriff's certificate under a mortgage foreclosure sale, applied for, and there was issued to him, a fire insurance policy, the premium for which was paid to and retained by defendant company. The policy was the standard form adopted in this state, containing the following stipulations: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein. . . . This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership. . . . This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representa-

Headnotes by FISK, J.

Note. — As to effect of nonwaiver agreement on conditions existing at inception of insurance policy, see note to *Gish v. Insurance Co. of N. A.* 13 L.R.A. (N.S.) 826.

As to power of agents to bind insurer by oral waiver or estoppel *in pais* as to forfeiture occurring after issuance of policy and before loss, under policies requiring consent or waiver to be in writing, see note to *Industrial Mut. Indemnity Co. v. Thompson*, 10 L.R.A. (N.S.) 1064.

As to parol-evidence rule as to varying or contradicting written contracts, as affected by the doctrine of waiver or estoppel, as applied to policies of insurance, see note to *Haapa v. Metropolitan L. Ins. Co.* 16 L.R.A. (N.S.) 1165.

tive of this company shall have power to waive any provision or condition of this policy except such as, by the terms of this policy, may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions, no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

In applying for such insurance, plaintiff acquainted defendant and its agent with the true facts regarding his interest in the property, but, notwithstanding such information, the defendant's agent carelessly and negligently omitted to state in the policy the nature of plaintiff's said interest. About three weeks after the policy was issued, a loss occurred. In an action to recover on the policy, defendant seeks to escape liability upon the ground that such policy, by its terms, is and was void at its inception, on account of the above facts.

Held, for reasons fully stated in the opinion, that defendant is estopped to urge such defense.

Same — waiver.

2. Where a fire insurance company, with full knowledge of facts which, under the stipulations contained in the application or policy, render such policy void at its inception, issues and delivers the same, and collects and retains the premium therefor, it will be deemed in law to have impliedly waived such forfeiture, and will not be permitted to urge the invalidity of the policy in an action to recover for a loss thereunder. Certain language contained in the opinions in *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799, and *J. P. Lamb & Co. v. Merchants' Nat. Mut. F. Ins. Co.* (N. D.) 119 N. W. 1048, approving the Federal rule to the contrary, is disapproved.

Same — acceptance of premium — effect.

3. Where a policy of insurance has been delivered and the premium collected with full knowledge of all the facts, it would operate as a fraud upon the insured if the insurance company were permitted to avoid the policy after a loss by urging the invalidity thereof at its inception, on account of stipulations contained therein.

Same — restrictions on agent's rights — effect.

4. Restrictions in a policy, limiting the power of agents to waive conditions except in a certain manner, cannot be held to apply to those conditions which relate to the inception of the contract, where the agent, with full knowledge of the facts, issues the policy and collects the premium, and the insured has acted in good faith.

(Spalding, J., dissents.)

(May 28, 1910.)

30 L.R.A. (N.S.)

A PPEAL by defendant from an order of the District Court for Cass County, overruling a demurrer to the complaint in an action brought to recover the amount alleged to be due on a policy of fire insurance. Affirmed.

The facts are stated in the opinion.

Mr. George A. Bange, for appellant:

One who signs an instrument is, in the absence of fraud or deception, conclusively presumed to know its contents, and is bound thereby.

9 Cyc. Law & Proc. p. 388; *Southern R. Co. v. White*, 108 Ga. 201, 33 S. E. 952; *Johnstone v. Richmond & D. R. Co.* 39 S. C. 55, 17 S. E. 512; *Kellerman v. Kansas City, St. J. & C. B. R. Co.* 136 Mo. 177, 34 S. W. 41, affirmed in 136 Mo. 194, 37 S. W. 828; *Hutchinson v. Chicago, St. P. M. & O. R. Co.* 37 Minn. 524, 35 N. W. 433; *Boylan v. Hot Springs R. Co.* 132 U. S. 147, 33 L. ed. 291, 10 Sup. Ct. Rep. 50; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. 134; *Western U. Teleg. Co. v. Carew*, 15 Mich. 524; *Grinnell v. Western U. Teleg. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Redpath v. Western U. Teleg. Co.* 112 Mass. 71, 17 Am. Rep. 69.

The acceptance and retention of the paper known or suspected to contain the terms of the contract binds the party, and he cannot be heard to contradict the same.

9 Cyc. Law & Proc. pp. 260, 391; 6 Cyc. Law & Proc. p. 404; *Steers v. Liverpool, N. Y. & P. S. S. Co.* 57 N. Y. 1, 15 Am. Rep. 453; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 90, 28 Am. Rep. 113; *Hill v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L.R.A. 846, 23 N. E. 205; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L.R.A. 340, 25 Am. St. Rep. 600, 27 N. E. 665; *McMillan v. Michigan S. & N. I. R. Co.* 16 Mich. 79, 93 Am. Dec. 208; *Drummond v. Southern P. Co.* 7 Utah, 118, 25 Pac. 733; *Watson v. Louisville & N. R. Co.* 104 Tenn. 194, 49 L.R.A. 454, 56 S. W. 1025.

The law applicable to contracts in general is equally applicable to insurance policies.

9 Cyc. Law & Proc. p. 391; *Clement, Fire Ins. p. 452, rule 5*; *Morrison v. Insurance Co. of N. A.* 69 Tex. 353, 5 Am. St. Rep. 63, 6 S. W. 605; *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799; *Wilcox v. Continental Ins. Co.* 85 Wis. 193, 55 N. W. 188; *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 599; *Holmes v. Charlestown Mut. F. Ins. Co.* 10 Met. 211, 43 Am. Dec. 428; *Goddard v. East Texas F. Ins. Co.*

67 Tex. 69, 60 Am. Rep. 1, 1 S. W. 906; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; *American Ins. Co. v. Neiberger*, 74 Mo. 167; *Bostwick v. Mutual L. Ins. Co.* 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246; *Cleaver v. Traders' Ins. Co.* 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660, 71 Mich. 414, 15 Am. St. Rep. 275, 39 N. W. 571; *McMaster v. New York L. Ins. Co.* 40 C. C. A. 119, 99 Fed. 856; *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63.

Where an insurance policy is delivered to the applicant, he is presumed to know its contents, and cannot evade a forfeiture for a violation of its provisions on the ground that he never read it.

Wood, Ins. § 503; *Smith v. Continental Ins. Co.* 6 Dak. 433, 43 N. W. 810; *Cleaver v. Traders' Ins. Co.* 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837; *American Ins. Co. v. Neiberger*, supra; *Richardson v. Maine Ins. Co.* 46 Me. 394, 74 Am. Dec. 459.

The legislative standard policy is a statute, and should be interpreted as such; the insurance company has no choice in the language employed or its provisions; it should receive a reasonable construction.

Kerr, Ins. pp. 142, 143, 712, 713; *Temple v. Niagara F. Ins. Co.* 109 Wis. 372, 85 N. W. 361.

The requirement that the policy of insurance must specify the interest of the insured in the property insured, if he is not the absolute owner thereof, is contrary to the common law.

White v. Hudson River Ins. Co. 7 How. Pr. 341; *Crowley v. Cohen*, 3 Barn. & Ad. 478, 13 Eng. Rul. Cas. 314; 2 *Parsons, Maritime Law*, 202; 2 *Duer, Ins.* 463; *Tyler v. Aetna F. Ins. Co.* 12 Wend. 507, 16 Wend. 385; *Niblo v. North American F. Ins. Co.* 1 Sandf. 551; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Binns v. United States*, 194 U. S. 480, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816; *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *State ex rel. Coleman v. Kelly*, 71 Kan. 811, 70 L.R.A. 450, 81 Pac. 450, 6 A. & E. Ann. Cas. 298; *Wisconsin Industrial School v. Clark County*, 103 Wis. 651, 79 N. W. 422; *Dane County v. Reindahl*, 104 Wis. 302, 80 N. W. 438; *Mosle v. Bidwell*, 65 C. C. A. 533, 130 Fed. 334.

If the limitations upon the agent's authority to act are known to the person with whom he is dealing, or if the transaction

is such as to charge him with the duty of inquiring into the extent of the agent's authority to do the particular act, the principal will be protected if the act be unauthorized, or in clear excess of the agent's powers, and if the principal be an innocent actor in the transaction.

Cullinan v. Bowker, 180 N. Y. 93, 72 N. E. 911.

The provisions of the policy are binding and the plaintiff cannot recover.

Rohrbach v. Germania F. Ins. Co. 62 N. Y. 47, 20 Am. Rep. 451; *Marvin v. Universal L. Ins. Co.* 85 N. Y. 278, 39 Am. Rep. 657; *Quinlan v. Providence Washington Ins. Co.* supra; *Allen v. German American Ins. Co.* 123 N. Y. 6, 25 N. E. 309; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; *J. P. Lamb & Co. v. Merchants' Nat. Mut. F. Ins. Co. (N. D.)* 119 N. W. 1048; *Syndicate Ins. Co. v. Bohn*, 27 L.R.A. 614, 12 C. C. A. 531, 27 U. S. App. 564, 65 Fed. 165; *Hartford F. Ins. Co. v. Small*, 14 C. C. A. 33, 30 U. S. App. 127, 66 Fed. 490; *Pennsylvania Casualty Co. v. Bacon*, 67 C. C. A. 497, 133 Fed. 907; *Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union F. Ins. Soc.* 77 C. C. A. 121, 146 Fed. 695; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Dunham v. Peterson*, 5 N. D. 414, 36 L.R.A. 232, 57 Am. St. Rep. 550, 67 N. W. 293; *Clevenger v. Mutual L. Ins. Co.* 2 Dak. 114, 3 N. W. 313; *Collins v. Metropolitan L. Ins. Co.* 32 Mont. 343, 108 Am. St. Rep. 578, 80 Pac. 609, 1092; *Reaper City Ins. Co. v. Brenna*, 58 Ill. 158, 11 Am. Rep. 54; *Liverpool, L. & G. Ins. Co. v. T. M. Richardson Lumber Co.* 11 Okla. 585, 69 Pac. 938; *Deming Invest. Co. v. Shawnee F. Ins. Co.* 16 Okla. 17, 4 L.R.A. (N.S.) 607, 83 Pac. 918; *Cator v. American L. Ins. & T. Co.* 33 N. J. L. 487; *Bennett v. St. Paul F. & M. Ins. Co.* 55 N. J. L. 377, 27 Atl. 641; *Dimick v. Metropolitan Mut. L. Ins. Co.* 69 N. J. L. 399, 62 L.R.A. 774, 55 Atl. 201; *Lippman v. Aetna Ins. Co.* 108 Ga. 391, 75 Am. St. Rep. 62, 33 S. E. 897; *O'Leary v. Merchants' & B. Mut. Ins. Co.* 100 Iowa, 173, 62 Am. St. Rep. 555, 66 N. W. 175, 69 N. W. 420; *Shuggart v. Lycoming F. Ins. Co.* 55 Cal. 408; *Hinman v. Hartford F. Ins. Co.* 36 Wis. 159; *Wilcox v. Continental Ins. Co.* 85 Wis. 193, 55 N. W. 188; *Hankins v. Rockford Ins. Co.* supra; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380; *Sisk v. Citizens' Ins. Co.* 16 Ind. App. 565, 45 N. E. 804; *Weidert v. State Ins. Co.* 19 Or. 261, 20 Am. St. Rep. 814, 24 Pac. 242; *Birmingham F. Ins. Co. v. Kroegher*, 83 Pa. 64, 24 Am. Rep. 147; *German Ins. Co. v. Heiduk*, 30 Neb. 288, 27 Am. St. Rep. 402, 1

N. W. 481; New York Cent. Ins. Co. v. Watson, 23 Mich. 486; Cleaver v. Traders' Ins. Co. 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660; Cook v. Standard Life & Acci. Ins. Co. 84 Mich. 12, 47 N. W. 568; Mallory v. Metropolitan L. Ins. Co. 97 Mich. 416, 56 N. W. 773; Improved-Match Co. v. Michigan Mut. F. Ins. Co. 122 Mich. 256, 80 N. W. 1088; Collins v. St. Paul F. & M. Ins. Co. 44 Minn. 440, 46 N. W. 906; Wilbur v. Bowditch Mut. F. Ins. Co. 10 Cush. 446; Pendar v. American Mut. Ins. Co. 12 Cush. 469; Conway Tool Co. v. Hudson River Ins. Co. 12 Cush. 144, 59 Am. Dec. 172; Fitchburg Sav. Bank v. Amazon Ins. Co. 125 Mass. 431; McCoy v. Metropolitan L. Ins. Co. 133 Mass. 82; Batchelder v. Queen Ins. Co. 135 Mass. 449; Fox v. Queen Ins. Co. 124 Ga. 948, 53 S. E. 271; Wyandotte Brewing Co. v. Hartford F. Ins. Co. 144 Mich. 440, 6 L.R.A. (N.S.) 852, 115 Am. St. Rep. 458, 108 N. W. 393; Chismore v. Anchor F. Ins. Co. 131 Iowa, 180, 108 N. W. 230; Maupin v. Scottish Union & Nat. Ins. Co. 53 W. Va. 571, 45 S. E. 1003, overruled in Medley v. German Alliance Ins. Co. 55 W. Va. 351, 47 S. E. 101, 2 A. & E. Ann. Cas. 99.

Mr. V. R. Lovell, for respondent:

The limitation upon the agent's authority, contained in the policy of insurance, does not prevent knowledge by the agent, acquired while acting within the scope of his employment, of facts then existing which constitute a breach of warranty of the policy of insurance, as subsequently made and issued, from being imputed to the principal, so as to estop the insurer from asserting a forfeiture because of such breach of warranty.

Ostrander, Fire Ins. § 265; Vance, Ins. 304, 305; Johnson v. Dakota F. & M. Ins. Co. 1 N. D. 169, 45 N. W. 799; Michigan Shingle Co. v. State Invest. & Ins. Co. 94 Mich. 389, 22 L.R.A. 319, 53 N. W. 945; Sternaman v. Metropolitan L. Ins. Co. 170 N. Y. 13, 57 L.R.A. 318, 88 Am. St. Rep. 625, 62 N. E. 763; German-American Ins. Co. v. Yeagley, 163 Ind. 651, 71 N. E. 897, 2 A. & E. Ann. Cas. 275; People's F. Ins. Asso. v. Goyne, 79 Ark. 315, 16 L.R.A. (N.S.) 1180, 96 S. W. 365, 9 A. & E. Ann. Cas. 373; Miller v. Mutual Ben. L. Ins. Co. 31 Iowa, 216, 7 Am. Rep. 122; Boetcher v. Hawkeye Ins. Co. 47 Iowa, 253; Vesey v. Commercial Union Assur. Co. 18 S. D. 632, 101 N. W. 1074; Home Ins. Co. v. Hancock, 106 Tenn. 513, 52 L.R.A. 665, 62 S. W. 145; Taylor v. Anchor Mut. F. Ins. Co. 116 Iowa, 625, 57 L.R.A. 328, 93 Am. St. Rep. 261, 88 N. W. 807; 16 Am. & Eng. Enc. Law, 2d ed. p. 949; Aetna Live Stock, Fire & Tornado Ins. Co. v. Olmstead, 21 Mich. 246, 4 Am. Rep. 483; 30 L.R.A. (N.S.)

Williamson v. New Orleans Ins. Asso. 84 Ala. 106, 4 So. 36; Creed v. Sun Fire Office, 101 Ala. 522, 23 L.R.A. 177, 46 Am. St. Rep. 134, 14 So. 323; Syndicate Ins. Co. v. Catchings, 104 Ala. 176, 16 So. 46; Triple Link Mut. Indemnity Asso. v. Williams, 121 Ala. 138, 77 Am. St. Rep. 34, 26 So. 19; Southern Ins. Co. v. Hastings, 64 Ark. 253, 41 S. W. 1093; Menk v. Home Ins. Co. 76 Cal. 51, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; Parrish v. Rosebud Min. & Mill. Co. 140 Cal. 635, 74 Pac. 312; Mackintosh v. Agricultural F. Ins. Co. 150 Cal. 440, 119 Am. St. Rep. 234, 89 Pac. 102; Wich v. Equitable F. & M. Ins. Co. 2 Colo. App. 484, 31 Pac. 389; State Ins. Co. v. Du Bois, 7 Colo. App. 214, 44 Pac. 756; State Ins. Co. v. Taylor, 14 Colo. 499, 20 Am. St. Rep. 281, 24 Pac. 333; National Mut. F. Ins. Co. v. Duncan, 44 Colo. 472, 20 L.R.A. (N.S.) 340, 98 Pac. 634; Johnson v. Aetna Ins. Co. 123 Ga. 404, 107 Am. St. Rep. 92, 51 S. E. 339; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Lycoming F. Ins. Co. v. Jackson, 83 Ill. 303, 25 Am. Rep. 386; Germania F. Ins. Co. v. Hick, 125 Ill. 361, 8 Am. St. Rep. 384, 17 N. E. 792; Security Trust Co. v. Tarpey, 182 Ill. 52, 54 N. E. 1041; Provident Sav. Life Assur. Soc. v. Cannon, 103 Ill. App. 543; Orient Ins. Co. v. McKnight, 197 Ill. 190, 64 N. E. 339; Phoenix Ins. Co. v. Stark, 120 Ind. 444, 22 N. E. 413; Rogers v. Phenix Ins. Co. 121 Ind. 570, 23 N. E. 498; Indiana Ins. Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100; Ohio Farmers' Ins. Co. v. Vogel, 166 Ind. 239, 3 L.R.A. (N.S.) 966, 117 Am. St. Rep. 382, 76 N. E. 977, 9 A. & E. Ann. Cas. 91; Young v. Hartford F. Ins. Co. 45 Iowa, 377, 24 Am. Rep. 784; Donnelly v. Cedar Rapids Ins. Co. 70 Iowa, 693, 28 N. W. 607; Jamison v. State Ins. Co. 85 Iowa, 229, 52 N. W. 185; Fitchner v. Fidelity Mut. Fire Asso. 103 Iowa, 276, 72 N. W. 530; Lutz v. Anchor F. Ins. Co. 120 Iowa, 136, 98 Am. St. Rep. 349, 94 N. W. 276; Glasscock v. Des Moines Ins. Co. 125 Iowa, 170, 100 N. W. 503; Gurnett v. Atlas Mut. Ins. Co. 124 Iowa, 547, 100 N. W. 542; Sullivan v. Phoenix Ins. Co. 34 Kan. 170, 8 Pac. 112; National Mut. F. Ins. Co. v. Barnes, 41 Kan. 161, 21 Pac. 165; State Ins. Co. v. Gray, 44 Kan. 731, 25 Pac. 197; Kansas Farmers' F. Ins. Co. v. Saindon, 52 Kan. 486, 39 Am. St. Rep. 350, 35 Pac. 15; Standard Life & Acci. Ins. Co. v. Davis, 59 Kan. 521, 53 Pac. 856; Queen Ins. Co. v. Straughan, 70 Kan. 186, 109 Am. St. Rep. 421, 78 Pac. 447; Hartford Ins. Co. v. Haas, 87 Ky. 531, 2 L.R.A. 64, 9 S. W. 720; Continental Ins. Co. v. Thomason, 27 Ky. L. Rep. 158, 84 S. W. 546; Marston v. Kennebec Mut. L. Ins. Co.

89 Me. 266, 56 Am. St. Rep. 412, 36 Atl. 389; Steele v. German Ins. Co. 93 Mich. 81, 18 L.R.A. 85, 53 N. W. 514; Temmink v. Metropolitan L. Ins. Co. 72 Mich. 388, 40 N. W. 469; Crouse v. Hartford F. Ins. Co. 79 Mich. 249, 44 N. W. 496; Gristock v. Royal Ins. Co. 87 Mich. 428, 49 N. W. 634; Beebe v. Ohio Farmers' Ins. Co. 93 Mich. 514, 18 L.R.A. 481, 32 Am. St. Rep. 519, 53 N. W. 818; Anderson v. Manchester Fire Assur. Co. 59 Minn. 182, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; Otte v. Hartford L. Ins. Co. 88 Minn. 423, 97 Am. St. Rep. 532, 93 N. W. 608; Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521; Combs v. Hannibal Sav. & Ins. Co. 43 Mo. 148, 97 Am. Dec. 383; Nute v. Hartford F. Ins. Co. 109 Mo. App. 585, 83 S. W. 83; German Ins. Co. v. Frederick, 57 Neb. 538, 77 N. W. 1106; Fidelity Mut. F. Ins. Co. v. Lowe, 4 Neb. (Unof.) 159, 93 N. W. 749; Grand View Bldg. Asso. v. Northern Assur. Co. 73 Neb. 149, 102 N. W. 246; Spalding v. New Hampshire F. Ins. Co. 71 N. H. 441, 52 Atl. 858; Wood v. American F. Ins. Co. 149 N. Y. 385, 52 Am. St. Rep. 733, 44 N. E. 80; Patten v. Merchants' & F. Mut. F. Ins. Co. 40 N. H. 375; Fishblate v. Fidelity & C. Co. 140 N. C. 539, 53 S. E. 354; Farmers' Ins. Co. v. Williams, 39 Ohio St. 584, 48 Am. Rep. 474; Eilenberger v. Protective Mut. F. Ins. Co. 89 Pa. 464; Kister v. Lebanon Mut. Ins. Co. 128 Pa. 553, 5 L.R.A. 646, 15 Am. St. Rep. 696, 18 Atl. 447; Dowling v. Merchants' Ins. Co. 168 Pa. 234, 31 Atl. 1087; Highlands v. Lurgan Mut. F. Ins. Co. 177 Pa. 566, 55 Am. St. Rep. 739, 35 Atl. 728; Graham v. American F. Ins. Co. 48 S. C. 195, 59 Am. St. Rep. 707, 26 S. E. 323; Pearlstine v. Phoenix Ins. Co. 74 S. C. 246, 54 S. E. 373; Continental F. Ins. Co. v. Whitaker, 112 Tenn. 151, 64 L.R.A. 451, 105 Am. St. Rep. 916, 79 S. W. 119; Mutual F. Ins. Co. v. Ward, 95 Va. 231, 28 S. E. 209; Mullin v. Vermont Mut. F. Ins. Co. 58 Vt. 113, 4 Atl. 817; Foster v. Pioneer Mut. Ins. Asso. 37 Wash. 288, 79 Pac. 798; May v. Buckeye Mut. Ins. Co. 25 Wis. 291, 3 Am. Rep. 76; Gans v. St. Paul, F. & M. Ins. Co. 43 Wis. 108, 28 Am. Rep. 535; Dunbar v. Phenix Ins. Co. 72 Wis. 492, 40 N. W. 386; Matthews v. Capital F. Ins. Co. 115 Wis. 272, 91 N. W. 675.

The fact of the acceptance and retention of the policy of insurance by the insured, under the circumstances of this case, did not bind him to the terms of the contract as actually written.

McMaster v. New York L. Ins. Co. 40 C. C. A. 119, 99 Fed. 856, 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10; Otte v. Hartford L. Ins. Co. supra; Bidwell v. 30 L.R.A. (N.S.)

Astor Mut. Ins. Co. 16 N. Y. 266; Albany City Sav. Inst. v. Burdick, 87 N. Y. 40; Bennett v. Agricultural Ins. Co. 106 N. Y. 243, 12 N. E. 609; Gristock v. Royal Ins. Co. 87 Mich. 428, 49 N. W. 634; Kister v. Lebanon Mut. Ins. Co. supra; McElroy v. British America Assur. Co. 36 C. C. A. 615, 94 Fed. 990; Fitchner v. Fidelity Mut. Fire Asso. supra.

Flisk, J., delivered the opinion of the court:

This is an action to recover on an insurance policy. The complaint is in the usual form, alleging: That in consideration of \$51 paid by the plaintiff to defendant, the latter issued its policy of insurance, a copy of which is annexed to and made a part of the complaint, whereby defendant insured the plaintiff against loss or damage by fire in the sum of \$1,000 on a certain frame building situated on lots 9 and 10, block 21 of the village of Leonard, Cass county, for the term of one year from January 6, 1906. That plaintiff duly performed all of the terms of said contract of insurance on his part to be performed, and that on January 29, 1906, said building was totally destroyed by fire, which fire did not occur by reason of any of the causes enumerated in said policy exempting the insurance company from liability in case of fire or loss, and that plaintiff's loss by reason of such fire exceeded the sum of \$1,500. That the destruction by fire as aforesaid was complete and the loss total, and that there was no disagreement between the plaintiff and defendant as to the amount of said loss, but that shortly after defendant was notified of the loss, it denied any liability under the policy, on the ground that plaintiff's title to the property insured was not truly stated in the policy or the application therefor. Plaintiff, in his complaint, anticipates the defense that the policy never attached or became effective by reason of the fact that plaintiff's title to the property insured was not that of unconditional and sole ownership, etc., and in this respect alleges the following facts: "That at and during the said month of January, 1906, plaintiff was and still is the owner and holder of a certain sheriff's certificate of mortgage foreclosure sale of and upon the said frame building and the lot or parcel of land on which the same was situated, and at the time of the destruction of such building by fire, hereinafter referred to, there was due and unpaid on the said certificate of mortgage foreclosure sale an amount exceeding the total amount of such insurance, and that at the time of the plaintiff's application for the insurance aforesaid, and at the

time of the execution and delivery of the policy aforesaid, the plaintiff notified and informed the defendant company and its agent of the nature and character of plaintiff's insurable interest in the frame building aforesaid, and that plaintiff was the owner and holder of a sheriff's certificate of mortgage foreclosure sale, as aforesaid, but the defendant and its said agent, though it then and there knew, as aforesaid, the character and extent of plaintiff's insurable interest in the frame building and premises aforesaid, carelessly and negligently stated and caused to be stated in the said policy of insurance and application therefor that plaintiff was the owner in fee simple of said premises and the whole thereof, and thereby waived the conditions of said policy of insurance, exempting the defendant company from liability in case the plaintiff's interest in the premises insured be not truly stated in such policy or in the application therefor."

The policy is the standard form adopted in this state, and contains, among others, the following stipulations: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein. . . . This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple. . . . This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as, by the terms of this policy, may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

A demurrer was interposed to the complaint upon the ground that the complaint fails to state facts sufficient to constitute a cause of action. Such demurrer was over-
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ruled, and the appeal is from the order overruling the same.

In brief, appellant's contention on this appeal is that, under the facts alleged in the complaint, the policy is and was void at its inception for the reason that the interest of the insured was not that of "unconditional and sole ownership," and the nature and extent of his interest in the property was not stated in nor indorsed upon the policy. In other words, notwithstanding the fact that plaintiff, in applying for the insurance, and at the time of the execution and delivery of the policy, expressly notified and informed defendant and its agent of the nature and character of his interest in the property, and that defendant, with such notice and knowledge, executed and delivered to plaintiff such policy and collected the premium thereunder, that defendant may, nevertheless, urge that such policy was void at its inception and no liability ever attached thereunder; that the doctrine of implied waiver and estoppel cannot be successfully invoked because the parties, by their contract, have otherwise stipulated, and the legislature, by statute, in effect, otherwise declared.

If appellant's contention be sound, the result would be most harsh and inequitable. We cannot countenance such a doctrine unless imperatively required so to do by plainly established principles of law. We are entirely clear that we are confronted with no such situation. On the contrary, we are entirely clear that appellant's contention is without support on principle or reason, and is contrary to the overwhelming weight of authority in this country. In support of this broad assertion, we proceed to give our reasons, but in the main shall adopt the reasoning of other courts upon the questions involved.

We will first notice the present status of the adjudications of this court and its predecessor, the territorial court, so far as material to the question here involved. In *Lyon v. Insurance Co.* 6 Dak. 67, 50 N. W. 483, the court unanimously held that defendant's agents had the power to waive the matter of encumbrances which were known to them at the time of negotiating and accepting the risk. In that case, as in the case at bar, it was contended that the policy was never in force, on account of the omission of the insured to comply with a condition requiring him to inform the company of encumbrances on the property. Such condition was as follows: "If the property hereby insured, either real or personal, or any part thereof, be or shall become encumbered by mortgage, judgment, or otherwise, and it be not so stated in

the written application, or indorsed in writing on the policy, this policy and every part thereof shall be void." The proof showed that the property was encumbered by mortgage at the time the application for insurance was made and at the time the loss occurred, but that the agents of the insurance company knew such fact, but nevertheless issued the policy and collected the premium. Plaintiff contended there, as here, that the stipulation in the policy above quoted had been waived, and such contention was sustained.

Again, in the case of *Waterbury v. Dakota F. & M. Ins. Co.* 6 Dak. 468, 43 N. W. 697, the territorial court, in speaking on this point, said: "It is too well settled to be now questioned that the company, or its agent, acting within the scope of his authority, may waive any of the conditions of the policy, and if, at the time of issuing the policy, the company or such agent knows the falsity of a representation made by the applicant in procuring the insurance, the company is estopped from asserting its falsity in order to avoid liability,"—citing numerous cases.

During the early history of this court, and over twenty years ago, it was called upon to consider a similar question in the case of *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799. In speaking upon the question of estoppel, the court, among other things, there said: "But it is further contended by respondent's counsel that defendant is estopped from claiming a forfeiture of the policy on account of the false answers as to encumbrances, contained in the application, for the reason that such answers were wholly unauthorized by the plaintiff, and were falsely written into the application by E. E. Strong, the soliciting agent, despite the fact that he (Strong) was fully and truthfully informed by the plaintiff as to the encumbrances. The fact of deception practised by the agent is not questioned; but who shall shoulder the consequences of such deceptions?—is a question much mooted in the adjudicated cases, and one which has given this court no little difficulty. For whom was Strong acting, and who was he representing when soliciting and taking plaintiff's application for the insurance? The earlier cases held quite uniformly that, where the insured signed a written application as a basis for the contract of insurance, he adopted all of its contents and was bound by it, and that if, by his request or permission, the solicitor of the insurance acted for him in filling out the application, such solicitor was so far forth the agent of the insured, and not the agent of the company. Some courts still ad-

here to this holding, but the decided weight of authorities is to the contrary." The court here cites numerous cases, among which is *Kausal v. Minnesota Farmers' Mut. F. Ins. Asso.* 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430, from which it quotes approvingly the following very accurate statement of the rule: "Agents for an insurance company, authorized to procure applications for insurance, and to forward them to the company for acceptance, must be deemed the agents of the insurers in all that they do in preparing the application, or in any representations they may make as to the character or effect of the statements therein contained. Hence, when such agent, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are stated to him by the applicant, the error is chargeable to the insurer, and not to the insured. This is the rule in case of 'mutual' as well as 'stock' or 'proprietary' companies. The rule is not affected or changed by a stipulation inserted in the policy subsequently issued, that the acts of such agent in making out the application shall be deemed the acts of the insured, and not of the insurer. Such stipulation does not convert acts done for the insurer into the acts of the insured. The admission of the verbal testimony to show that the application was filled up by the agent of the company, and that the facts were correctly stated to him, but that he, without the knowledge of the insured, misstated them in the application, is not in violation of the rule that verbal testimony is not admissible to vary a written contract. It proceeds upon the ground that the contents of the paper was not the statement of the applicant, and that the insurance company, by the acts of their agent, is estopped to set up that it is the representation of the insured." This court thereafter further said: "The defendant sent its policy direct to the plaintiff, and the latter had possession of it some months prior to the loss. A copy of the application containing the false answers as written by the agent was indorsed upon the back of the policy, but such indorsement was not referred to in the body of the policy. The trial court found that the plaintiff did not at any time object to the answers as stated in the application, or request the defendant to correct the same. The evidence, however, is conclusive that the plaintiff did not in fact know that a copy of the application was indorsed upon his policy, nor discover the errors in the application respecting the encumbrances until the day preceding the trial. Under these circumstances, the question arises

whether the plaintiff, despite the contrary fact, is not conclusively presumed to have read and become acquainted with the contents of the policy, including the copy of his application for insurance, indorsed on the policy. If such is the presumption of law, then the further question arises whether the plaintiff is guilty of such laches in not seeking a correction or reformation of the contract as will defeat his recovery upon the policy. It is well settled that, where an insurance policy is delivered to the applicant, he is presumed to know its contents, and cannot evade a forfeiture for a violation of its provisions on the ground that he never read it." Here the court cites *Smith v. Continental Ins. Co.* 6 Dak. 433, 43 N. W. 810; *Hankins v. Rockford Ins. Co.* 70 Wis. 1, 35 N. W. 34; *Cleaver v. Traders' Ins. Co.* 65 Mich. 527, 8 Am. St. Rep. 908, 32 N. W. 660, and other authorities.

We do not question the soundness of these authorities, but, in citing them, the court evidently overlooked the very important fact that they do not involve forfeitures for breaches of conditions existing at the inception of the contract, the facts creating such breaches being fully known to the agent, and hence to the insurance company, at the time the policy was delivered and the premium paid. In the case of *Smith v. Continental Ins. Co.* supra, Judge Templeton wrote the opinion. He very clearly differentiates that case from a case like the one at bar. He says: "This is a very different case from that where a soliciting agent purposely or erroneously inserts false answers to questions in an application; the applicant stating the facts truthfully and being innocent of fraud. In such a case the subagent is acting within the scope of his powers and duties,—taking applications is his business,—and notice to him is notice to the principal, under well-settled rules of law. If Angell had been a general agent,—that is, if he had been authorized by the company to make contracts of insurance and issue policies,—he doubtless would have had implied authority to waive the effect of conditions in the policy inconsistent with existing facts."

The court in the *Johnson Case* thereafter quotes approvingly from the Federal rule as announced in *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837, and thereafter, among other things, says: "The application was made a part of the policy in express terms, and a copy thereof was indorsed upon the policy. . . . Upon receiving the policy with copy indorsed thereon, the plaintiff is legally chargeable with notice and knowledge of the entire terms of the insurance contract, and he is estopped from denying 30 L.R.A.(N.S.)

such knowledge. It was the plaintiff's duty to have taken steps at once, upon receiving the policy, to have the same corrected or rescinded. He did not do so, and by his silence when required to speak he became constructively a participant in the original fraud of the agent, and thereby forfeited his right under the policy; and unless defendant has waived such forfeiture, the plaintiff must fail to recover." The court thereafter held that such forfeiture had been waived.

As we shall hereafter see, the above rule is no doubt sound when properly applied; but as there applied it is clearly against the great weight of modern authority as well as reason, and we feel obliged to modify the rule thus announced, so that it will apply only to forfeitures for breaches of conditions subsequent, except in cases where the assured has actual knowledge at the inception of the contract of facts and conditions creating a forfeiture or annulling the policy.

This court, in the case of *Thompson v. Travelers' Ins. Co.* reported in 11 N. D. 274, 91 N. W. 75, and 13 N. D. 444, 101 N. W. 900, again recognized the doctrine of implied waiver and estoppel in clear and explicit language. The present chief justice, in differentiating that case from certain cases cited and relied on by respondent in support of a waiver of the forfeiture, said: "Not one of the numerous cases cited by respondent is in point on the facts of the case at bar. These cases are cases where premiums were paid, accepted, and retained with knowledge of the facts constituting the forfeiture, and of course it was held that the companies were thereafter estopped to plead the forfeiture claimed. With that doctrine this court fully concurs." On the second appeal, Chief Justice Young, in voicing the opinion of the court, clearly recognized the right of plaintiff to prove an estoppel by showing that when the policy was delivered and the premium collected by defendant's agent, he had knowledge of the fact which the insurance company claimed avoided the policy; the entire opinion being devoted to the question of the insufficiency of the proof offered for such purpose. We quote from the syllabus as follows: "(1) The life insurance policy upon which this action is brought contained this condition: 'This policy shall not take effect unless the first premium is actually paid while the assured is in good health.' Held that, in the absence of an estoppel, the liability of the insurer depends upon the actual, and not mere apparent, good health of the assured when the first premium was paid. (2) In order that the acceptance or retention of

the premium may estop an insurer from relying upon a breach of condition in the policy, it must appear that it had knowledge of the facts constituting the breach."

Thus it will be seen that this court was, until the decision in *J. P. Lamb & Co. v. Merchants' Nat. Mut. F. Ins. Co.* (N. D.) 119 N. W. 1048, firmly committed to the doctrine that the insurer, by knowledge on the part of its agent, which knowledge is imputed to the company, of facts existing at the inception of the policy, which, under its terms, would avoid it, will be estopped to urge such invalidity. In denying a rehearing in the *Lamb Case*, Judge Spalding used certain language which might be construed as approving a contrary rule, and appellant's counsel in the case at bar quotes therefrom the following: "One point was, however, not referred to which we deem it advisable to mention at this time. The policy contained a provision reading as follows: 'No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as, by the terms of this policy, may be indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached.' The authorities on similar provisions are in hopeless conflict, but the Supreme Court of the United States in 1901 had this identical provision under consideration in *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, and, after an exhaustive review of the conflicting authorities, sustained the provision in question as against the contention that it could be waived in some manner other than in writing indorsed on the policy. The opinion in that case is most instructive, as is also that in *Modern Woodmen v. Tevis*, 54 C. C. A. 293, 117 Fed. 369, in which the opinion of the circuit court of appeals of the eighth circuit was delivered by Judge Sanborn."

As we shall hereafter see, the rule of the Federal court as announced in *Northern Assur. Co. v. Grand View Bldg. Asso.* supra, is opposed to the decisions of nearly every state in the Union which has had occasion to pass upon the question, and to the extent that the opinion in *J. P. Lamb & Co. v. Merchants' Nat. Mut. F. Ins. Co.* approves the rule thus announced by the 30 L.R.A. (N.S.)

Federal court, the same is hereby disproved.

We deem the correct rule to be as stated in the leading case of *Wood v. American F. Ins. Co.* 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80, as follows: "The restrictions inserted in the contract upon the power of the agent to waive any condition unless done in a particular manner cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation. To take the benefit of a contract with full knowledge of all the facts, and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party." That court, in a later case, also said: "The agent of a fire insurance company may, by issuing a policy with knowledge of the facts, waive a condition that the policy shall be void if the property insured be encumbered, and a note of the encumbrance be not indorsed upon the policy, notwithstanding a provision in the policy that no agent of the company shall have power to waive any such condition, except by written indorsement." *Skinner v. Norman*, 165 N. Y. 565, 80 Am. St. Rep. 776, 59 N. E. 309. That the rule of the New York cases is supported by the overwhelming weight of authority must be conceded. We cite the following cases supporting the above rule: *Welch v. Fire Asso. of Philadelphia*, 120 Wis. 456, 98 N. W. 227; *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369, 12 S. W. 915; *German-American Ins. Co. v. Yeagley*, 163 Ind. 651, 71 N. E. 897, 2 A. & E. Ann. Cas. 275; *King v. Council Bluffs Ins. Co.* 72 Iowa, 310, 33 N. W. 690; *McGonigle v. Susquehanna Mut. F. Ins. Co.* 168 Pa. 1, 31 Atl. 868; *Continental Fire Asso. v. Norris*, 30 Tex. Civ. App. 299, 70 S. W. 769; *Continental F. Ins. Co. v. Brooks*, 131 Ala. 614, 30 So. 876; *Phoenix Ins. Co. v. Fleming*, 65 Ark. 54, 39 L.R.A. 789, 67 Am. St. Rep. 900, 44 S. W. 464; *Rhode Island Underwriters' Asso. v. Monarch*, 98 Ky. 305, 32 S. W. 959; *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 63 Am. St. Rep. 499, 38 Atl. 29; *Improved-Match Co. v. Michigan Mut. F. Ins. Co.* 122 Mich. 256, 80 N. W. 1088; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. 13; *Flournoy v. Traders' Ins. Co.* 80 Mo. App. 655; *Parsons v. Knoxville F. Ins. Co.* 132 Mo. 583, 31 S. W. 117, affirmed in banc 132 Mo. 600, 34 S. W. 476; *Benjamin v. Palatine Ins. Co.* 80 App. Div. 260, 80 N. Y. Supp. 256, affirmed in 177 N. Y. 588, 70 N. E. 1095; *Grabbs v. Farm-*

ers' Mut. F. Ins. Co. 125 N. C. 389, 34 S. E. 503; Gould v. Dwelling-House Ins. Co. 134 Pa. 570, 19 Am. St. Rep. 717, 19 Atl. 793; Gandy v. Orient Ins. Co. 52 S. C. 224, 29 S. E. 655; Virginia F. & M. Ins. Co. v. Richmond Mica Co. 102 Va. 429, 102 Am. St. Rep. 846, 46 S. E. 463; Wagner v. Westchester F. Ins. Co. 92 Tex. 549, 50 S. W. 569; Bartlett v. Fireman's Fund Ins. Co. 77 Iowa, 155, 41 N. W. 601; Medley v. German Alliance Ins. Co. 55 W. Va. 342, 47 S. E. 101, 2 A. & E. Ann. Cas. 99; Orient Ins. Co. v. McKnight, 197 Ill. 190, 64 N. E. 339; German Ins. Co. v. Shader, 68 Neb. 1, 60 L.R.A. 918, 93 N. W. 972; Grand View Bldg. Asso. v. Northern Assur. Co. 73 Neb. 149, 102 N. W. 246.

Many of the foregoing cases were decided since the Supreme Court of the United States handed down the Northern Assurance Company decision, and they expressly disapprove the same. In Welch v. Fire Asso. of Philadelphia, supra, Marshall, J., said: "It is well understood that the judicial rule here discussed is peculiar to insurance contracts, and significantly exceptional, in that it ignores the familiar principle applied to written obligations generally, that he who becomes a party to such an obligation is presumed to have knowledge of its contents and is bound thereby, unless by some artifice resorted to by the other party thereto, reasonably calculated to prevent or deter him from obtaining such knowledge, he is so prevented or deterred. Bostwick v. Mutual L. Ins. Co. 116 Wis. 392, 67 L.R.A. 705, 89 N. W. 538, 92 N. W. 246. As an original proposition, it would be difficult to justify that special favor to policy holders in actions to recover losses sustained. The long line of decisions in this state supporting it, however, precludes any change thereof other than by legislative enactment. The authorities elsewhere are not all in harmony with it. A very few condemn it. Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, is a significant instance thereof. In that case the departure from general principles is most vigorously condemned in this language: 'It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel *in pais*, is a mere invasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with.' The court said further, in effect, 30 L.R.A. (N.S.)

the only exception to that is where, by fraud, a person is induced to accept a contract different from the one agreed upon, in excusable ignorance of the variance. The exception thus condemned has the sanction of some forty years of our judicial history and of the general run of authorities. Under the circumstances, we do not feel warranted in overturning it or seriously questioning the wisdom of it. The conclusion to which we have arrived is supported by the courts generally where a policy law exists. That is amply shown by citations in the brief of counsel for respondent, and the absence of authorities to the contrary in that of appellant, and our own inability to discover any. In the supporting authorities it appears that there was no judicial hesitation in holding that a policy like ours does not, in letter or in spirit, affect the established rule that an insurance company, barring fraud upon it, participated in by the assured and its agent (Koerts v. Grand Lodge, O. H. S. 119 Wis. 520, 97 N. W. 163), cannot avoid the effect of the law charging it with knowledge which its agent has at the time of delivering its policy of insurance, respecting the condition of the subject thereof. In all cases, or most of them, waiver is sharply distinguished from estoppel,"—citing numerous cases.

In addition to the foregoing authorities, we cite the following very recent cases, holding to the same effect: Fosmark v. Equitable Fire Asso. 23 S. D. 102, 120 N. W. 777; O'Neill v. Northern Assur. Co. 155 Mich. 564, 119 N. W. 911; Sharp v. Scottish Union & Nat. Ins. Co. 136 Cal. 542, 69 Pac. 253, 615; Allen v. Home Ins. Co. 133 Cal. 29, 65 Pac. 138; Loring v. Dutchess Ins. Co. 1 Cal. App. 186, 81 Pac. 1025; Springfield F. & M. Ins. Co. v. Price (1909) 132 Ga. 687, 64 S. E. 1074; Wisotzkey v. Niagara F. Ins. Co. 112 App. Div. 599, 98 N. Y. Supp. 760; Plunkett v. Piedmont Mut. Ins. Co. 80 S. C. 407, 61 S. E. 893; Westchester F. Ins. Co. v. Ocean View Pleasure Pier Co. 106 Va. 633, 56 S. E. 584; Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 8 L.R.A. (N.S.) 708, 74 N. E. 964, 79 N. E. 905; People's F. Ins. Asso. v. Goyne, 79 Ark. 315, 16 L.R.A. (N.S.) 1180, 96 S. W. 365, 9 A. & E. Ann. Cas. 373; House v. Security F. Ins. Co. (Iowa) 121 N. W. 509; Capital F. Ins. Co. v. Montgomery, 81 Ark. 508, 99 S. W. 687; Parsons v. Lane (Re Miller's & Mfrs. Ins. Co.) 97 Minn. 98, 4 L.R.A. (N.S.) 231, 106 N. W. 485, 7 A. & E. Ann. Cas. 1144; 19 Cyc. Law. & Proc. pp. 812-814, and cases cited; 16 Am. & Eng. Enc. Law. 2d ed. p. 949; 3 Cooley, Briefs on Insurance, 2650-2655; Clement, Fire Ins. 418; Os-

trander, Fire Ins. § 265; Vance, Ins. pp. 304, 305.

In speaking on the question of waiver or estoppel under facts here involved, Mr. Vance says: "Issue and delivery of a policy with knowledge by the company or its agent of existing facts which, by its terms or conditions, would render it void, operates as a waiver or estoppel preventing the company from claiming a forfeiture by reason of such facts. By the weight of authority this is true, although the policy contains the usual limitation upon the agent's authority." Ostrander says [§ 353]: "When a person is employed to solicit risks and take applications to be forwarded to the company for approval, but has no authority to make a complete or binding contract of insurance, and has never been held out by his principal as having such power, he cannot waive any condition or requirement of the policy. It has, however, been often held that the soliciting agent is competent to do certain things in respect to his distinctive duties that will create estoppel. Any knowledge communicated to him in regard to the risk he solicits at the time of such solicitation will be imputed to the company. If the facts imparted to the solicitor are of such a character as, under the terms of the policy, will cause an avoidance unless disclosed, such as other insurance, defective title, encumbrances, etc., and such facts are by him withheld from the company, the latter will be estopped from insisting on the failure of the insured to give the required notice as a defense to an action on the policy." Vance says [p. 304]: "Again, a second incident of the relation of principal and agent is that any information material to the transaction, either possessed by the agent at the time of the transaction, or acquired by him before its completion, is deemed to be the knowledge of the principal, at least, so far as that transaction is concerned, even though in fact the knowledge is not communicated to the principal at all. It is here to be observed, and the importance of the principle is so great that it cannot be too strongly emphasized, that these incidents of agency are created by law, and not by the parties. The insurer is charged with the knowledge acquired by his agent in making or negotiating a contract of insurance, not because he has consented to be so charged, nor because he has authorized his agent so to bind him, but because, as a legal consequence of the relation he sustains to the agent, the latter's knowledge is imputed to him. It therefore follows that this incident, created by the law, in response to the demand of public policy, irrespective of agreement, cannot be destroyed or altered by the agreement of the parties. The parties cannot, by their contract, contravene the policy of the law in this instance, any more than the husband, by contract, can escape his duty to support the wife, or the carrier can, by contract, exempt himself from liability for his negligent failure to carry safely his passenger. Those cases which ignore this principle, and regard these legal incidents as powers conferred, and subject to limitation, are much to be deplored."

By the issuance and delivery of the policy and the acceptance of the premium with knowledge of the existing facts relative to plaintiff's interest in the property, the company, in effect, said to the plaintiff that, "notwithstanding the stipulations and conditions in the policy to the contrary, we will treat the same as a valid and binding contract of indemnity." In other words, "We agree not to urge such conditions or stipulations to defeat such policy in the event plaintiff shall assert any rights thereunder." The company thereby, in effect, said to plaintiff: "The policy is a valid policy of insurance." It would seem, therefore, on the plainest principles of equity and good conscience, that the company should be estopped by such conduct to assert the contrary. As said thirty-two years ago by Justice Walker of the Illinois supreme court: "This information given to the agent operated as notice to the company, and, it having accepted the premium and assumed the risk, it must be held that the company has waived the condition; or, if not, it is estopped from urging its breach as a defense. To permit such a defense would be highly unjust and iniquitous. It would shock the sense of right and fair dealing to permit money to be obtained under such assurances, and to permit the company to say: 'We are not bound, and did not intend, on our part, to be bound, for any loss that might occur. We misled and deceived you into paying the premium, and although we did not intend to be bound, and knew we were not, still we will keep the premium, and you must suffer the loss.' This is the substance of the defense, and such a defense cannot be allowed to prevail." *St. Paul F. & M. Ins. Co. v. Wells*, 89 Ill. 82.

Appellant's counsel lays stress upon the fact that this is a standard policy prescribed by statute, and that the courts are therefore bound to give it effect. Such argument has repeatedly been made and as often repudiated by the courts as unsound. It is firmly established that a form of policy of fire insurance, although prescribed by law, is, when issued by the insurance company, none the less a contract, and to

be construed as such by the courts; and that, while it may affect a question of pure waiver, it does not abrogate the doctrine of estoppel. In addition to the foregoing authorities, see Clement on Fire Insurance, pp. 409, 451, and cases cited. Moreover, such rule is crystallized by statute in this state. Section 6058, Rev. Codes 1905, provides: "Policies of insurance in the form prescribed by the last section shall be in all respects subject to the same rules of construction as to their effect or the waiver of any of their provisions as if the form thereof had not been prescribed."

It is urged that by receiving and retaining the policy, plaintiff is conclusively deemed to have acquiesced in and agreed to its terms. Such contention has the support of many authorities and no doubt is sound when properly applied. Aside from the case of Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, and the few other authorities adhering to the rule there announced, it is firmly settled that restrictions in a policy on the power of agents with respect to waiver have no application to those conditions relating to the inception of the contract. 3 Cooley, Briefs on Insurance, pp. 2510, 2511. Mr. Cooley states the reason for this doctrine to be that "the insured is not bound by restrictions and stipulations of which he has no knowledge. As an insured cannot be charged with constructive notice of the stipulations in a policy until he has accepted it, therefore a limitation in a policy on an agent's authority will not bind the insured with reference to matters occurring prior thereto. Until an insured has either actual or constructive notice of the limitations on an agent's authority, he may assume that the agent has the authority indicated by the apparent scope of his employment." At page 2619 the same author says: "Unquestionably, the weight of authority supports the doctrine that an insured cannot rely on waivers by parol prior to the issuing of a policy. But this rule does not apply to implied waiver by the issuance of a policy, and receipt of the premiums thereon, with knowledge of matters vitiating the policy at its inception; for a large majority of the cases, especially the more recent ones, support the rule that an insurance company will not be permitted to defeat a recovery upon a policy issued by it by proving the existence of facts which would render it void, where it had full knowledge of it when the policy was issued." As said by the Georgia court in City F. Ins. Co. v. Carrugi, 41 Ga. 660: "It would be a fraud to take a man's money, with a full knowledge of the facts,

and then set up that a particular mode of proving the fact, agreed upon by the parties, but not required by law, had not been resorted to. The receipt of the money and the issuing of the policy is a waiver of the indorsement, even if it be admitted that parties may, by their contract, agree as to how any particular fact shall be proven." And in Dwelling House Ins. Co. v. Brodie, 52 Ark. 11, 4 L.R.A. 458, 11 S. W. 1016, the court said: "The issue of a policy by an insurance company with a full knowledge or notice of all the facts affecting its validity is tantamount to an assertion that the policy is valid at the time of its delivery, 'and is a waiver of the known ground of invalidity.'" See also 3 Cooley, Briefs on Insurance, pp. 2632, 2652, and authorities cited.

Of course, in order to successfully invoke the doctrine of estoppel against the insurer, as above stated, the insured must be devoid of any taint of fraud on his part. If there is any collusion between him and the insurance company's agent, he cannot invoke the doctrine of implied waiver or estoppel. If, however, the insured in good faith informs the agent of the actual facts regarding the property insured, and makes truthful answers to the questions asked him by such agent, we know of no sound reason why the insurance company should be permitted, in a court of law, to urge in avoidance of the policy that answers or representations inserted in the application or policy by the agent, either through mistake, carelessness, or fraud, avoid such policy, and exonerate the company from all liability thereunder. The few courts holding to the contrary base their decisions upon the untenable ground that to permit plaintiff to prove facts contrary to the written statements in the application and policy would violate the rule against the admission of parol testimony tending to vary the written contract. But, as will be seen by the foregoing authorities, the courts, with but a few exceptions, hold "that to apply the doctrine as to parol testimony with the strictness demanded by the insurer would be to make a rule of evidence adopted as a protection against fraud an instrument of the very fraud it was intended to prevent." 3 Cooley, Briefs on Insurance, 2565, 2566, and cases cited.

For a correct statement of the rule regarding the subjects of waiver and estoppel as applied to the standard form of policy such as the one in the case at bar, see Clement on Fire Insurance, pp. 405, 448, and cases cited. At pages 415 and 416 the rule is stated as follows: "The stipulation in a policy that no agent or other representative shall have power to waive

any condition may be effective as against an alleged waiver by agreement or contract with an agent or representative, but has no application when the law declares a waiver by estoppel because of the acts of the company through its agent or representative. Such estoppels do not rest upon the power or lack of power of the agent to change the provisions of the policy or waive any of its agreements, but arise in law because of the acts of the company, through its agent, acting in the scope of his apparent power as its representative. . . . Restrictions in the policy upon power of agents to waive its conditions, unless done in a particular manner, do not apply to those conditions which relate to the inception of the contract, when it appears that company's agent delivered it and received the premium with full knowledge of the actual situation."

The above rule is supported by the great weight of authority. We shall not attempt here to cite the many cases. They are collated in the opinion of Mr. Justice Corson in the recent case from South Dakota, —*Fosmark v. Equitable Fire Asso.* 23 S. D. 102, 120 N. W. 777. Particular attention is called to the case of *People's F. Ins. Asso. v. Goynes*, 79 Ark. 315, 16 L.R.A. (N.S.) 1180, 96 S. W. 365, 9 A. & E. Ann. Cas. 373, from which we quote the following: "A fire insurance company may be estopped by the conduct of its agent, acting within the apparent scope of his authority, from availing itself of a false answer to a material question, or of a breach of warranty, or of a violation of the provisions of the application or policy, notwithstanding clauses in the application or policy to the effect that the company shall not be bound by any such conduct or representation of its agent; and such estoppel or waiver may be proved by parol evidence, though the policy or application contains clauses to the effect that no waiver shall be effective unless indorsed in writing on the policy, at the home office of the company."

Appellant's counsel strenuously contends, in effect, that, by force of certain statutory provisions in this state, the rule of implied waiver or estoppel cannot be invoked. The particular sections of the statute relied on are §§ 5952 to 5956 and 5960 and 5961, Rev. Codes, 1905. These sections merely deal with the subject of warranties in relation to insurance contracts, and the effect of a breach thereof. It is a sufficient answer to such contention to say that in our opinion it was not the legislative intent, by the enactment thereof, to do away with the well-settled and most equitable rule of implied waiver and

estoppel *in pais*. It is inconceivable that it could have been the legislative intent to enable insurance companies, in effect, to take advantage of their own mistakes, carelessness, or fraud, or that of their agents; in other words, to repudiate all liability on account of a state of facts involving misrepresentations for which the company or its agent is alone to blame. Although like statutory provisions exist in California and South Dakota, the decisions in those states do not support counsel's contention. On the contrary, the courts of both states most emphatically recognize and enforce the doctrine of implied waiver and estoppel as announced so generally by nearly all courts in this country.

Counsel's criticism of certain of the New York cases shows that he apparently fails to distinguish between a waiver and an estoppel, and also fails to distinguish between conditions or warranties which are precedent and those which are subsequent to the formation of the contract.

Our conclusion leads to an affirmance of the order appealed from.

All concur, except Spalding, J., dissenting.

Spalding, J., dissenting.

The rule on the question involved in this case was established in *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799, in 1890. The Supreme Court of the United States, in 1902, in *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, reviewed the authorities with great care, and settled the question for the Federal courts in harmony with the views of this court, expressed in the *Johnson Case*. The case of *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, 6 Sup. Ct. Rep. 837, also covers the same ground. I see no reason of sufficient weight to warrant this court in overruling the *Johnson Case* and disregarding the Federal authorities, and thereby establishing two rules in this jurisdiction. It results in this: That foreign insurance companies who write large risks in this state and suffer losses in cases where this principle is in question are not liable, while foreign companies which write risks in this state of less than \$2,000, and all domestic companies, are liable. In *Dunham v. Peterson*, 5 N. D. 414, 36 L.R.A. 232, 57 Am. St. Rep. 558, 67 N. W. 293, this court said: "What, in the absence of any statute on the subject, would be decisive with us, even if we were in that state of mind on this question described by the phrase 'halting between two opinions,' is the fact that in the Fed-

eral courts this more universally accepted rule has become the law by reason of the decision of the Federal Supreme Court. . . . There should be only one rule in this state, whether the litigant resort to the Federal court or the state tribunals."

While the weight of authority seems to be in harmony with the majority opinion, yet, on close examination, many of the authorities which at first reading appear to be so are distinguishable. This is shown by the opinion in *Russell v. Prudential Ins. Co.* 176 N. Y. 178, 98 Am. St. Rep. 656, 68 N. E. 252. The policy under consideration in that case contained provisions similar to those in question in the case at bar, and the court held that the insurer was not liable where the waiver had not been indorsed on the policy, and distinguished *Stewart v. Union Mut. L. Ins. Co.* 155 N. Y. 257, 42 L.R.A. 147, 49 N. E. 876, and prior decisions which appeared to be in conflict with the *Russell* Case, on the ground that, in the former decisions, it was clear, by inevitable inference, that they had been based upon the fact that the policy had never been delivered to the insured, and that, consequently, he could not be charged with knowledge of its contents, and the court says: "Is this contract to be enforced as clearly written, or is it to be ignored for the reason that men enter into contracts without reading them and assume that a vague and unproven custom exists permitting a local agent to give life and validity to the policy without reference to the terms of the contract of insurance? The question may be put in another form. Can an insurance company enter into a contract with a person applying for insurance which can so fix the precise conditions under which the policy shall issue that the agent, in the absence of express authority, cannot abrogate it? It would seem that the statement of the foregoing questions would compel an answer in favor of the company without argument."

Mr. Freeman, in an exhaustive note on this subject, contained in 107 Am. St. Rep., on page 123 states that the weight of more recent adjudications is in favor of the power of the insurer to limit the authority of an agent, and that when brought to the actual knowledge of the insured, or when made a part of the terms of the contract of insurance, the insured is bound thereby. The conflict of authority on the subject arises by reason of some courts emphasizing one and other courts another of several conflicting legal principles. As I read the opinion in the *Johnson* Case, it in effect lays down the rule that the insured is charged with knowledge of the contents and conditions of the policy when he has

had it in his possession for a sufficient length of time to enable him to acquaint himself with its contents and conditions. Now this length of time may be variable, depending upon circumstances and conditions. The complaint in the case at bar does not disclose whether the insured had any opportunity to read the policy or not, and I think, in the absence of allegations regarding this subject, unless it must be presumed that he did have, which I doubt, evidence on this question is necessary. Any attempt to review the authorities at any length would be useless. Their number is legion, and I rest my decision on the ground that the rule has been established and followed in this state for twenty years, that it is supported by a large number of state authorities and by the Supreme Court of the United States, and that two rules in the same state should be avoided, unless there are reasons for establishing the second rule far more convincing and necessary than those presented in this instance.

Petition for rehearing denied September 10, 1910.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

FOURTH STREET NATIONAL BANK,
Petitioner,
v.

A. MERRITT TAYLOR et al., Trustees in
Bankruptcy of Millbourne Mills Com-
pany.

RE MILLBOURNE MILLS COMPANY,
Bankrupt.

(96 C. C. A. 629, 172 Fed. 177.)

Bankruptcy — rights of trustee.

1. In determining the validity of liens on the property of a bankrupt as against the

Note. — Issuance and delivery by private warehouseman of receipt for his own property as a constructive transfer of possession essential to a valid pledge.

For a treatment of this subject so far as relates to public warehousemen, see note to State use of Hart-Parr Co. v. Robb-Lawrence Co. 16 L.R.A.(N.S.) 227. This note is confined to private warehousemen.

Private warehouseman issuing receipts directly on his own property.

The issuance and delivery by one not a public warehouseman, of a receipt on his own property in his own warehouse, in the form of a warehouse receipt, is not such a change of possession as is essential to a valid pledge as against his other creditors or subsequent purchasers in good faith.

claims of the trustee, the latter has, under the bankruptcy act, the rights of creditors of the bankrupt, and is not limited to those of the bankrupt himself.

Pledge — warehouse certificates.

2. No pledge valid as against creditors can be effected by the issuance and delivery of certificates similar to those issued by warehousemen, which purport to cover property retained in possession of the pledgeor, with nothing outside of the certificates to indicate the rights of the certificate holders to it.

Same — intent — effect.

3. A pledge of property which is not sufficient to effect a lien because of non-delivery cannot be charged with an equitable lien as against creditors of the pledgeor, by the fact that there was an intent to pledge,

and that a certificate in the form of a warehouse certificate was given covering the property.

(Buffington, Circuit Judge, dissents.)

(August 10, 1909.)

PETITION by the Fourth Street National Bank to review an order of the District Court of the United States for the Eastern District of Pennsylvania confirming the referee's report disallowing its claim to a lien on the proceeds of certain goods of the Millbourne Mills Company, bankrupt, and awarding the fund to the trustees for the benefit of the estate. Affirmed.

The facts are stated in the opinion.

Adams v. Merchants' Nat. Bank, 9 Biss. 390, 2 Fed. 174; Thurber v. Oliver, 26 Fed. 224; American Can Co. v. Erie Preserving Co. 171 Fed. 540; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 39 L.R.A. 725, 63 Am. St. Rep. 302, 49 N. E. 592; Mechanics' Trust Co. v. Dandridge, 18 Ky. L. Rep. 625, 37 S. W. 288; Bell & C. Co. v. Kentucky Glass Works Co. 20 Ky. L. Rep. 1080, 48 S. W. 440, rehearing 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180; Geddes v. Bennett, 6 La. Ann. 516; Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. 244 (rule above limited in National Exch. Bank v. Wilder, 34 Minn. 149, 24 S. W. 699, to persons who are not public warehousemen); Valley Nat. Bank v. Frank, 12 Mo. App. 460; Conrad v. Fisher, 37 Mo. App. 352, 8 L.R.A. 147; Grand Ave. Bank v. St. Louis Union Trust Co. 135 Mo. App. 366, 115 S. W. 1071; Yenni v. McNamee, 45 N. Y. 614; Farmers & M. Nat. Bank v. Lang, 87 N. Y. 209 (arguendo); Thorne v. First Nat. Bank, 37 Ohio St. 254; Tradesmen's Nat. Bank v. Thomas Kent Mfg. Co. 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018; Moors v. Jagode, 195 Pa. 163, 45 Atl. 723; Geilfuss v. Carrigan, 95 Wis. 651, 37 L.R.A. 166, 60 Am. St. Rep. 143, 70 N. W. 306.

This is true even though the delivery of the receipt is helped out by the delivery of samples of goods stored. Adams v. Merchants' Nat. Bank, *supra*.

The bona fides of the pledgee does not validate the attempted pledge. Tradesmen's Nat. Bank v. Thomas Kent Mfg. Co.; Moors v. Jagode; and Geilfuss v. Carrigan,—*supra*.

But it was held in Grand Ave. Bank v. St. Louis Union Trust Co. *supra*, that when a piano dealer obtains a loan from a bank on a pledge of pianos in his storage room situated at some distance from his sales room, and not having his name thereon, and delivers to the cashier a storage receipt therefor, and the bank places in charge a piano repairer who is an employee of the dealer, but is not known by the cashier to be so, there is sufficient delivery of possession to enable the bank to hold as against 30 L.R.A. (N.S.)

a trustee under a deed of general assignment given by the dealer.

Where receipts are issued ostensibly by another claimed to be really acting for pledgeor.

The indorsement to a third person, as security for loans, of a receipt issued by a warehouse company for goods kept under lock and key in a place on the premises of the owner of the goods, leased from such owner, but walled off from the rest of his premises, and placarded with the name of the warehouse company, which receipt recites that the company received the property on storage, "to be delivered only upon surrender of this receipt, properly indorsed, and payment of all charges thereon," is a sufficient delivery as against attaching creditors of the owner to validate the transaction as a pledge, whether the receipt is to be deemed a public warehouse receipt, under a statute defining public warehouses, or not. Union Trust Co. v. Wilson, 198 U. S. 530, 49 L. ed. 1154, 25 Sup. Ct. Rep. 766.

But no such a change of possession results from the issuance of so-called warehouse receipts acknowledging the receipt of goods on premises really occupied by the owner, though in form leased to the warehousing company, as renders valid a pledge of such receipts, where actual possession of the goods was exercised by and existed with the owner substantially the same after issuance of the receipts as before, and there were no signs to indicate that a change of possession had taken place. Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789.

The Supreme Court in the above case said that "the alleged change [of possession] was a mere pretense, a sham," and adopted the following language of the circuit court of appeals: "So far from the security company's maintaining an open, exclusive, unequivocal possession during the two years this arrangement was carried on, it seems to us that the security company

Argued before Gray and Buffington, Circuit Judges, and Archbald, District Judge.

Messrs. Henry S. Drinker, Jr., and Samuel Dickson, for petitioner:

The trustee in bankruptcy takes the property of the bankrupt subject to all of the equities impressed upon it in the hands of the bankrupt, and stands simply in the shoes of the bankrupt, acquiring no higher rights than the bankrupt itself had, and being subject to all liens, equitable or otherwise, which could have been enforced against the bankrupt.

might as well have been eliminated, and the knitting company have employed its own stock keepers and shipping clerks as custodians for intending lenders, directly, instead of indirectly through the security company. In that view this becomes one of the cases "in which the exclusive power of the so-called bailee (Union Trust Co. v. Wilson, 198 U. S. 530, 537, 49 L. ed. 1154, 1156, 25 Sup. Ct. Rep. 766) tapers away to nothingness. Drury v. Moors, 171 Mass. 252, 50 N. E. 618; Tradesmen's Nat. Bank v. Thomas Kent Mfg. Co. supra."

A jobbing and manufacturing firm which takes out a warehouse license in the name of a son of one of the firm, for the sole purpose of issuing warehouse receipts on its own property for its own convenience in raising money by pledging its own property, does not keep a public warehouse of class "B," within the meaning of an Indiana statute defining class "B" as embracing warehouses where property of any class is stored for a consideration, and making their receipts negotiable when they do not state on their face the brand or distinguishing mark of the property stored, as required by law. *Adams v. Merchants' Nat. Bank*, supra.

In *Re Rogers*, 60 C. C. A. 567, 125 Fed. 109, a seed dealer leased without consideration a portion of his private warehouse to a storage company which stored therein only the dealers' property, and issued warehouse receipts thereon which the dealer pledged as security for loans. No signs were put up on the outside, and there were only a few inconspicuous signs inside, to indicate possession by the storage company, which kept no key, but left the premises in the control of the dealer, who substituted at will other seeds for those pledged, though it does not appear that this was known to the storage company. It was held that this transaction did not constitute a warehousing of property, and that pledgees of the receipts could not hold against a trustee in bankruptcy of the dealer. This case was reversed in *First Nat. Bank v. Chicago Title & T. Co.* 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693, on a point of practice, without considering the merits.

Where a railroad car manufacturing company leased a part of its premises to a warehouseman, on which was to be stored 30 L.B.A. (N.S.)

York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; *Hurley v. Atchison*, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466; *Hewitt v. Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 580; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789; *Re Burnham*, 140 Fed. 926; *Re Cavagnaro*, 143 Fed. 668; *Re Platteville Foundry & Mach.*

only its own goods, on which it was to receive warehouse receipts, and the latter took possession of so much of the premises as was needed for the purpose, put in charge a custodian agreed on by both parties, put signs or tags on property for which he had given receipts, there was sufficient change of possession so that persons to whom the manufacturing company had pledged the receipts would have a claim to the goods prior to that of a trustee in bankruptcy of the manufacturing company, even though stored material had from time to time been used up and replaced, and the premises leased were also used, so far as necessary, by the manufacturing company in the operation of its business. *Bush v. Export Storage Co.* 136 Fed. 918.

In *American Can Co. v. Erie Preserving Co.* supra, a preserving company leased for its own convenience, to a warehousing company, the warehouses at its factories, and the superintendent of the preserving company was made custodian, who, though he received a salary, always turned it over to the preserving company. On the requisition of the superintendent, warehouse receipts were issued which were pledged by the preserving company. The warehouses were not marked in any way to indicate possession by the warehousing company, except by recording the leases, which were not required to be recorded, nor were the goods covered by receipts separated from the others or marked. It was held that there was no such visible possession by the warehouse company as to make its receipt good as against a receiver of the preserving company.

A Kentucky statute regulating warehousemen provided that "hereafter in this state all and every person or persons, firms, . . . companies, . . . who shall receive . . . in store, or undertakes to receive, or take care of, property, shall be deemed and held to be a warehouseman." Warehousemen were also prohibited from issuing receipt for goods, unless the same shall have been bona fide received into possession and stored by such warehousemen. Discussing the statute the court, in *Mechanics' Trust Co. v. Dandridge*, 18 Ky. L. Rep. 625, 37 S. W. 288, said: "The statute supra evidently refers to only such persons as in fact keep a warehouse to store goods in, and are engaged in that business. It cannot be

Co. 147 Fed. 828; *Re Blake*, 80 C. C. A. 167, 150 Fed. 283; *Re Muncie Pulp Co.* 81 C. C. A. 116, 161 Fed. 732; *Re E. W. Newton & Co.* 83 C. C. A. 23, 153 Fed. 841; *Goodnough Mercantile & Stock Co. v. Gallo-way*, 156 Fed. 504; *Davis v. Crompton*, 85 C. C. A. 633, 158 Fed. 735; *Re Atlanta News Pub. Co.* 160 Fed. 519; *Pridmore v. Puffer Mfg. Co.* 90 C. C. A. 42, 163 Fed. 496; *Re Fish Bros. Wagon Co.* 26 L.R.A.(N.S.) 433, 90 C. C. A. 427, 164 Fed. 553; *Re Franklin*, 94 C. C. A. 269, 168 Fed. 857; *Walter A. Wood Co. v. Eubanks*, 95 C. C. A. 273, 169 Fed. 929.

Mr. H. Gordon McCouch also for petitioner.

Mr. John G. Johnson for trustee.

Archbald, District Judge, delivered the opinion of the court:

The question involved in this case is the validity, as against the trustee, of certain pledges or attempted pledges of grain and flour on store at the mills of the bankrupt company. The company issued certificates, after the manner of a warehouse, of the quantity of these commodities on hand, on the strength of which, as collateral, loans

that it was the intention of the legislature to provide that any and all persons might become legal warehousemen by simply receiving one particular piece of property in store, and issuing a receipt therefor." They accordingly held that a receipt issued by the secretary and manager of a railroad company to the company itself, for a part of its rolling stock, with an indorsement reciting that the property was pledged to pay a note given by the company to a third person, did not have the effect of a warehouse receipt, and, there being no visible change of possession of the property, that the note holder had no lien thereon superior to that of other creditors of the company.

In *Kentucky Furnace Co. v. City Nat. Bank*, 25 Ky. L. Rep. 28, 75 S. W. 848, a furnace company leased to another a portion of its premises, which was marked off and separated from the rest of the premises, piled thereon a quantity of pig iron, and received what purported to be a warehouse receipt therefor, which it pledged to a bank. The iron was then chalk marked with the initials of the name of the bank. It was held that, regardless of the question whether the lessee was a warehouseman within the meaning of the Kentucky statute, there was sufficient delivery to constitute a valid pledge.

In *Porter v. Shotwell*, 105 Mo. App. 177, 79 S. W. 723, a miller leased one of his private warehouses to another as a warehouse, and placed grain therein on which he received what purported to be a warehouse receipt. This grain he pledged by delivery of the receipt to secure money borrowed. The lessee put up his signs on the building and bins therein, but allowed the miller access at will to the building to care for his grain therein, though it does not appear that this was known to the pledgee. It was held that, whether the lessee could be called a "warehouseman" or not, he had possession of the grain, and was at lease a bailee, so that an order for the property and notice to the bailee was sufficient to transfer possession as against creditors of the pledgor.

In *Yenni v. McNamee*, 45 N. Y. 614, it was held that where the owner of petroleum took from his superintendent a receipt therefor in the form of a warehouse receipt, and transferred the receipt by indorsement

to a bank as collateral for a loan, but the petroleum remained all the time unmoved in the owner's factory, the instrument was not a warehouse receipt, within the meaning of a statute making warehouse receipts transferable by indorsement, and providing that the indorsee shall be deemed to be the owner of the goods, but was in the nature of a chattel mortgage, and void as against creditors because not recorded.

In *Tradesmen's Nat. Bank v. Thomas Kent Mfg. Co.* 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018, it appeared that a clerk of a corporation leased a building in his own name, and called it a warehouse, but that the rent was paid by the corporation, which was the only depositor in the warehouse, and paid no compensation to the clerk for storage; that rents from subtenants were paid over by the clerk to the corporation; that no signs were on the building which indicated the clerk's proprietorship, that no books were kept by him except a book of blank receipts, that he had no office or desk in the warehouse, was seldom there, did not keep the key in his possession, and that servants of the corporation deposited and removed goods at will. It was held that there was no real warehouse, that the clerk was a mere employee or man of straw used by the corporation to cover its operations with its own goods, that a holder even in good faith, of a warehouse receipt issued by the clerk, could not hold the goods called for as against one who has actual possession of the goods on which he had made advances in the regular course of business.

A case very similar in its facts to the above is that of *Moors v. Jagode*, 195 Pa. 163, 45 Atl. 723, though it appeared that sometimes goods of others were stored. It was held that, whatever might be the character of the goods stored by third persons, so far as goods deposited by the real owner are concerned, it is not a warehouse at all, within the meaning of the warehouse act, and that a holder of a receipt issued by the assumed warehouse, for goods of its real proprietor stored therein, cannot hold as against a person who received actual possession of the goods for a valuable consideration, without knowledge of the claim of the real owner.

R. A. E.

were secured from time to time: the property, however, remaining in the possession and under control of the company, and there being nothing outside of the certificates to indicate the rights of the certificate holders to it. By agreement the property was sold by the trustee, and the money brought into court for distribution, where the pledges were held to be invalid for want of possession taken; the money being awarded to the trustee for the benefit of the estate. And thereupon this petition was prosecuted.

By the express provisions of the bankruptcy act, § 70 a, the trustee is vested with the title of the bankrupt by operation of law as of the date of the adjudication, to all (5) property which, prior to the filing of the petition, might have been levied upon and sold under judicial process against him; and is authorized (§ 70 e) to "avoid any transfer by the bankrupt of his property which any creditor of said bankrupt might have avoided." It is also provided (§ 67a) that "claims which, for want of record or for other reasons," would not be "valid liens, as against the claims of creditors of the bankrupt, shall not be liens against his estate;" and (b) "whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor, who afterwards becomes bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of said creditor for the benefit of the estate."

It follows as a necessary consequence from these enactments, unless the plain terms of the statute are to be disregarded, that, if creditors in any given case would have the right to call in question the transaction, the trustee as their representative is entitled to do so also. Indeed, unless the rights of creditors are preserved and protected in some such way, bankruptcy, instead of being in their interest, as supposed, is an actual disadvantage, taking from them that which they otherwise would have. Nor is this representation confined to creditors who have liens on the property of the bankrupt, but applies equally to those by simple contract only, whose rights are no different except that, until judgment and execution, they are simply not in a position to assert them. *Skilton v. Codington*, 185 N. Y. 80, 113 Am. St. Rep. 885, 77 N. E. 790. It may be, as said in *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306, that "the trustee takes the property in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it;" or, as it is put in *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481, that he "stands

simply in the shoes of the bankrupt." But it is also true, as declared by the same high authority in *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 580, that "the rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens, which, although valid as to the bankrupt, are invalid as to creditors,"—a qualification which it is of the utmost importance to bear in mind here.

There is no analogy to the position of an assignee for the benefit of creditors under the state law, and the decisions relied on with that idea (*Vandyke v. Christ*, 7 Watts & S. 373; *Wright v. Wigton*, 84 Pa. 163; and *Smith v. Equitable Trust Co.* 215 Pa. 418, 64 Atl. 594) are misleading, and do not apply. An assignment is the voluntary act of the debtor, who can confer no authority which he does not himself have, and whose assignee is therefore limited to the same extent that he is; while a trustee in bankruptcy, as we have seen, takes title by operation of law, entirely independent of the bankrupt, and is expressly invested with the rights of creditors, which he is authorized to enforce. The position of a trustee in insolvency, on the other hand, is squarely in point, taking title by operation of law as he also does, and being similarly authorized to avoid the fraudulent acts of the insolvent in the interest of creditors. *Tams v. Bullitt*, 35 Pa. 308; *Ruff v. Ruff*, 85 Pa. 333, 336. "A voluntary assignee for the benefit of creditors," says Chief Justice Mitchell, in *Duplex Printing Press Co. v. Clipper Pub. Co.* 213 Pa. 207, 62 Atl. 841, "is a mere representative of the debtor, and is bound where he will be bound. *Wright v. Wighton*, 84 Pa. 163. But *Tams v. Bullitt* establishes the distinction that when the assignee, trustee, or whatever he may be called, derives his authority, not from the mere voluntary act of the assignor, but from the mandate of the law, even when enforced, by the language of that case, through a 'compulsory assignment' from the debtor, in the interest of the creditors, he represents the latter, and is vested with their powers."

It was accordingly held, in *Bank of Alexandria v. Herbert*, 8 Cranch, 36, 3 L. ed. 479, that the trustee of an insolvent, representing creditors, was entitled to take advantage of a defect in the recording of a mortgage, although the insolvent himself could not. "In reason," says Chief Justice Marshall, "there can be no difference between this suit, which asserts the right of the creditors in the mode prescribed by law, and an assertion of that right in their own names." And in line with this, in *Moors v. Reading*, 167 Mass. 322, 57 Am.

St. Rep. 460, 45 N. E. 760, and Drury v. Moors, 171 Mass. 252, 50 N. E. 618, a trustee in insolvency, as the representative of creditors, was allowed to recover personal property which had been inadequately pledged.

The same principle applies also to a receiver, appointed by court, upon a creditor's bill, who derives authority, as it is said, not at all from the debtor, but from the court, acting in the interest of creditors, and for the enforcement of their rights (*Duplex Printing Press Co. v. Clipper Pub. Co. supra*), a view to which this court is committed by the decision in *H. K. Porter Co. v. Boyd*, 96 C. C. A. 197, 171 Fed. 305, in which it was enforced in favor of the receiver of an insolvent corporation as against chattels held under a conditional sale. And so does it to the receiver of a national bank, who, in *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779, was held entitled to maintain a bill to recover securities which had been agreed to be pledged, but failed of being so for want of delivery; the authority for this being most significantly drawn by analogy from that of an assignee (now trustee) in bankruptcy, a receiver to wind up a bank being regarded as occupying an equivalent position. "That an assignee in bankruptcy has this power," as is there said, "cannot well be doubted." And in *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789, a trustee in bankruptcy was allowed to avoid a pledge of personal property, invalid for want of delivery, on the ground that this could have been done by creditors, the very case which we have here.

"By § 70a," says Mr. Justice Peckham, "the trustee in bankruptcy is vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against him; and by subdivision (e) of the same section, the trustee in bankruptcy may avoid any transfer by the bankrupt of his property, which any creditor of the bankrupt might avoid, and may recover the property so transferred or its value. Here are special provisions placing the title to the property transferred by fraud or otherwise, as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same."

And again: "The title to this property was in the knitting company. There had been no valid pledge of it, because the possession had been at all times in the knitting company, and it could have been levied upon and sold under judicial process against the knitting company at the time of the adjudication in bankruptcy. The security com-

pany had, of course, full knowledge that the knitting company, in fact at least, shared in the possession of the property. It was itself an actor, or it acquiesced in the arrangement under which it had, at most, but a partial possession, and even that was subject to the control of the knitting company."

Distinguishing the case of *York Mfg. Co. v. Cassell* and others of like character, preceding it, it is further said: "The case at bar bears no resemblance in its facts to the cases just cited. There was no valid disposition of the property in the case before us, or any valid lien. The so-called 'warehouse receipts' issued by the warehousing company to the knitting company, upon the facts of this case, gave no lien under the law in Wisconsin, in which state they were issued. In such case this court follows the state court."

The present case arises out of an attempt by the bankrupt, a milling company, to pledge its property for money advanced, while still retaining possession and dominion over it. The form adopted was the issuing of so-called "certificates," for so much grain or flour in store at the mills,—these certificates being issued to different parties, as collateral to loans, somewhat like ordinary warehouse receipts. The grain in question was contained in tanks adjoining the mills, from which it was run to the mills to be made into flour, by means of a conveyer, by simply unlocking a slide. It was drawn upon freely in this way; no definite quantity being kept on hand, and there being no special arrangement with the holders of certificates with regard to it, except that it was not to be reduced beyond the amount called for thereby. The fact is that it was a shifting quantity, sometimes running far below this, although sometimes possibly above it; there being certificates outstanding at the time of bankruptcy for 138,000 bushels, while there were but 83,000 bushels on hand. The difference is ascribed to the depredation of insects, by which the grain became heated and lost weight; but it is difficult to see how 55,000 bushels could have disappeared in that way. Nor is it material, the fact being, from whatever cause, that it was not there.

The arrangement with regard to the flour was somewhat similar. It was stored in barrels in the basement of the company's warehouse, under the charge of the superintendent, in three sections, two of 200 barrels each, and one of 800 barrels, divided off from each other by upright posts, and all bearing a certain common brand. There was also a sign that it was not to be touched by an employee; but, aside from

what this might vaguely imply, there was nothing to indicate that there was any control or ownership over it other than that of the bankrupt company in whose possession it was. Differing from the grain, there was no change in the quantity of the flour from the start, and certificates for the whole 1,200 barrels were issued to the one bank.

It is clear, upon this showing, that the certificate holders have no case. The certificates, admittedly, cannot be sustained as warehouse receipts, however, they may bear that form. A man cannot make a warehouse of himself as to his own goods. *Tradesmen's Nat. Bank v. Thomas Kent Mfg. Co.* 186 Pa. 556, 65 Am. St. Rep. 876, 40 Atl. 1018; *Security Warehousing Co. v. Hand*, supra. Neither, there having been no delivery of the property, was there a valid pledge. The lien of a pledge, undoubtedly, is preserved in bankruptcy. *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. ed. 945, 27 Sup. Ct. Rep. 681. But to have this so, the essentials of a pledge must appear, to which possession is indispensable; there being no lien, as there is no pledge, without it. "The requirement of possession," says Mr. Justice Bradley, in *Casey v. Cavaroc*, 96 U. S. 467, 490, 24 L. ed. 779, 788, "is an inexorable rule of law, adopted to prevent fraud and deception, for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

It is true that a symbolical or constructive delivery is recognized in favor of articles of great bulk or difficulty of handling; but the policy of the law is against the relaxation of the rule. *Sholes v. Western Asphalt Block & Tile Co.* 183 Pa. 528, 38 Atl. 1029. And even as to these there must be a surrender of dominion, and a setting apart of the property with such distinctive marks as will serve to indicate that, while in the apparent possession of the owner, it is not in fact his. *Philadelphia Warehouse Co. v. Winchester* (C. C.) 156 Fed. 600. As is well said by Judge Bradford in that case, there must be enough to negative ostensible ownership,—nothing of which is to be found here. The grain in question was a shifting quantity, sometimes more and sometimes less; the number of bushels called for by the several certificates being also simply an undivided portion of the general mass. No specific part was set aside to any particular holder, and much less was there anything to distinguish that it was his. It was his on paper; that is all. And he had to take his chances, whether it would be all there when he wanted it, as in the end, from whatever cause, it was not. Most significant, how-

ever, of all, it was open at all times to be drawn upon, as it freely was, to be manufactured into flour; and it was thus not only retained in the immediate and undistinguished possession, but in the complete and unrestricted dominion and control of the owners, who, to meet the needs of their business, converted and sold it at one end faster than it was replaced at the other. This never has been and never will be regarded, by the most liberal construction, as meeting the requirement of delivery, so as to create a valid pledge.

Nor is the case of the flour practically any better, although in some respects not quite so bad. It is true that it was set apart by itself in the basement of the company's warehouse, and that the original 1,200 barrels were not broken in upon or disturbed. It was also marked not to be touched by the employees, and was under the special charge of the superintendent, although not as the agent of the certificate holders, so far as appears,—whatever advantage, under the circumstances, that might be. *Drury v. Moors*, 171 Mass. 252, 50 N. E. 618. But the vital thing lacking, the same as in the case of the grain, was that there was nothing to negative the apparent ownership of the bankrupt company, in whose possession and under whose control, to all intents and purposes, it was. Without this, it was presumptively, as it was actually, theirs, subject only to such rights as against the company, as the certificate holders might be entitled to assert before the rights of creditors had attached, with which, at this time, we are not concerned. To preserve the rights of such holders as against creditors, either by way of equitable lien or pledge, it had to be openly and clearly indicated that the flour was theirs, without which the mere storing of it, by itself, in the basement, which in effect was all that was done, was of no avail. *Sholes v. Western Asphalt Block & Tile Co.* supra; *Barlow v. Fox*, 203 Pa. 114, 52 Atl. 57; *Moors v. Reading*, 167 Mass. 322, 57 Am. St. Rep. 460, 45 N. E. 760; *Drury v. Moors*, supra; *Casey v. Cavaroc*, 96 U. S. 467, 24 L. ed. 779; *Security Warehousing Co. v. Hand*, supra; *Adams v. Merchants' Nat. Bank* (C. C.) 9 Biss. 396, 2 Fed. 174; *Thurber v. Oliver* (C. C.) 26 Fed. 227; *Re Gebbie & Co.* (D. C.) 167 Fed. 609.

In *Sholes v. Western Asphalt Block & Tile Co.* supra, there was an attempted pledge of asphalt blocks as collateral security for a note, the blocks being stored in the company's yard. Neither at the time of making the note, nor afterwards, as it is stated in the opinion, was anything done by either of the parties to carry the pledge

into effect. The pledgeor did not deliver the goods, nor did the pledgees remove or take possession of them, either actually or constructively. The goods were not even separated, marked, or in any way distinguished from the unpledged assets of the company, and it was held, as against a receiver under a creditor's bill, that the pledge could not be sustained. "The rule," says Fell, J., "is that delivery is essential to the contract of pledge. It is true that the rule has been relaxed in cases where, because of the nature of the thing pledged or for other reasons, the requirement of delivery would be such a hardship as to defeat the purpose of the contract; but the policy of the law is against such relaxation, and it has been mainly confined to cases in which the goods have remained in the possession of the pledgeor as agent of the pledgee, under an express agreement to that effect. Even in such cases the want of constructive or symbolical delivery, or of some act whereby the goods pledged may be distinguished and set apart from the other goods in the possession of the pledgeor, has not been excused. Here we have no evidence of such an agreement, or of anything in the nature of a constructive delivery; and to relax the rule for any other reason, sufficiently to include such a case as this, would be to abrogate it entirely."

This case is of especial importance, not only as determining the necessity, even as to bulky articles, for, at least, a constructive delivery, in order to create a valid pledge, and what is requisite to make that out, but also as emphasizing the fact that, under the local law, the rights of general creditors, although having no lien, and only represented by a receiver, are superior, and must prevail over those of a pledgee who has never had possession; it being to these rights, as we have seen, that a trustee in bankruptcy, representing creditors, succeeds.

So, in *Barlow v. Fox*, supra, there was an attempted pledge, by bill of sale, of the personal property in a hotel; but there was no delivery of the goods, and the pledgeors having become bankrupt, the trustee took possession and made a sale, and the title of the purchaser was sustained, as against the pledgee. This case is squarely in point; the pledge being held invalid as against the trustee in bankruptcy, representing creditors, there having been no delivery, constructive or otherwise, of the goods pledged, —showing how the question is regarded by the state courts, which, according to *Security Warehousing Co. v. Hand*, supra, is controlling here.

In *Girard L. Ins. Annuity & T. Co. v. Mellor*, 156 Pa. 579, 27 Atl. 662, Barker 30 L.R.A. (N.S.)

Brothers & Company, bankers, of Philadelphia, desiring to secure those whose money they had taken for subscriptions to the stock of a company which was being formed abroad, inclosed in an envelope certain notes and bonds which, with a list of the persons intended to be protected, they placed in a tin box which they confided to the custody of a safe deposit company; the package being indorsed as containing securities held as collateral against the subscription deposits made. Having shortly afterwards failed and made an assignment for the benefit of creditors, it was held that, as against such assignment, the attempted declaration of trust was of no avail. "As a general rule in this state," says Chief Justice Sterrett, "a debtor cannot, as against his creditors, assign personal property as security, etc., and at the same time retain the possession thereof as theretofore. Possession must accompany the transfer as an essential part thereof. If the property is permitted to remain in the exclusive possession and control of the assignor, the transaction, while good as against himself, is a constructive or legal fraud upon his creditors, and may be so treated by them. To hold that exclusive possession may be retained by the debtor provided he agrees to hold as trustee, until the same is demanded by his creditors, or until default is made, would be to permit that to be done secretly and by indirection which the law condemns when done directly and openly. This principle is so firmly grounded in our jurisprudence that no court of equity should lend its aid in the enforcement of a transaction which is not in harmony with the settled law on that subject. We think the transaction in question clearly belongs to that class."

This case is particularly significant in that creditors were represented by an assignee by deed of voluntary assignment, who is supposed to stand squarely in the shoes of the assignor, but as against whom the attempted pledge was nevertheless declared void.

It is said, however, that in *First Nat. Bank v. Pennsylvania Trust Co.* 60 C. C. A. 100, 124 Fed. 968, a pledge of steel billets was sustained by this court, as against a trustee in bankruptcy, under circumstances similar to those of the case in hand; but, while the billets there remained on the premises of the pledgeor, they were marked by signs posted on the several piles, giving notice of the claim of the bank, which clearly distinguishes it from anything which we have here. "To complete its title or lien as against creditors and strangers," says Judge Kirkpatrick, "the bank was not obliged to take the billets into actual pos-

session; it was sufficient to give notice of their lien or change of ownership. This they did by posting on the billets, which were in distinct and separate piles, the signs to which reference has been made." There was thus in that case an assertion of lien in favor of the pledgee, and a denial of ownership in the pledgeor, which entirely satisfied the law, and made the pledge good,—nothing of which is to be found here.

The case of *Davis v. Crompton*, 85 C. C. A. 633, 158 Fed. 735, is also relied on, but is not in point. The transaction which was there sustained was a conditional sale in which, by express agreement, the title never passed, being retained by the vendor until payment in full was made. That this is a valid stipulation in many jurisdictions is shown by *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51, where the subject is fully discussed; and the property having been accepted upon these terms, it was held that the trustee, the same as the bankrupt, was bound thereby. But that is very different from anything which we have here, where not only the possession, but the title, was in the bankrupt company; there being nothing but the agreement that the property should stand pledged in their hands,—a secret lien which the law does not permit.

It is, however, contended that, there being an intent to pledge, an equitable lien was at least created, which entitles the certificate holders to the fund. It is difficult to see how a transaction which, for want of delivery, is ineffective as a pledge, can be pieced out so as to make it hold as something else. There would be little left to the established doctrine with regard to pledges, if that was the case; and it is somewhat singular that, in all the litigation where pledges of personal property have been upset for want of a delivery, no one should have discovered this easy way out. This is not to say that an equitable lien under some circumstances may not exist; but only that there is nothing to support it here. It never arises or is enforced except against property in the hands of a party to the original transaction out of which it is claimed to grow, or his voluntary representatives, or one who has notice of it and is affected with it as a superior right,—within which all the cases cited in support of it will be found to fall. 19 *Am. & Eng. Enc. Law*, 2d ed. p. 36. It is not good as against a trustee in bankruptcy, taking title in the interest of creditors, by operation of law, as is the case here. *Re Olzendam Co.* (C. C.) 117 Fed. 179; *Re Liberty Silk Co.* (D. C.) 152 Fed. 844; *Casey v. Cavaroc*, 96 U. S. 407, 491, 24 L. ed. 779, 789; *Duplex Printing Press Co. v.* 30 L.R.A. (N.S.)

Clipper Pub. Co. 213 Pa. 207, 62 Atl. 841.

There is nothing to the contrary of this in *Hurley v. Atchison*, T. & S. F. R. Co. 213 U. S. 126, 53 L. ed. 729, 29 Sup. Ct. Rep. 466. True, an equitable right or lien was there recognized as against a trustee in bankruptcy, but upon materially different facts. The railroad there, in whose favor it was held to exist, was a party to the tripartite agreement by which the bankrupt acquired the right to mine the coal against which it was enforced, which he agreed to mine and deliver to the railroad at a certain price; the railroad, on failure to comply, having the right to enter and avoid the lease. It was with these relations to the property that the railroad, anticipating its payments, advanced money to the bankrupt for coal not yet mined, in order to enable the company to go on with its mining business; and it was in return for this that the delivery of a certain amount of coal was claimed and allowed. The transaction, as it was said, was not one of ordinary borrowing and lending on credit or security, but constituted, from an equitable standpoint, a pledge or hypothecation of the unmined coal to the extent of the advancements made, with which, in view of the reciprocal rights and relations of the parties, the trustee, equally with the bankrupt, was bound to comply. It is manifest that this has nothing in common with the case in hand.

The question of equitable lien is met and effectively disposed of by the court of appeals of the seventh circuit, in *Security Warehousing Co. v. Hand*, 74 C. C. A. 186, 143 Fed. 32, affirmed in 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789, which cannot be distinguished from the present case. "The appellant lenders [certificate holders here] finally assert," says Baker, J., "that, if they have neither the negotiable receipts of a public warehouseman, nor a pledge through an unequivocal possession by their agent, the security company, nevertheless they have 'equitable liens' which entitle them to the possession of the property as against the trustees. The trustee succeeds, as of the date of the adjudication, not only to the bankrupt's title and possessory right to the property, but also to the right of the bankrupt's creditors to assert that the title and possessory right as to them is in the bankrupt. Sections 70a (4) and (5), § 70e. . . . Liens that remain undisturbed are those that were good against both the bankrupt and his creditors immediately preceding the adjudication. . . . The conclusion results not merely from a consideration of the nature of the trustee's succession, but as well from the inhibitions of the

act. Section 67a (30 Stat. at L. 564, chap. 541, U. S. Comp. Stat. 1901, p. 3449) vitiates as liens 'all claims which, for want of record or for other reasons,' the bankrupt's creditors might have avoided as liens; that is, no secret liens or equities shall prevail against the trustee that were not good against the general unsecured creditors represented by the trustee. Section 67d protects 'liens given or accepted in good faith . . . and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice.' The liens thus saved are liens, not promises to give liens, not equitable claims that what ought to have been done shall be considered done, but liens perfected according to law. 'Notice' as well as 'a present consideration' is necessary. If a chattel mortgage be given in good faith and for a present consideration, recording is not obligatory; but the imparting of notice is. Recording is one way; another is actual and continued change of possession. If a pledge be similarly given, recording is not 'necessary in order to impart notice,' because no provision has been made that a record of the fact shall be notice of the fact; but what is 'necessary' in order to impart notice' is the delivery of exclusive and unequivocal possession. We think that § 67d does not change § 67a into the meaning that 'claims which, for want of record or for other reasons,' are not good liens as against creditors, are good liens as against the estate, if the lender advanced his money without any actual intent to defraud unsecured creditors. He is chargeable with the constructive intent which is attributed to secrecy."

This case was affirmed, it is to be noted, and while this particular feature of it was not alluded to, except in passing, it was not disturbed. Much less did anyone undertake to urge before the Supreme Court that what was not good as a pledge for want of delivery might be sustained as an equitable lien. It leaves no place, in our judgment, for the idea which is now advanced, that any such claim can be asserted as to personal property ineffectually pledged, to the detriment of general creditors acting through a trustee in bankruptcy or other representative taking title in their interest by operation of law.

The decision under review is made to rest upon this case, by which, as we view it, it is fully sustained and should therefore be affirmed.

Buffington, Circuit Judge, dissenting:

In the court below the Fourth Street National Bank of Philadelphia asserted a lien on the proceeds of certain wheat in bulk

and on 1,200 barrels of flour of the Millbourne Mills Company, the bankrupt, which lien it claimed to have as security for loans made by the bank to said company. That court denied such lien, and awarded the fund in question to the trustee in bankruptcy. Thereupon the bank filed this petition to review. The facts of the case are that more than four months prior to its bankruptcy, the Millbourne Mills Company obtained loans from the bank on notes, and at the same time gave as security therefor its indorsed certificates, which, in the case of the flour, were as follows:

Flour Certificate
Millbourne Mills Company.
Philadelphia, March 8, 1907.

No. 1.

This is to certify that Millbourne Mills Company has stored in its warehouse, basement floor, section A, . . . 200 barrels of flour, branded U, . . . which will be subject to its order, and only deliverable upon the indorsement and surrender of this certificate.

George B. Hicks, Jr.,

Supt. of Warehouse.

Countersigned: R. S. Dewees, President.
Flour Certificate.

This flour was branded "U" on the barrels which were stored in a basement warehouse of the mill. The flour was divided into marked-off sections by upright posts, in each of which a certain number of barrels were stored. These were described by marks, and were further identified by the exact number of barrels in the separate certificates which were issued for each lot. By agreement of the parties, the flour remained in the mills company's warehouse and in the special custody of Hicks, its superintendent. After the certificates were issued, a notice was posted, "None of this flour to be touched by any employee," and, pursuant to the agreement, no flour was used; but it remained intact until after bankruptcy, when, on assertion of a lien thereon by the bank, it was, by agreement of the parties, sold by the trustee, and the proceeds, which were less than the bank's notes, substituted for the flour.

Two questions arise in this case: First, as between the mills company and the bank, did the latter, under the law of Pennsylvania, at the time of bankruptcy, have an equitable lien on this flour? Secondly, if so, did the trustee take the flour subject to such lien? The first question is to be settled by the Pennsylvania state decisions. "The questions of the extent and validity of the pledge were local questions, and the decisions of the court of New York are to be

followed by this court." *Hiscock v. Varick Bank*, 206 U. S. 28, 51 L. ed. 945, 27 Sup. Ct. Rep. 681, and cases cited. The second question depends on the bankrupt law and Federal decisions.

In taking up the first question, it should be noted *in limine* that the case before us is one of entire good faith. It was a business transaction of unquestioned integrity and supposed efficacy. It was not the sort of transaction involved in *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789, where not only was the attempted pledge void under the laws of Wisconsin, but was one the Supreme Court designated as "a mere pretense, a sham," which the circuit court of appeals, in *Security Warehousing Co. v. Hand*, 74 C. C. A. 186, 143 Fed. 32, said, "with regard to Wisconsin law, was a fraud in fact," and which this court, in *Davis v. Crompton*, 85 C. C. A. 633, 158 Fed. 742, stated was "a fraud in fact."

Before turning to the Pennsylvania decisions, we note that equitable liens are a generally recognized means of security, and their nature is thus defined in 3 Pom. Eq. Jur. § 1235: "The doctrine may be stated, in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, . . . creates an equitable lien upon the property so indicated, which is enforceable. . . . In order, however, that a lien may arise in pursuance of this doctrine, the agreement must deal with some particular property, either by identifying it, or by so describing it that it can be identified, and must indicate with sufficient clearness and intent that the property so described or rendered capable of identification is to be held, given, or transferred as security for the obligation."

This statement, cited and approved in *Walker v. Brown*, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453, is in accord with numerous Federal decisions. *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. ed. 999; *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 635, 41 L. ed. 855, 17 Sup. Ct. Rep. 439; *Burdon Cent. Sugar Ref. Co. v. Payne*, 167 U. S. 127, 42 L. ed. 105, 17 Sup. Ct. Rep. 754; *Philadelphia Warehouse Co. v. Winchester (C. C.)* 156 Fed. 600; *Bridgeport Electric & Ice Co. v. Maeder*, 18 C. C. A. 451, 30 U. S. App. 580, 72 Fed. 115; *Clark v. Sigua Iron Co.* 26 C. C. A. 423, 39 U. S. App. 753, 81 Fed. 312; *Sheffield* 30 L.R.A.(N.S.)

Furnace Co. v. Witherow, 149 U. S. 578, 37 L. ed. 835, 13 Sup. Ct. Rep. 936.

The characteristics of an equitable lien thus generally recognized obtain also in Pennsylvania; but the decisions of that state go farther, and hold that where the property pledged is sufficiently designated, retention of the property by the pledgeor by mutual consent does not, as between pledgeor and pledgee, affect the validity of such lien. The case of *Vandyke v. Christ*, 7 Watts & S. 373, in which Chief Justice Gibson held that retention of property in a contract of sale, while fraudulent as to creditors by Stat. 13 Eliz., and as to purchasers by Stat. 27 Eliz., was not fraudulent between the parties at common law, is the law of that state to-day, and is followed in *Wright v. Wigton*, 84 Pa. 163; *Smith v. Equitable Trust Co.* 215 Pa. 420, 64 Atl. 594, and other cases. And that retention of the pledge by the pledgeor, where this is by the agreement of the parties, will not, as between pledgeor and pledgee, defeat an equitable lien, is held in *Collins's Appeal*, 107 Pa. 605, 52 Am. Rep. 479, followed in *Wallace's Appeal*, 104 Pa. 564, where the court, referring to the necessity of a change of possession, said: "There is, however, a class of cases in which it is disregarded. They are cases in which the possession of the pledge is, by agreement of the parties, to remain with the pledgeor. It is held that, as the pledgeor is bound notwithstanding this provision of the contract, so are all bound who claim under him, except purchasers for value and without notice."

After a discussion of numerous cases where equitable liens were enforced, although possession was retained by the owner, the court summed its conclusions by saying: "The foregoing cases all relate to liens upon specific chattels, as to which it is almost universally necessary that possession should accompany the pledge in the hands of the pledgee, to validate the lien; but we have seen that this requirement may be dispensed with, if such is the agreement of the parties, and the lien of the pledgee may be enforced by virtue of the contract."

And in *Sholes v. Western Asphalt Block & Tile Co.* 183 Pa. 528, 38 Atl. 1029, where there was no separation or identification of the pledge, and it was held there was no lien, yet the exception was recognized where "the goods have remained in possession of the pledgeor as agent of the pledgee, under an express agreement to that effect."

From this it will be seen that, under the Pennsylvania decisions, the bank had an equitable lien on this flour, and had had it for more than four months prior to bankruptcy, and had the mills company prior to bankruptcy sought to dispose of the

flour, the bank could have by bill enjoined it from so doing, and on maturity of the note have enforced its lien. Indeed, the validity of the lien under the Pennsylvania decisions was conceded in the opinion of the court below, saying: "The pledge is, no doubt, good as between the pledgor and pledgee in Pennsylvania, as against creditors who have never levied."

The first question must therefore, in accordance with the state decisions, be answered in the affirmative. Such being the case, we then have the status, not of a preference or lien within four months of bankruptcy, but of a lien valid under the state law prior to the bankruptcy, existing for more than four months, and which no provision of the bankrupt law invalidates.

The second question, *viz.*, If so, did the trustee take the flour subject to such lien? must, under the Federal decisions (York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; First Nat. Bank v. Pennsylvania Trust Co. 60 C. C. A. 100, 124 Fed. 968; Davis v. Crompton, 85 C. C. A. 633, 158 Fed. 735, be also answered in the affirmative, for it is clear that the trustee in bankruptcy simply succeeded to the rights of the bankrupt, and, as conceded in the petitioner's brief, took the property "subject to all of the equities impressed upon it in the hands of the bankrupt."

It is contended, however, that the force of these decisions is qualified by the late case of First Nat. Bank v. Staake, 202 U. S. 149, 50 L. ed. 970, 26 Sup. Ct. Rep. 580, where it was said: "The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors."

But this language, which the court quoted from the opinion of the circuit court of appeals (60 C. C. A. 547, 133 Fed. 717), must be read in connection with the subject-matter of that case. That subject was an attachment, a "lien created by or obtained in or pursuant to any suit or proceeding at law or in equity," which § 67, clause c, makes void. Under that statute, it was sought to subrogate the trustee to the right of the attaching creditor. It was of such a lien, one obtained by legal process, and which, be it observed, the statute itself declared void, that it was in effect said that the rule laid down in Hewitt v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690, and York Mfg. Co. v. Cassell, *supra*, that the trustee takes the estate in the same plight that the bankrupt held it, had no application, because the lien before them was by the act itself declared invalid. It will thus be seen 30 L.R.A. (N.S.)

that the decisions noted are not affected by what was said in First Nat. Bank v. Staake, *supra*.

It remains to discuss the wheat. The mills company was engaged in manufacturing flour, and to do so it was forced to carry large amounts of wheat in bulk and in bins. In order to prevent this wheat from overheating, it had to be shifted occasionally from bin to bin. At times it was necessary to withdraw parts of the wheat for grinding. To enable it to purchase and carry this wheat in reserve, the mills company borrowed from the bank on notes, and at the same time delivered to it indorsed wheat certificates in the following form:

Grain Certificate.

Millbourne Mills Company.

No. 2700. Philadelphia, 1906.

This is to certify that Millbourne Mills Company has stored in its fireproof grain storage tanks 1,000 bushels No. 2 Penna. winter wheat, unloaded from cars No. —, which will be subject to its order, and only deliverable upon the indorsement and surrender of this certificate.

Benj. P. Hoopes, Supt. of Elevators.

Countersigned: R. S. Dewees, President.

These certificates, as originally issued, covered grain in particular tanks for each certificate. The tanks adjoined the mill property and were connected with it by a slide or conveyer. This slide was locked, and by agreement of the parties was kept under lock and key by an employee of the mills company. It was agreed between the parties that the mills company could not withdraw any of this wheat without first paying enough of the loan to effect a release, or furnishing other wheat to take its place. This was always done. Later it was found necessary to shift the grain from tank to tank, as the inconvenience to all parties of holding the wheat in individual tanks for individual certificates was found impracticable. To meet this practical necessity, and in good faith, the agreement was therefore modified, so that all the certificates were to cover all the grain in all the tanks of the storage system. As none but the certificates here in question were issued, and as these, owing to loss and depreciation, were, at the date of bankruptcy, more than sufficient to cover all the grain in the bins, no question of identity arose. Indeed, nothing further remained to be done by the lienor at any time, so far as the identity of the pledge was concerned. The agreement as above was kept, the grain remained under lock and key, and as with-

drawals were made corresponding reductions were made on the certificates.

To me these propositions are clear:

First. It was the intent of both parties in good faith that the bank should have a lien on these goods, and the bank parted with its money on the strength of that intent.

Second. That, under the decisions of the supreme court of Pennsylvania, an equitable lien on identified personalty is good between pledgeor and pledgee where, by agreement of the parties, possession is retained by the former.

Third. That the trustee in bankruptcy took no higher rights than the pledgeor had, but simply succeeded to them.

Fourth. That there is no provision in the bankrupt act which invalidates this equitable lien, which was acquired more than four months before bankruptcy.

Because the effect of this decision is to make the rights of a trustee rise higher than the bankrupt's, by thus striking down a lien which was valid in Pennsylvania, and which is not invalidated by any provision of the bankrupt act, I am constrained to record my dissent.

Petition for writ of certiorari abandoned.

SOUTH DAKOTA SUPREME COURT.

HENRY HOFFMAN, Appt.,

v.

ELLEN MARIE HOFFMAN.

(— S. D. —, 127 N. W. 478.)

Contempt — finding of facts — necessity.

A finding of facts showing that accused was guilty of contempt as matter of law is necessary to support a judgment adjudging one guilty of contempt for failure to pay alimony and attorney's fees in a divorce proceeding.

(June 27, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Minnehaha County adjudging him guilty of contempt of court in a divorce proceeding. Reversed.

The facts are stated in the opinion.

Messrs. Null & Royhl, for appellant:

Imprisonment does not follow in civil contempt unless it is found by the court that the party has the ability to comply with the order of the court.

Steller v. Steller, 25 Mich. 159; Lewis v. Lewis, 80 Ga. 706, 12 Am. St. Rep. 281, 6 S. E. 918; Carlton v. Carlton, 44 Ga. 216; Pain v. Pain, 80 N. C. 322; Blake v. 30 L.R.A. (N.S.)

People, 80 Ill. 11; Ex parte Cottrell, 59 Cal. 417; Ex parte Todd, 119 Cal. 57, 50 Pac. 1071; Newhouse v. Newhouse, 14 Or. 290, 12 Pac. 422; Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167; O'Callaghan v. O'Callaghan, 69 Ill. 552; Peel v. Peel, 50 Iowa, 521; Allen v. Allen, 72 Iowa, 502, 34 N. W. 303; Re Wilson, 75 Cal. 580, 17 Pac. 698; Hurd v. Hurd, 63 Minn. 443, 65 N. W. 728.

It was error to commit without finding appellant able to comply.

Wright v. Wright, 74 Wis. 439, 43 N. W. 145; Re Bissell, 40 Mich. 63; Ex parte Silvia, 123 Cal. 293, 96 Am. St. Rep. 58, 55 Pac. 988.

Messrs. Muller & Conway, for respondent:

An award of temporary alimony to a wife in a suit for divorce in an interlocutory order collateral to the divorce proceedings, which the court has jurisdiction to enforce by contempt proceedings on the husband's refusal to comply therewith.

Schuele v. Schuele, 57 Ill. App. 189; O'Callaghan v. O'Callaghan, 69 Ill. 554.

Imprisonment to compel compliance with the order of the court is authorized.

State v. Knight, 3 S. D. 509, 44 Am. St. Rep. 809, 54 N. W. 412, 9 Am. Crim. Rep. 221.

Whiting, P. J., delivered the opinion of the court:

This is an appeal from the judgment of the circuit court adjudging the appellant guilty of contempt of said court, and which judgment provided for his punishment by

Note. — Necessity of finding facts before adjudging one guilty of contempt.

This question seems to resolve itself always into the question whether or not the judgment finding the defendant guilty of contempt or the order committing him for the offense should contain a statement of the facts upon which he was adjudged guilty. This has been settled in most jurisdictions by statutes requiring one or both orders to contain such statement of facts, and therefore only those cases in which it does not appear in the opinions that there was any statute governing the question will be included in this note. It may also be stated here that the note does not aim to include the question as to what facts should be set out.

In Shore v. People, 26 Colo. 516, 59 Pac. 49, it was held that under the statute regulating the procedure in cases of contempt, it was only in contempts committed in the immediate view and presence of the court or judge in chambers, that is, in direct contempts, that it was necessary for the judgment to recite the facts constituting the contempt, and that where the contempt

imprisonment. The action out of which this matter arose was one brought for divorce, in which said action the appellant was plaintiff. In said action the court, upon proper notice, had entered an order requiring this appellant to pay certain sums by way of temporary alimony, suit money, and attorneys' fees, and the appellant, having neglected to make the payments as ordered, was brought to the court upon an order to show cause, requiring him to show cause why he should not be punished for contempt owing to his failure to obey said order of such court directing him to pay alimony and suit moneys. Upon the return of such order to show cause, the appellant submitted his own and another affidavit to substantiate the claim of appellant that he

was financially unable to obey the said order requiring such money payments. Upon such hearing on said order to show cause, the court rendered a judgment, as hereinbefore noted, finding the appellant in contempt and punishing him by imprisonment. There appears to have been no separate findings of fact made by the court; and the judgment itself, after setting forth the jurisdiction matters, so far as it purported to find facts showing the appellant guilty of contempt, was in words as follows: "And the court having read the affidavits of the plaintiff in reply to said order to show cause as aforesaid, and heard arguments of counsel in behalf of the plaintiff and in behalf of the defendant, and being fully advised in the matter and having

was not committed in the immediate view and presence of the court in chambers, in other words, in cases of constructive contempt, it was not necessary that their judgments should recite the facts, since in such cases an affidavit must be presented setting forth the facts constituting the contempt. The court said: "The only object of requiring these facts to be shown somewhere in the record is to enable the reviewing court to see whether or not they amount to a contempt, and thus to determine from them the jurisdiction of the trial court. And if the procedure prescribed requires an affidavit first to be presented to the trial court, containing these facts as the foundation of the proceeding, the court of review can, and does, look to the statement in the affidavit for the purpose of ascertaining whether or not the court below had jurisdiction, and it is not necessary to repeat the statement in the judgment."

And in *Rawson v. Rawson*, 35 Ill. App. 505, in which the contempt was a direct one, it was held that where the only record that was in fact made, or that the law required to be made, was the order of commitment, and where judgments in contempt were subject to review on error, the reasonable and just rule was that the order of commitment should state the facts or conduct constituting the contempt, and that a failure to make such statement would work the reversal of the judgment.

And in *Ex parte Wright*, 65 Ind. 504, it was held that in rendering a judgment adjudging a party guilty of a direct contempt and in making up the record the causes of the contempt should be stated, but whether or not this should be done in cases of indirect contempt the court failed to state.

And in *Ogden v. State*, 3 Neb. (Unof.) 886, 93 N. W. 203, it was held to be essential in proceedings to punish one for contempt committed in the presence of the court, that it should affirmatively appear on the face of the record, "with all the certainty of an indictment or information, that an offense had been committed." Accordingly, where the accused was found guilty of using insulting and menacing lan-

guage to the court during the trial of a case, and the record, while so stating, failed to set out the language used by the defendant, it was held to be insufficient to sustain a judgment of conviction.

And in *Re Odum*, 133 N. C. 250, 45 S. E. 569, 14 Am. Crim. Rep. 296, an order adjudging one guilty of contempt was reversed, which, though it recited as a basis of the accusation certain acts of the defendant, failed to find certain other facts necessary to bring it within a statute defining contempts.

And in *State v. Galloway*, 5 Coldw. 326, 98 Am. Dec. 404, while it was declared that at common law a general judgment of contempt, that is, a judgment not specifying the particular cause upon which the contempt was founded, was valid, the court thought it proper to depart from this rule to the extent of requiring the judgment for an indirect contempt to state upon its face the cause of contempt alleged, as the ground of jurisdiction on which the judgment must rest for its validity.

So, in *Re McCarty*, 154 Cal. 534, 98 Pac. 540, in which the contempt was an indirect one, it was held that the record of the court upon which the party was adjudged guilty of contempt should show upon its face the facts upon which the judicial action was based and upon which its jurisdiction depended. It may be said, in passing, that California now has a statute requiring an order adjudging one guilty of a direct contempt to state the facts upon which it is based.

And in the following cases, it was held that an order adjudging a person guilty of contempt should set forth the facts upon which the adjudication was made: *People ex rel. Field v. Turner*, 1 Cal. 152; *Ex parte Henshaw*, 73 Cal. 486, 15 Pac. 110; *Crites v. State*, 74 Neb. 687, 105 N. W. 469; *Albany City Bank v. Schermerhorn*, 9 Paige, 372, 38 Am. Dec. 551; *Roncoroni v. Gross*, 92 App. Div. 366, 86 N. Y. Supp. 1113; *Bergin v. Deering*, 70 Hun, 381, 24 N. Y. Supp. 35; *Re Deaton*, 105 N. C. 59, 11 S. E. 244; *Ex parte Robertson*, 27 Tex. App. 634, 11 Am. St. Rep. 207, 11 S. W. 609; *Ex*

duly considered the same, and it further appearing that the plaintiff has refused to comply with the conditions of said order of February 1, 1910, and that he is now in contempt of court and guilty of disobedience of said order." Appellant upon this appeal assigns as error the omission of the court to make any finding as to the ability of appellant to comply with the court's order requiring the said money payments; also, the adjudging of the appellant to be guilty of contempt without a finding that appellant was financially able to comply with the court's order. Certain other assignments are saved in the record; but, in the view which we take of this case, it is unnecessary for the same to be considered.

The sole question for our consideration herein is whether the court has the right to adjudge a party to be in contempt of court without in any manner making findings of fact showing as a matter of law that the party accused was in fact guilty of contempt. A similar question arose in the case of *Re Deaton*, 105 N. C. 59, 11 S. E. 244, wherein a party had been adjudged guilty of contempt for acts not committed in the presence of the court; and in relation to the point before us the court said: "It is the duty of the court in passing sentence for contempt when committed in the pres-

ence of the court, though no appeal lies, to spread its findings of fact upon the record. Code, § 650. The reasons therefor are given in *State v. Mott*, 49 N. C. (4 Jones, L.) 449, and cases cited above. For a stronger reason, . . . [they] should be set out in this class of contempts in which the party is entitled to have the matter reviewed by an appeal. The judgment of the mayor, as set out in the record, is fatally defective as to the allegation of publishing grossly inaccurate accounts of judicial proceedings, in that it does not set out and recite in what the publication consisted. It is true that in the notice to show cause a certain article is charged and set out as published by the respondents. But in the judgment, there is no specific finding that such article" was published by the defendant, nor, if a part, what was proven. "It can only be inferred. This is not sufficient. The article must be set out in the judgment, and its publication, and the intent with which it was published, must be found as facts by the court." In North Carolina there is no statute requiring findings in contempt proceedings where the contempt charged was not committed in the presence of the court, and in our own state we have no such provision, but in this state we have, in reference to con-

parte *Kearby*, 35 Tex. Crim. Rep. 531, 34 S. W. 635.

But in the following cases the rule was relaxed so as to allow a judgment of contempt to stand, though it failed to set out the facts on which it was based, where other parts of the record sufficiently showed such facts:

Thus, in *Fischer v. Hayes*, 19 Blatchf. 13, 6 Fed. 63, in which the contempt was an indirect one, it was held that where the contempt alleged was set forth with sufficient particularity in the affidavits on which the motion of contempt was founded and in the report of the referee, and all the proceedings and the various orders were sufficiently connected by reference and recital to identify the contempt alleged, the order adjudging the defendant guilty need not recite the offense.

And in *Clay v. Waters*, 101 C. C. A. 645, 178 Fed. 385, in which the contempt was also an indirect one, it was held not to be a fatal objection to the judgment, that it did not recite the facts which constituted the contempt, where the petition alleged and the answer admitted them, and the judgment recited that the defendant was adjudged to stand in contempt as alleged in the petition.

And in *Ex parte Smith*, 40 Tex. Crim. Rep. 179, 49 S. W. 396, in which the alleged contempt consisted in an attempt to influence a juror, it was held that the order adjudging the contempt need not recite the offense, where the motion to punish for contempt recited the nature of the contempt, 30 L.R.A. (N.S.)

and the order following the motion showed that the defendant pleaded guilty to the charge contained therein.

And the case last reviewed was cited in *Ex parte Cash*, 50 Tex. Crim. Rep. 623, 9 L.R.A. (N.S.) 304, 123 Am. St. Rep. 865, 99 S. W. 1118, to support the conclusion that in a contempt proceeding originating in a civil suit (an indirect contempt) the moving papers could be looked to, to determine the particular contempt, when it did not appear in the judgment.

And in *Poertner v. Russel*, 33 Wis. 103, which was a proceeding to punish the defendant for violation of an injunction and in which the order adjudging the defendant guilty of the contempt was attacked upon the ground that it did not specify the particulars wherein the injunction had been violated, the court declared that the record showed fully the particulars in which the injunction had been violated, and "no good reason" was perceived why that was not sufficient.

The following cases would seem to go far towards establishing the rule that, while it is the better practice to have the order adjudging the accused guilty of contempt set forth the facts upon which it is based, it is not absolutely necessary, and the judgment will not be reversed for that reason alone:

In *Ex parte Summers*, 27 N. C. (5 Ired. L.) 149, the court refused to hold void a judgment of guilty of contempt, because the contempt was not set out by a statement of particular facts and the finding of the

tempt proceedings in justice court, a provision of our statute very similar to the North Carolina statute (Code, § 650, *supra*); our section being § 89 of the Revised Justice Code, and reading as follows: "When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made, reciting the facts as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as herein prescribed." And we may well say that, in conformity with the spirit of this statute and in view of the unusual nature of contempt proceedings, and, further, in order to carefully guard the rights of our citizens, no court should render any judgment punishing one for contempt of such court without, either by separate findings of fact or by incorporating findings in the judgment itself, clearly and specifically finding the facts upon which the judgment of the court is based.

In the case of *People ex rel. Field v. Turner*, 1 Cal. 152, the supreme court of that state, after considering this question quite fully and showing the reasons why such findings should be made, said: "We think it follows from the distinctions above considered that the final order of the court by

which a party is adjudged to have been guilty of a contempt should always show upon its face the facts upon which the exercise of the power is based, and the adjudication made. This is certainly the general, if not the uniform, practice." It is true in that case that there was absolutely no findings in the judgment, but we think that, even if there were some findings, unless such findings were sufficient to warrant the conclusion of the court, the judgment could not stand; and it must be conceded that in the case at bar, where there were no findings, either to the effect that appellant was financially able to obey the order of the court, or that he had wilfully and intentionally rendered himself unable to obey such order, there was insufficient to warrant the judgment. It is true that in a later California case—*Ex parte Henshaw*, 73 Cal. 486, 15 Pac. 110—the court found that no findings of the court were necessary, and distinguished the *Turner Case*; but an examination of said case shows that as a matter of fact the court virtually made complete findings, in that in the judgment the court referred to the charges presented against the party found guilty of contempt, and specifically declared that the court found each and every one of such allegations to be true.

contempt by the court upon those facts. Chief Justice Ruffin, however, used the following language: "It befits every court which has a proper tenderness for the rights of the citizen and a due respect to its own character, to state the facts explicitly, not suppressing those on which the person might be entitled to be discharged, more than it would insert others which did not exist, for the sake of justifying the commitment. A court which knows its duty, and is not conscious of violating it, will ever be desirous of putting upon the record, or in its process, the truth of the case, especially as thereby a higher court may be able to enlarge a citizen illegally committed or fined. But if the commitment or fine be in a general form for a contempt, all other courts are bound by it, and the party can only free himself by urging the contempt before the court that has adjudged it."

The case just reviewed was cited in *Easton v. State*, 39 Ala. 551, 87 Am. Dec. 49, in which the court declared it to be well settled that a judgment or sentence of contempt was valid without any recital of the conduct or facts which constituted the contempt, though it added that it considered the practice of inserting such facts in the judgment far more satisfactory.

In *Ex parte Chastian* (Ark.) 127 S. W. 973, it was held that, while the court below should have stated, in its judgment that the defendant was guilty of a direct contempt, the facts constituting the offense, the absence of such statement did not ren-

der the judgment void, citing *Ex parte Summers*, *supra*, and *Ex parte Davies*, 73 Ark. 358, 84 S. W. 633, in the latter of which, though the court declined to discuss the question whether the absence of a finding of facts upon which the judgment of contempt was based would render it void, since in the case before it the court below did make such finding, it was declared to be highly proper that the judgment should contain such finding.

And in *Ex parte Adams*, 25 Miss. 883, 59 Am. Dec. 234, in which the contempt alleged consisted in the refusal to answer questions to the grand jury, the court said that it was properly held that a judgment of contempt which did not set out the particular cause upon which it was founded was a nullity, but that the more recent cases had laid down the rule that the specific cause need not be set out in the judgment, and that the judgment would be sufficient if it expressed on its face that it was for contempt generally.

In *Coleman v. State*, 121 Tenn. 1, 113 S. W. 1045, in which the contempt charged was an indirect one, the judgment rendered was thought by the appellate court to be "too meager" in not setting out fully the grounds upon which the accused was found guilty, but a correction of it was permitted so as to set out the facts sufficiently.

Whether or not there should be a judgment that the party was in contempt before he could be lawfully committed is not within the scope of this note. J. A. C.

For all that may appear from the records herein, the trial court punished this defendant without finding that he was acting wilfully or contumaciously in not obeying the court's order.

The judgment of the Circuit Court punishing the appellant for contempt is reversed.

SOUTH DAKOTA SUPREME COURT.

ARLINGTON B. MELODY, Resp.,
v.

GREAT NORTHERN RAILWAY COMPANY, Appt.

(— S. D. —, 127 N. W. 543.)

Interstate commerce — tariffs — effect on shipper.

1. Persons dealing with interstate carriers are as effectually bound by the interstate commerce act and the orders of the Commission as to both freight and passenger tariffs as is the carrier himself.

Same — attempted use of erroneous ticket.

2. A passenger who accepts from a carrier's agent a ticket for interstate passage at a through rate which, under the rules of the Commission, does not allow stop-over privileges, cannot hold the carrier liable in damages for his expulsion from the train in case he attempts to exercise such privileges, although the marks necessary to show the limited character of the ticket are not placed upon it.

(June 15, 1910.)

APPEAL by defendant from an order of the Circuit Court for Minnehaha County sustaining a demurrer to the answer in an action brought to recover damages for an assault alleged to have been made by defendant's servants upon plaintiff. Reversed.

The facts are stated in the opinion.

Note. — Search has failed to disclose any other case discussing the question of the right of a railroad passenger to ride upon a ticket issued in violation of the interstate commerce act or of the orders of the Interstate Commerce Commission. The question was suggested by one of the assignments of error in *Mexican C. R. Co. v. Goodman* (Tex. Civ. App.) 43 S. W. 580, but the court disposed of the point by saying that the evidence was such as not to require a new trial on that ground.

As to the effect of provisions of the interstate commerce act against rebates upon contracts for the carriage of goods prescribing rates less than those established in accordance with the act, see note to *Armour Packing Co. v. United States*, 14 L.R.A. (N.S.) 400.
30 L.R.A. (N.S.)

Messrs. W. R. Regg and C. H. Winsor, for appellant:

The schedule tariff rates absolutely govern.

Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Southern R. Co. v. Harrison*, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552.

Mr. Ransom L. Gibbs for respondent.

Departure from tariff in the sale of a ticket constitutes no defense to an action for ejecting a passenger.

Mexican C. R. Co. v. Goodman (Tex. Civ. App.) 43 S. W. 582.

The ticket presented by plaintiff had not expired, and entitled him to the transportation refused by defendant.

6 Cyc. Law & Proc. pp. 557, 570, 571, 573; *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118, 18 N. W. 592; *Ward v. New York C. & H. R. R. Co.* 56 Hun, 268, 30 N. Y. S. R. 604, 9 N. Y. Supp. 377.

The plaintiff was wrongfully ejected from the defendant's train and is entitled to the damages resulting therefrom.

Guy v. New York, O. & W. R. Co. 30 Hun, 399; *Rown v. Christopher & T. Street R. Co.* 34 Hun, 471; *Kleven v. Great Northern R. Co.* 70 Minn. 79, 72 N. W. 828; *Krueger v. Chicago, St. P. M. & O. R. Co.* 68 Minn. 445, 64 Am. St. Rep. 487, 71 N. W. 684; *Chamberlain v. Lake Shore & M. S. R. Co.* 122 Mich. 477, 81 N. W. 339.

Smith, J., delivered the opinion of the court:

This is an appeal from an order of the circuit court of Minnehaha county, sustaining a demurrer to the defendant's answer. The complaint sets forth a cause of action for the recovery of damages for an assault claimed to have been committed upon the plaintiff by the conductor and train men of the defendant railway corporation on the 7th of March, 1908. It is alleged that on the 6th day of March, 1908, the plaintiff purchased a railway ticket at the town of Lester, in the state of Iowa, for transportation to Sioux Falls, South Dakota, by way of Garretson, and paid therefor the sum of 75 cents; that on said day the plaintiff traveled on defendant's train on said ticket from Lester, Iowa, to Garretson, South Dakota; that on the 7th day of March, 1908, the defendant received the plaintiff as a passenger upon its train at Garretson, South Dakota, to be carried to Sioux Falls, South Dakota, and that he presented the ticket above mentioned to the defendant's conductor in charge of said train, who refused to accept the same, and

demand fare from this plaintiff from Garretson to Sioux Falls; that the said plaintiff refused to pay said fare, whereupon the conductor and the employees of the defendant wilfully, maliciously, and violently ejected the plaintiff from the train, whereby the said plaintiff was greatly injured, wounded, and suffered exposure and grievous mental suffering, alleging damages.

The defendant in its answer admits the foregoing allegations of the complaint, except as to injury, and sets forth the terms and conditions of the ticket in part as follows: "Great Northern Railway Line. Good for one first-class passage from Lester to Sioux Falls. This ticket is not transferable and will not be honored for passage if presented by another than the original purchaser, whose signature appears hereon. Any alteration or erasure on this ticket makes it void, and it will be taken up by conductor or exchanger. It will not be honored for passage after date punched in margin. If closely limited no stop-over will be allowed, if limited to thirty days from date of issue, stop-overs will be allowed under usual rules, upon application to conductor." The defendant alleges that this ticket was not limited to thirty days from date of issue; that the conductor in charge of the train refused to accept the ticket, and demanded fare from Garretson to Sioux Falls, South Dakota, which demand plaintiff refused, whereupon the conductor ejected him from the train at the station of Corson, using no more force than was reasonably necessary; that the defendant in receiving said ticket for transportation between Lester and Garretson on the 6th day of March, 1908, accepted it as and for part of a continuous passage from Lester to Sioux Falls, and not otherwise; that it was necessary for the plaintiff to change cars at Garretson; that the plaintiff arrived at Garretson on the 6th day of March, and that the defendant's regular train left Garretson for Sioux Falls on said day, after the arrival of the train on which plaintiff traveled from Lester to Garretson, and plaintiff could have continued his passage from Garretson to Sioux Falls on the same day; that the distance from Lester to Garretson over the defendant's railway line is 23.5 miles, and from Garretson to Sioux Falls is 18.2 miles; that the ticket for continuous passage between Lester and Sioux Falls was sold under and in accordance with Local Passenger Tariff No. 192, which tariff was duly posted and published in the stations and depots of defendant and duly filed with the Interstate Commerce Commission and went into effect on August 1, 1907, by authority of the Interstate Commerce Commission Order No. 2184; that by

said tariff schedule the fare from Lester to Sioux Falls for continuous passage, and not otherwise, over the defendant's railway, is 75 cents; that said tariff schedule provides as follows: "Tickets will be limited to continuous passage. Journeys to commence on the day of sale. Stop-overs will not be allowed. Exception: One-way tickets between points 300 miles or over apart may be limited to thirty days from date of sale and, when so limited, stop-overs will be allowed at all points within limits;" that said passenger tariff fixes the local fare between Lester and Garretson at 60 cents, and the local fare between Garretson and Sioux Falls at 55 cents. Defendant further alleges that the plaintiff was not a passenger in continuous passage from Lester to Sioux Falls, he having stopped over at Garretson, but was a passenger from Garretson to Sioux Falls as a complete trip, and that the plaintiff refused to comply with the passenger tariff schedule as above set forth, by refusing to pay his fare according thereto, from Garretson to Sioux Falls. The original ticket is made a part of these pleadings, and discloses the fact that the ticket agent of defendant at Lester neglected to punch the ticket as required by the recitals on its face, so as to indicate the limitation to a continuous trip required by the order of the Interstate Commerce Commission permitting the lower charge for the transportation. On the face of the ticket appears the following: "I agree to the above conditions ———, Purchaser;" but this agreement was not signed by the purchaser. The plaintiff demurred to the answer on the ground that the facts stated do not constitute a defense, which demurrer was sustained by the trial court, and the appellant assigns this ruling as error.

The record discloses that the agent of defendant at Lester, Iowa, either intentionally or inadvertently sold the plaintiff an unlimited ticket or contract for transportation from Lester, Iowa, to Sioux Falls, South Dakota, for the sum of 75 cents. This transaction, whether entered into by the agent and purchaser intentionally or inadvertently, was a violation of the order of the Interstate Commerce Commission. It is admitted by the record that the order of the Commission contained the requirement that tickets sold at this special rate must be for continuous passage, and that stop-overs could not be allowed, and that the order had been regularly filed, and posted in the station of defendant at Lester, Iowa. There can be no doubt, we think, under the construction given the interstate commerce act (act Feb. 4, 1897, chap. 104, 24 Stat. at L. 379, U. S. Comp.

Stat. 1901, p. 3154) by the Federal courts, that every person dealing with an interstate carrier is as effectually bound by the law and the orders of the Commission, as to both freight and passenger tariffs, as is the carrier himself. To hold that either party under any conditions may be estopped from asserting the illegality and invalidity of a contract made in violation of the interstate law and the orders of the Commission would afford an easy means for its evasion, and might result in its practical annulment.

Plaintiff can recover damages only for a refusal of defendant's conductor to comply with a valid contract to transport him from Lester, Iowa, to Sioux Falls, South Dakota. Section 545 of the Civil Code provides: "If any passenger shall refuse to pay his fare it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars in the manner prescribed in § 1593." In the absence of any special regulations legal payment of fare may be made either to the conductor personally, or to the agent of the company. Upon payment of the fare to either, a contract arises creating a duty toward the passenger; and his ejection thereafter becomes a wrongful trespass, and entitles him to compensation for the injury. Upon payment of the necessary fare to the agent of the company, the passenger received a ticket which, to the conductor, is the only evidence of the contract; which contract is required to be made in strict conformity with the order of the Commission, under heavy penalties. To say that a conductor is bound to accept a ticket issued in violation of the order of the Commission would seem to be an anomaly, and to permit the passenger who was a party to the same violation of law, to insist upon a right to ride upon a void and unlawful ticket, or to recover damages for a wrongful ejection, would be a still greater one.

The ticket was for interstate passage between points less than 300 miles apart, was wholly unlimited, and therefore in plain violation of the filed and posted schedules and the order of the Commission. Suppose, instead of a ticket, the defendant, in violation of the statute, had furnished plaintiff a pass, and the conductor, knowing it to be unlawful, had refused to honor it, and, on plaintiff's insisting on his right to ride and refusal to pay fare, had ejected him from the train, would it be possible for him to recover damages for such an ejection? We think not. The issuance of an unlawful pass is no different in principle from the issuance of an unlawful ticket. Nor do we see any reason why the 30 L.R.A. (N.S.)

terms and conditions and rates upon which a passenger may contract for his own transportation under the order of the Commission duly filed and posted are not binding upon him as upon the shipper of freight. The same law requires the posting and filing of both the passenger and freight schedules, and in the same manner. Such schedules are intended for the inspection, information, and advantage of the public. *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 101, 39 L. ed. 911, 15 Sup. Ct. Rep. 802. And the Commission have authority to determine and prescribe the form in which schedules required to be kept open for public inspection shall be prepared and arranged. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896. It is held by the Federal courts that a shipper is presumed to know the schedule rates and the necessity of compliance therewith, regardless of the terms of the contract, and the same presumption must, we think, necessarily apply to passenger tariff rates. *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Southern R. Co. v. Harrison*, 119 Ala. 539, 43 L.R.A. 385, 72 Am. St. Rep. 936, 24 So. 552; *Mobile & O. R. Co. v. Dismukes*, 94 Ala. 131, 17 L.R.A. 113, 4 Inters. Com. Rep. 200, 10 So. 289; *Gerber v. Wabash R. Co.* 63 Mo. App. 145; *Church v. Minneapolis & St. L. R. Co.* 14 S. D. 443, 85 N. W. 1001. The unlawful act of the carrier in fixing a lower rate by contract will not prevent recovery of the higher schedule rate. *Missouri, K. & T. R. Co. v. Trinity County Lumber Co.* 1 Tex. Civ. App. 553, 21 S. W. 290. It is also held that a contract for less than schedule rates, induced by mistake, is unlawful and cannot be enforced. *Houston & T. C. R. Co. v. Dumas* (Tex. Civ. App.) 43 S. W. 609.

It must be borne in mind that plaintiff is here insisting that as to him this contract is binding and effective, notwithstanding it is by its terms unlimited as to both time and stop-over privileges; and is in clear violation of the order of the Commission. He plants his action squarely upon the very language and terms of the contract. He insists that the carrier, whether intentionally or inadvertently, has furnished him a contract which, though in terms in violation of the order of the Commission, entitled him to be transported according to the very terms of the contract itself. Such a contention could be only maintained upon the theory that the carrier may be estopped by the act of its agent from repudiating the unlawful contract to plaintiff's detriment. But the act

of the agent upon which plaintiff must found his right was in itself illegal and void, and no doctrine of the law is more firmly established than that an estoppel cannot be founded upon an illegal act. Uhlig v. Garrison, 2 Dak. 71, 2 N. W. 253.

In *Mayer v. Cherokee Strip Live Stock Asso.* 58 Kan. 712, 51 Pac. 215, the court citing with approval *Uhlig v. Garrison*, supra, says: "The controversy arises here directly between the parties to the illegal contract, and the plaintiff seeks a recovery through and under that contract. The parties voluntarily entered into the contract, and they must be held to have had knowledge that in doing so they were violating the law."

"The estoppel claimed by complainant in this case, if the facts were proved as claimed, could not have the effect sought to be attributed in this case. Public policy will not allow the doctrine of estoppel to come in and aid in validating an unexecuted contract which it holds to be void." *Robinson v. Patterson*, 71 Mich. 141, 39 N. W. 21.

"But it is insisted such a contract may be relied on as an estoppel, and a recovery therefor had. We do not believe this is correct, and are unwilling to hold that a contract void as being against public policy has any vitality whatever. It matters not how it may be pleaded, a substantial right cannot be enforced thereunder. That which cannot be recovered in an action on the contract should not be permitted to be done by indirection." *Langan v. Sankey*, 55 Iowa, 52, 7 N. W. 393.

"Courts will not aid a person whose cause of action, either upon his own showing or otherwise, appears to arise *ex turpi causa*, or from the transgression of positive law. They do not adopt this policy for the purpose of protecting a defendant, but from a determination not to assist such a plaintiff." *Den ex dem. Wooden v. Shotwell*, 24 N. J. L. 789.

Consequently, the doctrine of estoppel cannot be applied to give validity to what would be an illegal act, or to prevent the company from setting up, in answer to a claim to such stock, that the same is void, as being issued in excess of the capital. . . . By this I mean that no one can be estopped from refusing to do an illegal act; but that an estoppel can only operate in favor of a party injured, where there is no provision of law forbidding the party against whom the estoppel is to operate from doing the act which is sought to be carried out through its operation." *New York & N. H. R. Co. v. Schuyler*, 38 Barb. 537.

We have considered only the theory upon 30 L.R.A. (N.S.)

which plaintiff appears to have founded his action. By stipulation the original ticket was made a part of the answer, and on its face discloses that it is wholly unlimited either as to time or stop-over privileges. Apparently the answer originally intended to treat the ticket as though it were one properly limited by punching, for continuous passage without stop-over privilege, in accordance with the order of the Commission. The answer does not allege that the ticket was issued by mistake or inadvertence of defendant's agent. In this state of the pleadings the only question before us for determination is the single proposition whether the specific contract disclosed by the ticket itself, concededly in violation of the orders of the Interstate Commerce Commission duly filed and published, must be accepted by the conductor of a train as a valid and legal contract or ticket. There is no allegation in the complaint that the plaintiff was in any way deceived or misled by the defendant's agent, or was not aware of the illegality of the contract or the orders of the Commission, though we do not mean to infer that such facts might be material if pleaded. We refer to them only to make clear what appears to us to be plaintiff's only contention, viz., that he had an absolute right to be carried as a passenger upon a ticket issued to him by the carrier in violation of the terms and conditions contained in the orders of the Commission. We do not believe such a contention can be sustained.

The order sustaining the demurrer to the answer is reversed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Plff. in Err.,

v.

IOLA THURLOW.

(102 C. C. A. 128, 178 Fed. 894.)

Carrier — shipper — right to sleep in car.

An immigrant required to accompany his stock and household goods for the purpose of caring for them is not entitled to the rights of a passenger, where, after his car reaches destination, and his stock has

Note. — Right of drover or stockman who uses car after destination is reached.

In *CHICAGO, R. I. & P. R. Co. v. THURLOW*, not only had plaintiff's car reached its destination, but his stock had been unloaded; and while no other case has been found involving the rights of a drover or

been unloaded, he attempts to use the car for sleeping purposes until his goods can be removed from it, where the goods can be fully protected in the car, and there are hotel accommodations near by.

(April 27, 1910.)

ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in plaintiff's favor in an action brought to recover damages for the death of plaintiff's husband, which was alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Argued before Sanborn, Circuit Judge, and Riner and Wm. H. Munger, District Judges.

Mr. M. A. Low, with Mr. Paul E. Walker, for plaintiff in error.

Mr. J. T. Lafferty, with Mr. W. P. Hackney, for defendant in error.

Riner, District Judge, delivered the opinion of the court:

This was an action brought by the defendant in error, hereafter called the plaintiff, against the plaintiff in error, hereafter called the defendant, to recover damages for the death of her husband,

stockman in a car after his stock has been unloaded, the decision in this case seems to be in accord with the general principles as to the termination of a passenger's relation as such upon reaching his destination, for which see notes in 2 L.R.A. (N.S.) 873, and 20 L.R.A. (N.S.) 1019.

In *Orcutt v. Northern P. R. Co.*, 45 Minn. 368, 47 N. W. 1068, a car containing plaintiff's horse and some furniture and other property had been transported by the defendant under a contract requiring plaintiff to attend and care for the stock, and arrived at its destination about 2 A. M., whereupon plaintiff left it for a few minutes, and after it had been placed on a side track, returned to it and lay down, and was later injured by a freight engine running into it. In this case it was assumed that, on the arrival of the car at its destination, and after a reasonable opportunity to leave it, and the plaintiff having left it, the relation of carrier and passenger had ceased. "But the duty of care did not necessarily depend on the continuance of that relation, although the degree of care might be modified by a change in the relation. The duty of care, and the liability for injury caused by want of it, depended on plaintiff being rightfully in the car, and not on the relation in which he was there, though a higher degree of care was due if he was a passenger than if he was not." And it was held that it was a question for the jury whether, in view of the liability of horses, when in cars, to be frightened, and when frightened, to break their fastenings, and injure themselves, it was prudent attention to return and remain in the car; and that, if prudent attention rendered it proper for plaintiff to be there, he was rightfully there, and the defendant owed him a duty of care to avoid injuring him.

In *Hardin v. Ft. Worth & D. C. R. Co.*, 33 Tex. Civ. App. 448, 77 S. W. 431, where plaintiff was required by his contract with defendant for the shipment of certain household goods and stock, to ride in the car and look after and care for the property, and the car reached the station of its destination too late in the afternoon to be unloaded, and was left on a side track until the following morning, when it was to be

taken to a place where it could be unloaded, plaintiff left the car and slept on the depot platform until daylight, when it began to rain, and he went into the car, and later, while yet in the car, "fixing to feed" the stock, was injured by reason of a violent coupling made by the train crew with that car. Here the court said: "Naturally there are risks assumed by the passenger when he accepts passage on a freight train that would not be incident to travel upon a passenger train, but this does not lessen the degree of care to be exercised by the carrier in the operation of such freight train. It follows from what we have said that we are of opinion the evidence was not such as to authorize the trial court to assume in his charge that the appellant had ceased to be a passenger, and that he should at least have submitted that question to the jury, as requested." And further: "We think it was in the minds of the parties to the contract that appellant should remain in and about the car until it was delivered at the usual stopping place in Henrietta, and a reasonable time for unloading allowed."

On a second trial, the court, in his charge, treated plaintiff as a passenger, and the appellate court held, in 41 Tex. Civ. App. 19, 90 S. W. 679, that, under the facts shown, this was not error. But the judgment was again reversed "because the charge was on the weight of the evidence," in that, as plaintiff was only a qualified passenger, being on a freight train, and carried along for the purpose of caring for his stock, it was a question of fact which should have been submitted to the jury "whether very cautious and prudent persons, operating a train under the circumstances attending the injury in question, would have used the utmost care to discover the presence of Hardin in the car, at the time of the coupling," either "fixing to feed" the stock at that particular time, when the return of the engine should have been expected, and he had obligated himself not to be in the car while switching was being done at stations, or for the purpose of riding to the end of the journey with the stock at a time when, obviously, the car could not be moved for want of an engine.

A. C. W.

which she alleges in her petition was caused by the negligence of the defendant. The record discloses the following facts:

On February 28, 1908, W. C. Thurlow, the husband of the plaintiff, loaded a car at Oxford, Kansas, with household goods, farming implements, wearing apparel, bedding, four horses, and a wagon, for the purpose of shipping them to Calhan, Colorado, near which place he had taken up a homestead. The car was hauled from Oxford to Wellington, Kansas, by the Atchison, Topeka, & Santa Fé Railway Company, and there delivered to the defendant for transportation to Calhan.

The defendant had two rates in force between Wellington and Calhan for shipments of this character. When the higher of the two rates was paid, the railway company took full charge of the car, and became responsible for its safe and prompt delivery. The lesser of the two rates limited the liability of the defendant, and if accepted by the shipper, he was required to sign a contract whereby he was permitted to ride in the caboose attached to the train in which his car was being transported, for the purpose of caring for his stock. By the contract he also released the defendant from the duty of caring for the stock, and from liability for damages or injury resulting from certain causes therein specified, unless shown to be directly caused by the negligence of the defendant. The contract also contained a release, which the shipper, if he desired to accompany his stock, was required to sign, exempting the defendant from liability for injury to himself while he was accompanying the shipment. These two rates were shown in the tariffs filed with the Interstate Commerce Commission, and were open to inspection by the public at the station at Wellington.

It was entirely optional with Thurlow as to which rate he would accept. He chose the lower of the two rates, signed the contract and release, and rode from Wellington, Kansas, to Calhan, Colorado, on the same train in which his car was transported. The train of which Thurlow's car was a part reached Calhan on the evening of March 3d about 7 o'clock, and his car was placed on what is designated in the record as the "passing track," where the unloading chute for the purpose of unloading live stock was located. After this was done, he paid the freight to the agent at Calhan, and the car was delivered into his possession. Later in the evening another emigrant car was placed on the passing track, the two were coupled together, and Thurlow's car was placed opposite the unloading chute. Assisted by Munyan, the man in charge of the other car, Thurlow's horses

were unloaded and placed in the stock yards and cared for for the night. After that had been done, Munyan, and Thurlow released the brakes on Thurlow's car, ran it down the track for a distance of about 200 feet from the unloading chute to a highway crossing, where Thurlow stopped it by setting the brakes. Thereafter, and about 10 o'clock, the night operator, at Munyan's request, assisted in releasing the brakes on Munyan's car and pushing the car to the chute, where his live stock was also unloaded.

After the horses had been unloaded, Munyan and Thurlow built a fire, and prepared and ate their supper. About 12:30 on the morning of the 4th, Thurlow went to his car for the purpose of going to bed. Munyan requested Thurlow to go with him to the hotel, where he (Munyan) offered to procure rooms for them. Thurlow refused to do so, although the door of his car was protected by a padlock. The fact that Thurlow intended to, or did, sleep in his car, was not known to the agent or any person connected with the defendant. In some manner during the night, though for what reason or how the record does not disclose, Thurlow's car escaped and ran out on the main line, where it collided with a train, and Thurlow was killed.

The petition charges that the defendant was negligent in failing to set the brakes on the car when it was left at Calhan, and failing to place the derail provided for that purpose, so that the car could not escape onto the main line, and in failing to capture the car after it had escaped from the passing track, and before it collided with the train. The passing track at Calhan, from near the point where Thurlow's car was located, descends rapidly towards the east, and a derail switch was installed for the purpose of protecting trains on the main line, and was so located that, if a car got beyond control while on the passing track, the derail, if in position, would wreck it and turn it down an embankment. The derail switch consisted of a movable bar, which was laid on the top of the rail, and placed in position to derail cars. The bar was fastened by means of hinges to three pedestals, which were spiked to the ties between the rails.

At the trial of the case, the court withdrew from the consideration of the jury all allegations of negligence, except the allegation respecting the position of the derail switch. The evidence tended to show that when the section crew quit work on the evening of March 3d, the derail was in proper condition in every respect, and that when it was last used by anyone connected with

the defendant, it was placed in position so that it would derail cars. Upon examination the morning following the accident, it was found that the derail had been turned over and laid between the rails in such a position that the passing track could be used without hindrance. The west pedestal of the derail switch had been broken; but the evidence shows that, notwithstanding that fact, it could be used. The only evidence offered by the plaintiff in respect to the derail switch was a telegram sent by Dickey, the conductor of the train which brought the Munyan car to Calhan, which read as follows:

Calhan, 3-3, 2-97. Run over derail east end Calhan passing track. Derail is broken, but can be used. Dickey

The brakeman, one of the members of the crew of this train, testified that after his train left the passing track at Calhan, he placed the derail in proper position to derail any car that might become unmanageable. The night operator testified that he cautioned both Munyan and Thurlow to be very careful with their cars while on the passing track, and called their especial attention to the heavy grade and the danger of attempting to move the cars. At the conclusion of the evidence, the defendant requested the court to direct a verdict in its favor, which request was overruled, and an exception taken.

The court by its instructions took away from the jury the question whether the deceased was a licensee, on the ground that there was no evidence in the case which tended to show that he was such licensee, or on which recovery could be had if he was a licensee, but instructed that if the jury believed the deceased did not intend to terminate his relation of passenger with the defendant, and defendant did nothing to terminate the contract, and if a reasonably prudent man would have remained in the car during the night, a recovery might be had, unless the deceased did some act which contributed to his death.

The petition did not allege that, at the time of the accident, the deceased was a passenger. The allegation is that, pursuant to a custom and verbal agreement with the defendant, the defendant allowed the deceased "to ride in and live in such cars with such property, and look after and care for the same, until such cars arrived at their destination and were emptied of their freight at the terminal of such car's destination, which the said W. C. Thurlow did;" and after alleging the arrival of the car at its destination, and that deceased had unloaded his horses, it is further alleged:

"And in pursuance of said verbal agreement, and according to defendant's said custom of allowing care takers in charge of such cars, theretofore and then in evidence, and customary, as aforesaid, the said W. C. Thurlow remained in said car, intending to stay in said car and care for said property until the same should be placed on the said defendant's side track adjoining its depot the next day."

There was no evidence tending to show a verbal agreement or custom permitting the deceased to remain in the car during its transportation, or after it had reached its destination. No attempt was made to prove a verbal agreement, and the only evidence of a custom was to the effect that, prior to that time, some of the persons in charge of emigrant cars remained in them overnight. There was no evidence tending to show that they did so with the permission of the defendant, or that it ever at any time recognized in any way their right to do so.

It is well settled by repeated decisions that a person must be expressly or impliedly received as a passenger before a carrier becomes under obligation to exercise towards such person that high degree of care and caution for his safety which is due from a carrier to a passenger. The relation between carrier and passenger is contractual, and is created only by a contract, express or implied. In *Chicago, R. I. & P. R. Co. v. Lee*, 34 C. C. A. 305, 92 Fed. 318, Judge Sanborn said: "The presumption, in the absence of countervailing evidence, is that one who rides in a baggage car, an express car, a stock car, or on a freight train, is not a passenger on it, and, even if he is, since he is riding out of the place provided by the company for passengers, that he has assumed the increased risk resulting from riding there, and is therefore guilty of contributory negligence. *Bryant v. Chicago, St. P. M. & O. R. Co.* 4 C. C. A. 146, 12 U. S. App. 115, 53 Fed. 997; *Player v. Burlington, C. R. & N. R. Co.* 62 Iowa, 727, 16 N. W. 347; *Jenkins v. Chicago, M. & St. P. R. Co.* 41 Wis. 112; *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Gardner v. New Haven & N. Co.* 51 Conn. 143, 50 Am. Rep. 12; *Powers v. Boston & M. R. Co.* 153 Mass. 188, 26 N. E. 446; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513; *Files v. Boston & A. R. Co.* 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311; *Hoar v. Maine C. R. Co.* 70 Me. 65, 35 Am. Rep. 299."

Although it is not alleged in the petition that the deceased was a passenger, yet the case was tried by the plaintiff on the theory that he was a passenger, and

that at the time of the accident the relation of carrier and passenger had not been terminated. Assuming, for the purposes of the case, that the relation of passenger and carrier did exist by virtue of the contract entered into between the deceased and the defendant for his transportation from Wellington to Calhan, and that the defendant had undertaken, as to him, all the duties and obligations of a carrier of passengers, manifestly that relation terminated upon his arrival with his car at his destination, and after a reasonable time had elapsed for him to alight and leave the premises of the defendant. *Chicago, R. I. & P. R. Co. v. Wood*, 44 C. C. A. 118, 104 Fed. 663; *Archer v. Union P. R. Co.* 110 Mo. App. 349, 85 S. W. 934; *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 478, 54 L.R.A. 827, 60 N. E. 818; *Allerton v. Boston & M. R. Co.* 146 Mass. 241, 15 N. E. 621, 34 Am. & Eng. R. Cas. 563; *Legge v. New York, N. H. & H. R. Co.* 197 Mass. 88, 23 L.R.A. (N.S.) 633, 83 N. E. 367; *Bowen v. Illinois C. R. Co.* 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306; *Chicago, K. & W. R. Co. v. Frazer*, 55 Kan. 586, 40 Pac. 923; *Payne v. Illinois C. R. Co.* 83 C. C. A. 589, 155 Fed. 73; *Orcutt v. Northern P. R. Co.* 45 Minn. 368, 47 N. W. 1068.

This was certainly true after his horses had been removed from the car and placed in the stock yards for the night. His contract provided for his transportation upon the train for the sole purpose of caring for the live stock; and after the train reached its destination and the live stock had been unloaded, his car being provided with a padlock, whereby it could be securely locked, there was no occasion for him to return to the car. The car had been safely transported to its destination, he had paid the freight, and his live stock had been unloaded and placed in the stock yards. After that time he stood in no closer relation to the defendant than an ordinary consignee, who has a car load of freight on a side track at a station. He would have the right to go into the car for the purpose of unloading his freight, and while there for that purpose the defendant would owe him the duty of using reasonable care to see that he was not injured by its negligence or the negligence of its employees. The contract provided that he should remain seated in the caboose attached to the train while the train was in motion, and that he was permitted to go on the train and in his car only for the purpose of carrying for the live stock. The removal of the stock from the car took from the deceased his right to protection while in the car; at least, until he commenced to remove his freight.

There is no evidence tending to show that 30 L.R.A. (N.S.)

he used this car as a place to sleep, or that he rode therein, during the transportation of the car from Wellington to Calhan. The contract provided that he should ride in the caboose, and the only authority he had for being upon the car at any time was for the purpose of taking care of the live stock. It is not claimed that there was any omission of duty towards the deceased until after he reached his destination, and even if it be conceded that the relation of passenger and carrier continued up to the time his horses were unloaded in the stock yards and cared for for the night, which was between 9 and 10 o'clock, it certainly terminated after that had been done and a reasonable time had elapsed to enable him to leave the defendant's premises. That he had sufficient time to do so is clearly established by the record. The testimony shows that he did not attempt to go to bed on the car until half past 12 on the morning of the 4th; that when he did go into his car to sleep, he did so without the knowledge or consent of the defendant or its employees; and in the absence of such knowledge, it was but reasonable for the defendant's employees to suppose, after the stock had been cared for, there being a hotel within 300 feet of the station, that he would go to the hotel for the night.

If he remained upon the car without the knowledge of the defendant or its employees, we cannot understand upon what theory it can be held guilty of negligence. If he was a mere trespasser, as we think he was, the defendant owed him no duty except that it should not, through wanton or wilful negligence, injure him; and such negligence cannot be attributed to the defendant unless it or some of its employees knew of his presence upon the car. As we have already suggested, there was no occasion for him to be in or about the car after his horses had been unloaded and cared for for the night. He had been provided with a padlock, and his car could have been securely locked, and his goods fully protected without his presence in the car; nor does his contract of shipment presuppose a necessity for doing so, and therefore confer upon him a corresponding right.

The court instructed the jury as follows: "Now, gentlemen, if the plaintiff in this case has proven to you by the greater weight of all the credible testimony in the case that after this train arrived at the town of Calhan, taking into consideration the time at which the car arrived there, the time in which it would take a reasonably prudent person to care for the stock in his car, which he was obliged to care for under the contract, properly, and taking all the facts and circumstances in evidence in the case,

if you believe the deceased did not intend to terminate his relation of passenger with the defendant company, and defendant did nothing to terminate the contract, and that on account of the manner in which the car was there left, and the obligation imposed upon the deceased to look after and care for his live stock, if a reasonably prudent man would have there remained all the night, as he did, then in that case the relation of the deceased to the railway company as passenger had not been terminated either by himself or defendant. The plaintiff may, if the relation of passenger continued at the time of the accident, recover in this action, unless he did some act that contributed to his death. There is evidence here that he, with others, moved this car, that the brakes were unset, and that the brakes were again set. If in any act he did there, unloosening these brakes or in resetting them,—not setting them tight, as they should have been,—if anything he did there on that night directly contributed toward that car escaping down that track, and colliding with the westbound train, which resulted in his death, then you cannot find for the plaintiff in this case. And you cannot find for the plaintiff in this case unless you find at the time that this car escaped he occupied the relation of passenger to the railway company. If the railway company carried deceased to the town of Calhan, and the deceased then intended to abandon his relation with the company, the plaintiff cannot recover in this suit. If, under all the facts and circumstances, taking into consideration the time of arriving there, the place at which the car was left, as to whether it was day or night,—taking into consideration all the facts and circumstances in the case, if the deceased did not have a reasonable time after arriving there to leave the train and premises of defendant, and thus sever his relation as passenger with the company, then plaintiff may recover in this action for such injury and damages as she has sustained by reason of his death."

This instruction made the right to recover depend upon whether the relation of passenger and carrier existed at the time of the accident, leaving the question to the jury to be determined as a question of fact. We think, under the plaintiff's evidence, if it stood alone, that the court should have declared as a matter of law that the relation of carrier and passenger had ceased, and that the defendant's request for an instructed verdict in its favor should have been sustained.

In the view we have taken of this case, it becomes unnecessary to discuss other 30 L.R.A. (N.S.)

questions urged at the argument and in the briefs of counsel.

The judgment of the Circuit Court must be reversed, with instructions to grant a new trial.

MAINE SUPREME JUDICIAL COURT.

JOHN P. SQUIRE & COMPANY

v.

CITY OF PORTLAND.

(106 Me. 234, 76 Atl. 679.)

Tax — nonresident corporation — duty to furnish list.

1. A nonresident corporation doing business within the state is not within the provisions of statutes requiring inhabitants to bring in a list of their property for taxation and barring resident owners of the right to make application for abatement in case of failure to bring in the list.

Same — tenant — betterments.

2. A tenant is not taxable for a cold-storage plant erected by him in the leased building, extending from basement to the fifth story above, involving substitution of floors, and constructed so as to form part of the building, if there is no provision in the lease giving him the right to remove it, and it cannot be removed without causing injury to the estate and destruction of the plant itself as such.

(December 13, 1909.)

Note. — Cold-storage plant as a fixture.

It was held in *Re New York*, 101 App. Div. 527, 92 N. Y. Supp. 8, affirmed in 182 N. Y. 281, 74 N. E. 840, in determining whether landlord or tenant was entitled to an award in condemnation proceedings, that a cold-storage plant installed by tenants, comprising false walls, partitions, calked and asphalted floors, and refrigerating machinery, are such installations as are built into the premises and become a part of the realty. The court said that even though they might be removed without materially injuring the building, the very method by which they were annexed to the building made them part of it, rendering them valueless except for a use connected with the building. The same conclusion was reached as to an ice chest, installed by a tenant which would be mere lumber when removed, and impossible of restoration.

A large cold-storage room erected by a lessee of a building for use in his meat-market business was held removable as a trade fixture in *Ward v. Earl*, 86 Ill. App. 635, though so attached to the walls as to tear off considerable plaster when removed, such damage not being material. It appeared that the premises were rented for use as a meat market to the knowledge of

REPORT by the Supreme Judicial Court for Cumberland County for the opinion of the full bench after dismissing an appeal by plaintiff from the decision of the assessors for the city of Portland refusing to abate certain taxes assessed to him. Appeal sustained, and cause remanded.

The facts are stated in the opinion.

Mr. Chase Eastman, for plaintiff:

A nonresident need not bring in a list of his taxable property within a specified time as a preliminary to making application for an abatement of taxes.

Hopkins v. Reading, 170 Mass. 568, 49 N. E. 923.

A foreign corporation is a nonresident, and is neither an inhabitant nor a resident owner, under the statute, in any place by reason of having an office or place of business there.

Hammond Beef & Provision Co. v. Best, 91 Me. 431, 42 L.R.A. 528, 40 Atl. 338; Northern Invest. Co. v. Boston, 158 Mass. 461, 33 N. E. 580.

The cold-storage plant is not taxable under the provisions of Rev. Stat. chap. 9, § 13, as "machinery employed in any branch of manufacture."

25 Cyc. Law & Proc. p. 1661; 26 Cyc. Law & Proc. p. 520; Dudley v. Jamaica Pond

Aqueduct Corp. 100 Mass. 183; People ex rel. New England Dressed Meat & Wool Co. v. Roberts, 155 N. Y. 408, 41 L.R.A. 228, 50 N. E. 53; Com. v. Cover, 29 Pa. Super. Ct. 409.

It is taxable as real estate.

Foxcroft v. Straw, 86 Me. 76, 29 Atl. 950; Paris v. Norway Water Co. 85 Me. 330, 21 L.R.A. 525, 35 Am. St. Rep. 371, 27 Atl. 143; Ashby v. Ashby, 59 N. J. Eq. 536, 40 Atl. 528; Collamore v. Gillis, 149 Mass. 578, 5 L.R.A. 150, 14 Am. St. Rep. 460, 22 N. E. 46.

It is not even a trade fixture removable by the tenant during the term.

19 Cyc. Law & Proc. p. 1066.

Even if it should be considered a trade fixture removable by the tenant during the term, it is still a part of the realty until severed.

19 Cyc. Law & Proc. p. 1035; Green v. Chicago, R. I. & P. R. Co. 8 Kan. App. 611, 56 Pac. 136; Sampson v. Camperdown Cotton Mills, 64 Fed. 939; Lee v. Risdon, 2 Marsh. 495; Bliss v. Whitney, 9 Allen, 114, 85 Am. Dec. 745; Tyler, Fixtures, 108; Stockwell v. Marks, 17 Me. 455, 35 Am. Dec. 266; Davis v. Buffum, 51 Me. 160.

Mr. Emery G. Willson, for defendant:

Unless plaintiff could satisfy the assess-

the lessors, that the lessors knew of the manner of putting in the cold-storage room, and that for the general purpose of renting the building the room in question would have been undesirable. It was also held that the fact that it was necessary to remove the cold-storage room in sections would not affect its character as a fixture.

In Park v. Baker, 7 Allen, 78, 83 Am. Dec. 668, a large and heavy wooden ice chest in no way connected with or affixed to the building in which it stood was held removable as personal property although it was intended for use in the tavern where it was originally constructed, and could not be removed without taking it in pieces.

As to certain refrigerators placed in an apartment house, it was said in Cosgrove v. Troesch, 62 App. Div. 123, 70 N. Y. Supp. 764, that it was quite likely that they were removables as matter of law, but the insufficiency of the evidence as to whether the refrigerators were specially constructed and finished to be placed in the alcoves where they stood did not enable the court to definitely declare their character.

A parallel case is found in Williams v. London, 61 Misc. 494, 115 N. Y. Supp. 547, where ice boxes or refrigerators specially constructed for an apartment house and connected with drains to carry off the water were held to have become part of the realty.

See also in connection with this question Union Bank & T. Co. v. Fred W. Wolf Co. 114 Tenn. 255, 108 Am. St. Rep. 903, 86 S. W. 310, 4 A. & E. Ann. Cas. 1070, where certain machinery of an ice plant bolted to brick foundations, and so connected with

other parts of the plant as to form a complete and homogeneous system, and thus appear to be prima facie a part of the realty, was held to have lost its character as personalty as between the conditional vendor of the machinery in question and a subsequent mortgagee without notice.

But in Northwestern Mut. L. Ins. Co. v. George, 77 Minn. 319, 79 N. W. 1028, 1064, a refrigerating plant which could be removed from a building without material injury to the building or to the apparatus was held personal property as between a mortgagee and mortgagor, the latter having installed the plant on the basis of a conditional sale subsequent to the giving of the mortgage.

A few cases have been found which have to do with somewhat similar articles, and these are included for what they are worth. The following have been held removable as personal property: brewery cooler (Wolford v. Baxter, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. 744); ice box unattached (Bush v. Havird, 12 Idaho, 352, 86 Pac. 529, 10 A. & E. Ann. Cas. 107); ice box, trade fixture (Webber v. Franklin Brewing Co. 123 App. Div. 465, 108 N. Y. Supp. 251); ice box in meat market (Griffin v. Jansen, 19 Ky. L. Rep. 19, 39 S. W. 43). But a cooler in a brewery has been held a part of the realty (Scheifele v. Schmitz, 42 N. J. Eq. 700, 11 Atl. 257); likewise pipes for cooling beer (Dehring v. Beck, 146 Mich. 706, 110 N. W. 56); and a refrigerating plant in a building constructed for that purpose (Wade v. Donau Brewing Co. 10 Wash. 284, 38 Pac. 1009).

W. A. S.

ors that it was unable to file its list seasonably, it cannot have an abatement of its tax even though it may have been assessed for property which it did not own or possess.

Orland v. County Comrs. 76 Me. 466; *Edwards Mfg. Co. v. Farrington*, 102 Me. 143, 66 Atl. 309.

The corporation, although legally a non-resident of the city of Portland, was a resident for taxing purposes, and was bound by the assessors' notice.

Edwards Mfg. Co. v. Farrington, 102 Me. 140, 66 Atl. 309.

Cornish, J., delivered the opinion of the court:

This is an appeal from the decision of the assessors of the city of Portland refusing to abate a tax levied upon the appellant for the year 1908. Under the agreed statement of facts two questions are involved: First, whether the appellant can maintain this appeal not having furnished to the assessors a list of its taxable property; second, whether the property in question was taxable to the appellant on April 1, 1908, as personal property.

1. The appeal is clearly maintainable. Rev. Stat. chap. 9, § 73, provides that "before making an assessment, the assessors shall give seasonable notice in writing to the inhabitants," etc., to make and bring in true and perfect lists of their polls and all their estates, real and personal, not by law exempt from taxation. Under Rev. Stat. chap. 1, § 6, ¶ 7, "the word 'inhabitants' means a person having an established residence in a place." Rev. Stat. chap. 9, § 74, provides that "if any resident owner after such notice does not bring in such list," he is barred of his right to make application for abatement, unless he offers such list with his application and satisfies the assessors that he was unable to offer it at the time appointed. The only persons barred from making the application for abatement are "resident owners." Prior to 1895 this last section read, "If any person," etc., but in § 3 of chapter 122 of the Public Laws of 1895 it was provided that "any nonresident against whom a tax has been assessed shall not be debarred of his right to make application to the assessors for an abatement of his taxes nor to appeal from their decision according to the provisions of this act, by his failure to bring in a list of his estate to the assessors, but in such case no costs shall be allowed to the appellant." In the revision of 1903, therefore, the words "any person" in Rev. Stat. 1883, chap. 6, § 93, were changed to "any resident owner." The cases cited by the defendant on this point—*Boothbay v. Race* (1878) 68 Me. 351, and *Orland v. County Comrs.* (1884) 76 Me. 30 L.R.A. (N.S.)

402—were decided prior to this amendment while in *Edwards Mfg. Co. v. Farrington* (1906) 102 Me. 140, 143, 66 Atl. 309, it expressly appeared that the plaintiff was a Maine corporation and an inhabitant of Augusta for taxing purposes.

In the case at bar the appellant, on the contrary, is a corporation organized under the laws of and is a resident of New Jersey, as the residence of a corporation is in the state of its creation, although it may carry on business in another state. *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 10 L. ed. 274, 307; *Shaw v. Quincy Minn. Co.* 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935; *Hammond Beef & Provision Co. v. Best*, 91 Me. 431, 42 L.R.A. 528, 40 Atl. 338.

It follows therefore that the appellant being neither an "inhabitant" under § 73, nor a "resident owner" under § 74, was not obliged to furnish the assessors with a list of its taxable property, and the objection to the maintenance of the appeal is not well taken.

2. Was the property in question legally taxable to the appellant on April 1, 1908? In the opinion of the court it was not. This property which was assessed as personal property is called a refrigerator, but from the description given it really consisted of several cold storage rooms forming a part of a leased building. If taxable at all to the appellant it must be on the ground that it was a trade fixture, removable by the tenant during the lease, and therefore owned by it during that time as personal property. From the agreed statement it appears that the appellant has occupied a store in Portland since 1901 under a written lease, the terms or conditions of which, however, are not given; that a refrigerator or receptacle for the storage of meats and provisions has been constructed by the appellant during its occupancy; that "said refrigerator is constructed of wood, and occupies the whole width of the building aforesaid at one end, from wall to wall, a distance of about 23 feet, and is in length about 30 feet. It occupies the basement and the five floors immediately above the same, and is constructed by sheathing the interior walls of the building with wood, and packing between this wood and said interior walls shavings to the thickness of some 6 or 8 inches. A double wall of wood similarly packed with shavings constitutes the front of the refrigerator, extending from side wall to side wall, and extends from the basement to the roof of the building, six stores in all. The basement of the refrigerator is separated from the story immediately above, as is that story from the next succeeding story, and so on, up to and including the third story above the basement, by a double

wooden floor, filled with wood shavings, of some 18 inches in thickness, which floors replace the original floors of the building which were torn out by the petitioner, with the consent of the lessor, in the construction of the refrigerator. It is admitted that said refrigerator could be removed from said premises only after having been taken to pieces." Did this constitute a trade fixture, or was it a part of the real estate at the time of the assessment?

There is authority for holding that even granting this to be a trade fixture, it became a part of the realty when annexed, and remained so until actually severed. Ewell on Fixtures, 2d ed. p. 122, states the doctrine in this language:

"The nature of this right of removal has been explained in two ways: By supposing that the chattel nature of the thing is preserved after its annexation, or by considering that the thing ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty. There is some confusion and looseness of expression among the authorities on this subject, occasioned probably by the fact that in some relations and for some purposes, as in favor of the execution creditors, or the executors of a tenant, the chattel nature of the thing is not lost by its annexation. For many, if not most purposes, however, during the continuance of the annexation, the thing is treated as a parcel of the realty; and though it is in the power of the party making the annexation to reduce the thing again to the state of goods and chattels by severance, yet until so severed, it remains a part of the realty; and this seems to apply as well to trade fixtures as to other fixtures." See also *Preston v. Briggs*, 16 Vt. 124; *Bliss v. Whitney*, 9 Allen, 114, 85 Am. Dec. 745; *Stockwell v. Marks*, 17 Me. 455, 35 Am. Dec. 266; *Davis v. Buffum*, 51 Me. 160; *Sawyer v. Long*, 86 Me. 541, 30 Atl. 111.

Under these authorities, the assessment being laid while the annexation continued, it was invalid. But the property in the case at bar never constituted a fixture. It is undoubtedly true that the rules of law defining fixtures have grown less rigid in later years, and especially is this true of trade fixtures as between lessor and lessee. It is also true that as to such fixtures the intention of the party making the annexation is given special prominence in applying the rule, and that the burden of showing the existence of the requisites for a merger is upon the party claiming such merger. *Hayford v. Wentworth*, 97 Me. 347, 54 Atl. 940. The three requisites specified in the case last cited are physical annexation, adaptability or usability, and intention. The first

two of these requirements are fully met in the case at bar, as the description before given clearly shows. As to the third, the intention of the lessee, that must be proved not by the unrevealed and secret intention of the party, which would be well-nigh impossible, but by the facts and circumstances including the relations and the conduct. It is more a matter of inference than of declaration. Were it a question of intention as expressed subsequently, the attitude of the appellant in this suit, resisting the claim of a fixture and insisting upon the merger, would have great force, because it would be extremely difficult for the lessee to hereafter sustain such a claim in view of the position taken here. But the alteration made in this building by the lessee does not possess the elements of a trade fixture. "Trade fixtures" is a term usually used to describe property which a tenant has placed on rented real estate to advance the business for which the realty is leased, and may, as against the lessor and those claiming under him, be removed at the end of the tenant's term." 8 Words & Phrases, p. 7042; Ewell, Fixtures, p. 129. This definition embraces a large variety of additions and erections, of which the books are full, as the temporary partition in *Hanson v. News Pub. Co.* 97 Me. 99, 53 Atl. 990; a wash-down, syphon, water-closet in *Hayford v. Wentworth*, 97 Me. 347, 54 Atl. 940; an ice chest, consisting of a large and heavy wooden box lined with zinc, *Park v. Baker*, 7 Allen, 78, 83 Am. Dec. 668; bowling alleys nailed to the floor, *Hanrahan v. O'Reilly*, 102 Mass. 201; boilers, engines, shafting, etc., removable without material injury to the building, *Bergh v. Herring-Hall-Marvin Safe Co.* 70 L.R.A. 756, 69 C. C. A. 212, 136 Fed. 368; bakers' ovens and boilers, *Baker v. McClurg*, 198 Ill. 28, 59 L.R.A. 131, 92 Am. St. Rep. 261, 64 N. E. 701; temporary sheathing, partitions, and a cold-storage box, attached by strips and nails to the wall and floor, *Ward v. Earl*, 86 Ill. App. 635. But all these cases differ from the case at bar in two essential particulars: First, they involved addition, and not substitution; and, second, the fixtures could be removed without substantial injury to the realty.

It is a well-recognized principle that trade fixtures which are in substitution for essential parts of the leased premises, and not additions thereto, are not removable, but are presumed to be permanent additions. 19 Cyc. Law & Proc. p. 1066; Ewell, Fixtures, p. 146, note. This is but another way of stating that this fact when proved has great and possibly controlling weight upon the question of intention. In *Felcher v. McMillan*, 103 Mich. 494, 61 N. W. 791, the tenant removed the pillars, partitions

sewers, and floors in the building occupied by him, replacing them by others more expensive but better suited to his business; held, that the latter became a part of the realty, and could not be removed as trade fixtures. The court say:

"The lessees chose to remove the pillars, the partitions, the sewers, the cement floor, and to replace them by others which they considered better suited to their business. If they chose to replace wooden pillars with iron ones, plate-glass fronts and partitions with refrigerators and mirrors solidly built in the partition walls, and to take up the sewers and floors, and replace them with others better and more expensive, the new ones did not thereby become trade fixtures, subject to removal by the tenant. The law does not permit tenants to remove fixtures which are built into the building and become a part of it." In *Bovet v. Holzgraft*, 5 Tex. Civ. App. 141, 23 S. W. 1014, a new stairway was substituted for an old one. Held, that the former became a part of the realty and as irremovable by the tenant as the latter. See also *Ashby v. Ashby*, 59 N. J. Eq. 536, 46 Atl. 528.

The tenant in the case at bar tore out the original floors in the rear 30 feet of the building, and replaced them with double wooden floors 18 inches thick, filled with wood shavings. When completed the new floor simply took the place of the old and became a part of the building. They could no more be removed by the tenant than the original.

Another principle equally well settled is that the right of removal can only be exercised when it causes no material injury to the estate. The value of this principle also is its bearing upon the question of intention. But it is a rule universally recognized, and nowhere more carefully than in the cases first cited, where the right of removal was granted, it being proved that no substantial injury would ensue. In *Collamore v. Gillis*, 149 Mass. 578, 5 L.R.A. 150, 14 Am. St. Rep. 460, 22 N. E. 46, a baker's oven, built of bricks and mortar, and so united with the building that the two were inseparable without the destruction of the oven and a substantial injury to the building, was held not to be a removable trade fixture.

"Where the chattel is so annexed that it cannot be removed without material injury to the realty, it would ordinarily be a necessary inference that the intention was not to remove it," says this court in *Hayford v. Wentworth*, 97 Me. at page 350, supra. That necessary inference must be drawn here. The appellant did not place any fixture in the building that it intended to remove. A part of the structure itself was

changed and remodeled. It was for the most part a case not of construction, but of reconstruction; not of addition, but of substitution. Floors were removed and thicker floors were substituted. The walls were doubled with a thickness of 6 inches of shavings between, and a similar double wall was constructed to separate these several rooms from the rest of the building. To remove all this would be to leave the building with 30 feet in the rear without floors and open from basement to roof. And after removing what was put in, the tenant would have not a structure or machine the parts of which could fit into one another and be reassembled and set up in some other place, but a worthless mass of old lumber, hardware, and shavings. The burden of proof as to merger is fully sustained here by the character of the changes made by the fact of substitution, by the material injury to the building consequent upon removal, and by the valueless condition of the so-called fixture when removed, and the inference is irresistible that the property became a part of the building itself, and that the appellant is correct in its contention that it had no ownership therein.

Appeal sustained, with costs, and case remanded to the court at nisi prius, for the determination of the question of overvaluation in accordance with the stipulation of the parties.

So ordered.

MICHIGAN SUPREME COURT.

INTERNATIONAL HARVESTER COMPANY OF AMERICA

v.

CLEMENT SMITH, Circuit Judge.

(— Mich. —, 127 N. W. 695.)

Monopoly — right to enforce collateral contracts.

1. Agents of a foreign corporation which was organized for legitimate business purposes, and has fully complied with the laws entitling it to do business in the state, cannot defeat an action by it to compel them to pay over money belonging to it, arising from goods sold and collections made, on

Note. — Agreements collateral to contracts forming illegal combinations, and the enforcement thereof by members of such illegal combinations.

This was the subject of a note to *Straus v. American Publishers' Asso.* 64 L.R.A. 712, also a note appended to *Freed v. American F. Ins. Co.* 11 L.R.A. (N.S.) 368. It is intended to include herein only cases decided subsequently to the latter note.

As shown in the foregoing notes, both at

the theory that it is a trust or monopoly, either at common law or under a statute making illegal contracts in restraint of trade or commerce, although the statute denies to a foreign corporation violating its provisions, the right to do business in the state.

Mandamus — invalid order — annulment.

2. Mandamus lies to compel a trial court to vacate an invalid order requiring a plaintiff to produce its books and papers for examination by defendant.

(September 28, 1910.)

PETITION for a writ of mandamus to compel the Circuit Judge for Easton County to vacate an order requiring re-

common law and under the Federal anti-trust act, and also many state anti-trust acts, which in general only reassert the common-law rule against monopolies, or are similar thereto, the mere fact that a contract is made by or with a member of an illegal combination, or by or with the illegal combination itself, does not invalidate the contract if it is collateral to the illegal combination or agreement, and is based upon a sufficient consideration. *Continental Wall Paper Co. v. Louis Voight & Sons Co.* 212 U. S. 227, 53 L. ed. 486, 29 Sup. Ct. Rep. 280, affirming 19 L.R.A.(N.S.) 143, 78 C. C. A. 567, 148 Fed. 939; *Chicago Wall Paper Mills v. General Paper Co.* 78 C. C. A. 607, 147 Fed. 491, 8 A. & E. Ann. Cas. 889; *Boatmen's Bank v. Fritzen*, 175 Fed. 183; *Johns-Pratt Co. v. Sachs Co.* 176 Fed. 738; *Motion Picture Patents Co. v. Laemmle*, 178 Fed. 104; *Virtue v. Creamery Package Mfg. Co.* 102 C. C. A. 413, 179 Fed. 115; *Midland Valley R. Co. v. Hoffman Coal Co.* 91 Ark. 180, 120 S. W. 380; *Buckhorn Plaster Co. v. Consolidated Plaster Co.* 47 Colo. 516, 108 Pac. 27; *Brooklyn Distilling Co. v. Standard Distilling & Distributing Co.* 120 App. Div. 237, 105 N. Y. Supp. 267, affirmed on other grounds in 193 N. Y. 551, 86 N. E. 564; *Freed v. American F. Ins. Co.* supra.

Thus, the fact that the owner of a patent is a member of or is an illegal combination or monopoly, in reference to whose business the patent is used, is no bar to an action for the infringement of the patent. *Virtue v. Creamery Package Mfg. Co.*; *Johns-Pratt Co. v. Sachs Co.*; and *Motion Picture Patents Co. v. Laemmle*,—supra.

By alleging and proving a conspiracy to deprive the plaintiff of his interest in certain valuable patents, to establish therewith a monopoly, in violation of the state and Federal statutes, and the further fact that, in carrying out this conspiracy, the conspirators, by threats and false representations, induced the plaintiff to part with his interest in such patents, plaintiff is entitled to a cancellation of his assignment of his interest in the patents, or to an accounting of the profits derived therefrom. *Disbrow v.* 30 L.R.A.(N.S.)

lator to produce certain books and papers in an action brought to compel the payment of certain moneys alleged to have been collected, and payment for goods sold and delivered. Granted.

The facts are stated in the opinion.

Mr. James C. McMath, with Messrs. Harry H. Partlow and Thomas, Cummins, & Nichols, for relator:

Statutory provisions against "trusts" or monopolies are merely declaratory of the common law.

State v. Central R. Co. 109 Ga. 722, 48 L.R.A. 351, 35 S. E. 37; *Trust Co. v. State*, 109 Ga. 751, 48 L.R.A. 520, 35 S. E. 323; *Norwich Gas-light Co. v. Norwich City Gas Co.* 25 Conn. 19; *Richardson v. Buhl*, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102.

Creamery Package Mfg. Co. 110 Minn. 237, 125 N. W. 115.

A contract by a monopoly for the sale of merchandise is not illegal merely because the seller is an illegal combination, where the contract has no direct relation to the illegal combination, being merely a collateral contract, founded upon a good consideration. *Chicago Wall Paper Mills v. General Paper Co.* supra.

A member of an illegal trust or combination may, nevertheless, sue a railroad company for breach of its common-law and contractual duty to furnish cars to such member, although the cars are to be used by the member to transport a product with reference to which the illegal combination exists, since a breach of such a contract is not in any way connected with the alleged illegal combination. *Midland Valley R. Co. v. Hoffman Coal Co.* supra.

A lease of a distilling plant, to be used by a monopoly in the manufacture and sale of alcohol and spirituous liquors, is nevertheless valid, since such a contract does not come within the inhibition of the statute against arrangements or combinations whereby a monopoly in the production or sale of an article in common use is or may be created, as this statute does not prevent the selling or leasing of property, nor the buying or leasing of property to prevent competition, but is designed to prevent the owners or controllers of property from entering into a combination to regulate the production and maintain prices for their mutual benefit, according to their respective interest. *Brooklyn Distilling Co. v. Standard Distilling & Distributing Co.* supra.

So, a person engaged in a manufacturing business, who leases his plant to a consolidated company engaged in the same line of manufacture, and takes employment for a time with such company, cannot repossess himself of the leased property, and defend his possession on the ground that the lessee was an unlawful combination. *Buckhorn Plaster Co. v. Consolidated Plaster Co.* supra.

Promissory notes executed to a member of a trust or monopoly in part for borrow-

The collateral contracts of a "trust" are not void and unenforceable in Michigan.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *The Charles E. Wiswall*, 42 L.R.A. 85, 30 C. C. A. 339, 57 U. S. App. 179, 86 Fed. 671; *Barton v. Milvane*, 59 Kan. 313, 52 Pac. 883; *California Cured Fruit Asso. v. Stelling*, 141 Cal. 713, 75 Pac. 320; *National Distilling Co. v. Cream City Importing Co.* 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864; *Hadley Dean Plate Glass Co. v. Highland Glass Co.* 74 C. C. A. 462, 143 Fed. 242; *Wiley v. National Wall Paper Co.* 70 Ill. App. 543; *Straight v. National Harrow Co.* 51 Fed. 819; *Gilbert v. American Surety Co.* 61 L.R.A. 253, 57 C. C. A. 619, 121 Fed. 503; *Chicago Wall Paper Mills v. General Paper Co.* 78 C. C.

A. 607, 147 Fed. 491, 8 A. & E. Ann. Cas. 889.

In the absence of statutes showing a contrary intent or policy, foreign corporations will be permitted to do business, and make contracts which, under the doctrine of state comity, will be held valid and enforced by the courts.

People v. Hawkins, 106 Mich. 482, 64 N. W. 736; *Harris v. Runnels*, 12 How. 84, 13 L. ed. 903.

In a collateral proceeding between a corporation plaintiff and an individual defendant, the latter is not entitled to prove that the former is a monopoly or "trust," in order to establish the illegality of the contract sued on.

Lafayette Bridge Co. v. Streator, 105 Fed. 729; *American Steel & Wire Co. v.*

money, and also for services performed or to be performed by the payee in the line of business with reference to which the monopoly existed, are not, for that reason, invalid, since such a contract does not have the direct and necessary effect of furthering the purposes of the monopoly, although it does indirectly or incidentally have such effect. *Boatmen's Bank v. Fritzen*, supra. The foregoing decision considered the legality of such a contract under the anti-trust laws of Kansas. In this connection it is interesting to compare *State v. Wilson*, 73 Kan. 343, 117 Am. St. Rep. 479, 80 Pac. 639, 84 Pac. 737, wherein was considered the validity of notes secured by a mortgage given under substantially similar circumstances; and it was held that, under the anti-trust laws of Kansas, such notes and mortgage were invalid. The important provision of this act, so far as concerns this question, was to the effect that any contract or agreement in violation of the act should be absolutely void, and not enforceable in any of the courts of the state; and when any civil action shall be commenced in any court of the state, "it shall be lawful to plead in the defense thereof that the plaintiff, or any other person interested in the prosecution of the case, is at the time, or has within one year next preceding the date of the commencement of any such action, been guilty, either as principal, agent, representative, or consignee, directly or indirectly, of a violation of any of the provisions of this act, or that the cause of action grows out of any business transaction in violation of this act." As stated, the transaction involved in each of these cases was the execution of notes secured by a mortgage to a member of a commission association engaged in the buying and selling of cattle under a by-law prohibiting the members from charging a commission of less than a certain amount. This commission or exchange practically controlled all this business at that point. The consideration for the notes was borrowed money and payment of services ren-

dered or to be rendered by a member of this association in the sale of live stock. In reaching the conclusion that this transaction came within the provisions of the act, and hence was invalid, the court reasoned that the mortgage was void, not because it was given to one who was a member of an unlawful combination, but because a part of its consideration—the charge made for commission—was itself illegal, and added: "This is not an instance of an attempt to fasten a disability to sue upon an individual because of his violation of the law in some independent or collateral matter; the objection goes to the contract itself. The statute forbids a member of a trust to do any business in the state,—that is to say, as properly interpreted, to do any business in promotion of, or in pursuance of, the purposes of the trust. Assuming the facts to be as alleged by the defendant, the mortgagee, a member of the trust, bought these cattle for him, and, in pursuance of the obnoxious by-law, made him a charge of 50 cents a head for such service. This was an illegal act, and the contract to pay such commission was a contract to pay a sum exacted in defiance of the law. The contract for this payment was, therefore, a contract in violation of the statute, by the very terms of which such contracts are made not merely nonenforceable, but absolutely void."

In connection with the two preceding cases it is interesting to compare *Continental Wall Paper Co. v. Louis Voight & Sons Co.* supra, a leading and authoritative case on the question of what constitutes a collateral contract, in the sense that it does not come within the provisions of enactments against trusts and monopolies. This case was disposed of on demurrer to the answer of the defendants to an action brought for goods sold and delivered by a member of an alleged unlawful combination. By the demurrer the plaintiff admitted that it was a member of a combination or trust formed for the purpose of restraining and monopolizing trade and commerce among the sev-

Wire Drawers' & D. M. Unions Nos. 1 & 3, 90 Fed. 608; Harrison v. Glucose Sugar Ref. Co. 58 L.R.A. 915, 53 C. C. A. 487, 116 Fed. 304; Dennehy v. McNulta, 41 L.R.A. 609, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825; Pennsylvania Co. v. Bay, 138 Fed. 204; Dr. Miles Medical Co. v. Platt, 142 Fed. 606; Atty. Gen. ex rel. Miner v. Lorman, 59 Mich. 162, 60 Am. Rep. 287, 26 N. W. 311; Detroit Driving Club v. Fitzgerald, 109 Mich. 675, 67 N. W. 899; 2 Morawetz, Priv. Corp. §§ 758, 769; 10 Cyc. Law & Proc. p. 256; Importing & Exporting Co. v. Locke, 50 Ala. 332; Charles River Bridge v. Warren Bridge, 7 Pick. 344; Kayser v. Bremen, 16 Mo. 88; Centre & K. Turnp. Road Co. v. M'Conaby, 16 Serg. & R. 140; Pattison v. Albany Bldg. & L. Asso. 63 Ga. 373; Niemeyer v. Little Rock Junc-

tion R. Co. 43 Ark. 111; Aurora & C. R. Co. v. Lawrenceburgh, 56 Ind. 80; National Docks R. Co. v. Central R. Co. 32 N. J. Eq. 755; Duke v. Cahawba Nav. Co. 16 Ala. 372; Garrett v. Dillsburg & M. R. Co. 78 Pa. 465; Stout v. Zulick, 48 N. J. L. 599, 7 Atl. 362; Swartwout v. Michigan Air Line R. Co. 24 Mich. 393; Nichols v. Ann Arbor & Y. Street R. Co. 87 Mich. 368, 16 L.R.A. 371, 49 N. W. 538; Toledo & A. A. R. Co. v. Johnson, 49 Mich. 149, 13 N. W. 492; Canal Street Gravel-Road Co. v. Paas, 95 Mich. 381, 54 N. W. 907; Wyandotte Electric Light Co. v. Wyandotte, 124 Mich. 48, 82 N. W. 821; Detroit & T. Shore Line R. Co. v. Campbell, 140 Mich. 394, 103 N. W. 856.

Discovery will not be compelled in aid of any civil action, although no penalty or

eral states in the manufacturing, buying, selling, and dealing in wall paper; that this combination had the direct effect to accomplish that purpose; that the defendant, engaged in buying and selling wall paper in Ohio and other states, was compelled to become a party to the illegal combination or go out of business; that the account in suit was made up as to prices and terms of sale, not upon the basis of an independent collateral contract for goods sold and delivered, but with direct reference to and in conformity with, and for the object of, enforcing the agreement that constituted or out of which came the illegal combination whose business was carried on under the name of the plaintiff; that a judgment against the defendant upon the account in suit would, in effect, legally and practically aid the combination to reap the fruits of agreements that were illegal under the acts of Congress, and the making of which was declared by that act a crime. On the part of the plaintiff, the contention was made that the contract in question was a collateral agreement within the rule of Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. In distinguishing the two cases, the court pointed out that in the Connolly Case the defendant seeking to avoid payment for goods purchased had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, and was nothing more, and was not in itself illegal, nor part of, nor in execution of, any general plan or scheme which the law condemned. It was the case simply of a corporation that dealt with an entire stranger in its management and operations, and sold goods which it owned to one who wished to buy them. But the case then before it, the court said, was entirely differ-

ent, and added: "The Continental Wall Paper Company seeks in legal effect the aid of the court to enforce a contract for the sale and purchase of goods which, it is admitted by the demurrer, was in fact, and was intended by the parties to be, based upon agreements that were and are essential parts of an illegal scheme. . . . If judgment be given for the plaintiff, the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. . . . Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far it goes, to agreements that constituted that combination, and by means of which the combination purposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule long established in the jurisprudence of both this country and England, that a court will not lend its aid in any way to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality."

Under the anti-trust laws of Oklahoma, an illegal trust or monopoly, selling goods or merchandise manufactured within the state, cannot recover the purchase price thereof, where the illegality of the contract on this ground is properly pleaded by the purchaser. Wagner v. Minnie Harvester Co. (Okla.) 106 Pac. 969.

But to come within the provisions of such an act, the sale must have been made within the state, as the act does not apply to sales made in another state, since such a sale would be a part of interstate commerce, which cannot be controlled by an act of the state. Frank A. Menne Factory v. Harback, 85 Ark. 278, 107 S. W. 991.

A. G. S.

forfeiture would flow directly from it, if such discovery might have a tendency to, or might eventually, subject the party to such penalty or forfeiture in another proceeding.

6 Enc. Pl. & Pr. pp. 742, 743; Taylor v. Bruen, 2 Barb. Ch. 301; Skinner v. Judson, 8 Conn. 533, 21 Am. Dec. 691; Marshall v. Riley, 7 Ga. 367; Livingston v. Tompkins, 4 Johns. Ch. 432, 8 Am. Dec. 598; Lindsley v. James, 3 Coldw. 477; Northwestern Bank v. Nelson, 1 Gratt. 108; Thompson v. Whitaker Iron Co. 41 W. Va. 574, 23 S. E. 795; United States v. Saline Bank, 1 Pet. 100, 7 L. ed. 69; United States v. National Lead Co. 75 Fed. 94; Atterberry v. Knox, 8 Dana, 282; Legoux v. Wante, 3 Harr. & J. 184; March v. Davison, 9 Paige, 579; Stewart v. Drasha, 4 McLean, 563, Fed. Cas. No. 13,424.

Mr. Elmer N. Peters, with Mr. John L. Wright, for respondent:

Testimony as to the character of relator is admissible.

Detroit Salt Co. v. National Salt Co. 134 Mich. 121, 96 N. W. 1; Erpelding v. McKearnan, 143 Mich. 415, 107 N. W. 107.

The right of a foreign corporation to sue in our court is limited, first by statute, and second, by the general rule that the doctrine of state comity will not be applied in behalf of a foreign corporation seeking to recover upon a claim or contract expressly prohibited by law, or one which is clearly at variance with the settled policy of the state.

Seamans v. Temple Co. 105 Mich. 400, 28 L.R.A. 430, 55 Am. St. Rep. 457, 63 N. W. 408; People's Mut. Ben. Soc. v. Lester, 105 Mich. 716, 63 N. W. 977; 19 Cyc. Law & Proc. p. 1222; Swing v. Cameron, 145 Mich. 175, 9 L.R.A. (N.S.) 417, 108 N. W. 506, 9 A. & E. Ann. Cas. 332; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; American & F. Christian Union v. Yount, 101 U. S. 350, 25 L. ed. 890; Swing v. Weston Lumber Co. 140 Mich. 344, 103 N. W. 816; Heffron v. Daly, 133 Mich. 613, 95 N. W. 714; Union Trust Co. v. Preston Nat. Bank, 136 Mich. 460, 112 Am. St. Rep. 370, 99 N. W. 309, 4 A. & E. Ann. Cas. 347; Edison General Electric Co. v. Canadian P. Nav. Co. 8 Wash. 370, 24 L.R.A. 315, 40 Am. St. Rep. 910, 36 Pac. 260.

Corporations are not entitled to the privileges and immunities of citizens of the several states.

19 Cyc. Law & Proc. p. 1226 and note.

The question as to whether or not the relator has entered into a trust agreement, as defined in the statute, is material to the issue.

Detroit Salt Co. v. National Salt Co. 134 Mich. 119, 96 N. W. 1.
30 L.R.A. (N.S.)

Noncompliance with the provisions of the statute relating to the doing of business within the state by a foreign corporation may be interposed as a defense to a suit based upon contracts made in this state by such a noncomplying foreign corporation.

Rough v. Breitung, 117 Mich. 48, 75 N. W. 147; Wright v. St. Louis Sugar Co. 146 Mich. 555, 109 N. W. 1062; Hastings Industrial Co. v. Moran, 143 Mich. 679, 107 N. W. 706.

If the relator's books, papers, and records, if produced, would show that it had violated the anti-trust statute, the only effect of such disclosure, outside of the effect it would have upon the case at bar, would be the possible commencement of proceedings restraining the further carrying on of its business in this state; and this is not the infliction of a penalty of forfeiture, for the reason that foreign corporations doing business here, not by right, but by comity.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; State v. Standard Oil Co. 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413; Western U. Teleg. Co. v. Mayer, 28 Ohio St. 521.

Stone, J., delivered the opinion of the court:

Relator is a corporation organized and existing under the laws of Wisconsin. It was first incorporated in 1881, under the name of the Parker-Dennett Harvesting Machine Company, Limited, with a capital stock of \$100,000, for the purpose of manufacturing and selling harvesting and other farm machinery. In March, 1882, its name was changed to the Dennett Harvesting Machine Company, Limited. In February, 1883, its capital was increased to \$250,000. In December, 1883, it was again increased to \$500,000. In November, 1884, the name of the company was changed to the Milwaukee Harvester Company. In April, 1889, the capital stock was increased to \$750,000, and in January, 1893, was again increased to \$1,000,000, where it has remained ever since. On September 5, 1902, the name of the company was changed to the International Harvester Company of America, which name it now bears. On April 3, 1903, the relator was regularly admitted by the secretary of state of Michigan to carry on its business in this state, in accordance with the provisions of Act No. 206 of the Public Acts of 1901, and in pursuance of the authority granted it, as aforesaid, has conducted its business of selling agricultural implements in this state since that time, and has invested large sums of money in real estate, and ware houses necessary and incident to its business aforesaid. Since its admission to do business in this state, it claims that it has

complied with all the requirements of our foreign corporation laws by regularly filing its annual reports; and this claim is not denied by respondent. In 1907, in the regular course of its business in this state, the relator appointed Fayette De Puy and John Holmes (a copartnership doing business as De Puy & Holmes) its agents for the sale of its products at Grand Lodge and vicinity. During the continuance of this agency,—that is, during the spring and summer months of 1907,—the said De Puy & Holmes became indebted to the relator in the claimed sum of about \$1,500, a large portion of which was for moneys collected by said De Puy & Holmes as agents of relator, and the remainder was for the purchase price of goods sold and delivered to said De Puy & Holmes by relator during the continuance of the agency aforesaid. Most of this indebtedness remaining unpaid, the relator, on November 12, 1909, commenced an action of assumpsit in the circuit court for the county of Eaton, against said De Puy & Holmes, to recover the amount owing to it, as above stated. The declaration was on the common counts. Defendant Holmes made no defense, and his default was regularly entered; but defendant De Puy filed a plea of the general issue, with notice of two special defenses, *viz.*:

(1) That the plaintiff, at the time the indebtedness mentioned was created, was a "trust," as defined by the statutes of this state, and hence any contract made by defendant with the plaintiff was null and void, and against public policy. That the said plaintiff is a corporation organized and existing under the laws of the state of Wisconsin. That the purpose of said corporation is, to wit, the control of the manufacturing of all harvest machinery and other agricultural implements, to carry out restrictions in trade of the said agricultural implements, to limit or reduce the price of said implements, to prevent competition in the manufacture of said implements, to fix the price to the consumer, thereby controlling and establishing the price to the public at large by entering into an agreement whereby it has bound itself with the several harvester companies not to sell any of their or its manufactured products below a certain standard, by them and the plaintiff fixed. That the plaintiff is a pool and combine, whereby the interest of all, or nearly all, of the great harvester companies of the world, are united, and the interest of all such companies is fixed by the said plaintiff. And that the plaintiff thereby fixes and controls the price of their products.

(2) That the plaintiff had never filed a copy of its articles of incorporation with

the secretary of state of the state of Michigan, or paid the lawful fees by it to be paid, before doing business in this state, and hence any contract made by defendant with the plaintiff was null and void, and could not be enforced. We note in passing that the second allegation of the notice is in direct conflict with the relator's petition for mandamus (Petition, par. 2), which paragraph of petition is admitted to be true, in the answer of respondent.

After issue was thus joined, defendant De Puy filed a petition under circuit court rules 50-57 (124 Mich. xxxviii. 87 N. W. vi.), first reciting in substance the defenses above mentioned, and then alleging that it was necessary, to enable him to prepare for trial, that the books, records, documents, and papers of the plaintiff (relator), showing the names of its stockholders, the amount of stock held by each, the names of its officers, the total amount of property in Michigan from 1903 to 1909, the total amount of property owned by it from 1903 to 1909, the total amount of business done by it from 1903 to 1909, the total amount of business done by it in Michigan from 1903 to 1909, also the number and location of factories, also the records of its stockholders' and directors' meetings from 1903 to 1909, or sworn copies thereof, be produced, and deposited with the clerk of said court, and that all proceedings in the suit of the plaintiff be stayed until such books, records, etc., were produced, as prayed for. The petition contained an averment, upon information and belief (in addition to the special defenses set up under the plea of the general issue), that plaintiff (relator) had increased from time to time the proportion of its capital stock represented by property and business in Michigan, and had not, within thirty days after such increase, filed a statement showing such increase, with the secretary of state. We note again the fact that, in its petition for mandamus, the relator avers that it has in all respects complied with the laws of this state, governing the business of foreign corporations in the state. The answer of respondent does not deny the averment. *Berube v. Wheeler*, 128 Mich. 32, 87 N. W. 50; *Barlow v. Riker*, 138 Mich. 607, 101 N. W. 820. After hearing the said petition of defendant De Puy, the respondent granted the order prayed for, whereupon the relator formally moved the respondent to vacate such order, which motion of relator was denied. Relator filed its petition in this court for a writ of mandamus to compel the respondent to vacate and set aside the order above mentioned; an order to show cause was issued and served; and respondent has made a return, substantial-

ly admitting all of the material averments of relator's petition.

At the outset it may be well for us to distinguish this case from the several cases in this court, cited by respondent's counsel to the proposition that contracts of an unlicensed foreign corporation, made in this state, are illegal, and that such corporations will be denied the aid of our courts in enforcing such contracts. Most of the cases cited are insurance cases, in which the contracts were expressly prohibited, and some of them are cases of foreign mercantile corporations, in which the statute expressly declared that such contracts should be void. Such corporations have sometimes been spoken of as having no legal existence here, and as having no standing in our courts. Among such cases are the following: *Richardson v. Buhl*, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; *Seamans v. Temple Co.* 105 Mich. 400, 28 L.R.A. 430, 55 Am. St. Rep. 457, 63 N. W. 408; *People's Mut. Ben. Soc. v. Lester*, 105 Mich. 716, 63 N. W. 977; *Swing v. Weston Lumber Co.* 140 Mich. 344, 103 N. W. 816; *Swing v. Cameron*, 145 Mich. 175, 9 L.R.A. (N.S.) 417, 108 N. W. 506, 9 A. & E. Ann. Cas. 332. It was, however, held in *People v. Hawkins*, 106 Mich. 479, 64 N. W. 736, that an agent of a foreign corporation could not defend a charge of embezzlement, upon the ground that the corporation was prohibited from doing business in this state, by reason of noncompliance with the statutory conditions.

We are here dealing with a corporation that is alleged to be a "trust" or monopoly; one, however, which, as appears by its articles of incorporation, was lawfully organized for a legitimate purpose and business, under the laws of Wisconsin. It has complied with the laws of this state regulating foreign corporations. It comes into a court of this state, and sues upon an independent collateral contract, made with defendant, an agent in this state,—a contract in no way tainted with the illegality of the alleged trust or combination, and one not prohibited by our statute. Can the defense here sought to be imposed be maintained? Assuming, as contended, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that the defendant could refuse to pay for goods bought by him under special contract with plaintiff. The illegality of such combination and "trust" would not prevent the plaintiff corporation from selling goods that it obtained even from its constituent companies or either of them. It could pass title by sale to any one desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving

that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference generally to the sale of articles or products. *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. This was an action brought upon a contract between the parties, which was itself legal and entirely collateral to any illegal combination. It was sought there by special defense to defeat the action by showing that the plaintiff was a "trust" or combination, and the Supreme Court of the United States held that the defense could not be maintained. The court cites *Strait v. National Harrow Co.* (C. C.) 51 Fed. 819, and *Kiff v. Youmans*, 86 N. Y. 329, 40 Am. Rep. 543. Justice Harlan said:

"In *National Distilling Co. v. Cream City Importing Co.* 86 Wis. 352, 355, 39 Am. St. Rep. 902, 56 N. W. 864, which was an action to recover the price of goods sold and delivered, one of the defenses was that the plaintiff was a member of an illegal trust or combination to interfere with the freedom of trade and commerce. The supreme court of Wisconsin said: 'The first defense does not deny any allegation of the complaint, but the substance of it is that the sale and delivery of the goods in question to the defendant was void, as against public policy, because the vendor was at the time a member of an unlawful trust or combination, formed to unlawfully interfere with the freedom of trade and commerce, and in restraint thereof, and to accomplish the ends therein set forth. . . . Conceding for the purposes of this case that the trust or combination in question may be illegal, and its members may be restrained from carrying out the purposes for which it was created by a court of equity, in a suit on behalf of the public, or may be subject to indictment or punishment, there is, nevertheless, no allegation showing or tending to show that the contract of sale between the plaintiff and defendant was tainted with any illegality, or was contrary to public policy. The argument, if any the case admits of, is that, as the plaintiff was a member of the so-called "trust" or "combination," the defendant might voluntarily purchase the goods . . . of it at any agreed price, and convert them to its own use, and be justified in a court of justice in its refusal to pay the plaintiff for them, because of the connection of the vendor with such trust or combination. The plaintiff's cause of action is in no legal sense dependent upon or affected by the alleged illegality of the trust or combination, because the illegality, if any, is entirely collateral to the transaction in question, and the court is not called upon in this action

to enforce any contract tainted with illegality, or contrary to public policy. The mere fact that the plaintiff is a member of a trust or combination, created with the intent and purposes set forth in the answer, will not disable or prevent it in law from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. It does not appear that it had stipulated to refrain from such transactions. A contrary doctrine would lead to most startling and dangerous consequences.' . . . Denphey v. McNulta, 41 L.R.A. 609, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825, 827, 829. . . .

"It is undoubtedly the general rule that a contract made in violation of a statute is void, and no recovery can be had upon it; as in *Embrey v. Jemison*, 131 U. S. 336, 348, 33 L. ed. 172, 177, 9 Sup. Ct. Rep. 776. That was an action upon a promissory note given in execution of a contract for the purchase of 'future delivery' cotton, neither the purchase nor delivery of actual cotton being contemplated by the parties, but the settlement in respect to which was to be on the basis of the 'difference' between the contract price and the market price of cotton futures, according to the fluctuations in the market. The contract was held to be a wagering contract, and therefore illegal and void." *Miller v. Ammon*, 145 U. S. 421, 36 L. ed. 759, 12 Sup. Ct. Rep. 884; *McMullen v. Hoffman*, 174 U. S. 639, 654, 43 L. ed. 1117, 1123, 19 Sup. Ct. Rep. 839.

Assuming, therefore, that relator is a "trust" or monopoly, as defined by our laws, its independent or collateral contracts, such as is sued on in this case, are just as valid and enforceable as are the contracts of any other person or corporation, unless some statute has changed the rule of the common law in that respect. The only statutes touching the matter are act No. 255, Pub. Acts 1899, and act No. 329, Pub. Acts 1905. Subdivision 5 of § 1, and §§ 2, 3, and 8 of the act of 1899, are here referred to. Act No. 329 of 1905 is entitled, "An Act Relative to Agreements, Contracts, and Combinations in Restraint of Trade or Commerce." It is declared to be supplementary to, and declaratory of, and in addition to, act No. 255 of 1899. Its first five sections are material here, and are referred to. Neither of the acts undertakes to prohibit or forbid the making of such contracts as the one involved in this suit. It is evident that, by the language of § 8 of the act of 1899, and § 5 of act of 1905, above referred to, the legislature did not leave to inference or implication the illegality of the particular contracts which it was dealing with.

The language of Justice Harlan in Con- 30 L.R.A. (N.S.)

nolly v. Union Sewer Pipe Co. supra, where he deals with the special defense in that case, based upon the "Sherman anti-trust act," is pertinent here: "The special defense based upon act Cong. July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, was also properly rejected. . . . Much of what has just been said in reference to the first special defense, based on the common law, is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold, such property not being at the time in the course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement is of the combination referred to, and this is not an action to enforce the terms of such arrangement. . . . In the case of *The Charles E. Wiswall* (D. C.) 74 Fed. 802, which was a libel *in rem* by certain tug owners against a steam dredge, to recover the value of certain services rendered by the tug in towing the dredges, it was sought to avoid payment for the services thus rendered upon the ground that the tug owners were members of an association which was illegal and void under the Sherman act. The court, assuming that the agreement by which the tugs acted in unison was prohibited by that act, said: 'He [the claimant] should not be permitted to repudiate his just debts to the individual tugs because their association was illegal. Having asked for their services, and having accepted the benefit thereof, he should pay. . . . An agree-

ment by the tug *Mayflower* to tow the dredge *Wisewall*, for a reasonable sum, from Albany to Troy, is not void because the *Mayflower* is associated with other tugs to regulate the price of towing at Albany. Should the claimant purchase a pair of trousers at an Albany clothing shop, he would find it difficult to avoid paying their actual market price because the vendor and other tailors of that city had combined to keep up prices.' Nor can the defendants refuse to pay for what they bought upon the ground that the 7th section of the Sherman act gives the right to any person 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful' by the act to sue and recover treble the damages sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions, based upon special contracts for the sale of pipe, that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination. . . . If the act of Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defense of a suit for the price, the illegal character of the combination, that would present an entirely different question. But the act contains no such provision." *Chicago Wall Paper Mills v. General Paper Co.* 78 C. C. A. 607, 147 Fed. 491, 8 A. & E. Ann. Cas. 889. It was held there that a contract for the sale of merchandise is not rendered illegal by the fact that the selling corporation is a "trust" or monopoly organized in violation of law, either Federal or state; the contract of sale being collateral and having no direct relation to the unlawful scheme or combination. The following cases are cited: *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Star Brewery v. United Breweries Co.* 58 C. C. A. 133, 121 Fed. 713; *Harrison v. Glucose Sugar Ref. Co.* 58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304. This case was in the seventh circuit. Opinion by Jenkins, Ch. J., and concurred in by Grosseup and Humphrey. The opinion commences with the following language: "The objection that the appellee is an illegal trust or monopoly condemned by the law of the state of Illinois, and so declared by the su-

preme court of that state, cannot be sustained. We have held, in the case of an injurious combination of the nature here asserted, that the remedy is by direct proceedings; that with respect to a contract which is independent of the illegal combination, and is merely incident to other and innocent purposes, one who voluntarily and knowingly deals with parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, defend against the contract on the ground of the illegality of the combination,"—citing *Dennehy v. McNulta*, 41 L.R.A. 609, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825. See also *National Folding-Box & Paper Co. v. Robertson* (C. C.) 99 Fed. 985. Reference is also made to *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Hadley-Dean Plate Glass Co. v. Highland Glass Co.* 74 C. C. A. 462, 143 Fed. 243 (eighth circuit), opinion by Van Devanter, Ch. J., concurred in by Judges Hook and Lochren. The *Allen Glass Company*, a Pennsylvania corporation, engaged in manufacturing glass in that state, received and accepted an order for the manufacture and delivery of glass from the *Hadley-Dean Glass Company*, a Missouri corporation. There was some evidence tending to show that, at the time of making the contract, the plaintiff and others, not including the defendant, were in an unlawful combination to stifle competition to the sale of glass, and to arbitrarily control its price, and because of this it was contended that, in directing a verdict for the plaintiff, the court failed to give effect to the anti-trust statute of Missouri, and to the anti-trust legislation of Congress. After holding that, as to the said statute, it could have no application to the contract under consideration without impinging upon the exclusive authority of Congress to regulate commerce among the several states, the court proceeds to consider the "Sherman anti-trust act," and quotes therefrom, and proceeds in the following language: "That it does not render illegal or prevent a recovery on this contract is shown by *Connolly v. Union Sewer Pipe Co.* supra.

The only provision in either the act of 1899 or 1905 which gives any force to the claim that the collateral contracts of "trusts" and monopolies are void and unenforceable in this state is that contained in § 3 of act of 1899, which in substance provides that "every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing business in this state; and it shall be the duty of the attorney general to enforce this provision by bringing proper proceedings in quo warranto," and the provision of

§ 4, act 1905. There is not a word in either statute that gives a purchaser of goods the right to plead these statutes as a defense. As we have already indicated, it is not contended but that the relator is duly and regularly organized as a corporation under the laws of Wisconsin, and that its articles of incorporation state a purpose entirely lawful and legitimate. The notice of special defense in effect and substance is that, although the relator was duly and legally incorporated under the laws of Wisconsin authorizing the formation of corporations for a perfectly legitimate and lawful purpose, and although its articles of incorporation state a purpose in compliance with such laws, nevertheless the real purpose of the incorporation was unlawful, *viz.*, to carry out restrictions in trade and commerce, contrary to the common and statute law. In short, to create a "trust" or monopoly.

If the articles of the relator state a purpose for which the statute authorizes a corporation to be formed, then, if other requirements of the law are complied with, it is not only a corporation *de facto*, but it is a corporation *de jure*. In such a case the illegality of its organization cannot be attacked at all, and it can only be shown that the corporation is guilty of a misuser of its corporate franchises by attempting, under the guise of a legal corporate existence, to conduct a business not authorized by its charter, or in a manner contrary to law or some principle of public policy; and this by a direct proceeding to test its right. *Atty. Gen. ex rel. Miner v. Lorman*, 59 Mich. 162, 60 Am. Rep. 287, 28 N. W. 311; *Detroit Driving Club v. Fitzgerald*, 109 Mich. 674, 67 N. W. 899; 2 *Morawetz, Priv. Corp.* § 76d. The rule that, where a corporation is incompetent by its charter to do an act, a private party cannot raise the question, but the sovereign alone can object, in a direct proceeding instituted for that purpose, applies here. This rule has frequently been applied to *ultra vires* acts of national banks. *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188.

In conclusion, we quote the following from 10 *Cyc. Law & Proc.* p. 256: "This brings us to a doctrine, founded in public policy and convenience, and supported by an almost unanimous consensus of judicial opinion, which is that rightfulness of the existence of a body claiming to act, and in fact acting in the face of the state, as a corporation, cannot be litigated in actions between private individuals, or between private individuals and the assumed corporation, but that the rightfulness of the existence of the corporation can be questioned only by the state; in other words, that the question of the rightful existence of the cor-

poration cannot be raised in a collateral proceeding." More than 100 cases are cited in the note, from thirty states of the Union and United States Supreme Court. The Michigan cases are *Montgomery v. Merrill*, 18 Mich. 338; *Toledo & A. A. R. Co. v. Johnson*, 49 Mich. 148, 13 N. W. 492; *Wyandotte Electric Light Co. v. Wyandotte*, 124 Mich. 43, 82 N. W. 821.

It seems very clear to us that persons who buy goods or receive services from members of a combination cannot interpose the defense that the plaintiff is a party to an independent combination in restraint of trade, in no way affecting the contract sued upon, unless, as in some few states, there is an explicit statutory provision creating such a defense; and that there is no such statutory provision in Michigan.

We are of opinion that the claimed defense is not available to, and cannot be maintained by, the defendant in the pending suit.

It follows that the order made by the respondent should be vacated, and the writ of mandamus will issue as prayed for in relator's petition, with costs to the relator against the defendant *De Puy*.

NEBRASKA SUPREME COURT.

MARK UPDIKE

v.

CITY OF OMAHA, Appt.

(— Neb. —, 127 N. W. 229.)

Municipal corporation — defective street — notice.

Section 207 of the act governing cities of the metropolitan class (*Comp. Stat.* 1907, chap. 12a), requiring written notice of defective public ways or sidewalks thereof to be filed with the clerk five days before the occurrence of the injury complained of, has no application to defects caused by the city itself in negligently constructing a sewer in one of the streets of the city.

(Root and Letton, JJ., dissent.)

(June 10, 1910.)

APPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages for personal injuries al-

Headnote by SEDGWICK, J.

Note. — As to the necessity of written notice as to defects, as a condition of liability of a municipal corporation for injuries due to the positive act of its officers or servants, see the note accompanying *Tewksbury v. Lincoln*, 23 L.R.A. (N.S.) 282.

leged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Harry E. Burnam, I. J. Dunn, and John A. Rine, for appellant:

As the liability of a city for injuries resulting from the defective condition of its streets must rest on some express or implied provision of the statute, the legislature may place such limitations upon it as it may deem proper, or, for that matter, take it away entirely.

Goddard v. Lincoln, 69 Neb. 594, 96 N. W. 273; Woods v. Colfax County, 10 Neb. 555, 7 N. W. 269; Hollingsworth v. Saunders County, 36 Neb. 141, 54 N. W. 79; Bryant v. Dakota County, 53 Neb. 755, 74 N. W. 313.

The statute must be complied with in order to hold the city responsible.

Schmidt v. Fremont, 70 Neb. 577, 97 N. W. 830; Nicholson v. South Omaha, 77 Neb. 710, 110 N. W. 558; Williams v. Galveston, 41 Tex. Civ. App. 63, 90 S. W. 505; Galveston v. Posnainsky, 62 Tex. 119, 50 Am. Rep. 517; Schigley v. Waseca, 106 Minn. 94, 19 L.R.A.(N.S.) 689, 118 N. W. 259, 16 A. & E. Ann. Cas. 169; MacMullen v. Middletown, 187 N. Y. 37, 11 L.R.A.(N.S.) 391, 79 N. E. 863; Lincoln v. Grant, 38 Neb. 369, 56 N. W. 995; Lincoln v. Finkle, 41 Neb. 575, 59 N. W. 915; Lincoln v. O'Brien, 56 Neb. 761, 77 N. W. 76.

The knowledge or notice which the statute requires is that of the particular defect complained of, and not knowledge or notice of other defects which, although they are shown to exist to the knowledge of the city, did not occasion the injury alleged.

Dundas v. Lansing, 75 Mich. 499, 5 L.R.A. 143, 13 Am. St. Rep. 457, 42 N. W. 1013; Ruggles v. Nevada, 63 Iowa, 185, 18 N. W. 867; Northdurft v. Lincoln, 66 Neb. 434, 92 N. W. 628, 96 N. W. 163; Fuller v. Jackson, 82 Mich. 480, 46 N. W. 723.

The courts cannot, by construction, destroy the effect of a plain and unambiguous act of the legislature because, in the judgment of the court, to accept the law as the legislature passed it would amount to an admission that the law-making body in enacting the law showed a lack of foresight.

Shellenberger v. Ransom, 41 Neb. 643, 25 L.R.A. 564, 59 N. W. 935; Stoppert v. Mierle, 45 Neb. 112, 63 N. W. 382; State ex rel. School Dist. No. 6 v. Moore, 45 Neb. 18, 63 N. W. 130; Coad v. Read, 48 Neb. 43, 66 N. W. 1002.

Mr. F. W. Fitch, for appellee:

Where an obstruction in a street is the natural result of defects in its original construction by the city, the city is chargeable with notice from the beginning, and 30 L.R.A.(N.S.)

is under a continuing duty to repair it, and written notice of defect is unnecessary.

Tewksbury v. Lincoln, 84 Neb. 571, 23 L.R.A.(N.S.) 283, 121 N. W. 994; Stedman v. Rome, 88 Hun, 279, 34 N. Y. Supp. 737; Oklahoma City v. Welsh, 3 Okla. 288, 41 Pac. 598; Denver v. Saulcey, 5 Colo. App. 420, 38 Pac. 1098; Sweeney v. Butte, 15 Mont. 274, 39 Pac. 286; Sutton v. Snohomish, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; Smith v. St. Joseph, 42 Mo. App. 392; Detroit v. Corey, 9 Mich. 165, 80 Am. Dec. 78; Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Akers v. New York, 14 Misc. 524, 35 N. Y. Supp. 1099; Buck v. Biddeford, 82 Me. 437, 19 Atl. 912; Holmes v. Paris, 75 Me. 559; Evans v. Iowa City, 125 Iowa, 202, 100 N. W. 1112; Denver v. Aaron, 6 Colo. App. 232, 40 Pac. 587; Riddle v. Westfield, 65 Hun, 432, 20 N. Y. Supp. 359; Wilson v. Troy, 135 N. Y. 96, 18 L.R.A. 449, 31 Am. St. Rep. 817, 32 N. E. 44; Ringelstein v. San Antonio (Tex. Civ. App.) 21 S. W. 634; Barr v. Kansas City, 105 Mo. 550, 16 S. W. 483; Birmingham v. McCary, 84 Ala. 469, 4 So. 630; Abilene v. Cowperthwait, 52 Kan. 324, 34 Pac. 795; Bourget v. Cambridge, 159 Mass. 388, 34 N. E. 455; Kleopfert v. Minneapolis, 93 Minn. 118, 100 N. W. 669; McDonald v. Duluth, 93 Minn. 206, 100 N. W. 1103; 7 Thomp. Neg. § 5993; Pratt v. Cohasset, 177 Mass. 488, 59 N. E. 79; Hutchinson v. Clarke, 26 R. I. 307, 58 Atl. 948; Torphy v. Fall River, 188 Mass. 310, 74 N. E. 465; Drake v. Kansas City, 190 Mo. 370, 109 Am. St. Rep. 759, 88 S. W. 689; Brake v. Kansas City, 100 Mo. App. 611, 75 S. W. 191; Poole v. Jackson, 93 Tenn. 62, 23 S. W. 57; Houston v. Owen (Tex. Civ. App.) 67 S. W. 788; Dallas v. McAllister (Tex. Civ. App.) 39 S. W. 173; Cantwell v. Appleton, 71 Wis. 403, 37 N. W. 813; Dallas v. Muncton, 37 Tex. Civ. App. 112, 83 S. W. 431; Elam v. Mt. Sterling, 20 L.R.A.(N.S.) 701, note; Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407.

The question of notice to city authorities concerning the condition of a street, or an obstruction therein, is involved only where they have not produced the condition themselves.

Salem v. Webster, 192 Ill. 369, 61 N. E. 323; Ludlow v. Fargo, 3 N. D. 485, 57 N. W. 506.

When negligence on behalf of the municipality is the main issue, either in original construction, failure to inspect and repair, or to warn the public of danger, notice to the municipality of the condition of a public street or thoroughfare is implied, and need not be given prior to the injury of such defect or obstruction.

3 Elliott, Ev. § 2513; 2 Dill. Mun. Corp.

§ 1024; *Lincoln v. Calvert*, 30 Neb. 305, 58 N. W. 115; *Harvard v. Stiles*, 54 Neb. 29, 74 N. W. 399; *Ft. Wayne v. Patterson*, 3 Ind. App. 34, 29 N. E. 167; *Dallas v. Muncton*, *supra*; *McSherry v. Canandaigua*, 129 N. Y. 612, 29 N. E. 821, 35 N. Y. S. R. 432, 12 N. Y. Supp. 751; *Boltz v. Sullivan*, 101 Wis. 608, 77 N. W. 870; *Sullivan v. Oshkosh*, 55 Wis. 508, 13 N. W. 468; *Weber v. Creston*, 75 Iowa, 16, 39 N. W. 126; *Shinnick v. Marshalltown*, 137 Iowa, 72, 114 N. W. 542; *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 9 L.R.A. (N.S.) 146, 108 N. W. 1057.

Evidence as to the condition of the surface of the street in the immediate vicinity of the accident was admissible for the purpose of showing that the general condition of the street in that vicinity was such as to lead to the discovery of the defect in question.

Ledgerwood v. Webster City, 93 Iowa, 726, 61 N. W. 1089; *Pumorio v. Merrill*, 125 Wis. 102, 103 N. W. 464; *Elgin v. Nofs*, 212 Ill. 20, 72 N. E. 43; 6 *Thomp. Neg.* § 7845; *Chase v. Chicago*, 20 Ill. App. 274; *Clayton v. Brooks*, 31 Ill. App. 62; *Tice v. Bay City*, 84 Mich. 461, 47 N. W. 1062; *Kankakee v. Steinbach*, 89 Ill. App. 513; *Gude v. Mankato*, 30 Minn. 256, 15 N. W. 175; *Osborne v. Detroit*, 32 Fed. 36; *Shelbyville v. Brant*, 61 Ill. App. 153; *Armstrong v. Ackley*, 71 Iowa, 76, 32 N. W. 180; *McConnell v. Osage*, 80 Iowa, 293, 8 L.R.A. 778, 45 N. W. 550; *Munger v. Waterloo*, 83 Iowa, 559, 49 N. W. 1028; *Smith v. Des Moines*, 84 Iowa, 685, 51 N. W. 77; *Edwards v. Three Rivers*, 102 Mich. 153, 60 N. W. 454; *Belton v. Turner* (Tex. Civ. App.) 27 S. W. 831; *Shaw v. Sun Prairie*, 74 Wis. 105, 42 N. W. 271; *Dallas v. Muncton*, *supra*.

For the purpose of proving notice to a municipality the plaintiff may prove the condition of the place both before and after the accident.

Gude v. Mankato, *supra*; *Chicago v. Dalle*, 115 Ill. 386, 5 N. E. 578; *Hunt v. Dubuque*, 96 Iowa, 314, 65 N. W. 319; *Sheren v. Lowell*, 104 Mass. 24; *Neal v. Boston*, 160 Mass. 518, 36 N. E. 308; *Upham v. Salem*, 162 Mass. 483, 39 N. E. 178; *Chacey v. Fargo*, 5 N. D. 173, 64 N. W. 932; *Bloomington v. Osterle*, 139 Ill. 120, 28 N. E. 1068; *Cramer v. Burlington*, 49 Iowa, 213; *Nesbit v. Garner*, 75 Iowa, 314, 1 L.R.A. 152, 9 Am. St. Rep. 486, 39 N. W. 516; *Hoyt v. Des Moines*, 76 Iowa, 430, 41 N. W. 63; *Munger v. Waterloo*, 83 Iowa, 559, 49 N. W. 1028; *Abilene v. Hendricks*, 36 Kan. 196, 13 Pac. 121; *Shippy v. Au Sable*, 85 Mich. 280, 48 N. W. 584; *Johnson v. St. Paul*, 52 Minn. 364, 54 N. W. 735, 30 L.R.A. (N.S.)

O'Neil v. West Branch, 81 Mich. 544, 45 N. W. 1023.

The legislature cannot exempt a city from damages growing out of its own carelessness in doing those things and carrying out those powers granted to it for its own benefit and advantage, and for which it received consideration and benefit.

Birmingham v. Starr, 112 Ala. 98, 20 So. 424; *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483; *Brake v. Kansas City*, 100 Mo. App. 611, 75 S. W. 119; *McDonald v. Duluth*, 93 Minn. 206, 100 N. W. 1102; *Poole v. Jackson*, 93 Tenn. 62, 23 S. W. 57; *Houston v. Owen* (Tex. Civ. App.) 67 S. W. 788; *Dallas v. McAllister* (Tex. Civ. App.) 39 S. W. 173; *Cantwell v. Appleton*, 71 Wis. 463, 37 N. W. 813; *Dallas v. Muncton*; *Flam v. Mt. Sterling*; and *Hughes v. Fond du Lac*,—*supra*; *Salem v. Webster*, 102 Ill. 369, 61 N. E. 323; *Ludlow v. Fargo*, 3 N. D. 485, 57 N. W. 506; *Steadman v. Rome*, 88 Hun, 279, 34 N. Y. Supp. 737; *Hardy v. Brooklyn*, 90 N. Y. 435, 43 Am. Rep. 182; 28 *Cyc. Law & Proc.* p. 1265; *Peacock v. Dallas*, 89 Tex. 438, 35 S. W. 8; *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383.

A municipality when charged in its corporate character with the performance of a municipal function in regard to governmental affairs is civilly liable for injuries resulting from misfeasance or nonfeasance with respect to such municipal duties.

Weet v. Brockport, 16 N. Y. 161, note; *Missano v. New York*, 160 N. Y. 123, 54 N. E. 744; 28 *Cyc. Law & Proc.* pp. 1258, 1260, 1263; *New York v. Furze*, 3 Hill, 612; *Martin v. Brooklyn*, 1 Hill, 545; *McDade v. Chester*, 117 Pa. 414, 2 Am. St. Rep. 681, 12 Atl. 421; *Erie City v. Schwingle*, 22 Pa. 384, 60 Am. Dec. 87; *Bieling v. Brooklyn*, 120 N. Y. 98, 24 N. E. 389; *Seifert v. Brooklyn*, 101 N. Y. 143, 54 Am. Rep. 664, 4 N. E. 321; *Rankin v. Buckman*, 9 Or. 253; *Wilmington v. Ewing*, 2 Penn. (Del.) 66, 45 L.R.A. 79, 43 Atl. 305; *Winn v. Rutland*, 52 Vt. 481; *Conrad v. Ithaca*, 16 N. Y. 159; *Chicago v. Seben*, 165 Ill. 371, 56 Am. St. Rep. 248, 46 N. E. 244; *Shearm. & Redf. Neg.* 167; 2 *Dill. Mun. Corp.* 961, 965, 981, 1049; *McMahon v. Dubuque*, 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517; *Aldrich v. Tripp*, 11 R. I. 141, 23 Am. Rep. 434; *Hines v. Lockport*, 50 N. Y. 236; *Omaha v. Olmstead*, 5 Neb. 452; *Hart v. Bridgeport*, 13 Blatchf. 289, Fed. Cas. No. 6,149; *Cooley, Const. Lim.* p. 248; *Hitchins Bros. v. Frostburg*, 68 Md. 100, 6 Am. St. Rep. 426, 11 Atl. 826; *Bowden v. Kansas City*, 69 Kan. 587, 66 L.R.A. 181, 105 Am. St. Rep. 192, 77 Pac. 573, 1 A. & E. Ann. Cas. 955; *Toledo v. Cone*, 41 Ohio St. 149; *Johnston v. District of Columbia*, 118 U. S. 19,

30 L. ed. 75, 6 Sup. Ct. Rep. 923; Henly v. Lyme, 5 Bing. 91, 3 Barn. & Ad. 77; 1 Bing. N. C. 222; Neff v. Wellesley, 148 Mass. 487, 2 L.R.A. 500, 20 N. E. 111; Moulton v. Scarborough, 71 Me. 267, 36 Am. Rep. 308; St. Germain v. Fall River, 177 Mass. 550, 59 N. E. 447; Fox v. Chelsea, 171 Mass. 297, 50 N. E. 622.

Sedgwick, J., delivered the opinion of the court:

While the plaintiff, who was a teamster, was driving along Sixteenth street in the city of Omaha with a loaded wagon, the pavement gave way and let the wagon down with such force that it threw the plaintiff from his seat to the pavement. He brought this action in the district court of Douglas county to recover from the city the damages which he alleged he sustained by reason of the injuries received in his fall. He recovered in the district court, and the city has appealed.

Plaintiff alleges in his petition that some time prior to the 26th day of July, 1906, the defendant city constructed a sewer along, through, and under Sixteenth street from Vinton street south (north) to some point in the vicinity of Pacific or Pierce, and to lay said sewer made an excavation through the center of said street running north and south of the depth necessary to build such sewer, and in filling the excavation after said sewer was constructed the city carelessly and negligently placed the dirt over said excavation in said sewer in such a way as to cause the same subsequently to settle, and that by reason of the careless and negligent omission to properly construct, pack, tamp, and harden said earth, the dirt fell in said sewer and gradually settled so as to leave an opening and excavation immediately under the surface of said street, and that afterwards the city relaid or paved the street over said excavation and placed the paving, consisting of granite block stone, upon and along said excavation in such a way as to hide, cover up, and obscure the defect in so packing, filling in, tamping, and making solid the dirt underneath said paving along and upon said Sixteenth street, especially in the vicinity of Center and Sixteenth streets, and that on said 26th day of July, 1906, he was employed as a laborer in hauling and delivering sand, and was driving a team attached to a wagon loaded with sand, on which wagon the plaintiff was riding and driving, and being near the center of Sixteenth street in the vicinity of Center street, and while driving along over the paving of said street, because of the defect in so constructing said sewer, and because of covering up the same by paving, both

wheels on the left-hand side of said wagon broke through the paving and into the excavation so made by the settling of the dirt and earth in said excavation for said sewer, and that because of said defect in the street and overturning of the wagon the plaintiff was suddenly and without warning and without fault on his part thrown from the wagon to the street; that his right foot and ankle were broken thereby and he was permanently injured. The plaintiff alleged that after the accident he gave the notice thereof required by statute, but the petition contained no allegation that prior to the said accident the notice had been given of the defect in the street, required by § 207, chap. 12a, Comp. Stat. 1907. There was a general demurrer to the petition, which was overruled, and the defendant answered admitting that the sewer was constructed along Sixteenth street by the defendant prior to July, 1906, and that the defendant caused the street to be paved, and admitted that the plaintiff was injured to some extent, and that at the time and place where the plaintiff was injured a portion of the paving gave way while the plaintiff was driving a team and wagon over and along the street. The answer alleged that the accident and injury to the plaintiff was not caused by any defect in the street of which the city had, or was chargeable with, notice, or that the city could have discovered by an inspection or examination of the street, and that the defect complained of was not due to any act or omission on the part of the defendant, but was due to causes over which the defendant had no control and for which the defendant was not responsible.

There was a great deal of evidence given by both parties, and the principal question controverted in the evidence was as to the cause of the settling of the earth in the sewer trench. The plaintiff insisted and produced evidence tending to prove that the sewer in question along Sixteenth street, which was laid at the depth of something over 20 feet, and which was constructed about nineteen years before the accident, was not properly covered at the time of its construction; that the earth was carelessly replaced in the sewer trench and was insufficiently tamped; and that this caused the earth to settle, leaving the cavity under the paving. It appears to be conceded by both parties that there was a considerable settling of the earth at many places along this sewer, and that for several years prior to the accident it became necessary for the city in repaving the street to break down the concrete under the paving at various places along the sewer line and fill up the cavity under the paving caused by the set-

ting of the earth from time to time. The defendant insisted that this happened in all parts of the city; that the conditions were such that it was impossible to replace the earth in sewer trenches so as to prevent settling; and that particularly at the place where this accident occurred the settling of the earth was caused not only by natural conditions that could not be avoided, but also by the breaking of a water pipe which allowed large quantities of water to enter the sewer trench beneath the paving. A large part of defendant's brief is devoted to the discussion of the evidence as bearing upon this question, and there is much evidence tending to show that the settling of the earth and the cavity under the paving might have resulted from natural causes and from the action of the water from the broken service pipes. There is also evidence tending to show, as the plaintiff claimed, that the sewer trench was improperly filled, which was the cause of the cavity. The issue so presented was manifestly for the jury, and presents no question of law to the court. It is unnecessary to attempt an analysis of the large mass of testimony upon this point. The jury has resolved this question in favor of the plaintiff, and we must therefore consider that the original construction of the sewer by the defendant was improper, and that this was the cause of the cavity under the paving. Whether the original improper construction of the sewer was the proximate cause of the accident is a question of fact and is the subject of much conflicting evidence. This is also a question for the jury, and must be considered as determined in plaintiff's favor by the verdict.

This brings us to the consideration of the important question in the case. Section 207, chap. 12a, Comp. Stat. 1907, provides as follows: "Cities of the metropolitan class shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks thereof within such cities, unless actual notice in writing of the defect of such public way or sidewalk shall have been filed with the city clerk at least five days before the occurrence of such injury or damage. In the absence of such notice, so filed, the city shall not be liable, and in all cases such notice shall describe with particularity the place and nature of the defects of which complaint is made." No written notice of the defect in the paving at the point where the accident occurred had been filed with the city clerk, and the defendant insists that the statute applies in such case and that the plaintiff cannot recover.

The attorneys for defendant have furnished an able discussion which has greatly assisted us in our inquiry as to the true purpose and meaning of the statute in question. It is insisted: That unless provided by the statute no liability exists. That it does not require a legislative act to exempt municipalities from liability for defective streets, but it does require a statute to create such liability. The man who claims that the city would be liable must point to the law creating such liability, and there is none except that imposed by the legislative enactment. That, when the legislature by statute fixed such liability with reference to defective streets, the statute must be held to be exclusive. That the legislature may absolutely exempt the municipality from liability, or exempt it unless certain conditions are complied with. That if the legislature keeps within its constitutional right, and the language of the act is plain and free from doubt, there is nothing to interpret, and the courts should accept the law as it is. That it is not for the court to determine whether it is good or bad, just or unjust, reasonable or unreasonable. That a city acts through its officers, agents, or servants; but the city does not act by and through the doings of every officer, agent, and employee; strictly speaking, the city acts officially only through its mayor and council. That the city is not charged with "absolute knowledge" of the acts of a day laborer, a policeman, a fireman, or other employees, and the knowledge of such persons is not the knowledge of the city. That it was because the courts held the city to strict accountability, and held that the act of an agent or employee in many matters was the act of the city, that the legislature enacted § 207. That the city attorney of Omaha drafted this section of the statute for the express purpose of protecting the city against claims based upon implied notice of which the city actually had no notice or knowledge. That by this statute the city is not to be held liable for the negligent conduct of any individual, whether citizen, agent, officer, or employee of the city, which causes a defect in the street, until the city in its official governmental capacity has had its attention directed to the particular defect by written notice.

While this case has been pending in this court, the decision in *Tewksbury v. Lincoln*, 84 Neb. 571, 23 L.R.A. (N.S.) 282, 121 N. W. 994, has been published. In that case a statute substantially the same as said § 207 was construed. While the case at bar might be distinguished in some respects from that case, the defendant has not attempted to do so. The brief, so far as the construction of the statute is involved, is

confined to an attack upon that decision as unsound. The criticisms of the brief are especially directed to a quotation from the opinion in that case as follows: "To hold that five days' notice should be given for a wrong committed by the city itself one hour, or one day, before the occurrence of the accident, and of which the city already has absolute knowledge, would be in the highest degree ludicrous, and attribute to the lawmaker a want of foresight, insight, and comprehension which we cannot do. It is true that the statute provides that the city shall be 'absolutely exempt from liability' unless such notice be given; but we must give a reasonable construction to the language of the act. The law never requires an impossible thing. The section presupposes that the defect in the public way must have existed at least five days, otherwise the notice would be impossible." The criticism is that, when the language of the statute is plain and unambiguous, it is not the province of the court to say that the lawmakers acted without foresight and comprehension, if they are acting within their constitutional limitations. The language criticized, however, assumes that it is proper and necessary to ascertain the real intention of the legislature, and that in determining that intention the court will give such construction to the statute as will not attribute to the lawmaker a want of foresight and comprehension, and we are entirely satisfied with the language there used.

Is it true that no liability exists unless provided by statute? There is no express statute making the city liable for damages caused by defects in the street. If it can be said that the liability arises from statute, it is by implication only, and this implication is not derived from the language of the statute or any of its express provisions. It is not derived from a construction of the statute itself. It is rather an implication which the common law raises from the fact that the legislature has conferred certain privileges upon the municipality. When the legislature confers powers upon the city for the advantage of the city itself to enable it to hold its property and to conduct such affairs as are for the benefit of the city in its corporate capacity as distinguished from those powers which relate to its governmental functions, such privileges and benefits carry with them duties and liabilities of the same character as are imposed upon private corporations or individuals, who enjoy corresponding privileges. It is quite generally held that when the city accepts such powers and privileges it accepts them with the conditions that the common law imposes. The law requires that in using such powers and

privileges the city, like individuals, must so use them as not to violate the rights of others, and in doing so must use ordinary care and diligence to avoid injuries to others. This duty is not derived from the construction of the language of the statute, but is derived from the obligations which by the common law accompanies such powers and privileges. It seems, therefore, that to say that the liability is created by statute, without qualification, may be misleading. In *Goddard v. Lincoln*, 69 Neb. 594, 96 N. W. 273, it was said: "As the liability in such cases must rest on some express or implied provision of the statute, it is clear that the legislature may place such limitations upon it as it may deem proper, or, for that matter, take it away entirely." We have seen in what sense the liability is implied from the provisions of the statute, but what is meant by saying that the statute may take away the liability entirely? It was not necessary in that case to say, and we do not think that the language used must be construed as meaning, that the legislature can confer powers and privileges of the nature above suggested and at the same time relieve the municipality of all liability for their improper exercise. The defendant insists that it can, and to explain this position the following illustration is given: "Suppose the city dug a sewer trench and left it open, and the first night a man fell in and was injured; would the city be liable?" The question is answered in the negative, and it is argued that to hold that the city would be liable in such case assumes "that somehow the city was liable until the legislature passed a law exempting the city from liability," whereas, "on the contrary, there was no liability until the legislature so declared."

Can it be possible that the legislature is competent to authorize a city or any private corporation or individual, in the transactions of its own affairs and for its own benefit, to make a trench across a public thoroughfare and to take no precautions against dangers to the traveling public and at the same time relieve the city from any liability for the consequence of such an act? It would seem more reasonable to say that, if the legislature intended to relieve the city from incurring liability for such damages, it should withdraw from the city the power and privilege of constructing such a trench, and that when it is said that the legislature might relieve a city from all liability it is inferred that in order to do so it must prevent the city from engaging in such transactions.

There is no doubt that if the legislature keeps within its constitutional right, and

the purpose and meaning of the act are clear and unambiguous, "the court should accept the law as it is." When it is found that the attempted legislation is not prohibited by constitutional limitations of the legislative power, the next thing for the courts to do is to find out, if they can, the intention of the legislature, and when that is determined and declared, the duty of the courts in that regard is performed. It is not the duty nor the privilege of courts to change the meaning of constitutional acts of the legislature, nor to modify or enlarge their scope and purpose. The meaning of the legislature must be derived from the language used; all valid legislation on the given subject being considered and construed together. What did the lawmakers intend to do? If there was some apparent evil to be remedied, what remedy did the legislature propose to provide?

The defendant assumes that the object of the statute in question was to relieve the city of some part of the burden of claims for damages of this character. Can it be that the intention was to establish an arbitrary line of division between claims against the city for the purpose, without regard to merit or justice, of lessening the number of claims? Does the written notice required by statute become an essential element of the claim against the city? Was it intended that persons from other parts of the state, who had no means of knowing whether dangerous pitfalls existed, or whether notice had been filed with the city clerk, should be discriminated against. Of course it will not be presumed that the legislature intended such a result.

The city must act by its agents, and if it sends an agent to do a specified act, as to open a trench across a thoroughfare, that act, when done, is, of course, the act of the city. To provide that a notice must be lodged with the clerk stating that the trench has been opened, and is not being guarded, and that the stranger who falls into the trench within five days after such statement is filed has no remedy, but one who falls into the trench after the five days have expired may recover damages, will no doubt have the effect to limit the number of claims against the city; and so would a provision that under such circumstances none but an inhabitant of the city might recover, or one of light complexion. If the legislature could grant the power to a city to construct such work and allow it to so remain without guarding the public in any way for a period of five days, and exempt the city from liability for damages, which is at least doubtful, it would not be presumed to have intended to do so, if a

different and more reasonable purpose can be derived from the statute.

In another part of the brief a better reason for this legislation is suggested. "What was the purpose of requiring this notice? Clearly, to direct the attention of the proper officers of the city to the fact that at a particular point on one of the public highways of the city there exists at the time a condition in the public highway which renders the street unsafe and dangerous for public travel, a condition likely to result in injury to some traveler on the highway. The purpose of this notice was to enable the city to prevent accidents by repairing or guarding the defect." This is undoubtedly the real purpose of the legislation. The city had been held liable in some cases in which it was uncertain whether the officers of the city had notice of the defect complained of. It was regarded as a question of fact for the jury to determine whether they knew, or the circumstances were such that with reasonable diligence they must and ought to have known, of the dangerous condition of the streets. And having apparently more regard for the financial interests of the city than for the rights of strangers or dangers to the citizens, the legislature purposed to change this. There should no longer be any liability on the part of the city unless its officers actually knew of the defect. It was not presumed that the officers of the city would themselves create the defect. The statute was not necessary nor intended for such a contingency. To so construe the statute would be to hold that the intention of the legislature was to bar a proportion of the claims against the city without regard to the justice of the claims or the conditions under which they arose.

If we suppose that the statute applies in a case like this, what should the notice contain? If prior to this accident the written notice specified in the statute had been filed with the clerk, it must have stated that the original construction of the sewer was negligent, and that the earth had settled over the sewer so that there was danger of the paving giving way, and that the defect was hidden so that ordinary passengers would not discover it. If such a notice had been given, the city authorities must be presumed, pursuant to such notice, to have done precisely what they did do in this case. It appears that for several years prior to this accident the authorities recognized the deficiency in the construction of the sewer, and made many attempts, more or less effective, to remedy the defect. Can the defendant now deny liability because such notice was not given? It is generally held that where written notice is required

it may be waived by the party entitled to it. The fact that the city knew of the condition of the street and recognized its duty to remedy it, and attempted, however ineffectively, to do so, is equivalent to notice, and amounts to a waiver of notice, so that the city cannot now say it had no notice of the defect.

In *Goddard v. Lincoln*, supra, it was held that the plaintiff could not recover because the written notice required by § 110 of the act governing cities of the first class, which is substantially the same as the statute herein considered, was not given. In that case a sidewalk had become badly and dangerously out of repair. "The boards of the same . . . being loose, . . . and one or two boards being entirely removed therefrom, so that said sidewalk was, at said time and place, in an unsafe and dangerous condition." When a walk or a street, through wear or some accidental cause, becomes in an unsafe condition, the city authorities will perform this duty if the necessity of so doing comes to their knowledge. This at least the statute assumes, and its object and effect is to make certain that the officers of the city shall have such knowledge. The statute requiring notice of the defect to be in writing filed with the clerk is analogous to the statute of frauds. It guards against mistake or perjury in doubtful cases. The proof that notice has been given must be in writing. If the act causing the dangerous condition is done by the officers of the city themselves, the knowledge of its existence is inherent in the act. To suppose that the legislature intended that they must be notified of their own act is to question the judgment and the motives of the lawmakers. The defect was not caused by the city, and from its nature must have been without the knowledge of its officers. In such case knowledge must in some way be conveyed to the city officials, and the statutory method of accomplishing this had not been followed. The decision in that case was clearly right, but it furnishes no precedent for a case like this.

In *Schmidt v. Fremont*, 70 Neb. 577, 97 N. W. 830, the construction of § 39, art. 3, chap. 13, Comp. Stat. 1901, was involved. That section provided that no city shall be liable for damages arising from defective sidewalks, unless written notice of the accident or injury complained of was given within thirty days after its occurrence, and it was held that the plaintiff could not recover because such notice had not been given. The object of that statute was to enable the city officials to properly investigate the nature and validity of the claim presented. It devolved a duty upon the claim-

ant himself, and made that duty a part of his procedure in establishing his claim,—one of the necessary steps in enforcing his remedy analogous to the three days' notice required by the statute of forcible entry and detainer. The case is distinguishable from the one under consideration. Statutes somewhat similar to ours have been considered by other courts, although we have not observed any decisions involving the precise point here presented.

In *Houston v. Isaacks*, 68 Tex. 116, 3 S. W. 693, the law as applied in that state is stated in the first paragraph of the syllabus as follows: "A provision in a city charter exempting the corporation from liability to any person for damages caused by a street being out of repair through the gross negligence of the corporation, unless the same shall have remained so for ten days after special notice in writing to the mayor or street commissioner, does not apply where the city having put a contractor to work upon the street, and after he had commenced work, and made an excavation in the street, rendering it unsafe for travel, discharged him, and left the work in an unfinished condition. A person injured in consequence of such defect in the street may recover of the city though he has not given the ten days' notice. The city having by its own procurement made the street unsafe, and knowingly left it so, cannot escape behind the charter provisions, as it might if the defect had resulted from any extrinsic cause." In the opinion the court suggests a doubt as to the power of the legislature to exempt a city from all liability in such cases: "The provision is a most stringent one, and its practical effect would seem to be to exempt the city from all liability for such defects as ordinarily accrue. But we cannot say that it should not be enforced in a case in which it is applicable. We are of opinion, however, that it does not apply to the case before us. There may be some reason in requiring notice to the city authorities of a defect accruing from ordinary causes; such as the action of floods, the use of the street by the public, or it may be said from any cause except by the action of the city itself. But in the present case the city put a contractor to work upon the street, stipulating to have an excavation made which was to be filled with gravel, and after the work had been begun, and the street had been rendered unsafe for travel, discharged the contractor, and left the work in an unfinished condition."

The charter of the city of *Fon du Lac*, Wisconsin, provided that "no action shall be maintained against the city for injuries caused by any defect in the condition of the street unless notice in writing, signed by

the injured party, shall have been given to the proper persons within five days of the injury," and it was held that the requirement of notice had no application when the plaintiff "was injured through his horse taking fright at a large wooden roller, which had been used in the care of the streets, and left standing therein by the servants of defendant." The Wisconsin court also suggested a doubt as to the power of the legislature to exempt from liability in such cases. Mr. Chief Justice Cole in the opinion said: "I should have great doubt about the validity of the provision requiring the notice to be given within five days of the injury, even if the liability of the city in the case was wholly statutory. The time fixed is unreasonably short, and in many cases could not be complied with. The injured person might be unconscious, or so seriously hurt that he could not state 'the place where, and the time when, such injury was received, and the nature of the same,' within that period; so that the remedy given is coupled with an impossible condition. Such a provision is unreasonable and unjust. . . . It is an arbitrary and unreasonable provision, which professes to give a remedy for an injury, but annexes to it a condition which, in many cases, cannot be complied with." *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407.

In *Still v. Houston*, 27 Tex. Civ. App. 447, 66 S. W. 76, the ground of the decision is stated in the third paragraph of the syllabus as follows: "A city charter provided that the corporation should not be liable for any injuries sustained owing to the defective condition of sidewalks, etc., unless such condition should have continued for ten days after notice to the mayor or certain committees. A city sold certain fences on property through which a street was opened, and authorized the purchaser to remove them, which he did to the knowledge of the city, but he failed to fill a hole left where a fence post was removed, and subsequently a pedestrian stepped into such hole, it being just beside the sidewalk. Held that, though no notice of such hole had been given, the charter provision did not protect the city, inasmuch as the act of the purchaser was, under the circumstances, to be considered the act of the city, and the provision had no application to such case." In the opinion the court said: "This action was taken by the very officers to whom the charter required the notice to be given. The city is not sought to be held liable for any injury caused by a defect accruing from any extrinsic cause, but for having by its own procurement made the street unsafe, and knowingly left it in that condition."

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The charter of the city of Springfield, Illinois, provided that a city should not be liable for damages arising from the bad condition of the streets by reason of the neglect of the proper officers to repair the same, until notice was given and reasonable time given to make repairs. The action was for damages for injuries sustained by falling into a sewer which was being made in one of the streets of the city. While the statute did not purport to exempt the city from liability in all cases where the notice had not been given, but only in case the proper officer had negligently failed to repair the defect, still that court expressed a doubt as to the propriety of such a clause. "Laying out of view all consideration of the propriety of such a clause, and its inconsistency with other provisions of the charter, and with established rules of law, it is very manifest it cannot apply to this case. . . . The injury complained of was not the result of a defective street, which a traveler upon it might have noticed and reported, but for permitting the sewer in it to be excavated in a manner hazardous to the safety of the people." *Springfield v. Le Claire*, 49 Ill. 476.

In *Dallas v. McAllister* (Tex. Civ. App.) 39 S. W. 173, a sewer on one of the principal streets had caved in, leaving a dangerous depression up and down the street 10 or 12 feet long. It had been there about two months. The driver of a wagon was going around this broken place in the paving where the street appeared to be solid, when the sewer caved in under the wagon causing the injuries complained of. It was held that since the testimony tended to show a connection between the original break and the one through which the injury occurred, in such a manner as to indicate that in repairing the former the cause of the latter would have become known, the city was liable for the damages notwithstanding a clause in the charter which provided that no action should be maintained against the city for injuries caused from streets being out of repair from the gross negligence of the city, unless the same shall have remained so for ten days after special notice in writing to the mayor or city engineer, and no such notice had been given. The court said: "The evidence, however, shows that the entire sewer was defective and dangerous from the place of the accident down to the original caving in,—a distance of 15 or 20 feet,—for it is testified to that, when the wagon went down, the ground caved all the way down to the other cavity. It is therefore a reasonable inference that the sewer was in an unsafe condition all the way down, and that notice of this would have followed ordinary

care in repairing the first break; hence the city must be taken to have had knowledge of it, and be chargeable with the consequences."

In *Adams v. Oshkosh*, 71 Wis. 49, 36 N. W. 174, the case is stated in the syllabus as follows: "Plaintiff's horse was killed on a principal street of a municipal corporation by running, in the night time, upon a pile of gravel and stones placed there by an employee of the city while repairing the street. In an action to recover the value of the horse, held, that the provision of the charter 'that the city shall not be liable to or for any damages arising or growing out of any sidewalks, streets, drains, sewers, gutters, ditches, or bridges in said city being in a defective or damaged condition, or out of repair, unless it be shown that previous to the happening of the same one of the aldermen of the ward in which the same is located had knowledge thereof,' etc., does not apply to obstructions placed in the street by an employee of the city while in its employ." The court said in the opinion: "There is no claim that either of the aldermen of the ward had actual notice of the obstruction in the street, nor that it had existed for three weeks; so that, if the statute applies to an obstruction placed in the street by an employee of the city while engaged in repairing said street, the plaintiff did not make out a case. After a careful consideration of the statute, we think it was not the intent of the legislature to cover a case of this kind. In the case at bar the aldermen of the ward, in discharging a duty imposed upon them by law, were in fact engaged in repairing the street in question, and one of their employees negligently permitted the obstruction to be placed in and remain in said street. We think, in a case of this kind, the act of the employee while engaged in his employment must be considered as the act of the aldermen of the ward, and that the city, through the action of its ward officer, permitted the obstruction to be placed in the street, and to remain there. It cannot be supposed that the legislature intended to release the city from damages caused by the action of its officers in repairing its streets, when its employees create the obstruction, because such officers had no actual notice of the obstruction. In such case the acts of the employees are the acts of the officers, and their knowledge must be construed to be the knowledge of the employer. This would be the rule in every other case, and we cannot think the legislature intended to alter so just a rule in favor of the city."

In *MacMullen v. Middletown*, 187 N. Y. 37, 11 L.R.A.(N.S.) 391, 70 N. E. 863, it was held that the requirement in a city 30 L.R.A.(N.S.)

charter that written notice should be given of the existence of snow or ice on sidewalks is constitutional. The court said: "The charter created a liability for a neglect of the duty to remove snow and ice from the streets and sidewalks, and gave a remedy by action. . . . The requirement is the expression of the legislative will that the notice of the defective condition of the public way, which has occasioned the injury sustained, shall be of so certain a character as to charge the corporation with actual knowledge. It was always the legal rule that notice should be brought home to the corporation, or facts from which notice was reasonably inferable. In order that something more certain than constructive notice should be relied upon, provisions were inserted in municipal charters that 'actual notice' of the alleged defect must be shown." This was perhaps all that it was necessary to say in deciding the case. In the absence of any statute upon the subject, the city would not be required to remove the snow as fast as it fell upon the walk. It would only be liable if it knew that the walk had become dangerous by reason of the accumulation of snow and ice, and failed to protect the public by causing it to be removed. No one could doubt the power of the legislature to prescribe the manner of giving such notice and the method of proof that the city officials had such knowledge when notice was necessary; but the court discussed at great length the question whether removing snow and ice from walks is a governmental function and concludes that it is, contrary to the view of most other courts, and especially of this court, as expressed in *Burke v. South Omaha*, 79 Neb. 793, 113 N. W. 241, and *Tewksbury v. Lincoln*, 84 Neb. 571, 23 L.R.A.(N.S.) 282, 121 N. W. 994. The language used in the opinion in *MacMullen v. Middletown*, supra, which appears to be in conflict without conclusion in this case, is based upon the proposition that such duties are governmental functions. The reasoning upon this question in *Tewksbury v. Lincoln*, supra, and other authorities there cited, precludes this court from accepting such a view.

In *Parsons v. San Francisco*, 23 Cal. 463, it was held that the city was not liable in consequence of its streets or highways being out of repair. The statute exempting cities from such liability was held to be constitutional, but this is put expressly upon the ground that the statute afforded the injured parties a complete remedy. It made the person or persons on whom the law may have imposed the obligation to repair such streets, and also the officer or officers through whose official negligence such defects remained unrepaired, jointly and sev-

erally liable to the parties injured. This was thought to be a complete remedy, and, if the officer by whose negligence the injury was caused and his official bonds are presumed to be responsible, the remedy would appear to be complete.

In *Williams v. Galveston*, 41 Tex. Civ. App. 63, 90 S. W. 505, it was held that the city was not liable for damages caused by a defective bridge. The charter provision exempting the city from such liability was upheld. This opinion also placed the decision upon the theory that the repair of bridges is a governmental function. It is said in the opinion that "the counties in the state are held exempt from liability for the negligent construction or maintenance of public highways, and the act in question does no more than place the city of Galveston upon a plane with the counties."

If this court were not already fully committed to the doctrine that in the performance of such duties the cities are not exercising governmental functions, it might be thought necessary to further discuss this question.

It was complained in the brief that there were some errors in the instruction of the court to the jury, but these supposed errors are not discussed at length. For the most part objections made to the instructions are derived from principles already discussed, and it does not appear to be advisable to prolong this opinion after having devoted so much space to the main question involved. We have found no errors in the instruction, requiring a reversal of the judgment.

The judgment of the District Court is affirmed.

Rose, J., concurring:

I concur in the affirmance on the ground that the statute requiring notice does not apply to the defects of which complaint is made in plaintiff's petition.

Root, J., dissenting:

I am unable to concur in the majority opinion. The courts are not in accord concerning the principle controlling the liability of a municipal corporation for personal injuries inflicted by reason of its defective streets. In *Omaha v. Olmstead*, 5 Neb. 446, 451, we held that the city, in accepting its charter and the privileges therein bestowed, by implication promised the state to perform the duties thereby cast upon the municipality, and individuals injured by the city's failure to keep its promise had a right of action against the city: "The acceptance of these privileges is considered as raising an implied promise on the part of the city to perform its corporate duties; and this implied agreement

made with the sovereign power inures to the benefit of every individual interested in the proper performance of such duties." 5 Neb. 452, *supra*. In *Goodrich v. University Place*, 80 Neb. 774, 115 N. W. 538, the law is re-examined, and the liability of a city for personal injuries is again based upon its implied contract with the sovereign state. Judge Dillon suggests there is no contractual relation between the state and a municipality in those cases where the city may not reject, but is compelled to accept, its charter. 2 Dill. Mun. Corp. 4th ed. § 967. Judge Dillon admits, however, that the reason given by us in *Omaha v. Olmstead* and *Goodrich v. University Place*, *supra*, for holding a city liable in personal injury cases, sustains many decisions imposing a like liability upon municipalities. If the law may raise an implied promise by a city and fasten a liability upon it for a failure to keep that promise because the city has acted under a charter it is powerless to reject, it seems arbitrary and unjust to deny the city the benefit of those immunities specifically granted the city therein.

The defendant's charter provides that it "shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks," unless notice in writing of the defect shall have been filed with the city clerk at least five days before the accident occurred. And, further, "in the absence of such notice, so filed, the city shall not be liable." If, as suggested in the majority opinion, the legislature does not have the power to absolutely exempt a city from liability to respond in damages to those injured by reason of its defective streets, or may not lawfully provide that such a liability shall not arise unless the city shall have had notice in writing of the defect before such accident occurs, the statute is void if construed according to its terms. No principle of law is cited to sustain the suggestion made in the majority opinion. No adjudicated case has been referred to, nor do I believe one can be found, to sustain the proposition that the legislature may not, by the enactment of a statute uniform as to the class of cities upon which it operates, exempt a municipality from all liability because of personal injuries inflicted by reason of its defective streets or alleys. On the other hand, statutes granting such an exemption have been sustained by courts of last resort. *O'Hara v. Portland*, 3 Or. 525; *Rankin v. Buckman*, 9 Or. 253; *Wilmington v. Ewing*, 2 Penn. (Del.) 66, 45 L.R.A. 79, 43 Atl. 305; *Williams v. Galveston*, 41 Tex. Civ. App. 63, 90 S. W. 505.

In the opinion filed in the last cited case

the court did say, as suggested in the majority opinion, that the effect of the statute is to reduce the city's liability to that of a county. The majority opinion is also correct in stating that we hold that a city in controlling its streets exercises corporate and not governmental functions; but that question was not involved in the Texas case. The supreme court of Texas is in harmony with our decisions upon that subject. The real point determined in *Williams v. Galveston*, supra, was that the legislature had the power to relieve a city from the liability theretofore imposed upon it by judicial construction. Having the power to grant complete immunity, it follows as a matter of course that the legislature may extend a qualified exemption to the city. We also held in *Goddard v. Lincoln*, 69 Neb. 594, 96 N. W. 273, where a statute identical in terms with the one considered in the case at bar was construed and upheld. That case did not involve the mere determination of the power of the legislature to relieve the city from liability in cases resting upon imputed notice to the city that a sidewalk was defective. The plaintiff in the *Goddard Case* alleged in his petition that the sidewalk at the point where his intestate was injured was unsafe and dangerous by reason of the absence of boards which had formed a part of the way, and that the defendant city had "full knowledge" of said defect for a long time prior to the accident. The defendant's demurrer to the petition was sustained, and we affirmed the judgment of the district court. The constitutionality of the statute was raised, considered, and determined in the *Goddard Case*, and we held that, although the city had knowledge for a long time prior to the accident of the defect responsible for the injury, the defendant was not liable because the statutory written notice had not been given. See also *McNally v. Cohoes*, 53 Hun, 202, 6 N. Y. Supp. 842; *MacMullen v. Middletown*, 187 N. Y. 37, 11 L.R.A.(N.S.) 391, 79 N. E. 863. But it is said that a fair consideration of all the other legislation upon the subject, in connection with the statute concerning notice and the apparent evil to be remedied thereby, will convince the impartial, judicial mind that the statute should not be literally construed. There is no ambiguity in the statute under consideration; it is not inconsistent with any other provision in the city charter, nor does it conflict with any other legislative act. Under these circumstances, the court should hesitate before applying rules of construction to read exceptions into the written law inconsistent with the context and tenor thereof. *Morrill v. Taylor*, 6 Neb. 236, 243; 30 L.R.A.(N.S.)

State ex rel. McLean v. Liedtke, 9 Neb. 468, 4 N. W. 61; *State ex rel. School Dist. No. 6 v. Moore*, 45 Neb. 12, 63 N. W. 130; *Stoppert v. Nierle*, 45 Neb. 105, 63 N. W. 382.

It is argued, however, that in *Tewksbury v. Lincoln*, 84 Neb. 571, 23 L.R.A.(N.S.) 282, 121 N. W. 994, we departed from the literal meaning of the Lincoln charter, and for that reason are not bound by the language employed by the legislature in the statute under consideration in the instant case. *Tewksbury v. Lincoln* was a hard case, and, if it is authority for the majority opinion, should be overruled; but I am not willing to concede so much. In that case, while employees of the city of Lincoln were engaged for their master in flushing a sewer during cold weather, they negligently sprayed a street crossing so that it became slippery and dangerous. The plaintiff, while those servants were at work and by reason of such negligence, slipped, fell, and was injured. We said: "The law never requires an impossible thing. The section presupposes that the defect in the public way must have existed at least five days; otherwise the notice would be impossible." A well-recognized rule of statutory construction was thereby applied. *Lewis's Sutherland*, Stat. Constr. § 516. The instant suit presents no such feature, and the rule ought not to be applied. It is suggested, however, that where the defect has been caused by the city it has knowledge of the fact, waives the written notice, and the statute does not apply. This argument proceeds upon the assumption that the legislature did not intend to release the city where it had knowledge of the defect. We held to the contrary in *Goddard v. Lincoln*, supra. Furthermore, a municipal corporation is without perception, intellect, or memory, and all knowledge acquired or notice received by it must be by imputation from the knowledge of or notice to some of its officers or agents. In the case at bar the defendant's negligence is inferred from the alleged fact that in 1887, twenty years before the plaintiff was injured, the municipality failed to properly tamp the dirt on each side of and above a sewer 24 inches in diameter laid 20 feet beneath the surface of a street in said city; that subsequently the dirt settled in said trench, and the city paved the street so as to conceal the open trench. The defendant's liability, however, is predicated solely upon the alleged failure of the city to properly tamp or otherwise settle the dirt in said trench in 1887. That there may be no uncertainty upon this point, I quote the eighth paragraph of the district court's charge to the jury: "You are instructed as a matter of law, the plaintiff cannot recover in this

case unless the city was negligent in the construction of said sewer; that is to say, failed to use ordinary care and caution in tamping or ramming the dirt when refilling said sewer. And if the plaintiff has failed to satisfy you by a preponderance of the evidence that the city so failed, or if you find the evidence evenly balanced, then you should find for the defendant."

The judicial mind may logically reason and understand that whatever knowledge the city's agents or officers may have acquired in 1887 concerning the negligent tamping of earth in said sewer was by some process communicated to a conscious municipal mind and continued within the memory and understanding of that intangible person for two decades; but the laymen may be excused for refusing to accept that logic. The mere fact that courts do thus reason is a satisfactory explanation for the enactment of the statute under consideration. Many cases are brought against a city for personal injuries, where the doctrine of *respondet superior* is invoked to induce and justify a judgment. Where any considerable period of time exists between the happening of the alleged negligence and the injury to the plaintiff, there is fully as much probability that the city will be wrongfully mulcted in damages, as in those cases where imputed notice to the city of a defect in its streets caused by the negligence of third persons, or the action of the elements, is the basis for the demand. In the case at bar the defendant's negligence, if established, is demonstrated by the testimony of a member of the defendant's city council in 1887, who testified in substance that once or twice a day while the contractor was filling said trench he noticed the methods employed by the workmen, and observed that the specifications in the contract between the contractor and the city were being ignored. This evidence was supplemented by expert testimony. There is proof to the effect that at intervals subsequent to the construction of said sewer, and up to within about a year before the accident, the city had refilled parts of said trench and repaired the pavement along the line of the sewer; but the testimony further shows that the soil in Omaha is of a peculiar texture, and when used to fill excavations will settle, notwithstanding all known ordinary methods may be used to make it firm. An impartial consideration of the facts, and the well-known inclination of juries to accept slight proof to support a finding of notice to a municipality of defects in its streets, lead to the belief that the legislature intended to make the city's liability depend upon the statutory written

notice in all cases where a defective street is the proximate cause of an injury.

Judge Gray, in *MacMullen v. Middletown*, supra, gives a logical reason for statutes like the one considered in the instant case: "The novelty of the case, in the feature of the statutory requirement that a written notice shall have been given, is explained in the legislative purpose to make that certain which before was often uncertain. The fact of knowledge should no longer be dependent upon interferences from the evidence of circumstances; nor the liability of the municipality be left to a determination reached upon an indulgent construction of the legal rule as to actual notice."

I do not understand the opinion in the cited case to hold, as suggested in the majority opinion, that the city was exempt from liability because the removal of snow and ice from sidewalks is a governmental function; the court recognized that the defendant, in the absence of legislation upon the subject, would be liable for its neglect in such a case. I again take the liberty of quoting from the opinion: "Where the charter of a municipal corporation is silent upon the subject, the legislature may be regarded as having left its liability to depend upon the general rule that, if the power conferred relates to the accomplishment of corporate purposes, for the corporate benefit, the corporation is as a private company, and there attaches the same responsibility as there would to a legal individual, if possessing like powers and franchises. But where the charter voices the will of the legislature, upon the subject of the responsibility of the political agency of the state to answer to the complaint of a private individual, it announces a rule of conduct which is to govern the relations of the municipality with its citizens. No right is thereby taken away; but relative rights are defined, which are to be binding upon those who choose to remain residents of the municipality."

The opinion further demonstrates that, in the distribution through charters to municipalities of governmental powers and administrative duties, there is no constitutional limitation upon the regulative power of the legislature. The legislature may specifically impose a liability in cases like the one at bar, may attach conditions thereto, leave the citizen to the judge-made law upon the subject, or exempt the municipality from all financial responsibility. The legislature has prescribed conditions precedent to the defendant's liability for its defective streets which shield it from the plaintiff's claim. If the statute works a hardship to the citizen, the legislature should remedy the evil by an amendment to

the law. We should not destroy the statute under the guise of construing its meaning.

The judgment of the district court should be reversed, and the cause remanded for further proceedings.

Letton, J., dissenting:

The facts in this case do not bring it within the rule of the Tewksbury Case, where the injury was the immediate and direct result of the negligence of the city's servants. In the present case the city is held liable for a latent defect in its streets, caused by a contractor twenty years before the accident.

In my opinion, the city is not liable in the absence of the statutory notice.

Petition for rehearing denied November 21, 1910.

OKLAHOMA SUPREME COURT.

J. L. NEWHOUSE, Plff. in Err.,
v.

MARVIN M. ALEXANDER.

(— Okla. —, 110 Pac. 1121.)

Quo warranto — jurisdiction — constitutional provisions — construction.

1. The constitutional convention, by providing in article 7, § 2, Const., that the supreme court, and in § 10 of the same article that the district courts, shall have power to issue writs of quo warranto, looked rather to the substance than to the form, and simply meant not so much to give those courts power to issue writs of a prescribed form, but to solemnly fix the ancient remedies secured by that writ, and leave it to the legislature to prescribe any new process or procedure to invoke those remedies in the courts, and to amplify and extend the remedies theretofore obtainable in the form of the ancient writ.

Election — ballots — failure to preserve in manner provided — effect.

2. That part of Sess. Laws (Okla.) 1905, chap. 17, art. 1, § 8, which provides that "said ballot package shall be preserved by the county clerks in some secure and safe place," is not mandatory. Where the ballots are preserved so that their identity is assured, they can be counted during a contest; and they are undoubtedly better evidence of the vote cast than the returns, and should prevail where there is a difference. But, before a recount of the ballots should be allowed to rebut the presumption of the correctness of the official returns, it should be proved satisfactorily that the ballots have not been tampered with since the election, and that those offered in evidence are the identical ones cast.

Headnotes by TURNER, J.
30 L.R.A.(N.S.)

Same — failure to seal — effect.

3. That part of Sess. Laws (Okla.) 1905, chap. 17, art. 1, § 8, which provides that "all of the ballots counted and one certificate, one poll book, and one tally sheet shall be securely sealed in a stout paper or muslin envelop or bag," is not mandatory, and when the ballots at the close of the count were placed in a large paper envelop, and the envelop not sealed, with the names of the election judges written across the seal, but was folded over at the end and sewed through with a needle and twine string, and the envelop containing the ballots was placed in the box and locked, and the ballots produced in court were the identical ballots voted by the voters of the precinct in question, and in the identical condition that they were placed in the envelop by the election officers of the precinct, held, that the court did not err in admitting the same in evidence to rebut the presumption of the correctness of the official returns.

Same — improper indorsement — effect.

4. That part of Sess. Laws (Okla.) 1905, chap. 17, § 8, which provides: "If, in the canvass of the votes, any ballot is found not indorsed with the initials of the poll clerks, as provided, and any ballot which bears any distinguishing mark, or on which any writing appears with pen and pencil, and any ballot upon which the judges are unable to agree as to how it shall be counted, the same shall not be counted, but shall be designated as mutilated ballots, and shall be preserved and kept separate from the ballots counted, . . . " is mandatory, and all ballots which do not comply therewith were properly excluded by the court as evidence to rebut the presumption of the correctness of the official returns.

(June 8, 1909.)

Note. — Scope and effect of provisions in election law for preservation of ballots.

At the threshold of a discussion of this question, it may be stated that the rule of law is well settled, as declared in *Avery v. Williams*, 8 Ariz. 355, 76 Pac. 403, that where ballots have been preserved in strict accordance with the statutory requirements, so that they have in no way been tampered with, they are the primary and controlling evidence of the number of votes cast for the respective candidates, and are sufficient in themselves, without further evidence, to contradict and overthrow the returns. This rule is supported not only by all the authorities herein reviewed, but also by the following cases, in which it appeared that the ballots were preserved as required by law, and had not been tampered with: *People ex rel. Budd v. Holden*, 28 Cal. 123; *Coglan v. Beard*, 65 Cal. 58, 2 Pac. 737, on subsequent appeal 67 Cal. 303, 7 Pac. 738; *Huston v. Anderson*, 145 Cal. 320, 78 Pac. 626; *Perkins v. Bertrand*, 192 Ill. 58, 85 Am. St. Rep. 315, 61 N. E. 405; *Reynolds v. State*, 61 Ind. 392; *Pedigo v.*

ERROR to the District Court for Okmulgee County to review a judgment in plaintiff's favor in an action in the nature of quo warranto to try the defendant's title to the office of judge of the Okmulgee County Court. Affirmed.

The facts are stated in the opinion.

Messrs. W. W. Witten, B. T. Buchanan, and J. L. Maynard, for plaintiff in error:

To render doubtful or questioned ballots admissible as evidence in a judicial or other investigation, they must be sealed and returned as required by the statute.

Struss v. Johnson, 100 Ky. 319, 38 S. W. 680; Banks v. Sergeant, 104 Ky. 849, 48 S. W. 149; Anderson v. Likens, 104 Ky. 699, 47 S. W. 867; Neesley v. Rice, 123 Ky. 814,

Grimes, 113 Ind. 148, 13 N. E. 700; Ferguson v. Henry, 95 Iowa, 439, 64 N. W. 292; Searle v. Clark, 34 Kan. 49, 7 Pac. 630; Cole v. Nunnally (Ky.) 130 S. W. 972; Lester v. Fogarty, 30 Ky. L. Rep. 759, 99 S. W. 910; Leonard v. Woolford, 91 Md. 626, 46 Atl. 1025; Schneider v. Bray, 22 Nev. 272, 39 Pac. 326; People ex rel. Brink v. Way, 179 N. Y. 174, 71 N. E. 756; People v. McClellan, 191 N. Y. 341, 84 N. E. 68; Lunnicutt v. State, 75 Tex. 233, 12 S. W. 106; Gray v. State, 19 Tex. Civ. App. 521, 49 S. W. 699.

Under the circumstances of the cases just cited, the question here offered for discussion is one easy of solution. A more serious problem, however, is presented where it appears that, in keeping the ballots after an election, the statutory requirements in that regard have not been strictly followed. The question then arises: Does such a state of affairs result in the utter discrediting of the ballots? Here, too, there is great unanimity among the authorities, and it may be laid down as a general rule of law, as declared in NEWHOUSE v. ALEXANDER, that such provisions will be deemed directory only, and not mandatory, and that therefore mere irregularities by the election officers in the performance of their duties in preserving the ballots, or omissions on their part strictly to obey the statutory requirements, will not be allowed to result in the rejection of the ballots.

Thus, in *Avery v. Williams*, supra, in which it was also declared that the statutory requirements for the preservation of the ballots were not mandatory, but directory, and court used the following language: "The object of the election law is to prevent fraud, and to guarantee to the voter the registration and count of his ballot. A construction of the statute that would render it impossible to ascertain the will of the voter, as expressed by his ballot, without fault on his part, and would make that ballot inadmissible in evidence solely because of the action of the election officials in failing to comply with certain of the requirements of the statute in respect to the manner of preservation of the ballots, would

97 S. W. 730; *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257; *Powell v. Holman*, 50 Ark. 85, 6 S. W. 505; *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018; *State ex rel. Funkhouser v. Spencer*, 164 Mo. 23, 63 S. W. 1112; *Hudson v. Solomon*, 19 Kan. 177; *McCrary, Elections*, 475; *Cooley, Const. Lim.* 625; *Windes v. Nelson*, 159 Mo. 51, 60 S. W. 129; *People ex rel. Dickinson v. Sackett*, 14 Mich. 320; *People ex rel. Williams v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141.

That provision of the statute which requires both clerks of election to place their initials on the lower left-hand corner of the ballot is not a mandatory requirement.

Eufaula v. Gibson (Okla.); *State ex rel. Law v. Saxon*, 30 Fla. 668, 18 L.R.A.

make it possible for such officers to nullify the will of the voter, or of any number of voters, by a simple departure from some of the requirements of the statute, and would tend to defeat the object of the law. We think that where the requirements of the statute with respect to the method of preservation of the ballots have not been complied with, the object of the statute, to give effect to the expression of the will of the voter, is best subserved by holding that such noncompliance does not necessarily make the ballots inadmissible in evidence, but the burden of proof in such case is cast upon the party offering to introduce them in evidence, to show that the ballots offered are the identical ballots cast at the election, and that there is no reasonable probability that the ballots have been disturbed or tampered with; and, if it appears that the ballots are before the court in their integrity, they should be admitted in evidence."

And in *Tebbe v. Smith*, 108 Cal. 101, 29 L.R.A. 673, 49 Am. St. Rep. 68, 41 Pac. 454, the court said: "While the ballots are the best evidence of the manner in which the electors have voted, being silent witnesses, which can neither err nor lie, they are the best evidence only when their integrity can be satisfactorily established. One who relies, therefore, upon overcoming the prima facie correctness of the official canvass by a resort to the ballots, must first show that the ballots, as presented to the court, are intact and genuine. Where a mode of preservation is enjoined by the statute, proof must be made of a substantial compliance with the requirements of that mode. But such requirements are construed as directory merely, the object looked to being the preservation inviolate of the ballots. If this is established, it would be manifestly unjust to reject them merely because the precise mode of reaching it had not been followed."

And in *Mallett v. Plumb*, 60 Conn. 352, 22 Atl. 772, in which the disregard of the statutory provisions for the preservation of the ballots was denominated by the court as "gross," it was declared that the ballots, when returned to the boxes immediate-

721, 32 Am. St. Rep. 46, 12 So. 218; State ex rel. Sturdevant v. Allen, 43 Neb. 651, 62 N. W. 35; Wheeler v. Chicago, 24 Ill. 105, 76 Am. Dec. 736; Endlich, Interpretation of Statutes, §§ 433, 436, 437; Stackpole v. Hallahan, 16 Mont. 40, 28 L.R.A. 502, 40 Pac. 80; Hamilton v. Police Comrs. 2 Ct. Sess. 299; Wigmore, Ev. p. 196; Hawkins v. Smith, 8 Can. S. C. 676; Jenkins v. Brecken, 7 Can. S. C. 247; Hope v. Flentge, 47 L.R.A. 810, note; State ex rel. Braley v. Gay, 59 Minn. 6, 50 Am. St. Rep. 389, 60 N. W. 670; Moyer v. Van de Vanter, 12 Wash. 377, 29 L.R.A. 670, 50 Am. St. Rep. 900, 41 Pac. 60; Jones v. State, 153 Ind. 440, 55 N. E. 229; Horning v. Board of Canvassers, 119 Mich. 51, 77 N. W. 446; Pennington v. Hare, 60 Minn. 140, 62 N. W. 116; People ex rel. Hirsh v. Wood, 148 N. Y. 142, 42 N. E. 536; McCrary, Elections, 4th ed. 521, § 724; Lynip v. Buckner, 22 Nev. 426, 30 L.R.A. 354, 41 Pac. 762; Cooley, Const. Lim. 775.

ly after the election, and carefully kept in the same condition as when so returned, furnished the best evidence of the result of an election, and that the object of the statute was to make this source of evidence still more available by throwing around it safeguards for its preservation, and that this object was best subserved by holding that where the trier was satisfied that the ballots had not been tampered with or disturbed, they should be admitted in evidence, even though some provision of the statute had not been complied with. The court reasoned that, inasmuch as the statute in question contained diverse provisions, all looking to this main purpose or object, and enjoined with equal explicitness the observance of all these requirements, regardless of their relative importance, it could hardly follow that the nonobservance of any one or all of them should shut out the ballots as a source of evidence, and thus defeat the main object of the legislature in enacting the statute. It also thought it quite significant that the statute did not expressly provide that a failure to comply with one or all of its requirements should be followed with any such consequence.

And in O'Gorman v. Richter, 31 Minn. 25, 16 N. W. 410, the statutory provisions as to the preservation of the ballots cast at an election were held to be "merely directory," and that where it was clearly and satisfactorily shown that the ballots had been kept intact and inviolate, they were admissible evidence, though not sealed up in envelopes, as required by the statute. To quote from the opinion: "The statute does not make the ballots evidence. They are common-law evidence, and, when properly preserved and identified, they furnish the best evidence of the will of the electors. The statute treats of them as an existing form of evidence, and gives certain directions for the more careful preservation of them. Neither does the statute assume to

Messrs. F. F. Lamb, Belford & Hiatt, and Mark L. Bozarth, for defendant in error:

Ballots not initialed by poll clerks, as required by law, cannot be counted.

Bowers v. Smith, 111 Mo. 61, 16 L.R.A. 754, 33 Am. St. Rep. 491, 20 S. W. 101; Boyd v. Mills, 53 Kan. 594, 25 L.R.A. 486, 42 Am. St. Rep. 306, 37 Pac. 16; 10 Am. & Eng. Enc. Law, 2d ed. p. 726; Parvin v. Wimberg, 130 Ind. 561, 15 L.R.A. 775, 30 Am. St. Rep. 254, 30 N. E. 790; State ex rel. Waggoner v. Russell, 34 Neb. 116, 15 L.R.A. 740, 33 Am. St. Rep. 625, 51 N. W. 466; McCrary, Elections, 5th ed. §§ 225, 226; Kirkpatrick v. Deegans, 53 W. Va. 275, 44 S. E. 405; Mauck v. Brown, 50 Neb. 382, 81 N. W. 313; Orr v. Bailey, 59 Neb. 128, 80 N. W. 405; Lorin v. Seitz, 8 N. D. 404, 79 N. W. 869; Miller v. Schallern, 8 N. D. 395, 79 N. W. 805; Kelso v. Wright, 110 Iowa, 560, 81 N. W. 805; McKay v. Minner, 154 Mo. 608, 55 S. W. 866; Slay-

declare that the ballots shall not be admissible if not preserved as the statute directs. The preservation of the ballots being the only and ultimate object of the statute, if that fact is accomplished, the object is accomplished; and the omission to observe all the formalities provided by the law will not be fatal to the competency of the evidence; the point of inquiry always being the will of the electors, as manifested by their ballots. To exclude such evidence merely on account of an omission to comply with these statutory provisions would put it in the power of any ignorant, careless, or corrupt judge of election to frustrate an investigation into any election. Therefore, the general tendency of all courts is to hold all such provisions as directory only."

And in People ex rel. Dailey v. Livingston, 79 N. Y. 279 (a case fully set forth in NEWHOUSE v. ALEXANDER), it was declared that the preservation of ballot boxes inviolate being the ultimate object of the statute, the omission of the proper officers to observe all the formalities to secure that object would not prevent the admission of the ballots as evidence, if such object was in fact accomplished.

And in Hartman v. Young, 17 Or. 150, 2 L.R.A. 596, 11 Am. St. Rep. 77, 20 Pac. 17, it was held that the statutory provisions for the safe-keeping of ballots were "directory only;" and where it appeared that the ballots had been securely kept and preserved inviolate, they would not be excluded as evidence because of some omission to comply with the statutory requirements. To quote from the opinion: "The object of all such provisions is to secure the safe-keeping of the ballots, so that they may be easily identified in case they need to be resorted to in some judicial inquiry; and if they have been safely kept, and protected from any tampering, the chief object of the law is subserved, although omissions or ir-

maker v. Phillips, 5 Wyo. 453, 47 L.R.A. 842, 40 Pac. 971, 42 Pac. 1049; Rhodes v. Driver, 69 Ark. 501, 64 S. W. 272; Arnold v. Anderson, 41 Tex. Civ. App. 508, 93 S. W. 692; Clark v. Hardison, 40 Tex. Civ. App. 611, 90 S. W. 342; People ex rel. Nichols v. County Canvassers, 129 N. Y. 395, 14 L.R.A. 624, 29 N. E. 327; Lippincott v. Felton, 61 N. J. L. 291, 39 Atl. 646; Sweeney v. Hjul, 23 Nev. 409, 48 Pac. 1030, 49 Pac. 169; Keller v. Toulme (Miss.) 7 So. 508; State ex rel. Barry v. Connor, 86 Tex. 133, 23 S. W. 1103 (Tex. Civ. App.) 25 S. W. 815; Donnell v. Lee, 101 Mo. App. 101, 73 S. W. 997.

By forbidding the inspector and judges from depositing any ballot upon which the initials of the poll clerks do not appear,

regularities may have occurred, . . . the ballots are the best evidence of the will and choice of the voters; and if it is shown, or the facts find, that they have been securely kept, and preserved inviolate, they are entitled to be recounted, that the will of the electors may be carried into effect, and allowed to prevail."

Upon these principles, such statutory provisions were declared to be directory in the following cases also: State v. Ninth Judicial Ct. Judge, 13 Ala. 805 (in which the court said that while it was highly important that such provisions should be observed, yet, if the election officers failed in this respect to do their duty, the right to office, if it could be ascertained correctly, would not be thus divested); Murphy v. Lentz, 131 Iowa, 328, 108 N. W. 530 (in which it was declared that mere irregularities in not strictly pursuing the statutory provisions could not be permitted to defeat the will of the electors); People ex rel. Lake v. Higgins, 3 Mich. 233, 61 Am. Dec. 491; People ex rel. Williams v. Cicott, 16 Mich. 283, 97 Am. Dec. 141; Hughes v. Holman, 23 Or. 481, 32 Pac. 298; Re Zacharias, 3 Pa. Co. Ct. 656 (in which the court used the following language: "Ignorance, inadvertence, mistake, or even intentional wrong on the part of local officers should not be permitted to disfranchise a district").

And in the following cases, the ballots were permitted to overcome the returns, though they were not preserved strictly in accordance with the statute: Conaty v. Gardner, 75 Conn. 48, 52 Atl. 416; Blankinship v. Israel, 132 Ill. 514, 24 N. E. 615; Murphy v. Battle, 155 Ill. 182, 40 N. E. 470; Dooley v. Van Hohenstein, 170 Ill. 630, 49 N. E. 193; Collier v. Anlicker, 189 Ill. 34, 60 N. E. 615.

The following cases furnish illustrations of the practical application of these rules of law:

In McCarthy v. Wilson, 146 Cal. 323, 82 Pac. 243, it was held that the failure of the election officers to write their names across the seal of the envelop containing the ballots, as required by law, would not warrant

§ 9950 of Wilson's Statutes of Oklahoma, when taken in connection with § 8, chap. 17, Session Laws of Oklahoma, 1905, has the same force as it would have if it contained the express statement that such ballots are void.

People ex rel. Nichols v. County Canvassers; Kelso v. Wright; Rhodes v. Driver; McKay v. Minnier; and Donnell v. Lee,—supra; State ex rel. Barry v. Connor, 86 Tex. 133, 23 S. W. 1103; Clark v. Hardison; Arnold v. Anderson; and Keller v. Toulme,—supra.

Turner, J., delivered the opinion of the court:

At the election held in the proposed county of Okmulgee, in the proposed state of

the disfranchisement of all the voters of those precincts, where there was "no pretense" that the ballots in question were not the original ballots, and it was manifest that no injury resulted therefrom.

And in Apple v. Barcroft, 158 Ill. 649, 41 N. E. 1116, the result of a recount was preferred, though it appeared that the officer charged with the custody of the ballots kept them in an unlocked bureau drawer at his dwelling house, it being shown that the seal had not been broken, and that the ballots had not been tampered with.

To the same effect is Kreider v. McFerson, 189 Ill. 605, 60 N. E. 49, though it appeared that the officer charged with their custody put the ballots in a wooden ballot box, which was locked with a common lock, and placed by him in a room in the rear of his office, to which other persons had access, there being no testimony that the ballot box or lock was tampered with.

And in Dorey v. Lynn, 31 Kan. 758, 3 Pac. 557, the ballots were held to be controlling, though between the time they were properly inclosed in the ballot box and delivered to the proper officer, and the time of the contest, a city council, while acting as a canvassing board, illegally opened the envelop containing the ballots, and counted them.

Upon the same principle it was held in Hardin v. Cress, 113 Ky. 734, 68 S. W. 1090, and in Pace v. Reed (Ky.) 128 S. W. 891, that the innocent mistake of the election officers in destroying ballots after they had been counted, instead of preserving them, as required by statute, would not authorize throwing out the vote of the precinct where such mistake occurred, there being no question as to the truth of the returns.

In Coffey v. Edmonds, 58 Cal. 521, it was held that when packages of ballots came into the custody of a court, for use in an election contest, properly sealed, in accordance with the statute, the object of the law requiring them to be sealed was accomplished, and that the ballots were not, in the absence of evidence that any of them had been tampered with, to be discredited because, when brought into court to be

Oklahoma, on September 17, 1907, for the election of state and county officers, J. L. Newhouse, plaintiff in error, defendant below, and Marvin M. Alexander, defendant in error, plaintiff below, were rival candidates for judge of the county court of that county. On the face of the returns as certified by the board of canvassers, Alexander received 1,307 votes and Newhouse received 1,384 votes for said office, whereupon Newhouse was declared elected, and certificate of election issued to him. He thereupon qualified and took possession of said office, and was proceeding to hold the same when Alexander commenced this action against him in the district court of that county, which said action is in the nature of a quo warranto to try the title of that office.

After answer and reply, the cause was submitted by agreement to the Honorable George L. Mann, special judge, for trial, who thereupon proceeded to take testimony from which he made findings of fact and conclusions of law, and rendered judgment in favor of Alexander, declaring him legally elected judge of the county court of that county, and entitled to immediate possession of said office, and ousted Newhouse therefrom, from which said judgment, after motion for a new trial filed and overruled, said Newhouse appeals. It is first contended by Newhouse that the court was without jurisdiction to try this cause for the reason that the writ of quo warranto and proceedings by information in the nature of quo warranto, abolished by Wilson's Rev. &

counted, the seal was found broken and the strings loose.

Of course, the ballots will not be regarded as the best evidence of the result of an election if it appears that, as a result of their not being kept as required by the law, they were tampered with by unauthorized persons. *People ex rel. Freund v. Burden*, 45 Cal. 241; *Rhode v. Steinmetz*, 25 Colo. 308, 55 Pac. 814; *Beall v. Albert*, 159 Ill. 127, 42 N. E. 106; *Choisser v. York*, 211 Ill. 56, 71 N. E. 940; *Roland v. Walker*, 244 Ill. 129, 91 N. E. 80; *Spidle v. McCracken*, 45 Kan. 356, 25 Pac. 897; *Moorhead v. Arnold*, 73 Kan. 132, 84 Pac. 742; *Bailey v. Hurst*, 113 Ky. 699, 68 S. W. 807; *Galloway v. Braddburn*, 119 Ky. 49, 82 S. W. 1013; *McEuen v. Carey*, 123 Ky. 536, 96 S. W. 850; *Browning v. Lovett*, 29 Ky. L. Rep. 692, 94 S. W. 661; *Andrews v. Probate Judge*, 74 Mich. 278, 41 N. W. 923; *Windes v. Nelson*, 159 Mo. 51, 60 S. W. 129; *Owens v. State*, 64 Tex. 500; *Stafford v. Sheppard*, 57 W. Va. 84, 50 S. E. 1016.

Thus, in *McMahon v. Crockett*, 12 S. D. 11, 80 N. W. 136, ballots were not allowed to prevail over the official canvass where it appeared that the boxes containing the ballots were, after the election, delivered to the contestant, who was then the officer charged by law with their custody, and that he opened them for the purpose of getting the poll books to compare, and with the avowed purpose of ascertaining the result of the vote, and upon their production in court, they were found to be in a different condition than when delivered to him, and there was testimony that material alterations had been made in some of them.

There are many cases that have declared the law to be that if, as a result of the ballots not being kept as required by statute, they were exposed so as to furnish reasonable opportunity to be tampered with, they cannot be permitted to decide the result of the election. *Powell v. Holman*, 50 Ark. 85, 6 S. W. 506; *Chatham v. Mansfield*, 1 Cal. App. 298, 82 Pac. 343; *Rhode v. Steinmetz*, supra; *Catron v. Craw*, 164 Ill. 20, 46 N. E. 3; *Eggers v. Fox*, 177 Ill. 185, 52 N. E. 269; *Bouney v. Finch*, 180 Ill. 133, 54 N. E. 30 L.R.A. (N.S.)

318; *Caldwell v. McElwain*, 184 Ill. 552, 50 N. E. 1012; *Garms v. People*, 108 Ill. App. 631; *Doak v. Briggs*, 139 Iowa, 520, 116 N. W. 114; *Hudson v. Solomon*, 19 Kan. 177; *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257; *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248; *Hamilton v. Young*, 26 Ky. L. Rep. 447, 81 S. W. 682; *Newton v. Newell*, 26 Minn. 529, 6 N. W. 346; *Sone v. Williams*, 130 Mo. 530, 32 S. W. 1016; *Albert v. Twhig*, 35 Neb. 563, 53 N. W. 582; *Martin v. Miles*, 40 Neb. 135, 58 N. W. 732; *Fenton v. Scott*, 17 Or. 189, 11 Am. St. Rep. 801, 20 Pac. 95; *Hughes v. Holman and McMahon v. Crockett*, supra; *Dent v. Taylor County*, 45 W. Va. 750, 32 S. E. 250; *Fishback v. Bramel*, 6 Wyo. 293, 44 Pac. 840.

For example, in *Kingery v. Berry*, 94 Ill. 515, ballots were held to have lost their value as evidence where it appeared that after they were placed in the custody of the proper officer, he, with others, including the candidate whom the returns showed to have been defeated, out of the presence of the other party, and of the election officers, opened the ballot box and handled the ballots notwithstanding there was no evidence that the ballots had been tampered with or altered.

And in *Jeter v. Headley*, 186 Ill. 34, 57 N. E. 784, ballots were held not properly preserved by the officer charged with their custody, where they were kept in his office, in a vault accessible only through his office, having but a single door, provided with a combination lock, and it was shown that the lock was in such condition that persons unfamiliar with the combination could open the door, and there were many keys to his office, and his employees, when at their desks, could not see the entrance to the vault, particularly where the evidence tended strongly to show that the ballots had been tampered with after being placed in the vault. Accordingly, such ballots were not permitted to prevail over the returns.

And in *West v. Sloan*, 238 Ill. 330, 87 N. E. 323, it was held that ballots could not prevail over returns where the evidence showed that, though strung on a wire and

Anno. Stat. Okla. 1903, § 4848, revives by §§ 2 and 10 of article 7 of the Constitution, the ancient writ of quo warranto, which makes it the sole remedy of Alexander in this cause. If such is the effect of said provisions when construed together, then Alexander is without remedy, for the reason that the functions of the ancient writ were limited to matters of *publici juris*, and the same was not available for the trial of purely private rights. 23 Am. & Eng. Enc. Law, p. 598. There is no conflict in said provisions, and nothing in this contention. We take it that the constitutional convention, by providing in article 7, § 2, Const., that the supreme court, and in § 10 of the same article that the district courts, shall have power to issue writs of quo

warranto, looked rather to the substance than to the form, and simply meant not so much to give those courts power to issue a writ of a prescribed form, but to solemnly fix the ancient remedies secured by that writ, and leave it to the legislature to prescribe any new process or procedure to invoke those remedies in the courts, and to amplify and extend the remedies theretofore obtainable in the form of the ancient writ. This was done by Wilson's Rev. & Anno. Stat. (Okla.) 1903, art. 29, under the head of "Procedure Civil," which, in effect, provides that the remedies theretofore obtainable in that form might be had by civil action, and extends the remedy so as to permit a private person to contest with another private person the right or title

sealed, as required by law, they were put in a paper envelop and sealed only with mucilage, and kept by the officer charged with their custody for eleven weeks at the town hall, in a wooden cupboard, easy of access and easily opened, and a portion of the envelop was partly torn off when the officer took the ballots from the cupboard and produced them in court, and the ballots might easily have been re-marked, with little chance of detection, and without unstringing them or breaking the seal on the wire.

The same result was reached in *Davenport v. Olerich*, 104 Iowa, 194, 73 N. W. 603, in which it appears that, of the ballots rejected, some were wrapped in papers and others were not sealed, and all were placed on the floor under a table, in a vault in the office of the officer charged with their custody, where his employees did not at all times have them in sight, and many people had access to the vault, which was left open. The court declared the duty of preserving the ballots not to be "a negative one of noninterference, but a positive requirement to do whatever may be necessary in order to accomplish the purposes of the law in keeping them inviolate."

And in *DeLong v. Brown*, 113 Iowa, 370, 35 N. W. 624, ballots were held to be incompetent as evidence in an election contest where it appeared that they were left uncovered in the original envelopes in a vault which had no door, but did have an unfastened outside window, and many people had access to the vault unattended, and while in there were out of sight of the officer and his employees, and the envelopes in which the ballots were placed were in some instances so sealed that the ballots could be extricated, and in other instances the seals were of such a character that they could be opened and resealed without detection.

And in *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018, it was held that ballots lost their character as the best evidence, and could not be allowed to impeach the official canvass, where it appeared that one of the boxes in which they were placed was taken

by an election inspector to his father's house, and left in a bedroom generally accessible to all the family occupying the house, and the other was taken to the house of a judge of election, where the inspector got it the day before the trial, and produced it in court, not having had it in his custody in the meantime, or having seen it, and the boxes were thus kept for a period of seventy days before their production in court.

And in *Farrell v. Larsen*, 20 Utah, 283, 73 Pac. 227, ballots were held to be inadmissible where it appeared that they were delivered to the contestant, who was the officer charged with their custody, with a number of the packages unsealed, and were placed and kept in an unlocked telephone room in an unlocked office, to which unauthorized persons had access.

In the following cases, however, it was held that a mere irregularity showing that it was possible for someone to have tampered with the ballots was not sufficient to discredit them. *Avery v. Williams*, 8 Ariz. 355, 76 Pac. 463, supra; *Tebbe v. Smith*, 108 Cal. 101, 29 L.R.A. 673, 49 Am. St. Rep. 68, 41 Pac. 454, supra; *Mentzer v. Davis*, 109 Iowa, 528, 80 N. W. 557; *Wheeler v. Lawrence*, 78 Kan. 878, 99 Pac. 228.

To the Kentucky cases cited in *NEWHOUSE v. ALEXANDER*, holding mandatory the provisions of the Kentucky statute as to doubtful ballots, should be added: *Struss v. Johnson*, 100 Ky. 319, 38 S. W. 680; *Duff v. Crawford*, 124 Ky. 73, 97 S. W. 1124; *Childress v. Pinson*, 30 Ky. L. Rep. 767, 100 S. W. 278.

In the cases which follow, statutes requiring the preservation of the ballots cast in an election were construed as to matters not involving a failure to keep them as required.

In *Re Massey*, 45 Fed. 629, it was held that the laws of the United States concerning congressional elections being paramount, provisions of the Arkansas statute which forbade the opening of ballots preserved in accordance with other requirements of such statute, except in cases of

to a public office. On this subject in *State ex rel. Atty. Gen. v. Messmore*, 14 Wis. 116, the court said: "It was insisted that § 3 of article 7 of the Constitution only gave this court power to issue the writ of quo warranto at the common law; that the statutes of 1849 abolished the common-law writ and substituted the proceedings by information; that the present statute abrogated both the writ and the information, and declared a civil action to be the only remedy, and, as it was a mere civil action, it could not be entertained. We consider that the framers of the Constitution looked rather to the substance than the form; that their object was not so much to give us power to issue a writ of a prescribed form, as to enable us to hear and determine contro-

versies of a certain character; and that this jurisdiction could not be taken away by any legislative changes in the forms of the remedy, but that we might adopt any new process which was calculated to attain the same end." We are therefore of the opinion that the lower court had jurisdiction to try this cause. On the trial, Alexander, in support of the allegations in his petition, assumed the burden of proof to rebut the presumption of the correctness of the official returns, *inter alia*, of precinct No. 1, Seever's township, and to show that the ballots from that township were the identical ones before the court, and that the statutory provisions concerning their custody had been complied with, or, if not, that they had not been tampered with, and that they

contested elections, would not justify the refusal of the officer charged with their custody to produce them before the grand jury of the United States, pending an investigation of alleged violations of Federal election laws.

On the other hand in *Keenan v. People*, 58 Ill. App. 241; *Bryan v. Yungblut*, 136 Ky. 815, 125 S. W. 251; and *Ex parte Arnold*, 128 Mo. 256, 33 L.R.A. 386, 49 Am. St. Rep. 557, 30 S. W. 768, 1036, it was held that, under such a statutory provision, the officer charged with the custody of ballots could not be compelled to produce the same before the grand jury; while in *Ex parte Brown*, 97 Cal. 83, 31 Pac. 840, it was held that such officer could not be compelled by a committing magistrate to produce and open the ballots in a criminal prosecution against an election officer.

And in *Getty v. Holcomb*, 79 Kan. 224, 99 Pac. 218, it was held that a statutory provision forbidding ballots in contested cases to be opened except in open court, or in an open session of the body trying such contest, forbade their opening in a proceeding for the taking of depositions preliminary to the trial of a contested election.

In *Gonsoulin v. Decuir*, 121 La. 611, 46 So. 608, it was held, under a statute giving, under certain conditions, the right to a party in any suit to proceed to take evidence at any time before trial, that a trial judge might order ballot boxes to be opened and their contents examined before as well as after the filing of a suit to contest an election. The opinion does not show what were the requirements of the election law as to opening ballot boxes.

In *Lovewell v. Bowen*, 75 Ark. 452, 88 S. W. 570, it was held that, after the officer charged with the custody of ballots had produced them in court, the ballots passed from his control and into that of the court; and that the production of ballots from such officer after the ballots had been turned into court was not from the proper custodian of them, and that no presumptions of official regularity could be indulged on account of the source whence produced. 30 L.R.A. (N.S.)

In *Patten v. Florence*, 38 Kan. 501, 17 Pac. 174, it was held that a statutory provision requiring an officer charged with the custody of ballots not to permit them to be inspected except in cases of contested elections would not prevent the canvassers of an election from publicly opening the envelopes containing the ballots, and taking therefrom poll books which had been improperly inclosed with the ballots, so as to justify their refusal to canvass the returns.

In *Keith v. Wendt*, 144 Mich. 49, 107 N. W. 443, and *Ward v. Culver*, 144 Mich. 57, 107 N. W. 444, it was held that a recount board must, in order to have a recount, find from an inspection of the ballot boxes that the statutory requirements for the preservation of ballots as cast had been observed. The court in the first-cited case added, however, that it was true that in quo warranto proceedings the law as to the preservation of the ballots was to be held so far directory that it became a question of fact as to whether the ballots not cared for strictly as the law directed were in fact the ones cast at the election, upon the ground that there was an opportunity in such case for a judicial determination of the facts.

In *Re Van Cott*, 34 Misc. 411, 69 N. Y. Supp. 934, it was held that, under a statute requiring sealed packages of void and contested ballots to be retained inviolate for a certain period in the office in which they were filed, subject to the order and examination of a court of competent jurisdiction, the supreme court might, at the application of a defeated congressional candidate, order an inspection of such ballots, though no contest had been begun.

In *People v. McClellan*, 52 Misc. 614, 103 N. Y. Supp. 827, the court, in refusing to order certain ballot boxes to be taken from the custody of the officers designated by the election law, without proof of facts affording reasonable ground for the fear that they would be tampered with, or that they would be exposed to the danger of loss, declined to decide whether the court in any event had power to change the custody designated by law.

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should be received in evidence for that purpose. At the close of the testimony on both sides, the court opened the ballot box containing said ballots, and made with reference to them the following findings of fact:

"(4) That at precinct No. 1, SeEVERS township, there were counted, certified, and returned by the election board of said precinct 133 votes as having been cast for the office of judge of the county court of said county, of which 20 ballots were counted, certified, and returned for plaintiff, and 113 ballots for the defendant.

"(5) The court finds from the evidence that during the count in precinct No. 1 of SeEVERS township, the ballots were strung upon a string as they were counted, and at the close of the count were placed in a large paper envelop. The envelop was not sealed with the names of the judges written across the seal, but was folded over at the end, and sewed through with a needle and twine string. The envelop containing the ballots was placed in the ballot box and locked, and the ballot box taken in charge by the inspector at that precinct, and by him delivered to J. C. Trent, the county clerk of the proposed county of Okmulgee. The ballot box containing the ballots was kept by Trent for a time in a room the door of which was fastened with an ordinary lock, easily unlocked with what is commonly known as a skeleton key, and then removed and kept for a time in another room, the door of which fastened with a similar lock. These doors were kept locked, but any person with a skeleton key could easily have entered the same, and at least two persons not authorized to have the custody of the ballots did actually enter the rooms where these ballots were. Prior to statehood, Trent removed the ballot box containing the ballots from this precinct to the vault of the First National Bank of Okmulgee, where it remained until brought into court. Some time after statehood, Trent turned the ballot box over to Fred H. Smith, the deputy county clerk of Okmulgee county, by going with him to the First National Bank, and stating to the officers of that institution that the ballot box was turned over to Smith. The keys of the ballot box were not turned over to Smith, but remained in the possession of Trent until brought into court. When the ballots from this precinct were produced in court, they were in the envelop inside of this ballot box. The ballot box was made of wooden boards, apparently an inch thick, securely nailed together. The top fitted into the box by means of grooves in the board forming the sides of the box.

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and could not be removed except by unlocking the box. The box was locked with two locks of different design, and not easily unlocked except with the key. When the box was opened, the ballots were found to be in the envelop, the box being in perfect condition as described above, showing no evidence of having been disturbed. The ballots were on a string, and in apparently perfect condition. The court finds from all the evidence that the ballots as produced in court were the identical ballots voted by the voters at this precinct, and in the identical condition that they were in when placed in the envelop by the election officers of that precinct.

"(6) The court finds from an inspection and count of the ballots cast at precinct No. 1 of SeEVERS township that of the 20 votes cast at that precinct for plaintiff, Marvin M. Alexander, 8 ballots had on the back thereof the full name of one polling clerk only, and were numbered to correspond with the voter's number on the polling book, 4 ballots had on the back thereof the initials of one polling clerk only, and were numbered in like manner, 3 ballots had on the back thereof the initials of one polling clerk and were not numbered, 2 ballots were initialed 'L. G. H.,' the initials of both clerks being written by L. G. Hamilton, one of the clerks, 1 ballot had on the back thereof, in the lower left-hand corner, the initials of both polling clerks, 1 ballot had on the back thereof in the upper right-hand corner the name of one clerk in full and the initials of the other clerk, and 1 ballot was printed on colored paper. The court further finds that of the ballots cast at said precinct for defendant, J. L. Newhouse, 43 had on the back thereof the full name of one polling clerk only, and a number to correspond with the number of the voter on the poll book, 33 ballots had on the back thereof the initials of one polling clerk only, and a number to correspond with the number of the voter on the poll book, 15 ballots had on the back thereof the initials of one polling clerk only, 1 ballot had on the back thereof the full name of one polling clerk only, 4 ballots had on the back thereof the initials 'L. G. H.' and 'E. H.,' both sets of initials being written by L. G. Hamilton, one of the clerks, 1 ballot having on the back thereof the initials of one polling clerk in the lower left-hand corner, and the initials of one clerk in the upper left-hand corner, and 15 ballots had on the back thereof in the lower left-hand corner the initials of both polling clerks. . . . The court finds that none of the irregularities above found were accompanied by fraud, and that the re-

sult of the election was not in anywise changed by reason thereof."

The court also found the following:

Conclusions of Law.

(1) Upon the finding of fact numbered 5, the court declares the law to be that the ballots from precinct No. 1, Seevers township, should be admitted in evidence, and, when so admitted, are controlling as to the result of the election in said precinct.

(2) Upon the finding of fact numbered 6, the court declares the law to be that ballots having on the back thereof the name or initial of but one of the polling clerks, and ballots numbered on the back to correspond with the number of the voter on the poll book, and ballots printed on colored paper, and ballots having on the back thereof the initials of both clerks, both sets of initials being written by one clerk, are mutilated ballots, and should be excluded from the count. The number of ballots so excluded were counted, certified, and returned by the election board of said precinct is 18 ballots cast for plaintiff and 96 ballots cast for defendant.

As a result of the above findings of fact and conclusions of law, the court finds that the plaintiff received 1,349 legal votes at said election for the office of judge of the county court, said defendant 1,288 legal votes for said office, electing plaintiff by a majority of 61, and judgment will be entered accordingly, establishing the plaintiff's right to the office, and ousting the defendant therefrom.

George L. Mann, Judge.

It is contended by Newhouse that the court erred in admitting in evidence over his objection the ballots of precinct No. 1, Seevers township, because, he says, in effect, that said findings of fact show that the statutory provisions requiring the county clerk to preserve said ballot package in some secure and safe place had not been complied with, and that said facts so found were insufficient to rebut the presumption that said ballots had been tampered with. That this was not the identical ballot box returned from precinct No. 1, Seevers township, or that the box or its contents was in fact tampered with, or bore evidence that it had been, he does not contend. Neither does he contend that the findings of fact are unsupported by the evidence. Under said findings, we see no good reason why the ballots therein should have been excluded. If it be conceded that said statute was not complied with, that would not afford sufficient reason for excluding them, as said statute is not mandatory. The ballots themselves were better evidence of

how the electors voted at that particular precinct than the returns, and should be counted in a contest if free from fraud. The burden was upon Alexander to prove this, and we cannot say that the court erred in finding that he had fairly sustained it. 10 Am. & Eng. Enc. Law, 2d ed. p. 830, states the rule thus: "Where the ballots are preserved, so that their identity is assured, and they can be counted during a contest, they are undoubtedly better evidence of the vote cast than the returns, and should prevail where there is a difference. . . . Before a recount of the ballots should be allowed to rebut the presumption of the correctness of the official returns, it should be proved satisfactorily that the ballots have not been tampered with since the election, and that those offered in evidence are the identical ones cast. . . . Where the statute provides that the ballots shall be kept in a certain way, and they are in the hands of the proper officer, it is presumed that he has done his duty, and the burden of proof is upon those assailing them to show that they might have been tampered with. On the other hand, when it is made to appear that the statutory provisions have not been complied with, this fact alone does not render the ballots inadmissible, but merely throws upon the person who asks the recount, the burden of proof to show that they have not been tampered with. But this is a question of fact, to be determined by the jury or the court trying the issues." In *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257, the court said: "The rule may be stated to be that, where the ballots are preserved so that their identity is assured, they can be counted during a contest, and they are undoubtedly better evidence of the vote cast than the returns, and should prevail where there is a difference. *Hughes v. Holman*, 23 Or. 481, 32 Pac. 298; *Owens v. State*, 64 Tex. 500; *People ex rel. Budd v. Holden*, 28 Cal. 123. But, before a recount of the ballots should be allowed to rebut the presumption of the correctness of the official returns, it should be proved satisfactorily that the ballots had not been tampered with since the election, and that those offered in evidence are the identical ones cast." In *People ex rel. Dailey v. Livingston*, 79 N. Y. 288, it was said: "The statute required the ballot boxes to be preserved undisturbed and inviolate, and it is incumbent upon the party offering the evidence to show that they had been so kept,—not beyond a mere possibility of interference, but that they were intact to the satisfaction of the jury. The burden was upon the relator to satisfy the jury that the boxes had remained inviolate. The returns are the primary evidence of the result of an

election. They are made immediately upon canvassing the votes, and the votes are canvassed at the close of the polls in public, and presumably in the presence of the friends of both parties. . . . After the election, it is known just how many votes are required to change the result. The ballots themselves cannot be identified. They have no earmarks. Everything depends upon keeping the ballot boxes secure, and the difficulty of doing this for several months in the face of temptation and opportunity requires that the utmost scrutiny and care should be exercised in receiving the evidence. . . . Every consideration of public policy, as well as the ordinary rules of evidence, require that the party offering this evidence should establish the fact that the ballots are genuine. It is not sufficient that a mere probability of security is proved, but the fact must be shown with a reasonable degree of certainty. If the boxes have been rigorously preserved, the ballots are the best and highest evidence; but, if not, they are not only the weakest, but the most dangerous evidence."

It is next contended by Newhouse that these ballots should not have been admitted in evidence to rebut the presumption of the correctness of the official returns, because he says that they were not sealed with the names of the election board written across the package, as required by that part of Sess. Laws 1905, chap. 17, art. 1, § 8, which reads: "On completing the canvass, and recording same on the tally sheets, and executing the certificates, all of the ballots counted and one certificate, one poll book, and one tally sheet shall be securely sealed in a stout paper or muslin envelop or bag, with the names of the election board written across the seal of the package," and which he says is mandatory. The findings of fact disclose that these ballots "were strung upon a string as they were counted, and at the close of the count were placed in a large paper envelop. The envelop was not sealed with the names of the election judges written across the seal, but was folded over at the end and sewed through with needle and twine string. The envelop containing the ballots was placed in the ballot box and locked, . . . that the ballots produced in court were the identical ballots voted by the voters at this precinct, and in the identical condition that they were when placed in the envelop by the election officers at that precinct." The uncontradicted evidence in addition discloses that a needle and twine string were furnished with the election supplies, but no sealing wax, that said envelop was not sealed for that reason, and that the judges signed their names at the places designated on said envelop. We do 30 L.R.A. (N.S.)

not think the statute mandatory, and are of the opinion that the omission of the seal was at most a mere irregularity, in no manner affecting the actual merits of the election. The test as to whether an election statute is mandatory or merely directory is stated thus by Mr. McCrary in his work on Election, 4th ed. § 225: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, that statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election." Section 227: "The rule of construction to be gathered from all the authorities was thus stated in *Jones v. State*, 1 Kan. 273, and approved in *Gilleland v. Schuyler*, 9 Kan. 569: 'Unless a fair consideration of the statute shows that the legislature intended compliance with the provisions in relation to the manner to be essential to the validity of the proceedings, it is to be regarded as directory merely.'" A mere irregularity in forwarding the returns such as is here complained of will not warrant their rejection when free from fraud. 15 Cyc. Law & Proc. p. 377: "The manner of forwarding or transmitting election returns is purely a matter of statutory regulation; but these statutes are directory merely unless a noncompliance with them is expressly declared to be fatal, and, in the absence of fraud or any suspicion of fraud, a mere irregularity in forwarding the returns will not warrant their rejection. Thus, where it is the duty of the election officers to return the votes sealed, it has been held that a return of them unsealed, in the absence of any proof or suspicion of fraud, is good,"—citing *Mallory v. Merrill*, *Clarke & H. Elec. Cas.* 328; *Platt v. Goode*, *Smith, Elec. Cas.* 650; *Patton v. Coates*, 41 Ark. 111; 10 Am. & Eng. Enc. Law, 2d ed. p. 742: "There would seem to be no doubt that the principle that only things which are of the essence of the matter are mandatory, and that other provisions are to be considered as directory only, applies to forwarding the returns. And the authorities seem to bear out this doctrine, though there are some cases which seem to be at least

partially opposed to it." *Mallory v. Merrill*, supra, was a contested election case for a seat in the Sixteenth Congress. On January 5, 1820, the committee on elections to consider the contest reported that in their opinion Merrill was not entitled to the seat, and that Mallory was entitled to it. Under the laws of Vermont, from whence the contest came, the returns of the towns were transmitted to a canvassing committee chosen by the general assembly, and in accordance with the findings of that committee, and in accordance with the law, the governor of the state executed credentials to Mr. Merrill, but the committee on elections, going behind the governor's certificate and the result ascertained by the canvassing committee, found "that the canvassing committee had rejected the legally given votes of the town of Fairhaven because the election officers of that town had transmitted the certificate of votes to the canvassing committee in an unsealed packet, while the law required the packet to be sealed. The committee, holding that the house of representatives had not been accustomed to allow votes legally given to be defeated by the mistake or negligence of a returning officer, were of the opinion that the votes of Fairhaven should be allowed to the contestant," and by a vote of 116 to 47 Mallory was declared entitled to the seat. The syllabus of that case in part says: "No fraud being alleged, the house counted returns transmitted in an unsealed package, although the state law required the package to be sealed." In *People ex rel Williams v. Board of Canvassers*, 105 App. Div. 197, 94 N. Y. Supp. 996, the question considered was one closely akin to the one here. In that case the court said: "It is alleged also by the relators that original statements of canvass from 12 election districts, showing in the aggregate 1,404 votes in the affirmative and 1,166 in the negative, were filed with the county clerk and delivered to the defendant board and wrongfully canvassed, for the reason that they were not securely and separately sealed with sealing wax, as required by § 112 of the election law [Laws 1896, chap. 909]. These allegations were denied by the answering affidavits, which show that, while such statements were not in every case 'separately sealed,' yet in every case they were 'securely sealed' with sealing wax when filed with the county clerk; one having been sealed inclosed with the tally sheet, one with detached stubs and unvoted ballots, one with the poll book and tally sheet, and others with other official papers used at the election. The answering affidavits show that the failure to comply strictly with the requirements of the statute

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in this respect was in each case unintentional. At the most, these failures were mere irregularities, resulting either from not fully comprehending the statutory requirements, or from oversight on the part of the inspectors. In the absence of any claim that these irregularities resulted in any tampering with the returns, or in any fraud in connection with them, or that these returns as canvassed did not correctly show the votes cast on the question in the districts from which they came, the electors in such districts should not be disfranchised because of them. *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 461." *Patton v. Coates*, supra, was a contested election over the office of judge of Pulaski county. The law made it the duty of the election judges, before dispersing, to put one of the poll books under cover and seal the same, and direct it to the county clerk, to be delivered to him by one of the judges. It then became the duty of said clerk to call to his assistance two justices of the peace and canvass the vote. There was a failure to seal one of the poll books before sending it to the clerk. The court said: "It is plain enough from the evidence that the poll books from all the townships and wards in the county were those actually used and made up by the officers holding the election, that they are substantially authenticated in accordance with the statute, and that they contain no internal indication of fraud." And in the fourth division of the syllabus says: "The failure or omission of the judges to seal the poll book before sending it to the clerk will not invalidate it, where it has no appearance of having been tampered with."

And so we say in this case that, as there was no evidence whatever that the envelop in question or the ballots therein contained had been tampered with, and the same is not contended, we are of the opinion that the court did not err in admitting the same in evidence. In so holding we are not unmindful of the authorities cited by counsel for Newhouse, to wit, *Banks v. Sergeant*, 104 Ky. 849, 48 S. W. 149; *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867; *Neeley v. Rice*, 123 Ky. 806, 97 S. W. 739; and *Edwards v. Logan*, 114 Ky. 312, 70 S. W. 852, 75 S. W. 257, which seem to be followed on no other state. In those cases, the statute in substance required that, if there were any ballots counted or left uncounted concerning the legality or regularity of which there was any doubt or difference of opinion in the minds of the judges, said ballots "shall be placed in the large linen envelopes furnished by the county court clerk for that purpose and sealed up, and across the seal thereof the officers of the election shall plainly write their names, and at the point of the seal in-

licated for that purpose the judges of the election shall, in the presence of the judge and sheriff, place the election seal in hot wax, and the same shall be returned to the clerk of the county court with the returns of the election, for such judicial or other investigation as may be necessary, with a true statement of whether they have or have not been counted, and, if counted, what part and for whom." In construing said statute, all of said cases held the same with reference to the certificate of the election officers in regard to contested ballots, to be mandatory, in the absence of which said certificate said ballots were without probative force, but none of said cases go so far as to hold that the mere omission of the seal would have that effect in the absence of fraud, and, if they did, we would not feel disposed to follow them in the construction of the statute in question. That such was the effect of the holding in those cases is evident. In *Neeley v. Rice*, supra, the court said: "It is agreed that the officers of the election at Cow creek precinct did not comply with the provisions of the statute in making their returns as to the 85 contested ballots. They were placed in a large linen envelop, sealed and marked 'Contested ballots,' but without any certificate of the officers of the election attached thereto, and without any of the names of the officers of the election being written across the seal of the envelop. It will be observed that the statute requires a certificate to be attached to, or placed with, the questioned ballots, with a true statement as to whether they have or have not been counted, and, if counted, what part and for whom. The statute further requires that the officers of the election shall plainly write their names across the seal on the envelop and that the judges of the election shall, in the presence of the clerk and the sheriff, place thereon the county election seal in hot wax. All of this the election officers failed to do. Notwithstanding this statute, the court counted these ballots, evidently upon the theory that the statute had been changed since the opinions of this court were rendered in *Struss v. Johnson*, 100 Ky. 319, 38 S. W. 680, *Anderson v. Likens*, supra, and *Banks v. Sergeant*, 104 Ky. 843, 48 S. W. 149. In all of these cases this court held the provisions of the statute as it then existed with reference to the certificate of the election officers in regard to contested ballots were mandatory."

It is contended that the court erred in excluding from the count of the ballots so returned from precinct No. 1, Seevers township, the 18 ballots cast for Alexander and the 96 ballots cast for Newhouse, not bearing the initials of the poll clerks and other-

wise mutilated, thereby reducing the legal votes cast for the former to 1,349 and the legal votes cast for the latter to 1,288. We do not think so. *Wilson's Rev. & Anno. Stat. 1903*, § 2937: "At the opening of the polls, after the organization of and in the presence of the election board, the inspector shall open the package of ballots in such a manner as to preserve the seals intact. He shall then deliver to the poll clerk of the opposite political party from his own, twenty-five each of the territorial and local ballots, and to the other poll clerk the stamps for marking the ballots. The poll clerks shall at once proceed to write their initials in ink on the lower left-hand corner of the back of said ballots, in their ordinary handwriting, and without any distinguishing mark of any kind. As each successive elector calls for a ballot, the poll clerk shall deliver him the first signed of the twenty-five ballots of each kind, and the inspector shall immediately deliver to the poll clerks another of each kind, which the poll clerks shall at once countersign as before and add to the ballots already countersigned, so it shall be delivered for voting after all of those heretofore countersigned." Section 2950: "No inspector of election or judge acting for an inspector shall deposit any ballot upon which the initials of the poll clerk, as hereinbefore provided, do not appear, or any ballot on which appears externally any distinguishing mark, defacement, or mutilation." *Sess. Laws (Okla.) 1905*, chap. 17, art. 1, § 8: "If, in the canvass of the votes, any ballot is found not indorsed with the initials of the poll clerks as provided, and any ballot which bears any distinguishing mark, or on which any writing appears with pen or pencil, and any ballot upon which the judges are unable to agree as to how it shall be counted, the same shall not be counted, but shall be designated as mutilated ballots, and shall be preserved and kept separate from the ballots counted. . . ." The statute is mandatory. No authority is cited to the contrary. "The clerks shall at once proceed to write their initials in ink on the lower left-hand corner of the back of said ballots, in their ordinary handwriting. . . . No inspector of election or judge acting for an inspector shall deposit any ballots upon which the initials of the poll clerks . . . do not appear, or any ballot on which appears externally any distinguishing mark, defacement, or mutilation," and "the same shall not be counted." Under the subhead of "Irregularity in Ballots," 10 Am. & Eng. Enc. Law, 2d ed. p. 726, lays down the general rule that "these statutes, being designed to preserve the secrecy of the ballot, and to prevent fraud, intimidation, and bribery,

will generally be considered mandatory; and this will be so in all cases where the statute provides that a ballot varying from the requirements of the law shall not be counted."

In *Kirkpatrick v. Deegans*, 53 W. Va. 275, 44 S. E. 465, the court, speaking of similar statutes, says: "No case had been found, nor is it believed that any exist, in which the court has held that the disobedience to such a requirement does not invalidate the ballot, when the statute itself is held to be constitutional." And, after an exhaustive review of the authorities, says: "Further authority to the same effect is found in *McCrary on Elections*, 4th ed. At § 225, he admits that mere irregularity on the part of election officers, or their omission to observe some merely directory provisions of the law, will not vitiate the poll, but in § 226 he says, after referring to a case (*West v. Ross*, in 53 Mo. at page 350) in which the statute requiring the ballots to be numbered according to the numbers on the poll books was held to be mandatory: 'Although this doctrine may sometimes result in very great hardship and injustice, by depriving the voters of their rights by reason of the negligence or misconduct of the officers of the election, it is nevertheless difficult to see how any different construction could have been placed upon such a statute. Statutes which simply direct the judges of election to number the ballots, without declaring what consequences shall follow if this be not done, may well be held directory only; but, where the statute both gives the directions and declares what the consequences of neglecting their observance shall be, there is no room for construction. Such statutes are intended to prevent fraudulent voting; and, if the legislature is of the opinion that the general good to be derived from their strict enforcement will more than counterbalance the evils resulting from the occasional throwing out of votes honestly cast, the courts cannot reconsider the mere question of policy. The legislative will upon such a subject, when clearly expressed, must prevail.' *Major v. Barker*, 99 Ky. 305, 35 S. W. 543; *Slaymaker v. Phillips*, 5 Wyo. 453, 47 L.R.A. 842, 40 Pac. 971, 42 Pac. 1049; *State ex rel. Barry v. Connor*, 86 Tex. 133, 23 S. W. 1103; *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183; *Sego v. Stoddard*, 136 Ind. 297, 22 L.R.A. 468, 30 N. E. 204; *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St. Rep. 349, 17 N. E. 232." In *Mauck v. Brown*, 59 Neb. 382, 81 N. W. 313, the court says: "The ballots cast at the election were obtained and counted by the county court, and it was decided that the appellee had received 1,277 votes and the appellant 1,273, 30 L.R.A. (N.S.)

or that for the former there was a majority of 4. In the district court the ballots were examined, and as the result of another count it was settled that for the appellee there were 1,277 legal votes, and for the appellant 1,272, a difference of 5 in favor of the former, who was adjudged entitled to the office. . . . There were discovered during the count of the ballots 9 with the name of but one judge of election on the back of each. Seven of these were favorable to the election of appellant, and two to that of appellee. They were not counted, and that they were not is [one] of the complaints of appellant. In the decision of the case of *Orr v. Bailey*, 59 Neb. 128, 80 N. W. 495, similar questions were presented and examined, and it was determined that the provisions of the ballot law that the signatures of two judges of the election should be written on the back of the ballot before given to the voter, and, if not, the ballot should not be deposited in the ballot box, and, if it was, should not be counted, were mandatory, and ballots not so identified, or on the back of which there appeared the signature of but one judge of the election, should not be counted. A re-examination of the question at this time does not change our views of the matter; hence this objection must be overruled." In *Orr v. Bailey*, supra, the precinct in question cast 41 votes, as shown by the abstract and by the count, of which Bailey received 31 and Orr 10. The court said: "That each of the 41 ballots cast in said precinct at said election was indorsed on the back with the name of 'Christ Eichenberge,' written in ink, and that said name was all and the only indorsement on said ballots. . . . One of the important objects of the Australian ballot law was, and is, to provide purity and honesty in elections, to prevent frauds; and the prescriptions that the signatures of two of the judges of election shall be placed on the back of each ballot, before it is delivered to a voter, and it shall by the voter be folded so as to disclose these signatures, when he presents it for deposit in the ballot box, and it may not be deposited unless they do so appear or are in fact on the back of the ballot, and, if deposited without such indorsement, the ballot shall be void and not counted, are but parts of the general scheme, and it will be noticed that the voter is called upon to aid. He must take notice of the signatures of the two judges on the back of his ballot, and so notice them as to materially assist in the process of casting the ballot and its identification prior to deposit by the proper official. The elector is charged with a knowledge of the law, and he can hardly escape the discovery that the signatures are

or are not on the back of the ballot when he folds it, and that it is or is not a ballot which can be used. To this extent he must be asked to give his attention, and that he be so asked is certainly not destructive to the freedom of the election, nor do we deem it an impediment or a hindrance of the exercise of the elective franchise, nor a new qualification of an elector. The provisions in question are clearly but regulative in their essential features, and assist in the honest, intelligent exercise of the right to vote, and are not violative of the Constitution." In *Kelso v. Wright*, 110 Iowa, 560, 81 N. W. 805, a statute was under construction quite similar to the one in question. The court in its syllabus said: "Under Acts 24th Gen. Assem. chap. 33, §§ 21, 25, providing that one of the judges of election shall indorse his initials on the ballot given to the voter, and no ballot without such indorsement shall be deposited in the ballot box, and only ballots provided in accordance with the provisions of the act shall be counted, a ballot on which the initials of one of the judges are not indorsed should not be counted." In support of this doctrine, see also *Lorin v. Seitz*, 8 N. D. 404, 79 N. W. 869; *McKay v. Minner*, 154 Mo. 608, 55 S. W. 866; *Slaymaker v. Phillips*, supra; *Rhodes v. Driver*, 69 Ark. 501, 64 S. W. 272; *Arnold v. Anderson*, 41 Tex. Civ. App. 508, 93 S. W. 692; *Clark v. Hardison*, 40 Tex. Civ. App. 611, 90 S. W. 342; *People ex rel. Nichols v. County Canvassers*, 129 N. Y. 395, 14 L.R.A. 624, 29 N. E. 327.

We are therefore of the opinion that the court did not err in excluding the ballots in controversy, and, finding no error in the record, the judgment of the lower court is affirmed.

All the Justices concur.

Petition for rehearing denied.

COLORADO SUPREME COURT.

WINDSOR RESERVOIR & CANAL COMPANY et al., Appts.,
v.

HOFFMAN MILLING COMPANY.

(— Colo. —, 109 Pac. 422.)

Water — periodic appropriation — locality.

1. Where a mill for which water has been appropriated is idle part of the time, the water not then needed for its purposes is subject to appropriation by a user above the point of the mill's intake.
30 L.R.A. (N.S.)

Same — sale by first appropriator — validity.

2. One who has appropriated water for a mill which he uses only a portion of the time cannot sell to another his right to the water during the time he does not use it, as against the rights of one who has made a valid appropriation of the water when not needed by him.

(March 7, 1910.)

Note. — Right as between appropriator above, and junior appropriator below, mill, during periods when water not used by mill.

The question whether a user of water above a mill may take and appropriate the water belonging to the mill, when it is idle, as against a junior appropriator who, while the mill was running, has continuously used it after it was returned to the stream, seems to have arisen only in Colorado, and even there all the cases have been concerned with the use of the water of one stream.

The first case that arose, and which evidently has since created considerable misunderstanding by the trial courts, is *Cache La Poudre Reservoir Co. v. Water Supply & Storage Co.* 25 Colo. 161, 46 L.R.A. 175, 71 Am. St. Rep. 131, 53 Pac. 331. In this case a water company above a mill which was the oldest appropriator made an appropriation for storage purposes prior in time to an appropriation by a reservoir company below the mill. The water company always had recognized the superior right of the milling company, by permitting the amount appropriated by it to pass down the river and into the mill race. Before the water company had ever made any attempt to use the amount of water appropriated by the milling company, the reservoir company had appropriated the water turned back into the river by the milling company. Upon a threatened attempt of the milling company to abandon its use of the water in favor of the water company, the question arose which one of the two other companies was entitled to the water. The court held that since the reservoir company had made the first appropriation of this particular volume of water, it was, as to such water, an appropriator prior to the water company, though the latter might be, as against the reservoir company, as to all other waters of the stream, a senior appropriator. The court concluded by saying: "It follows, therefore, when the plaintiff [reservoir company] went upon the stream, and saw the use that was being made of the water by the milling company, and then made its appropriation, no subsequent act of omission or commission by the milling company could operate to the injury of the plaintiff: and, by virtue of its appropriation, the plaintiff, on the basis of then existing conditions, secured a vested right to have the water continue to flow, either from the mill race or from the stream itself, in substantially the same quantity as it flowed when its appropriation was

A PPEAL by plaintiff from a decree of the District Court for Larimer County restraining them from diverting waters from a certain natural stream in alleged violation of plaintiff's rights. Reversed.

The facts are stated in the opinion.

Mr. James W. McCreery for appellees.

Mr. L. R. Rhodes and P. W. Lee for appellee.

Bailey, J., delivered the opinion of the court:

This action by the Hoffman Milling Company, a Colorado corporation, appellee, as plaintiff, against the Windsor Reservoir & Canal Company, appellant, and others, as defendants, was brought for equitable relief by way of injunction. The complaint, among other things, avers that the Hoffman Milling Company is a milling and manufacturing corporation; that on or about the 1st day of April, 1894, it commenced the construction of a mill race to take water from the Cache la Poudre river, below the town of Ft. Collins, to procure water for power purposes, and thereafter diverted water for that use, whenever the same could be obtained, up to the time of the commencement of this suit. The complaint also shows that another milling company had, by means of the Mason & Hottel mill race, so called, therefore made an appropriation, to the extent of 60 cubic feet of water per

second, also for power purposes, from the same stream, above the city of Ft. Collins, and had diverted water to operate its mills from 1868 to 1894, when the plaintiff company commenced the construction of its mill and mill race; that the water diverted through the Mason & Hottel mill race was returned to the river by a tail race, at a point above the location of the head gate of the Hoffman mill race; that by reason of the return of this water to the river from the upper mill to the lower mill, the plaintiff, as owner of the lower mill race, claims the right to take the water from the tailrace of the upper mill for its use, to the exclusion of all other appropriators of this water, above the tailrace of the old mill, without regard to the date of appropriation above the tailrace. And further that the Windsor Reservoir & Canal Company, being the owner of a reservoir for the storage of water for irrigation and agricultural purposes, with a decreed right as of date prior to July, 1890, had diverted and sought to divert water from the Cache la Poudre river at a point above said tailrace, for the filling of its reservoir, whenever it could obtain the same from the river, and when the appropriation of the 60 cubic feet of water of the upper mill was not actually in use, and thus thereby deprived, as is said, the lower mill of the use of the water for propelling its machinery, which the upper mill

made. The plaintiff, though junior to the milling company in so far as the use of the water for power purposes is concerned, is a senior appropriator to the milling company as to the water which the former appropriated after it left the mill race. That right was just as valid as was the prior right of the milling company for power purposes, and each becomes a vested right.

The water company could not, by purchase, acquire from the milling company any superior right to this 60 cubic feet of water appropriated by the plaintiff, for the milling company had no prior rights to convey. Why, if the milling company ceases temporarily or permanently to use its appropriation, the water company could or should obtain a right which it could not get by purchase, is difficult to perceive, for one may not abandon a right in favor of another." After a new trial, this case was reaffirmed by the supreme court in 27 Colo. 532, 62 Pac. 420.

The last case was followed by Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. 44 Colo. 214, 98 Pac. 729. Although it is extremely difficult to determine all the facts from the opinion, it was evidently contended that the reservoir company noted in the earlier case, or any other person, might thereafter make an appropriation of water for storage purposes, through ditches taking water out of the river below the tailrace, and thereby acquire a priority over reservoirs for which appro-

priations had theretofore been made by means of ditches whose point of intake on the river was above the head gate of the mill race, where such earlier appropriations above the mill race were made subject only to the rights of the milling company and those of the reservoir company for the benefit of its particular reservoir, in controversy in the earlier case. The court, however, after saying that it was not decided or intended to be decided in the earlier case, that one who had, subject only to the superior right of the milling company, made an appropriation for storage purposes from the river above the mill race, and before any below the point of its discharge had acquired rights to the return waters, was junior to the latter as to such returned volume, continued: "When we said there that the storage company might not, as against the reservoir company, for its reservoir then in question, take this 60 cubic feet of water, this was not equivalent to saying that it had no right whatever thereto. The effect of the holding was not that as to such volume the storage company had no right at all, and never could acquire any, but that until the reservoir of the reservoir company was filled, the storage company might not intercept any of the mill-race flow. Under the fundamental law of such priorities, if the storage company made an appropriation from the river of a given volume, as it had, though it was junior to that of the reservoir company,

had appropriated long prior thereto, and which was accustomed to flow on down, after being used by the upper mill, to the lower, or Hoffman, mill race.

The answer of the Windsor Reservoir & Canal Company alleges that it had made an appropriation of water for filling its reservoir as of date July 8, 1890, and that from and after that date it had diverted water for such purpose from the Cache la Poudre river, whenever the same could be obtained without interfering with the rights and use of prior appropriators, including the first mill appropriation; that the reservoir company had used, at times, the 60 feet of water or an amount equivalent thereto, for storage purposes, when the same, for any reason, was not being used to supply the old mill appropriation; that, subject to the rights of the latter, and the use of water by it when actually required, the said reservoir company claimed the right to use that particular water, or any water found flowing in the Cache la Poudre river, by virtue of a prior appropriation thereto, for storage in its reservoir, at stated intervals of time, as against any right acquired by the Hoffman Milling Company under its appropriation.

At the conclusion of the trial, the court found in substance that the Windsor Reservoir & Canal Company had made an appropriation out of the Cache la Poudre river, for storage purposes, of waste, nonused and

winter waters, as of date prior to July, 1890; that the Hoffman Milling Company had an appropriation, for the purpose of propelling its mill machinery, of 50 cubic feet, as of date April 1, 1894, diverted below the return point to the river from the Hottel mill race; and that the date of appropriation of the Mason & Hottel mill race was of date 1868, for 60 cubic feet of water per second of time, also for power purposes. Under this state of facts the court held in effect, without reference to the prior appropriation of the Windsor Reservoir & Canal Company for storage purposes, that the Hoffman Milling Company was entitled, to the extent of its appropriation, to the undisturbed and constant enjoyment of water from the Cache la Poudre river below the tailrace of the old mill, in the same manner as if the old mill race diverted its 60 feet of water per second of time continuously, and discharged the same back into the river. That the new mill race should be held to be first appropriated of the particular water appropriated and used by the old mill, without regard to claims of intervening appropriators from the river, between the dates of 1868 and April 1, 1894, diverting water from a point or points above the tailrace of the old mill. The court, in reaching this conclusion, was constrained to do so in obedience to what it understood to have been decided by this

for its particular reservoir, it became senior as to all the waters of the river, including the 60 feet, irrespective of the location of its head gate with reference to the mill race, as against all subsequent appropriators who divert water from the same stream for storage purposes, whether they take it out above or below the mill race.

"This part of the decree proceeded upon the theory deduced by the trial court from our former decision, that when the reservoir company made its appropriation by diverting water at a point below the mill race, 60 cubic feet of water thereby became segregated from the river, and was reserved for all time to appropriations then and thereafter to be made below that point, and never could be utilized by appropriators above the mill race, even though their reservoirs were constructed and used years before such lower ones were started. Fairly considered, as it should be, with reference to the facts of the particular case, we do not think the decision susceptible of the construction which the court below, and appellee here, put upon it; but if it is, it is to be qualified by the views herein expressed."

And see the review of the above two cases in *WINDSOR RESERVOIR & CANAL CO. v. HOFFMAN MILL CO.*

The holding of the court in the *HOFFMAN MILL CO. CASE* was reaffirmed in *Windsor Reservoir & Canal Co. v. Hoffman Mill. Co.* 30 L.R.A. (N.S.)

(Colo.) 109 Pac. 425, which was an action for damages between the same parties, and arising out of the same facts.

It will be noted that in the *HOFFMAN MILL CO. CASE* the question also arose whether the proprietors of the mill could sell the use of the water to an upper appropriator as against the rights of the lower appropriator. It would seem that so far as the facts of this case are concerned that question can be of very little importance, since if the upper appropriator is entitled to use the water immediately upon the mill ceasing to use it, conceding that they cannot sell it, they can at least do indirectly what they are not permitted to do directly. That question would therefore seem to arise properly only in cases where the upper appropriator was junior in time to the lower appropriator. For another case on this question, see *Cache La Poudre Reservoir Co. v. Water Supply & Storage Co. supra.*

The question of periodical appropriation of water is discussed in a note in 46 L.R.A. 175.

For cases on right to store appropriated water, see note to *Seven Lakes Reservoir Co. v. New Loveland & G. Irrig. & Land Co.* 17 L.R.A. (N.S.) 329.

Appropriation of waste water not in channel, see note to *Burkart v. Meiberg*, 6 L.R.A. (N.S.) 1104. G. V.

court in the so-called Mill Race Case, where in the Cache La Poudre Reservoir Company was appellant, and the Water Supply & Storage Company et al. were appellees, reported for the first time in 25 Colo., at page 161, 46 L.R.A. 175, 71 Am. St. Rep. 131, 53 Pac. 331, and again in 27 Colo., at page 532, 62 Pac. 420. In its opinion, at the trial of this case, the court below, among other things, predicated its remarks upon its construction of what was determined by this court in those decisions, had this to say: "The Windsor Reservoir Company, with its head gate above the Hottel discharge, cannot ask to have this water distributed to it on its original reservoir priority, to the prejudice or injury of the Hoffman priority and the appropriation of this particular water. As against such appropriators of the Hottel mill appropriation below the mill discharge, no appropriator with head gate on the stream above can ask to have this water diverted in order of their original priority; on the contrary, the appropriators of this water below the Hottel mill race discharge may ask to have it diverted in order of their priority, as against those having earlier original priorities on the stream above the point of the mill discharge."

We waive a consideration of all other error assignments, and dispose of the case upon the fundamental point involved, it being the one upon which the trial court bases its decision. The judgment and decree here is founded solely upon the interpretation, by the court below, of the opinions in the Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., supra, to the effect, as above indicated, that the 60 cubic feet of water appropriated by the Mason & Hottel mill race was a segregation thereof from the general waters of the stream, which must thereafter be allowed, whether used or not, or whether needed for use, by the Mason & Hottel mill race, to go down the river, subject to reappropriation only by those taking water from the stream at a point below the tail of the old mill race. That is, that this water was not subject, and could not be subject, to appropriation by those diverting water from a point above the old mill tailrace. No such holding was ever intended by this court, and no such thing was in fact held or decided in the opinions above referred to.

The point of diversion of water for a beneficial use is a mere incident, and is in no sense a controlling factor in effecting an appropriation. This is just as true of the waters involved in the Mason & Hottel mill race appropriation as it is generally of the waters of a natural stream. Whenever the waters constituting this particular ap-

propriation were not in use, or were not needed for use, by the milling company, and were by it left in the stream, they were as subject to appropriation and use during such times, at any point upon the river, either above or below the tail of the old mill race, as were any of the other unused or unappropriated waters of the stream, and the one first in time to actually take and apply this water to a beneficial purpose, when not being used by the milling company, is the first in right, whether such an one has his point of diversion above the tail of the old mill race or below it. An analysis of those opinions will disclose that they announce no other or different doctrine than the foregoing. The vital and essential proposition there involved and decided, indeed the only one necessary to be, and the only one in fact, determined, a proposition fundamental in this case, is that the prior appropriator of water to a beneficial use is first in right. While it may be true that certain expressions made use of in those opinions, when standing alone, give some color of support to the contention that a modification of this principle has been announced, still when these expressions are taken and considered in connection with the peculiar facts of that particular case, as they must be, and with the opinions themselves as a whole, it is clear that there was no intention to modify, and that in fact there has been no modification of, this cardinal principle. If anything outside of the opinions themselves is needed to establish and show the fact that the construction here given to those opinions is correct, such helpful support is abundantly found in the opinion of this court in Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co. 44 Colo. 214, 98 Pac. 729, where they received a construction precisely in conformity with the views here expressed, and exactly contrary to the construction given them by the trial court in that case, which construction of the trial court there was identical with the view adopted by the same court at the trial of this case. That interpretation, on the authority of the case last above referred to, may not be permitted to stand. The opinion of this court last above referred to is decisive of, and rules, the case at bar, and requires its reversal.

To the extent, both in time and volume, to which the Windsor Reservoir & Canal Company had, by diversion and application to a beneficial use, made a prior appropriation of the 60 cubic feet of water of the old mill race appropriation, when the same was not in use and was not needed for use thereunder, before the Hoffman Milling Company made its appropriation, the former company is entitled, as against the latter

one, to continue to divert and use the same, as theretofore diverted and used. The question of the extent of this right is purely one of fact to be determined in a proper proceeding for that purpose.

Referring briefly to the question of the right of the owner of the Mason & Hottel mill race appropriation, which is discussed in the briefs, to sell the same to one diverting it above the tail of its mill race, which question is only incidentally involved here, as we view the matter, the court having decided the controversy upon the point above discussed, it is proper to say that, as against a vested right of a user and appropriator of this particular water, below the tailrace of the old mill appropriation, the owner of the Mason & Hottel mill race right cannot in any wise lawfully dispose of that right to another, to be applied to a new and different use, either above the tail of the mill race or at any other point on the stream, so as to adversely interfere with or injuriously affect the vested right of such other appropriator. In short, the relative rights to the use of this particular water depend upon, and must be governed by, the doctrine of prior beneficial use and appropriation thereof, both as to the volume of use and length of time for which use has been made of it, all parties being limited both in point of time of use and volume, by the facts of each particular case.

The judgment and decree is reversed, and the cause remanded to the court below for further proceeding, in conformity with the views here expressed.

Steele, Ch. J., and White, J., concur.

Petition for rehearing denied June 6, 1910.

IOWA SUPREME COURT.

ALANSON BAKER, Appt.,
v.

INCORPORATED TOWN OF AKRON et al.

(— Iowa, —, 122 N. W. 926.)

Water — diversion — liability of municipality.

1. A municipal corporation cannot, in grading and guttering streets, carry surface water out of its natural watershed, and cast it in a body on land outside its limits, without liability for the injury thereby caused.

2. That a season in which injury is done Same — unusual moisture. to land outside the limits of a municipality, by surface water turned by it out of its course, and cast upon such land, was un- 30 L.R.A.(N.S.)

usually wet, does not absolve the municipality from liability for the injury.

Joint wrongdoers — liability — inability to determine responsibility.

3. That it may be difficult to determine what portion of the injury to land by surface water was due to the act of a municipality, and what to another cause, does not defeat an action against the municipality for its share of the damage.

(October 26, 1909.)

Note. — Liability of municipal corporation for changing course of drainage, to injury of private property.

This note is limited strictly to those cases passing on the question whether a municipal corporation may, by the grading and guttering of streets, or otherwise, carry surface water out of its natural watershed, or gather it from a large extent of territory, and cast it in a body on private property. The note is therefore not concerned with the question whether a town or city is liable merely because, in the construction or grading of a street or highway, surface water is incidentally cast to a greater degree upon adjoining land.

The question of liability of a municipal corporation for damming back surface water by grading of street is discussed in a note to Hume v. Des Moines, 29 L.R.A.(N.S.) 126.

Since the question here presented has heretofore been discussed in notes to Johnson v. White, 65 L.R.A. 256, and Roe v. Howard County, 5 L.R.A.(N.S.) 831, the cases gathered here are only those supplementary thereto.

As will be observed from the above note, the authorities are practically uniform in holding that a municipal corporation has no right to collect surface water, and carry it out of its natural course, and cast it in a body on adjoining property, or, as it has been expressed, carry it to the vicinity of an owner's premises without furnishing a sufficient outlet therefor.

Recent cases so holding are: Valparaíso v. Spaeth, 166 Ind. 14, 76 N. E. 514, 8 A. & E. Ann. Cas. 1021, affirming in this respect 74 N. E. 518; Valparaíso v. Kyes, 30 Ind. App. 447, 66 N. E. 175; Lewis v. Springfield, 142 Mo. App. 84, 125 S. W. 824; Sandy v. St. Joseph, 142 Mo. App. 330, 126 S. W. 989; Kehoe v. Rutherford, 74 N. J. L. 659, 122 Am. St. Rep. 411, 65 Atl. 1047; Houston v. Richardson & South-erland, 42 Tex. Civ. App. 147, 94 S. W. 454; McGarvey v. Strathroy, 10 Ont. App. Rep. 631; Derinzy v. Ottawa, 15 Ont. App. Rep. 712; Smith v. Eldon Twp. 9 Ont. Week. Rep. 963.

This was also recognized in Cromer v. Logansport, 38 Ind. App. 661, 78 N. E. 1045; Garrett v. Winterich, 44 Ind. App. 322, 87 N. E. 161, 88 N. E. 308.

To the same effect is Miles v. Brooklyn, 98 App. Div. 195, 90 N. Y. Supp. 702, where,

A PPEAL by plaintiff from a decree of the District Court for Plymouth County dismissing the petition in an action brought to recover damages caused by the alleged unlawful flooding of plaintiff's lands, and to restrain further flooding thereof. Reversed.

Statement by Deemer, J.:

Action to recover damages for the flooding of plaintiff's land by the defendants city and the railway company, and for an injunction to restrain the continuance of the nuisance. The case was tried to the court as in equity, and at the conclusion of plaintiff's testimony, the trial court sustained a motion directing a decree for the railway company, from which no appeal has been taken. The case proceeded as against the other de-

fendants, resulting in a decree dismissing plaintiff's petition, and he appeals.

Messrs. McDuffie & Keenan, for appellant:

As the street improvements complained of were unlawfully and negligently made by defendants, and conveyed water over a portion of plaintiff's premises, which, without such improvements, would never have flowed upon his land, and as such improvements cast water upon plaintiff's land in a different manner and in greater quantities than would naturally have flowed upon it, to plaintiff's damage the relief prayed in the petition should have been granted.

Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563; Vannest v. Fleming, 79 Iowa, 641, 8 L.R.A. 277, 18 Am. St. Rep. 387, 44

because of the construction of a catch-basin and the simultaneous elevation of the street grade, adjoining property was flooded by collected surface water.

In *McAdams v. McCook*, 71 Neb. 789, 99 N. W. 656, a city was held liable where it appeared that, because of its failure to keep certain drains in repair, water gathered from a large part of the city, during a severe storm, was caused to flow against and injure adjoining property.

In *Elser v. Gross Point*, 223 Ill. 230, 114 Am. St. Rep. 326, 79 N. E. 27, it was held that an injunction would lie to prevent a municipal corporation from enlarging a culvert, the effect of which would be the draining of a swamp, and the casting of the water thereof upon land through which it had not theretofore flowed.

In *Daley v. Watertown*, 192 Mass. 116, 78 N. E. 143, a municipal corporation was held liable for a nuisance, where, after gaining permission from a private landowner for the digging of a ditch, it turned surface water through it into a shallow pond, causing such pond to overflow and flood adjoining property.

So, in *Fitzgerald v. Sharon*, 143 Iowa, 730, 121 N. W. 523, where water and filth gathered from private drains was caused to overflow adjoining property, the municipality was held liable for maintaining a nuisance. In this case it appeared that the mayor and councilman and other officers of the city had entered upon plaintiff's premises, and, against his wishes and without legal consent, extended the drain several feet. The court took occasion to say that this entry was a particularly lawless and unwarranted act, which could not be justified in any way, and which created liability somewhere.

Although a city must provide adequate means for the escape of surface water which has been gathered together, and brought to a place where it would not otherwise have flowed, it is not liable for the failure of ditches, culverts, and outlets to carry the waters that are the result of a cloud-burst or other rain storm of unprecedented and

extraordinary character. *Valparaiso v. Spaeth*, supra.

And where a park was improved without negligence, and in accordance with an adopted plan, and surface water was thereby caused to flow onto a street and thence onto adjoining property, the city is not liable and is under no obligation to provide sewers with sufficient capacity to carry off the waters, to one who became the tenant of such property after the improvement was completed. *Schweriner v. Philadelphia*, 35 Pa. Super. Ct. 128.

That a city may, by construction and grading of streets, so change the flow of surface water as to bring down upon a lot owner from new watersheds, water which would not otherwise have taken that course or reached his lot, was recognized in *Peck v. Baraboo*, 141 Wis. 48, 122 N. W. 740. The above case seemingly recognizes a distinction between cases such as itself and those where surface water was allowed to escape from a negligently defective sewer, after the municipal corporation had taken water into the sewer and assumed the carrying of it to the place of discharge.

It will be noted that in *BAKER v. AKEON* considerable stress was laid upon the fact that the property upon which the surface water was cast was outside the limits of the town. No other recent case has been found which has attempted to make this distinction. It may be observed here that, in view of the statement above made, that the cases—the vast majority of which no doubt concern property within the limits of the municipal corporation—are practically uniform in holding that a city cannot cast surface water gathered from other watersheds on private property, the distinction in most jurisdictions would not seem to be of much importance, since, if city property is not compelled to carry such a burden, there is certainly no less reason for holding that property outside the limits cannot be compelled to receive water in a body which the municipal corporation, by the grading and guttering of streets, has gathered from other sources. G. V.

N. W. 906; *Dorr v. Simerson*, 73 Iowa, 91, 34 N. W. 752; *Wharton v. Stevens*, 84 Iowa, 107, 15 L.R.A. 630, 35 Am. St. Rep. 296, 50 N. W. 562; *Collins v. Keokuk*, 91 Iowa, 293, 59 N. W. 200; *Williamson v. Oleson*, 91 Iowa, 290, 59 N. W. 267; *Stinson v. Fishel*, 93 Iowa, 656, 61 N. W. 1063; *Cedar Falls v. Hansen*, 104 Iowa, 189, 65 Am. St. Rep. 439, 73 N. W. 585; *Holmes v. Calhoun County*, 97 Iowa, 360, 66 N. W. 145; *Geneser v. Healy*, 124 Iowa, 310, 100 N. W. 66; *Schofield v. Cooper*, 126 Iowa, 334, 102 N. W. 110; *Brown v. Armstrong*, 127 Iowa, 175, 102 N. W. 1047; *Matteson v. Tucker*, 131 Iowa, 511, 107 N. W. 600; *Jones v. Stover*, 131 Iowa, 119, 6 L.R.A.(N.S.) 154, 108 N. W. 112; *Hull v. Harker*, 130 Iowa, 190, 106 N. W. 629.

It was the duty of the defendants in making its street improvement, to provide water ways sufficient to carry away, without damage to plaintiff, the water that might reasonably be expected to come upon its streets.

Damour v. Lyons City, 45 Iowa, 276; *Powers v. Council Bluffs*, 50 Iowa, 197.

Messrs. Zink & Roseberry and Sammis & Bradley for appellees.

Deemer, J., delivered the opinion of the court:

The appellees are the town of Akron and its mayor and city council. Plaintiff is the owner of a large tract of bottom land lying south and west of the limits of the town, and he claims that the town has so graded and guttered its streets as to collect and discharge the surface water falling upon the lots and lands within its limits onto plaintiff's lands, in a manner other and different from the way in which it passed off prior to the time the grading and guttering was done, to his great damage. The defendant denies that it has collected or is discharging the surface water from its natural course; that, in any event, it had the right to grade its streets, and turn surface water from its natural course; that it was guilty of no negligence in improving, guttering, and grading its streets; that it had the right to fight surface water, treating it as a common enemy; that whatever damage plaintiff has suffered was due to extraordinary floods; and that in no event is the town liable, for the reason that it was given full power to grade and gutter its streets.

Plaintiff's land is considerably lower than the land within the corporate limits of the town, and must, of course, bear its proper servitude. But it is not true, as counsel contend, that the town had the right to collect surface water originally flowing in another direction, and to discharge the same 30 L.R.A.(N.S.)

upon plaintiff's land, or in such a manner as that it caused an overflow of plaintiff's land, to his damage. Plaintiff's property is not within the limits of the town, and he was not amenable to the order and direction of the city council. He could not be compelled to bring his property to any grade established by the town council. In so far as the town is concerned, he had the same rights against it as if it were a natural person who was interfering with his rights and privileges. *Collins v. Keokuk*, 91 Iowa, 293, 59 N. W. 200. Had his property been within the town limits, a different question would arise, and the authorities cited for defendant would be applicable. In its relations to landowners outside the town limits, the town, had no greater rights than any citizen or private corporation. In grading and guttering its streets, it, so far as outsiders were concerned, acted in a proprietary capacity, and not as an instrumentality of government, and nowhere in our statutes is it given the right to collect and discharge surface water upon an adjoining property in a manner different from the way in which nature intended or provided. *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540. In this case *Andrews, J.*, speaking for the court, said: "A municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel, and discharge it upon the lands of another; nor has it any immunity from legal responsibility for creating or maintaining nuisances. *Weet v. Brockport*, 16 N. Y. 172, note; *Byrnes v. Cohoes*, 67 N. Y. 204; *Haskell v. New Bedford*, 108 Mass. 208; *Atty. Gen. v. Leeds*, L. R. 5 Ch. 583." See also *Eastman v. Meredith*, 36 N. H. 285, 72 Am. Dec. 302; *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470.

Assuming, then, that the defendant town occupies no different relation to plaintiff than if it had been a private corporation or an individual, we look to the law of this state with reference to the discharge and diversion of surface waters. We have adopted what is known as the civil-law rule in the leading case of *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563. The substance of that rule is that the owner of higher land has no right, even in the course of the use and improvement of his property, to collect the surface water upon his own lands into a drain or ditch, increased in quantity or in a manner different from the natural flow upon the lower lands of another, to the injury of such lands. This case has been followed time after time, and

was reaffirmed as late as the year 1906. See *Matteson v. Tucker*, 131 Iowa, 511, 107 N. W. 600. The following cases also announce the same doctrine: *Hull v. Harker*, 130 Iowa, 190, 106 N. W. 629; *Wharton v. Stevens*, 84 Iowa, 107, 15 L.R.A. 630, 35 Am. St. Rep. 296, 50 N. W. 562; *Brown v. Armstrong*, 127 Iowa, 175, 102 N. W. 1047; *Schofield v. Cooper*, 126 Iowa, 334, 102 N. W. 110; *Holmes v. Calhoun County*, 97 Iowa, 360, 66 N. W. 145; *Cedar Falls v. Hansen*, 104 Iowa, 189, 65 Am. St. Rep. 439, 73 N. W. 585; *Collins v. Keokuk*, *supra*. Now the evidence shows, without substantial dispute, that before the town graded and guttered its streets, there was a natural watershed running from near the southeast corner of town to the northwest corner; that the water east and south of this watershed ran through a depression or "swale" north and west to near the northwest corner of the town, where it emptied into the Big Sioux river a short distance from the railway track of the defendant railway company. It also appears without serious dispute that when the defendant graded and guttered its streets, it cut through this watershed, and caused water which fell upon the east part of the town, and which came down from the hills to the east, which, had it followed its natural course, would have gone north and west into the Big Sioux river, to flow east until it struck the embankment of the railway company running west of south, whence it ran along, and in places over, the embankment, and many times during the past five years flooded plaintiff's land, to his damage. There can be no doubt whatever that defendant caused water to run from the east along what are known as Main, Iowa, and Sargent streets, westward and down onto plaintiff's land, which did not originally go in that direction, but which went north and west and into the Big Sioux river. Defendant's own surveys, blueprints, and profiles establish these facts. Some of the water went through a culvert in the railway embankment, known as No. 511, down onto plaintiff's highland, and in times of high water it ran over the railway embankment and upon plaintiff's land. There is testimony to the effect that this increased the flow of water, and that this increased flow damaged plaintiff's lands and crops for several consecutive seasons.

Appellees contend, however, that, as they were not negligent in improving the streets, no recovery can be had. As the action is not bottomed upon negligence, this contention is without merit.

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They also insist that the damage was due to cloud-bursts and extraordinary floods. No doubt part of it was, but there was testimony that damages were suffered from ordinary rainfall. They also say that during the past five years the seasons have been unusually wet; but this, of course, constitutes no defense. Again, it is said that there is no testimony of any appreciable increase in the flow of water; but this too is not sustained by the record.

Again, it is asserted that there is no showing as to how much of plaintiff's damage was due to the diversion of the surface water by defendant, and how much to the overflow of a ditch on the south side of the town. It is true, perhaps, that the testimony as to this point is not definite, but, as it appears without serious conflict that the gutters and ditches increased the flow on plaintiff's land, defendant is responsible for its share of that increase, and the difficulty in arriving at its exact proportion of the damage is no reason for defeating plaintiff's action. Defendant is responsible for the damage it did, no matter what other causes contributed to the result.

The main proposition relied upon by appellee, however, is one of law, and that is, as applied to this case, the ordinary rules as to surface water do not obtain. We have seen that this is a misapprehension, and that the case is governed by these general rules. The cases cited by appellee from this state all have reference to the rights of land or lot owners within the limits of the municipal corporation. As to them, we have said in one or two cases the ordinary rules as to surface water do not apply. It will be found, returning to these cases, that the reasons given for these holdings were bottomed upon the fact that the property owner had certain duties to perform, because of the location of his property within the city or town limits.

As appellees' main premise is fallacious, the conclusion is manifestly unsound.

We shall not undertake on the appeal to fix the amount of plaintiff's damage. The case was not tried with any great degree of care on this issue, for the evident reason that defendants were proceeding on the theory of nonliability. For this reason, we shall remand the case for a retrial upon the issues as to the amount of damages to which plaintiff is entitled, and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Petition for rehearing denied.

**UNITED STATES CIRCUIT COURT
OF APPEALS, FOURTH CIRCUIT.**

**NATHAN B. FRANK, Bankrupt., Appt.,
v.**

MICHIGAN PAPER COMPANY et al.

(103 C. C. A. 268, 179 Fed. 776.)

**Bankruptcy — false representation of
partner — effect.**

A false representation by one member of a partnership for the purpose of securing credit, of which the copartner is ignorant, will not prevent the latter from securing a discharge upon his individual petition therefor, under the statute requiring the granting of the discharge unless applicant obtained property on credit from any person upon a materially false statement made for that purpose, although it may prevent the

discharge from operating as a release from liability for the credit so falsely obtained, under the section of the statute providing that the discharge shall release the bankrupt from all debts except such as are liabilities for obtaining property by false representations.

(July 12, 1910.)

APPEAL by Nathan B. Frank, bankrupt, from an order of the District Court of the United States for the District of Maryland denying his application for discharge on objections by the Michigan Paper Company et al. Reversed.

Statement by Keller, District Judge:

On the 21st day of May, 1908, the firm of McDonald & Frank, at the time composed

**Note. — Right of bankrupt to discharge
as affected by act of partner or
agent.**

A note on this question was appended to *Hardie v. Swofford Bros. Dry Goods Co.* 20 L.R.A.(N.S.) 785, and only the additional cases found will be herein considered.

This question is governed by § 14b of the bankruptcy act, which provides, among other things, that the court may grant an application for discharge in bankruptcy unless the applicant has (2), with intent to conceal his financial condition, destroyed, concealed, or failed to keep books of account or records from which such condition might be ascertained; or (3) obtained money or property on credit upon a materially false statement in writing made by him for the purpose of obtaining credit; or (4) transferred, removed, destroyed, or concealed, or permitted to be removed, etc., any of his property, with intent to hinder, delay, or defraud his creditors. It will be noticed that intent is expressly made the criterion in clause 2.

A partner whose application for a discharge in bankruptcy is contested under this clause has the burden of establishing his innocence, where it is shown that the firm books were improperly kept, with the intent, upon the part of his copartner, to conceal the firm's financial condition. *Re Schachter*, 170 Fed. 683, 22 Am. Bankr. Rep. 389 (D. C. S. D. N. Y.); *Re Currie*, 23 Am. Bankr. Rep. 539 (Referee E. D. Mich.).

In *Gilpin v. Merchants' Nat. Bank*, 20 L.R.A.(N.S.) 1023, 91 C. C. A. 445, 165 Fed. 607, it was held that a statement by the bookkeeper of the applicant for discharge, prepared from books not fully posted, which was believed to be approximately true, but which proved to be untrue, would not prevent a discharge. This followed from the view taken by the court that a false statement which prevented a discharge must be intentionally or knowingly untrue. (Upon that point, see opinion in this case, and note thereto, in 20 L.R.A.(N.S.) 1023.)
30 L.R.A.(N.S.)

Adopting the same view, the court, in *Firestone v. Harvey*, 98 C. C. A. 420, 174 Fed. 574, 23 Am. Bankr. Rep. 468 (sixth circuit), held that the wilfulness necessary to prevent a discharge of the bankrupt under § 14b (3) was not shown by proof that, in pursuance of a custom or arrangement between the bankrupt, a private banker, and another bank whereby one would draw a draft in favor of the other for the amount of their daily balance, the assistant cashier of the bankrupt drew drafts after the latter's insolvency, and with knowledge that the drawee was not in funds, where it appeared that those particular drafts were drawn without the bankrupt's knowledge or consent, although it also appeared that the bankrupt had previously drawn drafts for the payment of daily balances due from him, at times when the drawees were not in funds, but that they had always been met.

See also *W. S. Peck Co. v. Lowenbein*, 101 C. C. A. 498, 178 Fed. 178, 24 Am. Bankr. Rep. 138 (fourth circuit), which is sufficiently set out in *FRANK v. MICHIGAN PAPER Co.*

Clause 4 expressly makes intent an element. Under this clause it has been held that where a partner has so concealed assets that he is not entitled to a discharge in bankruptcy, his act will not alone operate to disentitle his copartner to a discharge, even though the latter may remain civilly liable for the consequences wrought by the fraud. *Re Schachter*, 170 Fed. 683, 22 Am. Bankr. Rep. 389 (D. C. S. D. N. Y.).

Whether fraud in preventing the collection of a claim excepts it from a discharge in bankruptcy is considered in *Jenkins v. Pilcher*, 28 L.R.A.(N.S.) 423, and the note thereto appended.

See the note to *American Steel & Wire Co. v. Coover*, post, —, on the effect of adjudication of bankruptcy of member of firm on rights of creditors of firm, against firm property; and see the references therein to other notes involving partners and partnerships in bankruptcy.

T. A. W.

of Walter A. McDonald and Nathan B. Frank, was adjudicated an involuntary bankrupt. Subsequently, on the 25th day of November, 1908, said Nathan B. Frank filed his individual voluntary petition in bankruptcy, and on the same day was adjudicated a bankrupt. On January 2, 1909, he filed his petition praying for a discharge, and on January 18, 1909, the Michigan Paper Company and the Kalamazoo Paper Company, two corporation creditors of the firm of McDonald & Frank, filed their separate specifications of objection to the discharge of the bankrupt, Nathan B. Frank, setting forth that on September 30, 1907, the bankrupt firm of McDonald & Frank (then McDonald, Frank & McDowell), through McDonald, one of its members, wrote unto Elmer H. Haas, of New York, selling agent of both of said creditors, a letter in which said firm set forth that their capital amounted to the sum of \$5,000, whereas said firm did not have the sum of \$5,000 as their capital, but only had in their business about \$2,500, as capital, and that the said creditors, upon said statement, "sold unto said firm of McDonald & Frank, of which said Nathan B. Frank was a member, large quantities of paper on credit, and that the said bankrupt firm, as aforesaid, have obtained the said property on credit upon a false statement in writing." To these specifications the bankrupt interposed his demurrer, and, the same being overruled, filed his answer, identical in form to the several specifications of objection filed by the corporate creditors. Upon the hearing before the district court, no evidence was introduced, but, in lieu thereof, the following agreed statement of facts was presented to the court:

"It is hereby agreed by Edward M. Hammond, attorney for the Kalamazoo Paper Company and the Michigan Paper Company, and E. Allan Sauerwein, Jr., attorney for the bankrupt, that the matters and facts upon which the specifications of the said paper companies, against the discharge in bankruptcy of the said bankrupt, shall be heard, are as follows:

That Walter McDonald and Robert McDowell were engaged in the paper jobbing business prior to the month of April, 1907, and during said month the bankrupt, Nathan B. Frank, was invited to and did become a partner, the firm name then being changed to McDonald, Frank, & McDowell; that McDonald invested two hundred and fifty dollars (\$250) in cash, and gave his note for a thousand; McDowell invested two hundred and fifty dollars (\$250) in cash, and gave his note for a thousand; and Frank invested twenty-five hundred

dollars (\$2,500) in cash,—all of which constituted the capital of the firm; that on the 20th day of September, 1907, the said McDonald wrote to one Elmer H. Haas, at New York, the selling agent of the said paper companies, the following letter:

We have your favor of the 19th, and thank you for the same. In regard to our responsibility, would say that our capital amounts to \$5,000; as you know we are all young men, doing all our own work together, with small expenses so far as warehouse is concerned. We have dealt with mills only whom writer knows very well, and no one has refused to give us a good line of credit. For instance, we have been buying right along from P. H. Glatfelter in the way of book paper. We have discounted every month, and now owe them about \$2,000. We would rather you not to write Glatfelter, however, because we don't want him to know whom else we are buying book paper from, but we would refer you to N. Frank & Sons, No. 1402 Mullikin St., and Hubbs & Corning Company, both of Baltimore, and the Lee Paper Company of Vicksburg, Michigan. We have bought some little from Kalamazoo, you know, whom we have paid promptly. We also inclose herewith some letters which speak for themselves.

Now, while our capital is small, as stated above, our expenses are small, and we are going along carefully, not overstepping the mark. Of course, there may be times when we will have to ask some of our mills for a little time, but thus far we have been able to discount. Would further state that we are not selling anybody but those who discount and pay their bills promptly. We are getting a very good percentage of the business in Baltimore, and some little out of town business. Altogether, we feel very much encouraged, and confidently believe that your mill will make no mistake in placing their paper with us. Kindly return the inclosed letters, and let us hear from you by an early mail. Thanking you for past favors, we are,

Yours truly,

McDonald, Frank, & McDowell,

By McDonald.

That said letter was written by the said McDonald for the purpose of opening an account with the said paper companies, and that the firm did thereafter, by virtue of said letter, obtain goods from them to the amount of \$——, upon which credit payments of \$—— were made; that the said McDonald had been engaged for some time in the paper business, and attended to the active management of the same for the firm

and particularly to the purchasing of stock; that the said McDowell was the bookkeeper for the said firm, and that the said Frank, who, at the time of the formation of the said partnership, was not twenty-one years of age, had no knowledge of the business, and, during the existence of the partnership, he attended solely and only to the selling of goods; that said Frank, during the existence of the partnership, undertook to buy out said McDowell's interest for \$250, but, because he could not get his note discounted at his bank, he gave his note to the firm, who indorsed it, and it was then discounted to Mr. Frank's father. The firm then assumed the purchase of the interest. After bankruptcy Mr. Frank's father paid the note; that said Frank became twenty-one years of age on the — day of —; that the said Frank knew nothing whatever of the writing of the said letter at the time it was written, nor at any time thereafter, until the firm was thrown into involuntary bankruptcy; that he did not know at any time prior to said bankruptcy of any statements whatsoever having been made to the said paper companies for the purpose of inducing a line of credit; nor did he know what was the inducing cause of the extension of credit by the said paper companies; nor did he ever wittingly derive any benefit from any credit so wrongfully obtained.

Edward M. Hammond,
Atty. for Michigan Paper Company
and Kalamazoo Paper Company.
E. Allan Sauerwein, Jr.,
Attorney for Bankrupt.

Argued before Goff and Pritchard, Circuit Judges, and Keller, District Judge.

Mr. E. Allan Sauerwein, Jr., for appellant:

The discharge of the bankrupt should not be refused because the partner of the bankrupt, without his prior knowledge or his subsequent ratification, obtained from the firm a line of credit upon materially false statements.

Remington, Bankr. §§ 2467, 2562, 2563, 2567; Re Dresser, 13 Am. Bankr. Rep. 620; Neal v. Clark (Neal v. Scruggs) 95 U. S. 704, 24 L. ed. 586; Botts v. Hammond, 3 Am. Bankr. Rep. 775.

The right to a discharge is distinct from the effects of the discharge.

Re McCarty, 7 Am. Bankr. Rep. 40; Re Marshall Paper Co. 4 Am. Bankr. Rep. 468.

Mr. Edward M. Hammond, for appellees:

Where, in the regular course of a partnership business, one partner makes a materially false statement in writing, upon the faith of which property is obtained upon credit, the fraud thus committed may be

interposed as a bar to the discharge of a partner who did not participate in the wrongful act, and had no knowledge thereof.

Re Hardie, 16 Am. Bankr. Rep. 313, 143 Fed. 607; Loveland, Bankr. 3d ed. 809, § 280a; Re Goodhile, 130 Fed. 782, 12 Am. Bankr. Rep. 380.

Keller, District Judge, delivered the opinion of the court:

Section 14b of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3427), as amended in 1903 (act Feb. 5, 1903, chap. 487, § 4, 32 Stat. at L. 797, U. S. Comp. Stat. Supp. 1909, p. 1310), provides that upon the bankrupt's application for a discharge, the judge shall "investigate the merits of the application, and discharge the applicant unless he has . . . (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit. . . ."

Section 17, as amended in 1903, provides that a discharge in bankruptcy "shall release a bankrupt from all his provable debts except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations. . . ."

The only question to be decided here is whether the action of McDonald in making the statement of September 30, 1907, can be successfully urged to prevent the granting of a discharge to Frank, upon proceedings growing out of his individual voluntary petition in bankruptcy. In this connection it becomes important to distinguish between the right to a discharge and the effect of a discharge in bankruptcy. With regard to the latter, we think it clear from the language quoted from § 17 of the present bankruptcy act, as amended in 1903, that a false representation by one partner, by means of which property was obtained by the partnership, will in law be imputed to the other partners, to the extent of holding them civilly liable for the debt, and their discharge in bankruptcy will not discharge their liability as to such debt. Strang v. Bradner, 114 U. S. 555, 29 L. ed. 248, 5 Sup. Ct. Rep. 1038; Schroeder v. Frey, 60 Hun, 58, 14 N. Y. Supp. 71; Collier, Bankr. 6th ed. p. 225. As applied to partnership debts, these questions ought to be considered in connection with the fact that under the present bankruptcy act a partnership is a "legal entity;" consequently a materially false statement made in writing by one of the partners (without the knowledge of the others), for the purpose of obtaining credit on behalf of the partnership, and by means of which such credit is obtained, is (1) the act of the individual partner making it,

and (2) the act of the legal entity called the "partnership," and hence both the partner making such statement and the legal entity called the "partnership" are chargeable with having done one of the acts, the doing of which will, upon objection being properly made, prevent the granting of a discharge, under § 14b, bankruptcy act 1898, as amended in 1903; and it follows that any "party in interest" can successfully oppose the discharge of the acting partner and of the partnership.

Under the existing statute the question of what will bar a discharge has now been passed upon by at least three different circuit courts of appeals, and all of these decisions are in substantial harmony in holding that the bar to a discharge by reason of a false statement in writing is confined to such person or persons as actually made such statement with the intention to deceive, and to the partnership entity of which such person was a member.

In *Hardie v. Swafford Bros. Dry Goods Co.* 20 L.R.A.(N.S.) 785, 91 C. C. A. 426, 165 Fed. 588, the circuit court of appeals for the fifth circuit (Shelby, circuit judge, dissenting), reversing the district court for the western district of Texas (143 Fed. 607), in a case in every way similar to the one at bar, held that a materially false statement in writing made by a partner in the ordinary course of business of the partnership, for the purpose of obtaining goods on credit, and by means of which they were so obtained by the firm, is not ground for refusing a discharge in bankruptcy, under bankruptcy act July 1, 1898, chap. 541, § 14b, c. 3, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3427, as amended by act Feb. 5, 1903, chap. 487, 32 Stat. at L. 797, U. S. Comp. Stat. Supp. 1907, p. 1026, to another partner who did not participate in the wrongful act, and had no knowledge of it.

In *W. S. Peck Co. v. Lowenbein*, decided February 21, 1910, by this court (101 C. C. A. 498, 178 Fed. 178), it appeared that on September 14, 1907, Lowenbein, a member of the firm of Owens & Lowenbein, addressed a letter to W. S. Peck & Company, Baltimore, Maryland, which letter contained a statement of the financial condition of the firm of Owens & Lowenbein; that said statement was based almost entirely upon information derived by Lowenbein from Owens in the preparation of it; that matters in the statement other than those furnished by Owens were not misleading, being, in the main, true. The court affirmed the judgment of the court below, refusing a discharge to Owens, and granting that to Lowenbein, saying: "It is the evident purpose of the bankruptcy act to protect

that unfortunate class of debtors who are unable to pay their debts, by giving them a discharge, thus affording them an opportunity to engage in business again, while, on the other hand, it is manifestly intended to deny a discharge to those whose conduct has been such as to show that they obtained credit by false statements calculated and intended to deceive and thereby defraud their creditors. Construing the act with these ends in view, it would be manifestly unjust to deny a discharge to a debtor, when it appears, as it does in this instance, that the statement which he made was not actuated by any fraudulent purpose. This finding of fact has been approved by the learned judge who heard the case below, and is within itself conclusive in so far as the question involved in this controversy is concerned."

In *Gilpin v. Merchants' Nat. Bank*, 20 L.R.A.(N.S.) 1023, 91 C. C. A. 445, 165 Fed. 607, the bankrupt, upon the request of a bank from which he had asked an accommodation, for a financial statement, signed a statement form in blank, and delivered the same to his bookkeeper, requesting him to make an exact statement of his condition, for the bank, to which the bookkeeper replied that he could not (the posting of his books being in arrear), but that he would make an approximate statement and send it to the bank. The statement was made by the bookkeeper, marked "approximate," and sent to the bank, and upon the faith of this statement the bank extended credit. The referee found that, although the falsity of the statement sent to the bank was proved, the fact that the bankrupt knew it to be false, or did not know it to be true, was not proved, and said in his report: "There is no evidence to support the contention that the bankrupt knew or had any reason to believe that the statement sent to the bank by the bookkeeper was false, or that the bankrupt intended in any way to deceive the bank."

Upon these facts the circuit court of appeals for the third circuit, in an opinion by Gray, circuit judge, held that the word "false," as used in § 14b of the bankruptcy act, as amended by act February 5, 1903, which makes it a ground for denying a discharge to a bankrupt that he has obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit, means more than merely erroneous or untrue, being used in its primary legal sense as importing an intention to deceive, and such a statement, in order to constitute a bar to a discharge,

must have been knowingly and intentionally untrue.

It must be manifest that the intent to deceive can never be imputed to one who not only takes no part in making the written statement, but, as in the case at bar, knows nothing of it. We believe that the view taken by the circuit court of appeals for the third circuit, of the meaning of the word "false," as used in this section, is the correct one, and the decision above referred to is in entire harmony with the Lowenbein Case decided by this court.

Taking the view that the right to a discharge is determined by the good faith of the bankrupt, and that the effect of such discharge is to be determined in accordance with a proper recognition of his civil liability for the acts of partners and other agents, we come to the conclusion that the court below erred in refusing to grant a discharge to the bankrupt.

The order of the District Court for the District of Maryland, made and entered on the 22d day of January, 1910, sustaining the specifications of objection to the discharge of the appellant, and refusing to grant him a discharge, is therefore reversed, with costs, and the cause is remanded to the District Court for further proceedings herein not inconsistent with this opinion.

MINNESOTA SUPREME COURT.

FRANK PENAS, by Guardian *ad Litem*,
Appt.,
v.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY et al., Respts.

(— Minn. —, 127 N. W. 926.)

Master — liability for tort of servant — history.

1. In its early history, the law as to the liability of the master to third persons for the tort of his servant passed from holding the master absolutely liable, to holding him liable in case of particular command only. Later the liability was enlarged, and determined by general authority, express or implied, and was subsequently extended so as to result in the rule that the master is responsible for the tort of his servant, done in the scope of his authority, with the view to the furtherance of the master's business, and not for a purpose personal to himself, whether committed negligently or wilfully, and in excess of his authority, or contrary to his express instructions. The English courts now recognize a still larger responsibility in cases where the wrong complained of was not within the scope of the servant's authority, but was done in the course of

employment. The American cases have correspondingly extended the master's liability, and have considered it, not only from the master's point of view, but also from that of the person injured, and have placed emphasis, not so much on authority, real or apparent, as upon the violation by the servant of the duty owed by the master to the person complaining.

Same — when liability attaches.

2. Liability may attach to the master under one or more of two different classes of circumstances; namely, first, by virtue of personal commission, singular or joint, or by consent before or after the wrong; and, second, by virtue of relationship subsisting between the master and the person injured, or because of creation, ownership, custody, or control of instrumentalities intrinsically or potentially dangerous, or where the master's conduct, his implements and premises and facilities for doing business, or the course of his business generally, or of dealing with the party complaining, have a natural tendency to create, or to determine the extent of, damages involved; or by estoppel.

Many reasons, often divorced from the resulting standard, concur in imposing liability on the master.

Same — basis of liability.

3. The master's responsibility in the first class of cases rests on personal culpability through participation or authority, including ratification. In the second class of cases it is largely independent of personal fault, and rests essentially on reasons of public policy, the principal ones of which are here referred to.

Same — authority — kinds.

4. The equivocation and uncertainty of the terminology of the subject is necessarily a prolific source of inconsistency in decision. "Authority" is used in the sense of (1) real or actual authority, express or naturally implied; (2) fictitious or imputed authority, or which (3) apparent authority is really one variety. "Scope of authority" and "course of employment," and their congeners, are often used indiscriminately and interchangeably, and sometimes as representing, respectively, the more restricted and the more enlarged, and usually the

Note. — As to liability of master for malicious act of servant when master owes special duty to party injured, see note to *Daniel v. Petersburg R. Co.* 4 L.R.A. (N.S.) 485.

As to liability of master for tort committed by servant in course of his employment, and with a view to the furtherance of his master's business, but contrary to the master's express instructions, see note to *Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 L.R.A. (N.S.) 416.

As to other aspects of the general subject of liability of a master to third persons for the torts of the servant, see Index to Notes, under topic, "Master and Servant."

most enlarged, criterion of liability of the master.

Same — liability for tort of servant — damages — necessity for.

5. The master's liability is conditioned on proof of damage consequent on the wrong committed by one who at the time is a servant of the master, and under such circumstances that liability is attached to the master under the criterion prevailing in the jurisdiction and appropriate to the circumstances involved.

Same — tests of liability.

6. Liability may attach under the test of authority, the test of motive and benefit, or the test of duty violated. No one rule of liability is the sole or invariable standard. Different specific torts, or the same tort committed under different circumstances, may involve the application of different principles.

Railroad — trespasser on train — injury — liability.

7. Plaintiff's minor, who was really, but not apparently, a trespasser, claimed to have been thrown from a moving train by defendant's brakeman and injured. It is held that defendant's liability was for the jury, under proper instructions from the court.

(September 9, 1910.)

A PPEAL by plaintiff from a judgment of the District Court for Ramsey County in defendants' favor in an action brought to recover damages for personal injuries for which defendants were alleged to be responsible. Reversed.

The facts are stated in the opinion.

Mr. Thomas C. Daggett, with Mr. D. J. Keefe, for appellant.

Messrs. F. W. Root and Nelson J. Wilcox, for respondents:

The tort, although done in the course of the brakeman's employment, with a view to the furtherance of the master's business, and not for a purpose personal to himself, was not within the scope of his actual authority, express or implied, and therefore the railway company is not liable.

Brevig v. Chicago, St. P. M. & O. R. Co. 64 Minn. 174, 68 N. W. 401; 2 *Elliott, Railroads*, § 1255; *Barrett v. Minneapolis*, St. P. & S. Ste. M. R. Co. 106 Minn. 57, 18 L.R.A.(N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047; *Larson v. Fidelity Mut. Life Assn.* 71 Minn. 106, 73 N. W. 711; *Crandall v. Boutell*, 95 Minn. 116, 103 N. W. 890, 5 A. & E. Ann. Cas. 122; *Merrill v. Coates*, 101 Minn. 46, 111 N. W. 836; *Ellegard v. Ackland*, 43 Minn. 352, 45 N. W. 715; *Slater v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; *Soderlund v. Chicago, M. & St. P. R. Co.* 102 Minn. 242, 13 L.R.A.(N.S.) 1193, 113 N. W. 449; *Illinois C. R. Co. v. 30 L.R.A.(N.S.)*

Martin, 33 Ky. L. Rep. 666, 110 S. W. 815; *Wakefield v. Boston Coal Co.* 197 Mass. 527, 83 N. E. 1116; *Bassi v. Orth*, 58 Misc. 372, 109 N. Y. Supp. 88; *Waalder v. Great Northern R. Co.* (S. D.) 18 L.R.A.(N.S.) 297, 117 N. W. 140, 18 S. D. 420, 70 L.R.A. 733, 112 Am. St. Rep. 794, 100 N. W. 1097; *Barmore v. Vicksburg, S. & P. R. Co.* 85 Miss. 426, 70 L.R.A. 629, 38 So. 210, 3 A. & E. Ann. Cas. 594; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168.

Jaggard, J., delivered the opinion of the court:

For present purposes it will be assumed that plaintiff and appellant's minor was really, though not apparently, a trespasser on defendant's passenger train. Plaintiff's contention was that a brakeman struck or pushed him from one of its cars while in rapid motion, so that he fell to the ground in such a way as to have his right arm and part of his left hand severed. The jury found for defendants. This appeal was taken from the order of the trial court denying plaintiff's motion for a new trial.

I. This case involves a constantly recurring confusion in the law as to when a master is liable to third persons for the tort of his servant. That confusion is perhaps greater than in any other corresponding branch of our jurisprudence. The multiplication of authorities has not tended to clarify, but to obscure, the subject. Usually a decision on the subject consists of an imperfect collation of the more or less nearly related cases, without consideration of opposed opinions, and without inquiry into the status of the rule in history or in reason. One which contains even a bird's-eye view of the principles involved is a *varissima avis*. It has, indeed, become practically impossible to review all the decisions on the subject generally, and difficult even to refer to the opposed authorities on a particular point in issue.

The rules themselves originated from the law of master and servant and the law of principal and agent indiscriminately, at a time when torts as a general subject was practically unknown. In consequence their development has been largely, but not entirely, independent of many other necessarily related subjects. That evolution, however, has been in many respects radical. It is often ignored, and more often confused. Overruled cases and cases overruling them are constantly cited by eminent judges and writers as authority and reason for the overruled proposition itself, and almost as often for an inconsistent principle which has been repudiated times without number. In almost every state of the Union three or four stages of evolution may be found irre-

concilably confounded. Current judicial language is a tessellation of the terminology of each of those stages.

It is impossible within the necessary limits of this opinion to formulate all pertinent considerations, or to discuss or even refer to any considerable portion of the authorities. At various times practically all the relevant decisions and discussions have been examined. It is feasible here to attempt to state only a small part of the results of that examination applicable to the facts here in issue.

II. This confusion has arisen primarily from failure to apprehend the historical development of the subject. It is elementary that the law as to when the master is liable to third persons for the tort of his servant has passed through many stages of development. These may conveniently be thus stated:

(1) The earliest theory recognized the absolute liability of the master. This survives in few cases only, as where the master is held to have insured safety.

(2) It then came to be recognized that the master was liable only in cases where he had given a particular command to his servant to commit the wrong complained of. This period is treated as beginning about the time of Edward I., 1300.

(3) During Lord Holt's time (about 1700) the rule was widened, so as to impose liability on the master for his servant's conduct in pursuance of general authority, express or implied. Blackstone recognized this as the criterion. His teaching, correct at the time, but inconsistent with the subsequent trend of decisions, has been followed, and is constantly to-day regarded as the law by both commentators and courts.

(4) In Lord Kenyon's time (1800 et circa), the master's responsibility was greatly enlarged, so as to give to implied authority a wide meaning, including cases within the "sweep" or "apparent scope" of authority, in order to embrace cases of authority, express or implied, and also cases of mistaken and excessive execution of authority. The master was held responsible, even if he had specifically forbidden the servant's conduct, and the servant had acted wilfully and maliciously. The essential criterion became whether the conduct was in furtherance of his employment and for the benefit of the master. (The superiority of American scholarship on this subject will be demonstrated by a comparison of Mr. Wigmore's invaluable article in 7 *Harvard L. Rev.* 383 et seq., with the English review of this history in Macdonell, *Mast. & S.* 263. The transition in thought between the third and fourth stages of development is well illustrated by contrasting the 30 *L.R.A.* (N.S.)

familiar and leading cases of *M'Manus v. Crickett* [1800] 1 East, 106, and *Limpus v. London General Omnibus Co.* [1862] 1 Hurlst. & C. 529, 17 Eng. Rul. Cas. 258.

This rule has been subject to much criticism. It has been repudiated as a universal or invariable rule by practically all of the American courts. The English judges, absorbed in the contemplation of the law of master and servant and of principal and agent, appear to have been oblivious to the relation between the master and the person injured, necessarily involved, and to other considerations which in other but similar cases are judicially recognized as controlling in analogous situations. In particular they have overlooked the increasing stress the progress their own law has placed upon responsibility for the violation of duties recognized by law. Thus there are duties to third persons so far nondelegable as render the employer liable in damages for their breach, although the immediate cause of the harm complained of is an independent contractor, as in nuisance cases (and see *Williams, J., in Pickard v. Smith*, 10 C. B. N. S. 480; *Penny v. Wimbledon Urban Dist.* [1899] 2 Q. B. 72; *Winslow v. Commercial Bldg. Co.* [Iowa] 28 *L.R.A.* (N.S.) 563, 124 N. W. 321), or a stranger (*Illidge v. Goodwin*, 5 Car. & P. 190, et sim.). Under analogous facts, not distinguishable on principle, the master has been exonerated from responsibility for the tort of his servant. On the same principle, a total stranger to a contract may recover damages in tort from the manufacturer or contractor who has been guilty of negligence in connection with the delivery of potentially dangerous instrumentalities to his servant. *Parry v. Smith*, L. R. 4 C. P. Div. 327. And see later cases collected and discussed in *O'Brien v. American Bridge Co.* 110 Minn. 304, — *L.R.A.* (N.S.) —, 125 N. W. 1012. The basis of the liability is a breach of duty. *Clerk & L. Torts*, Can. ed. p. 465. So, also, a master owes his servant duties which are nondelegable, on proof of the breach of which by another servant the master is liable, irrespective of the motive of the servant. Apart from its inconsistency with these and other lines of authorities, the English criterion fails in reason because it primarily rests on the state of mind of the servant. This is often in fact a remote, accidental, and collateral circumstance. 1 *Thomp. Neg.* 2d ed. 553, 554. The test is artificial and metaphysical. The saving grace of a sense of humor is obviously wanting. See e. g., *Beven on Negligence*, preface, and *Macdonell, Mast. & S.* 242.

It is usual, but not accurate, to regard the progress of the English law as having

stopped at this point. Exactly what is the present English criterion is not clear, but (Mr. Beven to the contrary) it inclines to follow the reasoning of American courts, and to extend further protection to third persons. The difficulties in the situation have led the English courts to yield to "the modern tendency to extend the master's responsibility to acts naturally flowing from the employment thereof, not within its scope." *Ruddiman v. Smith* (1889) 60 L. T. N. S. 708 (where the servant negligently allowed water taps in a lavatory to run, plaintiff was damaged by the overflow, and the master was held liable. Cf. *Stevens v. Woodward* (1881) L. R. 6 Q. B. Div. 318, where, under similar circumstances, the master was held not liable. The servant there was forbidden to use the lavatory. However, "the law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability." *Willes, J., in Limpus v. London General Omnibus Co. supra.* In *Dyer v. Munday* [1895] 1 Q. B. 742, master was held liable for the unauthorized wrong of his servant in executing a warrant. In *Richards v. West Middlesex Waterworks Co.* (1885) L. R. 15 Q. B. Div. 660, under similar circumstances, the master was exonerated. And see *Engelhart v. Farrant* [1897] 1 Q. B. 240, and *McDowall v. Great Western R. Co.* [1903] 2 K. B. 331.) In *Citizens' Life Assur. Co. v. Brown* [1904] A. C. 423, the court said: "He [the servant] had no actual authority, express or implied, to write libels, nor to do anything legally wrong; but it is not necessary that he should have had any such authority in order to render the company liable for his acts. The law upon this subject cannot be better expressed than it was by the acting chief justice in this case. He said: 'Although the particular act which gives the cause of action may not be authorized, still, if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant.'" (Cf. *Palmeri v. Manhattan R. Co.* 133 N. Y. 261, 16 L.R.A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001.) In view of these later decisions, the familiar controversy between Lord Erskine, who recognized the larger liability of the master (see *Sleath v. Wilson*, 9 Car. & P. 607, approved in *Philadelphia & R. R. Co. v. Derby*, 14 How. 468, 14 L. ed. 502), and Lord Cockburn, who restricted it (see *Storey v. Ashton*, L. R. 4 Q. B. 476, but cf. *Venables v. Smith*, L. R. 2 Q. B. Div. 279, at page 283), has a significance which is principally historical. Lord Erskine's ideas appear to have finally prevailed.

(5) In America, however, the subject has 30 L.R.A.(N.S.)

undergone a radical change; and further, the master's responsibility has been distinctly increased. Mr. Beven has pointed out, in connection with *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504: "Though of the same parentage as ours, American law has in late years been developing along divergent lines, and accepts principles widely applicable that are to us not only novel, but fundamentally unsound." Conspicuously the liability of a master to third persons for the torts of his servants has been materially extended. *Beven, Neg. p. vii.* Especially the earlier English cases, reasoned from the point of view of the master only. American judges have regarded the controversy both from the point of view of the master and of the person injured. They have placed emphasis, not so much upon the authority of the master, as upon the duty imposed upon him to the person injured, which has been violated by the servant. The term "scope of authority," and especially the term "course of employment," and their congeners, have been given a much narrower connotation and wider denotation than in most of the English cases at least. In many groups of cases, the master is held liable, although the act be disapproved of or clearly forbidden by the master (*Grier, J., in 14 How. 486*, 14 L. ed. 509; *Singer Mfg. Co. v. Rahn*, 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175), although the motive of the servant was malicious, capricious, and not at all for the master's benefit or purpose, and even where the servant did wrong that he might embezzle for himself or merely injure the master's business. The English criterion is the formal result of *a priori* reasoning; the American is the natural product of *a posteriori* reasoning.

III. The confusion has been in part due to the failure to distinguish between the different ways in which liability for tort may attach. The person sought to be charged in an action *ex delicto* may be held responsible under one or more of two different classes of circumstances: (1) By virtue of personal commission, single or joint, or by consent before or after the wrong; i. e., by command or ratification. (2) By virtue of relationship, or because of the creation, ownership, custody, or control of instrumentalities intrinsically or potentially dangerous, or otherwise capable of doing harm, or because of conduct operating as estoppel. In the nature of things the elements of the second class often do not appear isolated. They usually run into each other, and occur blended in combinations in which they are more or less distinctly separable. The vital distinction is between the first and second class of cases.

See *Amidon, J.*, in *Helms v. Northern P. R. Co.* (C. C.) 120 Fed. 389-395; *Blackburn, J.*, in *Mercey Docks and Harbour Board v. Gibbs*, 11 H. L. Cas. 680, 715. And see *Macdonell, Mast. & S.* chap. 24.

In the first class of cases, liability attaches to the master's personal act, as where the master participates in the wrong of the servant, or is guilty of initial wrong, as in selecting or retaining an improper servant, or an insufficient number of servants, or in failing to establish rules for their government, and the like. It may also be that the master is held responsible because of his command or consent, given before or after the servant's tort, as where the master has expressly or impliedly authorized or ratified the tort. In such cases the wrong may be fairly said to be that of the master himself. In these cases he is usually culpable. The liability is founded on the doctrine of identification. The servant is the *alter ego* of the master. *Qui facit per alium facit per se*.

In the second class of cases, the tort is in no sense the master's personal wrong. He is not exonerated by proof of absence of personal culpability. He is merely held responsible in damages for reasons the law holds sufficient. His liability is "imposed" or "imputed." His authority to the servant to do the act complained of is, in strict logic, as wholly irrelevant as the fact that he may have expressly forbidden the servant so to act. His authority does not exist in fact. If the language of authority is used, the authority is purely fictitious. See *Macdonell, Mast. & S.* 247. It exists by construction, and this in cases wherein it is attributed, although the act complained of was not for the benefit of the master, but to his affirmative disadvantage. It is "imputed" or "quasi" (cf. *Real and Quasi Contracts*, 9 Cyc. Law & Proc. pp. 242, 243), as distinguished from "actual" authority.

(a) This is obvious in the familiar cases in which liability attaches by virtue of relationship existing between the person complaining and the person sought to be charged. A "principal who contracts to do a particular thing is liable for agent's torts which prevent the performance of the contract." *Wharton, Agency*, § 487. The relationship may be that of carrier and passenger. The carrier is liable for breach of his duty imposed, by common law, "of protecting each passenger from avoidable discomfort, from insults, disputes and personal violence." *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 9 L.R.A.(N.S.) 929, 124 Am. St. Rep. 90, 43 So. 210; *Birmingham R. & Electric Co. v. Baird*, 130 Ala. 334, 54 L.R.A. 752, 89 Am. St. Rep. 43, 30 So. 456; *Craker v. Chicago & N. W. R. Co.* supra. 30 L.R.A.(N.S.)

Possible advantage to the master is entirely irrelevant. A street car conductor throws a dead hen at the motorman of another car, and strikes plaintiff, a passenger therein. The car company is liable. *Hayne v. Union Street R. Co.* 189 Mass. 551, 3 L.R.A.(N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219. And see *Savannah Electric Co. v. Wheeler*, 128 Ga. 550, 10 L.R.A.(N.S.) 1176, 58 S. E. 38, 66 Cent. L. J. 23, note; and compare with *McCarthy v. Timmons*, 178 Mass. 380, 86 Am. St. Rep. 490, 59 N. E. 1038, and *Hayes v. Wilkins*, 194 Mass. 223, 9 L.R.A.(N.S.) 1033, 120 Am. St. Rep. 549, 80 N. E. 449. The relationship may be that of innkeeper and guest. The best discussion as to whether the innkeeper is liable for tort of servant, committed for his own purposes, will be found in the majority and dissenting opinions in *Clancy v. Barker*, 69 L.R.A. 653, 66 C. C. A. 469, 131 Fed. 161. And see 71 Neb. 83, 69 L.R.A. 642, 115 Am. St. Rep. 559, 98 N. W. 441, 103 N. W. 446, 8 A. & E. Ann. Cas. 682. The relationship may be vendor and vendee. In *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398, 4 L.R.A.(N.S.) 506, 45 N. E. 634, the master, the vendor, was held liable to his vendee for the act of his servant, done with intent to injure the master's business, in adulterating milk, contrary to statute. The relationship may be that subsisting between the proprietor of a place of amusement and a patron who has paid admission. *Drew v. Peer*, 93 Pa. 234; *Dickson v. Waldron*, 135 Ind. 507, 24 L.R.A. 483, 488, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1; cf. *Williams v. Mineral City Park Assn.* 128 Iowa, 32, 1 L.R.A.(N.S.) 427, 111 Am. St. Rep. 184, 102 N. W. 783, 5 A. & E. Ann. Cas. 924. The relationship may arise out of contract generally. A watchman hired by defendant, who has agreed to guard plaintiff's house, burglarizes it; the defendant cannot escape liability on the "ground that he never authorized that other person to do the act complained of." *Williams v. Brooklyn Dist. Teleg. Co.* 12 Misc. 565, 33 N. Y. Supp. 849. And see *Jones v. Morgan*, 90 N. Y. 4, 43 Am. Rep. 131. (Cf. *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168, to which, without any appearance of conscious humor, defendant has referred us. That case was decided on the theory that no circumstances were shown from which could be inferred authority of the master to the servant to steal bags of gold delivered to the defendant bank as bailee; therefore the bank could not be held responsible for its servant's theft!)

The relationship need not be contractual; it may be merely conventional. The servant, for his own amusement or other personal purpose, assaults one whom the mas-

ter has invited to use his premises as a store, station, or saloon; the master is liable, irrespective of the servant's authority or motive, or the master's benefit. Most of the many cases in this group may be found collated in *Cressy v. Republic Creosoting Co.* 108 Minn. 349-356, 122 N. W. 484. And see notes to *McDermott v. Sallaway*, 21 L.R.A.(N.S.) 456. So a railroad company may be liable for failure, *e. g.*, to give prescribed warning to pedestrians at a crossing, or to protect persons near its works, as those loading cars; the owner of adjacent premises may be liable to persons on the highway for the misconduct of his servants, *et sim.* There are many other classes of cases similar on principle.

(b) The same situation is presented when liability attaches because the master has put in the servant's power an ability to do damage by means of instrumentalities dangerous intrinsically or potentially. See *O'Brien v. American Bridge Co.* 110 Minn. 364, — L.R.A.(N.S.) —, 125 N. W. 1012. This is a natural, though somewhat remote, extension of the familiar principle given extreme expression in *Rylands v. Fletcher*, L. R. 3 H. L. 330, 1 Eng. Rul. Cas. 235, 6 Mor. Min. Rep. 129, and in some cases of nuisance, modified so as to meet the facts of each case. Servants, contrary to orders, take a dog out of the inclosure and into the presence of the person who is injured. The employer cannot escape liability because the wrong was beyond the scope of the servant's authority. *Fye v. Chapin*, 121 Mich. 675, 680, 80 N. W. 707. An employee of defendant blows a whistle (*Texas & P. R. Co. v. Scoville*, 27 L.R.A. 179, 10 C. C. A. 479, 23 U. S. App. 506, 62 Fed. 730; *Alsever v. Minneapolis & St. L. R. Co.* 115 Iowa, 338, 56 L.R.A. 748, 88 N. W. 841; but see *Ballard v. Louisville & N. R. Co.* 128 Ky. 826, 16 L.R.A.(N.S.) 1052, 110 S. W. 206), or explodes a torpedo (*Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387, 8 L.R.A. 464, 21 Am. St. Rep. 840, 24 N. E. 658, which contains an especially valuable discussion; but cf. *Sullivan v. Louisville & N. R. Co.* 115 Ky. 447, 103 Am. St. Rep. 330, 74 S. W. 171, for his own amusement, and a horse runs away. Plaintiff, injured thereby, it is quite generally recognized, can recover from the master.

(c) The principle is the same in many cases where the work of the servant is not naturally dangerous to third persons. The liability is recognized in the master largely because the master has put it in the power of the servant to inflict harm by investing him with means or by putting him in positions, innocent enough in themselves. In cases of false imprisonment or malicious

prosecution, for example, an officer of the law is in no wise, or but little, assisted in making an arrest by the fact that he may be in defendant's employ. The master's responsibility, if any, must depend largely on his authority, express or implied, actually conferred on his servant. The more restricted rule of liability usually controls cases of this kind. This is often true, also, in cases of assault and battery. The master's liability naturally involves the question of his authority to his servant, except where the circumstances impose a special duty of protection or hospitality. *Supra*; and see *Mr. Shumaker's article* in 5 *Current Law*, 275. For example: A train or car man who assaults a person on premises in which his employer has no property or interest ordinarily commits an independent tort. The fact that he is a servant has no natural tendency to contribute to or aggravate the wrong, and is naturally wholly disconnected from it. Yet a street car conductor, subject to a rule to prevent boys from catching on cars, who strikes a boy running by the side of the car, renders a car company liable. *Hewson v. Interurban Street R. Co.* 95 App. Div. 112, 88 N. Y. Supp. 816 (the collation of trespasser cases on pages 114, 115, of 95 App. Div., is valuable). When, for example, the railroad train man throws a trespasser from a moving train, the situation is substantially different. The fact of the service on the train and of the trespasser's place on the moving cars are necessarily conditions precedent to the commission of the wrong, and, in connection with the physical environment and the speed of the train, may determine the fact and extent of damage. If the trespasser is attempting to get on a train, he may be prevented by force without liability to the master; but his situation, if once on the moving car has a direct effect on the master's responsibility for the force exercised in his removal. *Kline v. Central P. R. Co.* 37 Cal. 400, 99 Am. Dec. 282. And if the assault be committed before the trespasser has left the car, and is completed by a brakeman who follows the plaintiff off the car, the defendant may be liable. *Girvin v. New York C. & H. R. R. Co.* 106 N. Y. 289, 59 N. E. 921. It is, however, too obvious to justify discussion that, *e. g.*, an assault by a trainman on a trespasser when on a train at rest in a railroad yard, and when on a train moving rapidly over a high bridge, involves radically different applications of elementary rules of law. The master is under no affirmative duty to take care of a trespasser, but is subject to the familiar rule applied to trespassers generally, namely, to abstain from wilful or wanton harm. *Kansas City, Ft. S. & G. R.*

Co. v. Kelly, 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172; Marion v. Chicago, R. I. & P. R. Co. 59 Iowa, 428, 44 Am. Rep. 687, 13 N. W. 415; Illinois C. R. Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112; Illinois C. R. Co. v. King, 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 552; Holler v. Ross, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472; Johnson v. Great Northern R. Co. 49 Wash. 98, 94 Pac. 895; De Vane v. Atlanta, B. & A. R. Co. 4 Ga. App. 136, 60 S. E. 1079; Gates v. Quincy, O. & K. C. R. Co. 125 Mo. App. 334, 102 S. W. 50; Magar v. Hammond, 183 N. Y. 390, 3 L.R.A.(N.S.) 1038, 76 N. E. 474; Illinois C. R. Co. v. Brown (Miss.) 39 So. 351 (brakeman). Cf. Ellington v. Great Northern R. Co. 96 Minn. 176, 104 N. W. 827-829. That the servant's motive in violating that duty was malicious is immaterial. Chicago, R. I. & P. R. Co. v. Kerr, 74 Neb. 1, 104 N. W. 49-54 (brakeman); Dealy v. Coble, (1906) 112 App. Div. 296, 98 N. Y. Supp. 452. (The transition in thought from the original rule, following *M'Manus v. Crickett*, is apparent with the contrast of this last case with *Wright v. Wilcox* (1838) 19 Wend. 343, 32 Am. Dec. 507, still sometimes cited as authority.) The motive of the servant generally, whether to act for the master's benefit or not, is not vital. Kansas City, Ft. S. & G. R. Co. v. Kelly, 36 Kan. 659, 59 Am. Rep. 596, 14 Pac. 172.

While the language of authority is often used to describe the liability of the master under such and similar circumstances, it is strained to meet the conclusion which the court has reached by independent reasoning, as in *Rowell v. Boston & M. R. Co.* 68 N. H. 358, 44 Atl. 488. Cf. *Barmore v. Vicksburg, S. & P. R. Co.* 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 A. & E. Ann. Cas. 594. Thus the learned editor, in 27 L.R.A. 162, says of the familiar and leading case on this subject, *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 507, Chase, Lead. Cas. on Torts, 237 (in which a boy trespasser was thrown from a moving train): "The absurdity of those statements [as to express and implied authority] taken together is such that the learned judge who made them never would have done so, had he not wished to apparently conform to precedents by which he did not intend to be bound, as is apparent from the remainder of the opinion." At the end of the opinion, the court rests the master's liability expressly upon the violation by the servant of the master's negative duty to abstain from wilful violence.

(d) On the same principle, the conduct of the master, the place, implements, facilities for doing business, and the course of the 30 L.R.A.(N.S.)

business or dealing may justify third persons in believing that the servant had certain powers conferred upon him, and in acting in reliance thereon. Thus is created a duty to them, or, as is often said, the servant is given not real, but imputed, authority, commonly called "apparent authority." A telegraph agent, who is also an express agent, forges and sends a message from a merchant to his local correspondent for a purchase of grain. The agent steals the remittance. The telegraph company is liable, not because of the agent's authority or motive to benefit the master, but because a duty to third persons is imposed on the master by law, which the master has put in the power of the agent to violate. *McCord v. Western U. Teleg. Co.* 30 Minn. 181, 1 L.R.A. 143, 12 Am. St. Rep. 636, 30 N. W. 315; *Jasper Trust Co. v. Kansas City M. & B. R. Co.* 99 Ala. 416, 42 Am. St. Rep. 75, 14 So. 546. On much the same theory a railroad company is often, but not universally, held liable for a fraudulent bill of lading issued by an agent, who has appropriated the proceeds. *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433; *Planters' Rice-Mill Co. v. Merchants' Nat. Bank*, 78 Ga. 574, 3 S. E. 327. Cf. *contra*, *Friedlander v. Texas & P. R. Co.* 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570; and see *National Bank v. Chicago, B. & N. R. Co.* 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560.

(e) This is really the principle involved in cases in which the liability of the master is worked out in the language of estoppel. A secretary of a corporation, intrusted with the seal of a corporation, and authorized to sign certificates of stock, issues unauthorized certificates and appropriates the proceeds. The agent, having no authority, could not have acted for his employer, but the corporation is held estopped from denying the validity of the fraudulent issue. See *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Fifth Ave. Bank v. Forty-second Street & G. Street Ferry R. Co.* 137 N. Y. 231, 10 L.R.A. 331, 33 Am. St. Rep. 712, 33 N. E. 378. Great English judges have deplored their inability to enforce the just American rule. Their own authorities deny it. See *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* L. R. 18 Q. B. Div. 714.

IV. Infinite confusion is produced by this anomaly: Criteria of liability formulated by the courts have generally no logical connection with the reasons for which liability is recognized by the law. All dictates of proper thought would lead to the creation of a test of liability which would be a natural result of, if not the formulated reason for, liability. In point of fact, the real

basis of the master's liability and its accepted criterion are often absolutely divorced. The same estrangement appears in the terminology employed. The standard is adopted, not in pursuance of the logical basis of liability, but to accord with surviving tradition. In the effort to achieve consistency by the establishment of one test, the courts have produced confusion worse confounded. A necessarily abbreviated review of some of the various reasons for imposing the apparent hardship of liability on a personally innocent master it is hoped will tend to clarify the situation.

Negatively, the doctrine of identification, as has been pointed out, suffices only when the tort complained of is the master's own by commission or consent, including ratification, and when the law has imposed some duty to a third person on the master, but rarely, if ever, in any other case. *Respondent superior* is not a reason, but only a dogmatic restatement of the rule. Neither the lawfulness or unlawfulness, nor the maliciousness or mischief, nor the caprice, of the servant's conduct, is an invariable reason for the master's exoneration of liability.

Affirmatively there are numerous reasons of public policy "which have had their origin in history, not in science." Sometimes one is exclusive and sufficient; sometimes many concur to produce the rule. Often the result is clear and explicit; often obscure and inferential.

(1) The fundamental underlying reason applicable in such cases from general considerations of policy and security (see Moody, J., in *Standard Oil Co. v. Anderson*, 212 U. S. at page 221, 53 L. ed. 483, 29 Sup. Ct. Rep. 252) is that announced in *Farwell v. Boston & W. R. Corp.* 4 Met. 49-55, 38 Am. Dec. 339: "This rule is obviously founded on the great principle of social duty that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." See *Anderson v. Pittsburgh Coal Co.* 108 Minn. 403, 26 L.R.A. (N.S.) 624, 122 N. W. 794.

(2) The expediency of having a remedy against someone capable of paying damages (see Willes, J., in *Limpus v. London General Omnibus Co.* 1 Hurlst. & C. 526, 17 Eng. Rul. Cas. 258; *McClung v. Dearborne*, 134 Pa. 406, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698), and of making a "master careful in the point of whom he employs" (*Bramwell, B.*, in *Swainson v. North-Eastern R. Co.* L. R. 3 Exch. Div. at page 348), has been regarded as a general consideration. It was obviously not an adequate

universal reason. *Guy v. Donald*, 203 U. S. 406, 51 L. ed. 246, 27 Sup. Ct. Rep. 63.

(3) The master is sometimes regarded as the *causa causans* of the mischief. *Grier, J.*, in *Philadelphia & R. R. Co. v. Derby*, 14 How. 487, 14 L. ed. 510. And see *Duncan v. Findlater*, 6 Clark & F. 894; *Quarman v. Burnett*, 6 Mees. & W. 509; *Mercy Docks & Harbour Board v. Gibbs*, 11 H. L. Cas. 716, 717. Negatively, the master is not answerable for a tort of one whom he cannot select, control, or discharge, as a pilot whom he is compelled to accept. *Guy v. Donald*, 203 U. S. 399, 51 L. ed. 245, 27 Sup. Ct. Rep. 63. So there has often been applied the rule of public policy, not invariably of law, that, when one of two innocent persons must suffer by acts of a third, he who has enabled such third person to occasion the loss must bear it. Essentially the basis of the later English doctrine is this: "The grounds upon which it seems to rest, as explained in cases such as *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Exch. 259, 12 Eng. Rul. Cas. 298, appear to be that the principal is the person who has selected the agent, and must therefore be taken to have had better means of knowing what sort of a person he was than those with whom the agent deals on behalf of his principal, and that, the principal have delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and who will have the benefit of his efforts if successful, should bear the risk of his exceeding his authority in matters incidental to the doing of the acts the performance of which has been delegated to him." *Hamlyn v. Houston* [C. A. 1903] 1 K. B. 81, 85, 86. And see *Houldsworth v. City of Glasgow Bank* (1880) L. R. 5 App. Cas. at page 326; *Citizens' Life Assur. Co. v. Brown* [1904] A. C. 423, at page 428. Cf. *Ploof v. Putnam*, 83 Vt. 252, 26 L.R.A. (N.S.) 251, 75 Atl. 277.

(4) Estoppel may account for liability, because the master has retained the benefit of the servant's wrong, as in some cases of fraud and conversion (see Lord Mansfield, in *Hamblly v. Trott*, Cowp. pt. 1, p. 371, 2 Eng. Rul. Cas. 1) and because of considerations of purely general policy (e. g., *New York & N. H. R. Co. v. Schuyler*, supra).

(5) The motive of the servant for the purpose or benefit of the master is regarded both as reason for and as a criterion of the master's liability. It is clear that the benefit of the master, as that expression is often used in England, is often misleading and sophistical. See *Macdonell, Mast. & S.* 242. The gist of the rule is that the motive of the servant must have been to have per-

formed his duty to, or to further the business or the interests of, the master. It is not at all necessary that the actual result should have been to the master's benefit. The cases on this subject resolve themselves into three classes: (a) There are cases in which no recognized legal obligation to the party injured has been violated, where the controlling consideration is quite frequently held to be that the servant must have acted with the intention of furthering the master's business. See *New York C. & H. R. Co. v. United States*, 212 U. S. 481-493, 53 L. ed. 613-621, 29 Sup. Ct. Rep. 304; *Kwiechen v. Holmes & H. Co.* 106 Minn. 148, 19 L.R.A.(N.S.) 255, 118 N. W. 668. But see dissenting opinion. Compare *Curran v. Olson*, 88 Minn. 307, 60 L.R.A. 793, 97 Am. St. Rep. 517, 92 N. W. 1124, with *Peter Anderson & Co. v. Diaz*, 77 Ark. 606, 4 L.R.A.(N.S.) 649, 113 Am. St. Rep. 180, 92 S. W. 861. (b) Where the law recognizes that a duty is owed to the person injured, and that duty has been violated by the servant, the liability of the master follows, irrespective of the motive of the servant or the benefit of the master. A, for example, is employed to warn persons who go over a crossing near a sharp curve of the approach of a train. He forgets to do so; he falls asleep or gets drunk, and B is run over; A's employers would, it is conceived, be answerable, even under the English law, for misconduct certainly not intended to benefit them. *Macdonell, Mast. & S.* 242. Cf. *Smith v. South Eastern R. Co.* [1896] 1 Q. B. 178. (Quare, if a servant be insane, see *Christian v. Columbus & R. R. Co.* 79 Ga. 460, 7 S. E. 216; *Id.*, 90 Ga. 124, 15 S. E. 701; and see *Cole v. Nashville*, 4 Sneed, 162.) And compare *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398, 4 L.R.A.(N.S.) 506, 45 N. E. 634, with *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 46 L.R.A. 316, 71 Am. St. Rep. 729, 54 N. E. 471. This subject has been previously discussed. (c) Two motives may coexist in the mind of the wrongdoer; one, his own personal motive, and the other, the benefit of the master and the furtherance of the master's business. Many, but not all, cases refuse to subtly distinguish between the two classes of motives, and hold the master liable unless the motive be purely and solely personal to the servant. See *Gracey v. Belfast Tramway Co.* [1901] 2 Ir. Q. B. 322; *New Ellerslie Fishing Club v. Stewart*, 123 Ky. 8, 9 L.R.A.(N.S.) 475, 93 S. W. 598; *Macdonell, Mast. & S.* collecting cases, on page 243. The cases recognizing the liability of the master despite the deviation of the servant from the prescribed journey of his vehicle are familiar illustrations of this principle. 30 L.R.A.(N.S.)

(6) The distinctive reasons for the American rule have been previously pointed out. In an increasingly large number of cases, and of classes of cases, the master is held responsible for the act of his servant as an instrumentality (cf. *Innes on Torts*), not because the servant was in any wise authorized to do the wrong, or because of his intention to benefit the master's business, but because he has violated the duty which the master owes to third persons. 27 L.R.A. 163. The rule in *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504, is properly to be regarded as of general application, not as confined to carrier cases. That criticism is merely a rule of thumb for indexing or digesting. In *Schaeffer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922, the court, in approving the doctrines in the *Craker Case*, said: "The mere fact that the conductor's duty to the passenger in that case arose out of the passenger's contract with the master does not confine the principle involved to the breaches of duty created by contract." Responsibility for damages resulting from racing sleighs on a public highway was accordingly attributed to the master. So, in *Winslow v. Commercial Bldg. Co. (Iowa)* 28 L.R.A.(N.S.) 563, 124 N. W. 320, it was held that, whenever the law imposes a personal duty upon anyone, he cannot escape responsibility therefor, for the manner of its performance, by delegating its performance to another.

V. The equivocation in the constantly recurring middle terms "authority," "scope of authority," "course of employment," and their congeners, is also a prolific source of error in decision. The reasoning of the law in this connection has been largely formal and nominalistic. It is saturated with the methods of the schoolmen. Its vices are those of medieval logic. The inevitable penalty for failure to clearly define terms has been peculiarly marked. In this connection, *Holmes, J.*, in *Guy v. Donald*, 203 U. S. 406, 51 L. ed. 247, 27 Sup. Ct. Rep. 63, has aptly said: "As long as the matter to be considered is debated in artificial terms, there is danger of being led by a technical definition to apply a certain name, . . . then to deduce consequences which have no relation to the grounds on which the name was applied." In numberless instances, gross miscarriages of justice have resulted.

(a) It has just been pointed out that "authority" is used in three senses: (1) That of real or actual authority, express or naturally implied; (2) that of fictitious or imputed authority, of which (3) apparent authority is really one variety. The ambiguity is plain. We reiterate: It is a palp-

able misnomer to hold the master liable because of the authority to the servant to do the thing which the master has openly, in good faith, and expressly, forbidden the servant to do. It is still more misleading to trace the liability of the master to the authority of the servant, when the master has not only forbidden the servant's conduct, but also when the servant has not acted in the furtherance of the master's business, nor for the protection of the master's property, nor in performance of his assigned duty, but for the servant's own benefit, and to the master's damage. Yet, as has been pointed out, in many groups of such cases the master has been held responsible. The authority of the master survives, in many cases, as a "lazy easy reason" for the master's liability.

The term "implied authority," as used generally and by the trial court here, is worse than ambiguous. It is constantly treated as including (1) authority which is naturally inferred from actual authority; (2) authority apparent from the course of dealing between the parties, or from an established and known course of business; (3) imputed by law on recognized principles, entirely apart from the actual instructions given. A jury is generally the proper judge in the first class of cases, often of the second, and rarely, if ever, of the third. The authorities have recognized the certainty of consequent errors. Macdonell, Mast. & S. 247, note "f"; 4 L.R.A. (N.S.) 492.

The subject is further confused by the fact that this law on master and servant is intimately related to, and largely, but indiscriminately, drawn from, that of principal and agent. The rule of master and servant concerns all acts of the representation which are noncontractual, and the rule of principal and agent such as are contractual. Hence, for example, an insurance solicitor who makes false representations as to the business in hand has been regarded as acting on behalf of the insurance company in a ministerial, and not in a contractual, capacity. Fraud has therefore been held to be chargeable to the insurance company, irrespective of the actual authority, and written restrictions on the agent's authority to be immaterial. Almost as many authorities have reached the opposite conclusion. See Mr. Vance in 4 Mich. L. Rev. 208-213.

(b) Quite as marked an equivocation and as great an uncertainty occurs in the current use of the middle terms "scope of authority" and "course of employment," and their antonyms and synonyms. "Much of the confusion in the decisions exists by reason of difficulty in determining what

the courts mean by the phrase 'scope of employment.' If the same meaning were attached to this phrase by all of the courts using it in deciding the point under discussion, most of the confusion would vanish, and in many instances it would probably appear that decisions apparently conflicting were in reality harmonious, since it is used to describe acts ranging all the way from one clearly within the line of duty to one entirely outside it, but committed during the continuance of the contract relationship between the master and party injured, and in violation thereof." Note in 4 L.R.A. (N.S.) 492. In England generally, and in America frequently, they are used indiscriminately. The later English cases, however, seem (for the matter is not wholly certain) to have followed the general American usage and regard the "course of employment" as indicating the widest measure of liability, as distinguished from "scope of authority," which signifies the more restricted rule. Compare later English cases previously cited and Mr. Abbott's celebrated note to *Mallach v. Ridley*, 24 Abb. N. C. 172-184, with Macdonell, Mast. & S. 241, 242.

(c) It is obvious that accurate and certain definition of these terms, "authority," "implied authority," "scope of authority," "course of employment," and the like, is a *sine qua non* to correct reasoning. Such a definition is rarely, if ever, to be found. Identically the same charge is given the jury in different jurisdictions to describe entirely different and inconsistent criteria. Miscarriage of justice is inevitable. The correct definition, it will be found, must resolve itself into an enlarged formula of the standard of liability applicable to the particular case.

VI. It follows from the previous discussion: (1) The master's liability is conditioned on proof of damage consequent on the wrong committed by one who, at the time, is a servant of the master, and under such circumstances that liability is attached to the master under the criterion prevailing in the jurisdiction and appropriate to the circumstances involved. (2) Liability may attach under the Blackstone test, the English test of motive and benefit, or the American test of duty violated. (3) No one rule of liability is the sole or invariable standard. Different specific torts, and the same tort committed under different circumstances, may involve the application of different principles. (4) The test of responsibility should be determined primarily by the reason the law assigns, and not by incidental or collateral circumstances, to be consistent with tradition. (5) The terms "implied authority," "scope of

authority," "course of employment," and the like, when used, should be clearly defined. (6) Generally little significance is to be attached to the fact that a given conclusion is or is not sustained by a group of related cases. Many decisions are negligible, because they constitute anachronisms in history, anomalies in logic, and aberrations from accepted general principles. (7) The fact that liability was attached to the master under a restricted criterion of liability is entirely consistent with holding him, under other and appropriate circumstances, responsible under an enlarged standard. (8) The tendency of the cases is to increasingly regard the question of the master's responsibility as one of fact, to be determined by the jury.

VII. In this case the first question is whether the defendant was entitled to a directed verdict; if so, plaintiff is not entitled to a new trial. Defendant argues on this appeal that "a brakeman upon a passenger train is presumed to have authority to eject from his train a person who is obviously a trespasser. But the presumption does not obtain where such person is not obviously a trespasser, and therefore the ejection of such a person would be without the scope of his authority." The subtlety, artificiality, and fallacy of this reasoning are apparent. The confusion as to authority and scope of authority is familiar. It might well be held that actual authority could be implied from the situation, but the liability of the master is independent of authority of that sort. It might exist, although the master is shown to have expressly forbidden the brakeman to determine the question or to expel the person from the train. The criterion for which defendant contends has been abandoned by courts of this and every other jurisdiction, including England and Massachusetts, for more than a century.

The question then arises whether plaintiff is entitled to a new trial. The court charged first that the master was liable within the scope of the brakeman's actual authority, express or implied. He then charged that the master was liable for what the servant did in the course of his employment, with a view to the furtherance of the master's business, and not for any purpose personal to himself, in which case the actual authority was immaterial. He finally charged that the company was not liable of the act was beyond the scope of his actual agency or authority. It is obvious that this charge submitted the Blackstone test then the later English criterion, and finally reverted to the rule of the great commentator. The anachronism is as plain as it is confusing. The criteria 30 L.R.A.(N.S.)

are hopelessly inconsistent. Under the first charge, "if the authority was expressly withheld, or its exercise forbidden, then the defendant company would not be liable." Under the second charge, "the fact that the brakeman exceeded his authority, or even disobeyed his instruction, did not alter the rule that the defendant would be liable." This court itself held, in *Brevig v. Chicago, St. P. M. & O. R. Co.* 64 Minn. 168-174, 66 N. W. 401, 404: "A railway company owes trespassers no contract duty. Neither are trespassers in a position to invoke the doctrine of apparent authority. They can only, under any circumstances, hold the company liable for acts of its agents or servants done within the scope of their actual authority, either express or implied." But in *Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co.* 106 Minn. 51-57, 1049, 18 L.R.A.(N.S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047, the court said: The "master is responsible for the torts of his servant, done in the course of his employment, with a view to the furtherance of his master's business, and not for a purpose personal to himself, whether the same be done negligently or wilfully, but within the scope of his agency, or in excess of his authority, or contrary to the express instruction of the master." The same conclusion must be reached if the question of liability be based on the violation by the servant of the duty to abstain from wilful harm the defendant owed to plaintiff.

Reversed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MAYOR AND COMMON COUNCIL OF CITY OF NEWARK

v.

GEORGE T. HATT et al.

and

CHARLES F. KILBURN et al., Pliffs. in Err.

(— N. J. —, 77 Atl. 47.)

Highway — vacation — damages.

1. Where part of a street between the two next adjacent cross streets is vacated, all of the land between the cross streets bounding on the partly vacated street suf-

Headnotes by BERGEN, J.

Note. — Right of property owner whose means of access from one direction is shut off or interfered with by closing of adjoining street or portion of street upon which he is situated.

The scope of this note, as indicated by the title, does not include a consideration of the rights of an owner of property abut-

fers a special injury, whether it abuts on the vacated portion or not, for which damages may be appraised and awarded, under a statute requiring a city to pay damages caused by the vacation of any street.

Same — railroad on vacated portion.

2. The building of a railroad embankment across such vacated portion of a street is not an element to be considered in assessing the damage resulting from the vacation in part of such street.

(Gummere, Ch. J., dissents.)

(June 20, 1910.)

ERROR to the Supreme Court to review a judgment setting aside an award by the commissioners of assessment for local improvements in Newark, of damages for

ting directly upon the portion of a street closed, so that access from that street is wholly prevented; or the rights of an owner of property abutting on a street originally a cul-de-sac, of which a portion is vacated, so as to shut off his sole means of access, although he does not abut directly on the portion closed.

For cases decided prior to those cited in this note, as to the rights of a property owner whose means of access from one direction only has been shut off or interfered with by the closing of a street or portion of a street, see note in 2 L.R.A. (N.S.) 269.

As indicated in that note, there is a conflict among the decisions of the different jurisdictions as to whether such a property owner may recover damages under the circumstances indicated. But the conflict seems to be in the application to specific facts of the generally adopted rule that, to entitle an owner to damages, he must show a violation of some right of his apart from that which he has as one of the public,— a loss or damage different in kind, and not merely in degree, from that suffered by the rest of the community.

Thus, in *Ponischil v. Hoquiam Sash & Door Co.* 41 Wash. 303, 83 Pac. 316, it is held that the owner of a city lot at the entrance of a cul-de-sac formed by the vacation of a portion of the street on which it abuts is not entitled to damages for the vacation, unless special damages are sustained, different in character from those suffered by the public at large; and that no such special damages are shown where the portion of the street closed has never been opened for travel, the business portion of the city is in the opposite direction, and the value of the lot in question has not been lessened.

But in *Vanderburgh v. Minneapolis*, 98 Minn. 329, 6 L.R.A. (N.S.) 741, 108 N. W. 480, it is held that an owner of lots on a city street which has been vacated from the line of such lots to another street, a portion of which was also vacated and which bounded on one side the block in which said lots are located, thus cutting off his means of access from that direction, and leaving his

injuries to defendants' land caused by the vacation of a portion of a street. Reversed.

The facts are stated in the opinion.

Messrs. Riker & Riker for plaintiffs in error.

Mr. Herbert Boggs for defendant in error.

Bergen, J., delivered the opinion of the court:

The commissioners of assessment for local improvements in the city of Newark made an award for damages to certain landowners arising from the vacation of several public highways; among them were George T. Hatt, Addison Brown, Charles F. Kilburn, and Walter D. Osborne. The mayor and

property fronting on a cul-de-sac, suffers an injury special and peculiar to his property, not common to the public at large, and is entitled to compensation under a constitutional provision which forbids the taking or damaging of private property for public use without compensation. The court said: "This question has been before many of the courts in other states having constitutional provisions similar to our own, and the general trend of the decisions is that, for the vacation of a public street under circumstances like those disclosed in this case, the property owner is entitled to compensation."

In some of the decisions, as in *NEWARK v. HATT*, and apparently in *Vanderburgh v. Minneapolis*, supra, the question whether a property owner has suffered a special injury from the closing of an adjoining street or a portion of the street on which he is situated, for which injury he is entitled to recover damages, turns upon the question of fact as to whether or not there is an intervening cross street between his property and the portion of the street closed.

Thus, in *Henderson v. Lexington*, 132 Ky. 390, 22 L.R.A. (N.S.) 20, 111 S. W. 318, it is held that the property owners entitled to compensation for the vacation of a street or portion of a street include all those, and only those, abutting on such street within the block or blocks in which the closed portion lies, not necessarily limited to those abutting on the vacated portion only.

And under a statute providing for damages for the vacating of streets, an owner of lots abutting on a city street sustains no injury which will entitle him to recover damages for the vacation of a portion of such street within another block, with a cross street or streets intervening, so that access to the lots in question is not cut off from any direction, but it is merely made necessary to travel farther than before to reach them from points in one direction beyond the portion vacated. Re *Ruscomb Street*, 30 Pa. Super. Ct. 476.

But where the vacation of a part of a street leaves to lots on the remainder of the street but one mode of access from the

common council of the city of Newark being dissatisfied with the award, removed the proceedings to the supreme court by writ of certiorari, in which court the award to the aforesaid landowners was set aside (see 77 N. J. L. 48, 71 Atl. 330), which judgment was brought here on error by Kilburn and Osborne, the other owners not joining in the writ. The facts shown in the record are that Lawrence street in Newark, previous to these proceedings, was a public highway connecting Hamilton street with Mechanic street, and that Osborne and Kilburn owned lands fronting on it; the Osborne tract being on the corner of Mechanic and Lawrence streets, with a frontage of 64 feet on the latter, and 107 feet along Mechanic street, the Kilburn tract having a frontage

of 50 feet on Lawrence street adjoining the Osborne lot, and it also extended along the side of the Osborne lot to Mechanic street. A railroad company, being the owner of all the land abutting on Lawrence street between the Osborne and Kilburn tracts and Hamilton street, desired to elevate its road-bed, and the city, by ordinance, vacated all of Lawrence street from the southerly line of the Kilburn lot to Hamilton street; the effect being to make that part of Lawrence street upon which the lots of these two owners abutted, a cul-de-sac. The railroad company elevated its road to the height of 8 feet 6 inches, and built a concrete retaining wall along the southerly Kilburn line and across Lawrence street, thus effectively closing it to the south of the lands of Os-

general system of street in the vicinity, whereas before the vacation there were two, damages will be allowed to the owners of such lots. On Reargument, 33 Pa. Super. Ct. 148.

In *Highbarger v. Milford*, 71 Kan. 331, 80 Pac. 633, an injunction action to restrain the closing of certain streets, it was held that an owner's right to pass freely in all directions to and from his premises by means of streets constituting the highway boundaries of the block in which his land is situated, at the time he purchased it, is a right in which he has a greater and more vital interest than has the general public.

And in *Reis v. New York*, 188 N. Y. 53, 80 N. E. 573, affirming 113 App. Div. 464, 99 N. Y. Supp. 291, a suit to restrain the continued maintenance and further erection of obstructions in the vacated portion of a street, it was said that a city having statutory authority to close streets may close a portion of a street between two cross streets without liability to make compensation for damages to an owner of property not abutting on the portion of the street closed, but on portions thereof in the two next adjacent blocks, so that the ways of access to such property are merely made less direct from certain points.

Under a statute providing for the compensation of owners of property "injuriously affected," an owner of property on one side of a street has been held to be entitled to compensation for the closing of a street running at right angles to the first street from opposite the property in question. *Re Tate*, 10 Ont. L. Rep. 651.

And so, also, an owner of property abutting on a highway was held to be entitled to damages for the closing of a portion thereof immediately adjacent to one of his boundaries, so that a road was left across the front of his lot, but terminated at that boundary, shutting off access from that direction. *Re Brown*, 14 Ont. L. Rep. 627.

But in *Southern R. Co. v. Ables*, 153 Ala. 523, 45 So. 234, it was held that an owner of property abutting on a street, but not on the particular part of the street vacated, is not within a constitutional provision for 30 L.R.A. (N.S.)

compensation to owners of property taken or injured for public use, although the vacated portion of the street is adjacent to his property, and the vacation entirely shuts off his means of access from that direction.

And an owner of property which does not abut on the street vacated, or if so, lies beyond two avenues, with reference to the vacated portion, so that there are numerous convenient and reasonable ways of ingress to and egress from such property, does not suffer a "taking" of a private right of property by such vacation. *Jackson v. Birmingham Foundry & Mach. Co.* 154 Ala. 464, 45 So. 660.

And where one end of an alley between two streets is closed, an owner of lots fronting on one of said streets and abutting on such alley, but not on the portion thereof closed, is not entitled to compensation for such closing, as he is not deprived of a convenient and reasonable outlet to neighboring thoroughfares, and only abutting owners are within the constitutional provision requiring compensation for property taken or injured. *Hall v. Atlanta, B. & A. R. Co.* 158 Ala. 271, 48 So. 365.

In *Enders v. Friday*, 78 Neb. 510, 111 N. W. 140, 15 A. & E. Ann. Cas. 685, it was held that an owner of property abutting on a city or village street is not entitled to damages on account of the vacation of a portion of such street other than the portion upon which his property abuts.

And *Lee v. McCook*, 82 Neb. 26, 116 N. W. 955, an injunction action against city authorities to restrain the passage of an ordinance closing a certain street, following *Enders v. Friday*, supra, holds that an owner of property no part of which abuts upon or is adjacent to a roadway sought to be vacated suffers no wrong that would be actionable at law for damages on account of the vacation of such roadway; the only injury he sustains is such as is common to the community generally; the nature of the injury is no different from that sustained by other persons.

In *Poythress v. Mobile & O. R. Co.* 92 Miss. 638, 46 So. 139, a bill for an injunction to restrain the closing of a portion of

borne and Kilburn, and preventing all access to their lands over Lawrence street from Hamilton street.

The charter of the city of Newark, P. L. 1862, p. 333, provides that when the city shall determine, by ordinance, to vacate any street, "and any land will be damaged by such vacating," the damages, if the city and owner cannot agree, shall be ascertained and awarded by commissioners appointed for such purpose. In the present case such award was made, and is now here under review. The record shows that the commissioners allowed damages to Osborne and Kilburn, estimated to result from the vacation of Lawrence street to the extent it was vacated, and also from the elevation of the roadbed of the railroad on their own land immediately adjoining the Kilburn tract and across Lawrence street. The supreme court set aside the award upon two grounds: First, because the commissioners awarded damages which they estimated to result to the land from the elevation of the railroad;

and second, that the lands not abutting on the vacated portion of the street were not lands which "will be damaged by such vacating" of the street, within the meaning of the statute.

We agree with the supreme court that it was improper for the commissioners to consider the elevation of the railroad as an element of damage; for that was no part of the street vacation, but a lawful use by the landowner of its property. The other question is more difficult because of a conflict of judicial opinion; authority entitled to the highest consideration supporting each side of the general proposition. The question has not been distinctly passed upon by this court, and we are at liberty to adopt that rule which appears to use to be most reasonable and just.

The right of the state to destroy public improvements of this class without compensation is not limited by the Constitution, and except for the statute, as expressed in the charter of the city, this street

a certain street, it was held that an owner of property abutting on the street, but not on the portion thereof proposed to be vacated, is not an abutting landowner on the street, within the meaning of the Mississippi Code, entitling him to have compensation first made to him before the closing of the street. The court said, however: "If the complainants have suffered any special damage by the closing of this street, not shared in by all the public, they have recourse against the municipality; but, in the meantime, it is within the power of the municipality to close the street, if, in the judgment of the municipality, it is dangerous to pedestrians and others."

And in *Alabama & V. R. Co. v. Turner* (Miss.) 52 So. 261, a suit brought after the closing of a street and the placing of an obstruction on the closed portion, to recover damages sustained by reason of such closing and obstruction, where the situation of the property with reference to the closed portion of the street seems to have been very similar to that in *Poythress v. Mobile & O. R. Co.* supra, it was held that an owner of property on a continuous street which, though its two ends bore different names, formed a continuous and unobstructed way to and from and in front of his property into a town and across a railroad right of way, is an "abutting owner," within the meaning of the same statute, and as such entitled to compensation in advance of the closing of a portion of the street adjacent to his property, whereby his means of access in one direction is entirely cut off, and he is compelled to take a very circuitous route to reach it.

In *People ex rel. Bushnell v. Newell*, 131 App. Div. 555, 115 N. Y. Supp. 399, it was held that an owner of property not adjacent to any part of a discontinued highway, but on a highway to which the discontinued one

ran perpendicular, is not entitled to damages for the discontinuance, his land not being "affected thereby," within the meaning of the section of the highway law providing for discontinuing a road. The court said: "The inconvenience he suffers by reason of the discontinuance comes to him in common with the general public whose business or pleasure might lead them to continue to use the highway, if it had not been discontinued."

So, a statute permitting a recovery of damages for the closing of a street, by reason of rights or interests therein taken, affected, or damages, does not authorize the payment of damages to an owner of property which does not abut upon any part of the street affected by the closing, and which is bounded by other streets. *Re West 151st Street*, 123 N. Y. Supp. 343.

Where a street is laid out upon a city plan up to the line of a railroad on each side, but not across the right of way, and the crossing is merely permissive to the public by the railroad company, an owner of property abutting on the portion of the street on one side of the railroad is not entitled to recover damage for a vacation of the portion on the other side, "for if the public had no legal right to cross the right of way of the railroad at the point involved, it would follow that any damage which the property owners west of the railroad suffered by reason of the striking of the street from the plan would not be different from that of the public at large." Nor is an owner entitled to recover damages for such vacation, where there is no evidence to show that the crossing on the vacated side joined any well-defined road which at any time corresponded with the platted lines of the street on that side. *Siddall v. Philadelphia*, 225 Pa. 55, 73 Atl. 1013.

A. C. W.

could have been vacated without the slightest consideration of its effect upon any land lying along it, or the payment by the city of compensation to any landowners for damages. But this statute requires the city to ascertain, by agreement, or appraisalment by commissioners, the extent to which any land will be damaged by the vacation of a street, which damage the city is required to pay to the owner. It is not such damage as the owner may suffer in common with the public, but the impairment of the value of the land caused by the vacation of the street.

The question now presented is whether land abutting on a public highway over which access may be had to it from intersecting streets at each end of the block in which it is located "will be damaged," within the meaning of our statute, by the vacation of a portion of the abutting street, so that direct access to it from one of such intersecting streets is prevented, although the land does not adjoin the part vacated, but only abuts upon a cul-de-sac created by the vacation; or, are lands so affected not damaged in such peculiar or special manner as to justify the ascertainment and awarding of damages for the consequent impairment of their value. In Massachusetts the latter rule seems to have been adopted.

In *Smith v. Boston*, 7 Cush. 254, suit was brought by a landowner for damages claimed to have resulted from the vacation of a portion of Market street. Some of the land was on Market street, but part was not, and they were all accessible by other public streets. At the trial it was held that plaintiff could not prove damages because neither of his estates abutted on that part of Market street which was vacated, and the ruling was sustained on error in the supreme court. But the court said: "We do not mean to be understood as laying down a universal rule that in no case can a man have damages for the discontinuance of a highway, unless his land bounds upon it; although as applicable to city streets intersecting each other at short distances, it is an equitable rule." It did not appear in this case that the plaintiff's land was in the block along which a portion of the street was vacated; the inference to be drawn from the case, as reported, is that such was not the case. This case and others approving it were followed in *Stanwood v. Malden*, 157 Mass. 17, 16 L.R.A. 591, 31 N. E. 702, the court saying: "We express no opinion as to how we should have decided any of the foregoing cases, had they arisen before us for the first time. It is enough to say that *Smith v. Boston* is intelligible, even if with justice it might have been more liberal." The Massachusetts rule has ap-

parently been adopted by the courts of New York. This rule, as I understand the reasoning, rests upon the ground that in the cases decided the lands affected by the vacation suffered damage of the same kind as that sustained by lands held by the general public, differing only in degree, and therefore too remote.

In *Chicago v. Burecky*, 158 Ill. 103, 29 L.R.A. 568, 49 Am. St. Rep. 142, 42 N. E. 178, the supreme court of Illinois had before it a case similar to that at present under consideration. There the plaintiff owned lands abutting on a street extending from one intersecting street to another, and the city vacated a part of that portion of the street, but not the part upon which plaintiff's land abutted; the vacated part, however, beginning at the corner of plaintiff's land, as in this case. In determining that the plaintiff had a right of action, the court said: "What was originally a thoroughfare along the entire line of plaintiff's property fronting on Sixty-first street was, by the action of the town, turned into a blind court. No other property was damaged or affected in the same way. . . . The property of the general public was not affected like plaintiff's, nor were the damages sustained by the public of the same kind."

In *Re Mellon Street*, 182 Pa. 397, 38 L.R.A. 275, 38 Atl. 482, it was held that, although the land alleged to be damaged did not abut on the vacated portion of the street, the effect of the vacation was to create a cul-de-sac, and therefore the land was subject to special damage, and the owner entitled to compensation therefor.

In *Dodge v. Pennsylvania R. Co.* 43 N. J. Eq. 351, 11 Atl. 751, the complainant filed his bill to restrain the Pennsylvania Railroad Company from obstructing Green street with an embankment at a point where it had been vacated for the purpose of allowing the company to elevate its railroad. The questions raised there are not pertinent to this issue, and the case is referred to only because it is relied upon by the defendant in error. But whatever may have been said by the court in deciding that case must be read in connection with the fact stated in the opinion that complainant's title was not to lands "in that part of Green street, extending both north and south of the lands conveyed to the two next adjacent cross streets, but in that part of Green street which lay entirely beyond the two next adjacent cross streets," thus showing that access to it was not restrained to a cul-de-sac.

In *State, Kean, Prosecutrix, v. Elizabeth*,

54 N. J. L. 462, 24 Atl. 495, it appeared that Schiller street crossed York street, on which prosecutor's land was located, between the land of the prosecutor and the vacated portion of York street, and the proceeding was to test the power of the city to vacate, no question of damages was presented, and in this court on error, 55 N. J. L. 337, 26 Atl. 939, the opinion of Chancellor, then Mr. Justice Magie, is confined to the question of the power of the city to pass the ordinance under review.

There is nothing to be found in the adjudged cases in this state inconsistent with the view that the right of the public in an open highway is of passage over it, and that this right the abutting owner has in common with the public, and suffers in common with it when deprived of such right by an obstruction to that use, and that there is in addition to this, at least, a special right of access to his land from the next adjacent intersecting streets, over the highway on which it bounds, and that such right of access, in either direction the street allows, is a special advantage to the lands lying on it between any two intersecting streets. It is not a question whether the land adjoins the vacated portion or not, but rather, Will its value be impaired if deprived of one of the immediate means of access to it? We are of opinion that such right of access is of special advantage to all the land abutting a highway on a block between two streets, and that the vacation of a part of such street diminishes the value of all the land between the next adjacent cross streets, and that, in appraising the damage to the lands of the plaintiffs in error, the commissioners of assessment should consider to what extent, if any, such lands are diminished in value because deprived of one means of access, but should not allow any damages on account of the track elevation. The views adopted by the supreme court resulted in denying to Messrs. Kilburn and Osborne any right whatever to damages for the vacation of Lawrence street. Accordingly, the judgment of that court in setting aside the award made by the commissioners of assessment did not provide for any new assessment to be made in favor of these land-owners.

The judgment of the Supreme Court should therefore be reversed, and a new judgment entered setting aside the award of damages under review by that court, and referring it back to the assessment commissioners to make a new award to the plaintiffs in error, Kilburn and Osborne, for the damages represented by the diminution of the market value of their lands, caused by the vacation of the street, but without al-

lowance for any diminution of value caused by the track elevation.

The judgment under review is reversed.

Gummere, Ch. J., dissents.

OKLAHOMA SUPREME COURT.

T. J. WALKER, Plff. in Err.,
v.

C. J. BOWMAN et al.

(— Okla. —, 111 Pac. 319.)

Action—against liability of title abstracter—when accrues.

A right of action against an abstracter for damages resulting from incompleteness, imperfections, or error in an abstract furnished by him, accrues at the time the examination is made and reported, and not when the error is discovered and the damages resulting therefrom have been paid.

(September 13, 1910.)

ERROR to the District Court for Oklahoma County to review a judgment sustaining a demurrer to the petition in an action brought to recover damages alleged to have been caused by errors in an abstract of title furnished by defendants. Reversed.

The former opinion in this case, rendered November 11, 1909, and reported in 105 Pac. 649, affirming the decision below, having turned upon the question of damages, and having been withdrawn upon rehearing, is of no value upon the question involved upon the present re-hearing, and is therefore omitted.

The other facts are sufficiently stated in the opinion.

Mr. S. A. Horton, for plaintiff in error:

Plaintiff stated a cause of action by alleging that she gave W. T. Scott a warranty deed, that W. T. Scott had redeemed the land from an existing lien, and that she had thereby become liable to him, it being sufficient that she becomes liable to pay.

Abilene v. Wright, 4 Kan. App. 708, 46 Pac. 715; Donnelly v. Hufschmidt, 79 Cal. 74, 21 Pac. 546; Frankfort & V. Traction Co. v. Hulette, 32 Ky. L. Rep. 732, 106 S. W.

Headnote by DUNN, Ch. J.

Note.—The question when an action accrues against abstracters for making an incorrect report or abstract of titles is discussed in a note to Aachen & M. F. Ins. Co. v. Morton, 15 L.R.A. (N.S.) 160. A note to Equitable Bldg. & L. Asso. v. Bank of Commerce & T. Co. 12 L.R.A. (N.S.) 449, discusses the general question of liability of title abstracter.

1193; *Kirn v. Cape Girardeau & C. R. Co.* 124 Mo. App. 271, 101 S. W. 673; *Stanton v. French*, 83 Cal. 194, 23 Pac. 355; *Swartz v. Ballou*, 47 Iowa, 188, 29 Am. Rep. 470.

Mr. H. R. Winn, for defendants in error:

In an action against an abstractor for incompleteness, imperfection, or error made in compiling an abstract, the petition must allege the incompleteness, imperfection, or error, and actual damage to the complainant by reason thereof.

Webb's Pollock, Torts, pp. 7, 215, 216; *Cooley, Torts*, 66, 67, 98; *Allen v. Clark*, 7 L. T. N. S. 781; *Dodd v. Williams*, 3 Mo. App. 281; *Morange v. Mix*, 44 N. Y. 315; *United States Wind Engine & Pump Co. v. Linville*, 43 Kan. 455, 23 Pac. 597; *Kimball v. Connolly*, 3 Keyes, 57; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; *Fish v. Kelly*, 17 C. B. N. S. 194; *Shearm. & Redf. Neg.* § 215; *Kahl v. Love*, 37 N. J. L. 5; *Houseman v. Girard Mut. Bldg. & L. Asso.* 81 Pa. 256; *Chase v. Heaney*, 70 Ill. 268; *Symms v. Cutter*, 9 Kan. App. 210, 59 Pac. 671; *Mallory v. Ferguson*, 50 Kan. 685, 22 L.R.A. 99, 32 Pac. 410.

Where the gist of the action is pecuniary damage, and no such damage has been sustained by plaintiff, the verdict should be for defendant, and not for nominal damages.

Sedgw. Damages, p. 45, note 2, pp. 55, 56; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *Hobson v. Thelluson*, L. R. 2 Q. B. 642; *Webb's Pollock, Torts*, 7, 215, 216.

If there is in fact an error in the abstract, and through reliance upon it, the customer has sustained injury, he may hold the abstractor liable therefor to the extent only of the injury sustained.

Equitable Bldg. & L. Asso. v. Bank of Commerce & T. Co. 118 Tenn. 678, 12 L.R.A. (N.S.) 449, 102 S. W. 901, 12 A. & E. Ann. Cas. 407; *National Sav. Bank v. Ward*, supra; *Banker v. Caldwell*, 3 Minn. 94, Gil. 46; *Kane v. Rippey*, 22 Or. 296, 23 Pac. 180; *Heinsen v. Lamb*, 117 Ill. 549, 7 N. E. 75; *Wacek v. Frink*, 51 Minn. 282, 38 Am. St. Rep. 502, 53 N. W. 633; *Young v. Lohr*, 118 Iowa, 624, 92 N. W. 684; *Rankin v. Schaeffer*, 4 Mo. App. 108; *Keuthan v. St. Louis Trust Co.* 101 Mo. App. 1, 73 S. W. 334; *Dickle v. Nashville Abstract Co.* 89 Tenn. 432, 24 Am. St. Rep. 616, 14 S. W. 896.

Dunn, Ch. J., delivered the opinion of the court:

This case presents error from the district court of Oklahoma county, and is an action brought by plaintiff in error as plaintiff, against C. J. Bowman and G. W. Stephenson, doing business under the firm name of Bowman & Stephenson, and certain sure-

ties on their bond as abstractors. To the petition a demurrer was filed on the ground that the same did not state facts sufficient to constitute a cause of action, which the court sustained, from which action the appeal is prosecuted. From the petition it appears that the plaintiff employed and paid the principal defendants herein to prepare for her an abstract to a certain tract of land which she desired to purchase. She procured the abstract for the purpose of ascertaining the condition of the title. Prior to that date an attachment had been run against the land, and was an existing lien at the time the abstract was prepared and delivered, but was not shown on the abstract. Thereafter plaintiff, relying on the correctness of the abstract, purchased the land, and subsequently sold it, giving a warranty deed thereto. Her grantee was compelled, in order to retain and protect his title, to pay off the attachment lien above mentioned, whereupon plaintiff became liable on her deed to her grantee for the amount of his damages. The petition fails to disclose that plaintiff has paid the damages incurred by her grantee, and it is the contention of counsel for defendants herein that, until plaintiff has made that payment, no cause of action accrues, contending that she had not been damaged within the meaning of the statute. Counsel for plaintiff contends that the damage accrued at the time the abstract was delivered, and the issue thus made is the one presented to us for our determination.

Section 1, chap. 1, Comp. Laws (Okla.) 1909, provides for a bond to be given by persons who engage in the making of abstracts, to contain the following provision that they (the abstractor and his bondsmen) "will pay all damages that may accrue to any person by reason of any incompleteness, imperfections, or error in any abstract furnished by him." The word "accrue," as used in that sentence, means to become a present and enforceable demand. *McGuigan v. Rolfe*, 80 Ill. App. 256, 259. "A cause of action accrues from the time the right to sue for the breach attaches." *Amy v. Dubuque*, 98 U. S. 470, 476, 25 L. ed. 228, 231; 1 Words & Phrases, p. 101. And the rule on the question presented, as adduced from the authorities, is stated by 1 Cyc. Law & Proc. p. 217, as follows: "The right of action against an abstractor for damages resulting from an incorrect abstract accrues at the time the examination is made and reported, and not when the error is discovered or damages result therefrom." See also cases cited under note 39. The following cases cited to sustain the text, and others, are noted as follows: *Provident Loan Trust Co. v. Wolcott*, 5 Kan. App. 473, 47

Pac. 8; Schade v. Gehner, 133 Mo. 252, 34 S. W. 576; Rankin v. Schaeffer, 4 Mo. App. 108; Security Abstract of Title Co. v. Longacre, 56 Neb. 469, 76 N. W. 1073; Brown v. Sims, 22 Ind. App. 317, 72 Am. St. Rep. 308, 53 N. E. 779; Russell & Co. v. Polk County Abstract Co. 87 Iowa, 233, 43 Am. St. Rep. 381, 54 N. W. 212; Lattin v. Gillette, 95 Cal. 317, 29 Am. St. Rep. 115, 30 Pac. 545.

In the case of Rankin v. Schaeffer, supra, it is said: "The examiner of titles does not warrant. He is not liable, except for negligence or want of necessary skill and knowledge. The contract made by him when he receives a fee and examines a title is not one of indemnity, but a contract that he will faithfully and skilfully do his work; and this contract is broken, and an action lies for the breach of it, so soon as he, through negligence or ignorance of his business, delivers a false certificate of title. Where indemnity alone is expressed, it has always been held that damage must be sustained before a recovery can be had; but, where there is a positive agreement to do the act which is to prevent damage to plaintiff, there the action lies if defendant neglects or refuses to do the act. *Re Negus*, 7 Wend. 499; *Ham v. Hill*, 29 Mo. 276; *Rowsey v. Lynch*, 61 Mo. 560." Also, in such a case, where the petition alleges the breach of duty and also special and consequential damages, the breach of the duty, and not the consequential damage, is the cause of action. *Moore v. Juvenal*, 92 Pa. 484.

The petition alleges the insolvency of plaintiff's grantor, and also with some detail sets up her liability on a warranty deed which she had made to the property, and under the authorities above noted, we think there can be no doubt about the liability of the defendants to her for the damage which she suffered by reason of any negligence on their part in making for her a faulty and erroneous abstract. If an abstracter could not be held liable under conditions presented and insisted on in this case, there would be practically no protection in an abstract to those who secure and pay for the same, for the purpose of relying thereon in the purchase of real estate.

The former opinion of this court in this case, reported in 105 Pac. 649, is reversed. The cause is accordingly remanded to the District Court of Oklahoma County, with instructions to set aside the judgment heretofore rendered, and proceed in accordance herewith.

Turner, Kane, Hayes, and Williams,
JJ., concur.
30 L.R.A. (N.S.)

VIRGINIA SUPREME COURT OF APPEALS.

SALLIE G. WAGGONER, Appt.,

v.

JOHN P. WAGGONER et al.

(— Va. —, 68 S. E. 990.)

Will — property of devisee — election.

1. Under a will devising by one clause the homestead in which testator had only an undivided moiety, the other moiety belonging to his wife, to her for life, and by other clauses giving the rest of his property to her for life, she is required to elect between her right in the homestead and her rights under the will.

Same — mistake of fact — effect.

2. The claim of a widow owning a half interest in the homestead property, under the will of her husband, who owned the other half interest, which gives her a life estate in the whole homestead and in other property, does not amount to an election which will destroy her individual right, if she was ignorant of the fact that loss of her right would result from claiming under the will, where the other party can be placed in substantially the same situation as if no election had been attempted, since her act must be regarded as under misconception of fact.

Election — statute — time limit.

3. A statute requiring a widow to renounce the provisions of her husband's will within a certain time after his death, if at all, has no application to her duty to elect between the will, which attempts to dispose of her individual property and her independent rights in such property.

(September 15, 1910.)

Note. — Devise or bequest of property in which testator had but a part interest as putting co-owner, who is a beneficiary, to his election.

This note aims to include only those cases in which it appeared that the testator had a devisable interest in the property which he attempted to dispose of, and not those where his interest in the property expired at his death, as, for example, where the property sought to be disposed of was community property, or was held by the testator and beneficiary as tenants by the entirety.

All the authorities are agreed upon the rule of law applied in the above decision that the doctrine of election is not applicable to a gift of property by a testator having only a part interest therein, unless he has so expressed his disposition thereof as to show an attempt to give the whole of such property.

One of the clearest expressions of this rule of law is in *Pratt v. Douglas*, 38 N. J. Eq. 516, where the court said: "Where a testator has only a limited interest in property he affects to dispose of by his will, as, for instance, an undivided share,

A PPEAL by complainant from a decree of the Corporation Court of the City of Roanoke in defendants' favor in a suit to construe the will of John P. Waggoner, deceased, to recover certain advances alleged to have been made to decedent's estate, and to partition such estate. Reversed.

The facts are stated in the opinion.

Messrs. Hall, Woods, & Jackson for appellant.

Messrs. C. B. Moomaw and H. M. Moomaw, for appellees:

He who accepts a benefit under a deed or will must adopt the contents of the whole instrument, conform to all its provisions, and relinquish every right inconsistent with it.

Penn v. Guggenheimer, 76 Va. 846.

The party must elect where it appears that there has been a disposition of the property of another to a third party, where

there is a valid gift of the testator's property to such third person.

Eaton, Eq. Jur. 180-185; Pom. Eq. Jur. §§ 464, 489; Penn v. Guggenheimer, 76 Va. 839; Kinnaird v. Williams, 8 Leigh, 400; Wilson v. Townshend, 2 Ves. Jr. 697.

To permit complainant to claim her undivided half interest in lot 15, section 9, and also a life estate in the residue of lot 15, section 9, and a life estate in lot 14, section 9, which was a part of the home property, and her life estate in the other property described in the will, would have the effect of destroying the whole scheme of the will. Craig v. Walthall, 14 Gratt. 518.

The petitioner had made an election under the will.

Penn v. Guggenheimer, 76 Va. 850; Adsit v. Adsit, 2 Johns. Ch. 448; 2 Story, Eq. Jur. §§ 1097, 1098.

there is a distinction between a gift in general words of description, such as 'all my lands,' or 'all my estate,' and the like, and a gift of specific property. In cases of the first class, an obligation to elect does not arise, for the testator's language can have full effect when applied only to his share or interest, and he is presumed to have intended to give only the property he had power to dispose of. In cases of the second class, it cannot be said that, upon every specific devise or bequest, a duty to elect arises. A case for an election by the co-owner of the property so given, who is a beneficiary under the testator's will, will be presented only where the testator's gift of it to another is so expressed by words of description as to import an intent to give to the latter the whole of the common property in its entirety."

And in Ditch v. Sennott, 117 Ill. 363, 7 N. E. 636, it was held that while it was true that the doctrine of election has no application to a case where the testator had but a part interest in the estate, and such interest only was devised, yet if it was apparent from the terms of the will that the intention of the testator was to devise the whole of the estate, including the interest of his co-owner, then the doctrine of election would apply, if the latter were a devisee under the will.

And in Penn v. Guggenheimer, 76 Va. 830, it was held that where the testator disposed of property not entirely his own, the presumption was that he intended to dispose of his share, and nothing more, unless the intention was "clearly manifested by demonstration plain, or necessary implication, on the part of the testator, to dispose of the whole estate." To quote further from the opinion: "Where the testator proposes to give the whole thing itself, using language which, by reasonable intention, must necessarily describe and define the whole corpus of the thing in which his particular interest exists as a distinct and identified piece of property, then an intention to

bestow the whole, and not merely the testator's individual share, must be inferred, and a case for an election arises."

And in Miller v. Thurgood, 33 Beav. 406, it was declared to be the rule that if a testator having an undivided interest in a particular property devised that property specifically to his co-owner, a case of election arose, and the devisee must choose between his own interest in the property and the interest he took under the will; but that if the testator did not dispose of it specifically, but by general words, such as, "all my land and hereditaments," or the like, no case for election arose, because there was other property of the testator's sufficient to satisfy the devise.

And the application of this rule was thus illustrated in Sanford v. Jackson, 10 Paige, 266: "If the testator should devise all his real and personal estate to his children, in general terms, to be equally divided between them, such a devise would not be held to include a particular estate which one of the children had in some of his father's real property, so as to compel him to elect between that particular estate and the portion devised to him by will. On the other hand, if the devise to the children was of a particular farm, and of all the testator's personal property, to be equally divided between them, one of the children would not be permitted to set up a particular estate in that farm as belonging to himself, and also to have an equal division of all the rest of the property except that particular estate, which was neither excepted nor referred to in the will, but he would be put to his election."

In accordance with these principles it has been held that a co-owner of property devised was put to his election between his own interest in the property and the provision for his benefit in the will:

—where the testator, in disposing of the property in which a legatee claimed an interest as a partner, described it "as my drug business," it appearing that the mani-

Buchanan, J., delivered the opinion of the court:

John P. Waggoner, the husband of the appellant, departed this life in September, 1904, testate. At the time of his death he was the owner of some personal estate, but not sufficient to pay his debts. He was also the fee simple owner of a house and lot, of a lot adjoining and used with the dwelling house in which he resided at the time of his death, and an undivided half interest in the dwelling house property; the other half being owned by his wife. He left a widow, the appellant, three children by a former wife, who were adults, and one child, an infant, by his last wife. By his will he disposed of all of his property in the following manner:

"First: After all my lawful debts are paid and discharged, I give and bequeath to my beloved wife, **Sallie G. Waggoner**, the dwelling house and land connected therewith which we now occupy as a homestead, and everything in and about said premises, the above to be held by her during her life time, or such portion thereof as she may remain my widow.

"Second: She shall have all moneys or any other property that may at any time come into my possession, this all to be used by her for the benefit of herself and my legal minor heirs, and at her death or marriage, all property of whatever kind shall be used for the benefit of my legal minor heirs. And after all my children shall have arrived at the age of twenty-one years, all property of whatso-

ever kind shall be equally divided among the same or their legal heirs (provided, however, that my wife, **Sallie G. Waggoner**, still survives me and remains my widow). The property shall not be divided so long as she shall live and remain as above stated.

"Third: I hereby appoint my wife, **Sallie G. Waggoner**, to be my executrix. And in case of her death or marriage, then the oldest of my surviving sons shall act as my executor."

The main question involved in this case depends upon the construction to be placed upon the first clause of the will. If by that clause the testator intended to devise the whole of the dwelling house or homestead property to the appellant, and not merely his undivided interest therein, it was incumbent upon the appellant to make her election, since she cannot claim both her own estate in that property and the provisions made for her by the will; for it is well settled that he who accepts a benefit under a will must accept the contents of the whole instrument, conforming to all its provisions, and relinquishing every right inconsistent therewith. *Penn v. Guggenheimer*, 76 Va. 839, 846, 847, and authorities cited. But, in order to make a case of election, it is equally well settled that the intention of the testator to give that which is not his own must be clear and unmistakable. It must appear from his language, which is unequivocal and which leaves no room for doubt as to the intention of the

test intention of the testator as to such property could not possibly have operation if the adverse claim of a partnership interest asserted by the legatee were established. *Lamar v. McLaren*, 107 Ga. 591, 34 S. E. 116;

—where the land devised was described as containing the amount of acreage of the whole tract, though it was further described as "to include all the land I own in" such tract. *Ditch v. Sennott*, supra;

—where there was a bequest of the proceeds "from all insurance policies on my life, except from the policies wherein my daughter (naming her) is the beneficiary," it appearing that but one of the policies was payable to the estate, and that one of the beneficiaries of the two policies in question (which were other than those expressly named in the exception) was a child who was a beneficiary under the will. *Van Schaack v. Leonard*, 164 Ill. 602, 45 N. E. 982;

—where the land devised was described as that purchased from its former owner, naming him, and was specifically designated by its number in the plan of the town, so that, in the words of the court, it was "impossible to satisfy the terms of its description without supposing that she intended to pass the lot as an entirety." *Isler v. Isler*, 88 N. C. 581;
30 L.R.A. (N.S.)

—where the testator owned but a third of the property in question, which was known as the "home place," the other two thirds belonging to his wife, and in disposing of it by will, used the following language: "It is my will and desire that my wife should retain the home place, and at her death it should be the property of my son, . . . which I hereby give to him, his heirs, and assigns forever." *Penn v. Guggenheimer*, supra;

—where the will described the property in question as "my farm," and went on to state that the devise thereof to his wife (the co-owner) should "be so construed as to give her only an estate for her natural life, and I devise and bequeath to my beloved daughters . . . said real estate after the death of my said beloved wife." *Tolley v. Poteet*, 62 W. Va. 231, 57 S. E. 811;

—where the property devised was described as "all that my freehold messuage or tenement, with the garden and all and singular, and the appurtenances thereunto belonging." *Padbury v. Clark*, 2 Macn. & G. 298;

—where the will read: "All that his messuage, tenement, and estate." *Fitzsimons v. Fitzsimons*, 28 Beav. 417;

—where the property was described as "all and every his freehold messuages or

testator. *Penn v. Guggenheimer*, supra, and authorities cited. It is not necessary that such intention should be expressly declared, but it may be gathered from the whole and every part of the instrument. But the will must be reasonably construed, even where by so doing the parties are put to an election. *Penn v. Guggenheimer*, supra, and cases cited; *Wilkinson v. Dent*, L. R. 6 Ch. 339.

The difficulty of ascertaining the testator's intent is generally, if not always, greater where he has a partial interest in the property devised than where he undertakes to dispose of an estate in which he has no interest. In the former case the presumption is that he intended to dispose of that which he might properly devise, and nothing more; and this presumption will always prevail unless the intention is clearly manifested by demonstration plain, or necessary implication, on the part of the testator to dispose of the whole estate, including interests other than his own. Usually where he has an undivided interest in certain property, and he uses general words in disposing of it, as "all my lands," or "all my estate," no case of election arises; for it does not plainly appear that he intended to dispose of anything not his own. *Penn v. Guggenheimer*, supra, and authorities cited; *Note to Noys v. Mor-daunt*, 1 White & T. Lead. Cas. in Eq. 514, and cases cited. But if a testator having an undivided interest in a particular prop-

erty devises the property specifically to his co-owner, a case of election does arise, and the devisee must elect between his own interest in the property and the interest given him by the will. Same authorities; *Miller v. Thurgood*, 33 Beav. 496; *Padbury v. Clark*, 2 Macn. & G. 298.

Let us apply these principles to the case under consideration. By the first clause of the will, the testator devises the dwelling house and land connected therewith occupied by him and his wife as a homestead. That property consisted of two parcels,—one lot upon which the dwelling house was situated, and in which he only owned an undivided moiety, and another lot connected with and used as a part of the homestead, of which he was the sole owner. The devise is not limited to his interest in the lands devised. The property is described specifically as that occupied as a homestead, and as an entirety. The language of the devise is such as would be suitable in disposing of the whole property. It is ample, complete, and correct for that purpose, but wholly inapplicable to a gift of a moiety merely in the lot on which the dwelling house was located.

It seems to use that there can be no reasonable doubt that it was the intention of the testator to dispose of the entire homestead property.

Having reached the conclusion that the appellant, by the provisions of her husband's will, was put to her election, and

tenement, cottages, hereditaments, and premises situate" in a certain named place "or elsewhere." *Miller v. Thurgood*, supra;

—where the will described the property as "my farm" without (in the words of the court) "the slightest reference to the fact that the interest of the testator was only an undivided moiety." *Howells v. Jenkins*, 2 Johns. & H. 706;

—where the will described the property as "all that and those of the lands of C." *Daxon v. Steele*, 2 Jones (Ir.) 178.

In *Colvert v. Wood*, 93 Tenn. 454, 25 S. W. 963, devisees were held to have made an election where they declined to take under the will, and recovered by suit an undivided share in the lands devised to themselves and others, upon the theory that these lands were the property of a partnership composed of the testator, themselves, and a third person; but the language of the will is not shown.

On the other hand, in *Leonard v. Steele*, 4 Barb. 20, a testator's co-owner was held not to be put to his election. The opinion, however, fails to show the language of the will in that regard, though the court declared that the doctrine of election was not applicable to cases where the testator had only a part interest in the estate disposed 30 L.R.A. (N.S.)

of by him, unless an intention was clearly manifested in the will to dispose of the whole estates, including the interest of co-owners; and that therefore he would be presumed to have intended to dispose of only that part which he might lawfully dispose of, and no more.

And the same enunciation of the rule was made in *Beal v. Miller*, 1 Hun, 390, in which a co-owner of the testator, whose legacy under the will was of trifling value compared to his interest in the property devised, was held not to be put to his election, though the property devised was specifically described by name and as containing the acreage of the whole tract.

And in *Gregory v. Gates*, 30 Gratt. 83, the children of a testator by a former wife, who were part owners with him in a certain property, were held not to be put to their election by a will which declared: "I wish my estate kept together and managed by my executors," for the support of the widow and children, and the will further gave the executors power to sell any property of the estate except the property which he owned with his children as aforesaid, specifically naming it, which was the only reference made in the will to that property.

J. A. C.

that she could not and cannot choose both her own estate and the bequests made in her favor, the next question is: Has she made such election?

The proof of an election may be express, or it may be implied from the acts and conduct of the party, but in either case it must have been with knowledge of the party's rights and with the intention of making an election. See *Showalter v. Showalter*, 107 Va. 713, 720, 60 S. E. 48, and authorities cited.

There was no express election in this case. The acts and conduct of the appellant in holding and using the property actually owned by her husband, and in claiming it in her bill, show that she was claiming under the will. But there is nothing in her acts and conduct, nor in the allegations of her bill, which show that, in claiming her husband's property given her by the will, she knew that she must surrender her fee simple interest in the dwelling house property, or that she intended to do so. There is nothing to show that she has not always placed the same construction upon the will that she now contends for, and that she did not in good faith shape her conduct by such interpretation. So far as the record shows, no one placed a different construction upon it prior to the filing of the answer of the adult appellees, or that she was ever called upon by any party in interest to elect which of the two interests she would take,—her own fee simple interest in the dwelling house property or the interest given her by the will.

Where an election is once made by a party bound to elect, either expressly or impliedly, with full knowledge of all the facts, it binds him and those who claim under him, although made in ignorance of the law. *Penn v. Guggenheimer*, supra, 70 Va. 850, 851. Ignorance of law is no excuse for a party's conduct. But, as was held in *Burton v. Haden*, 108 Va. 51, 56, 15 L.R.A. (N.S.) 1038, 60 S. E. 736, the maxim that ignorance of the law is no excuse is confined to matters of the general rules of law, and has no application to the mistakes of persons as to their own private rights and interests. The latter, as was said in that case, stand upon the footing of mistakes of fact.

"It is true," said Lord Chancellor Westbury in *Spread v. Morgan*, 11 H. L. Cas. 588, 602, "as a general proposition, that knowledge of the law must be imputed to every person, but it would be too much to impute knowledge of this rule of equity, election."

Treating this rule of equity as a matter of fact, and not as a matter of law, it would seem that the appellant's election to claim under the will of her husband was made under a misconception of her rights. 30 L.R.A. (N.S.)

Where a party has elected to claim under an instrument under a misconception of fact, such election may not be binding.

In 1 Pom. Eq. Jur. § 515, it is said: "To raise an inference of election from the party's conduct merely, it must appear that he knew of his right to elect, and not merely of the instrument giving such right, and that he had full knowledge of all the facts concerning the properties. As an election is necessarily a definite choice by the party to take one of the properties, and to reject the other, his conduct, in order that an election may be inferred, must be done with an intention to elect, and must show such an intention."

In 1 Jarman on Wills, *435, it is said: "In order to presume an election from the acts of any person, that person must be shown to have had a full knowledge of all the requisite circumstances, as to the amount of the different properties, his own rights in respect of them, etc., and a person having elected under a misconception is entitled to make a fresh election."

In 2 Minor, Inst. 4th ed. at page 1006, quoted with approval in *Showalter v. Showalter*, supra, it is said: "It is well established that no one shall be constrained to make an election until the interests to which the election relates are clearly defined and their relative values ascertained, and an election made before that is done will, for the most part, be disregarded, at least if made under mistaken impressions as to the facts; but only upon the terms (supposing the election to have been unambiguously made) of restoring other persons; whose right are affected by the party's act of election, to the same situation substantially as if the act had not taken place." And at page 1008 it is said: "Clear proof of an election made must be furnished, and ambiguous acts and conduct will in general not be so construed, unless in those cases where the interests of others have been affected by the acts, and require that they should be interpreted to amount to an election. . . ."

Where a person bound to elect between two properties continues in possession or enjoyment or receipt of the rents and profits of both, without being called upon by the other party interested to elect, this conduct indicates no intention of taking one and rejecting the other, and does not therefore amount to an election. 1 Pom. Eq. Jur. 1st ed. § 575, citing, among other cases, *Spread v. Morgan*, supra. See also *Padbury v. Clark*, supra.

From these authorities it would seem clear that, where a party elects to take under a will, under a misconception of fact as to his rights and interests under the will, such election will be disregarded where the

other parties affected by such election can be placed substantially in the same situation as if no such election had been made.

The only person affected by the election made by the appellant is her infant son, and nothing has grown out of her action which will work wrong or injury to him.

It is earnestly insisted by the appellees' counsel that it is too late now for the appellant to make a new election, since the statute (Code 1904, § 2271) requires that a widow must renounce, if at all, the provisions of her husband's will within one year after its admission to probate.

That section has no application to a case like this. It was "intended to provide how a widow must proceed who desires to reject the provisions made for her by her husband's will out of property other than her own, and to take such interest in his lands as the law gives her. Where a testator disposes of property belonging to his wife in her own right, and also makes provision for her by his will, she has the same right of election as to such property as any other person, and whether or not she has elected to take under or against the will is to be determined as in other cases." Pence v. Life, 104 Va. 518, 521, 52 S. E. 257, and cases cited; Showalter v. Showalter, supra.

We are of opinion that the appellant has not yet made an irrevocable election, and that the trial court erred in holding that she had.

We are further of opinion that the trial court in the decree appealed from properly construed the will, and that the cross error assigned is without merit.

For the error in the decree holding that the appellant had made a binding election, the decree must be reversed, and the cause remanded to be further proceeded in not in conflict with the views expressed in this opinion, and with liberty to the appellant to make her election between her fee simple interest in the dwelling house property and the life estate or less in all the property disposed of by her husband's will.

Reversed.

NORTH DAKOTA SUPREME COURT.

RICHARD MCGREGOR, Appt.,
v.

HENRY HARM et al., Respts.

(— N. D. —, 125 N. W. 885.)

Servant — extra work — compensation.

1. Compensation for work, within the scope of a regular employment, in addition

Headnotes by MORGAN, Ch. J.

Note. — See note, post, 652.

30 L.R.A. (N.S.)

to the usual but not fixed hours for a day's work, cannot be recovered in the absence of a contract therefor, unless the contract was entered into in reference to a controlling custom.

Same — discharge — question of law.

2. Where the evidence is undisputed as to the cause for a discharge from service under an existing contract, it is a question of law for the court as to the sufficiency of such cause.

Same — refusal to work overtime.

3. Where the employer requests the servant to do additional work not unreasonable in view of the nature of the employment, and the servant refuses such request without cause, such refusal will justify his discharge by the master.

Same — contract of employment — construction.

4. Where a contract for services is entered into for a sum certain per week, with an additional sum to be paid if the service is continued for one year, and the servant remains sober, it is a contract for employment by the week, and not an entire one for a year.

Appeal — reversal — immaterial error.

5. Evidence of payment in full for all services considered, and it is held therefrom that it was not error to refuse to direct the jury to find in plaintiff's favor for a small balance of 39 cents, claimed to be unpaid.

Same — nominal sum.

6. No question of costs being involved, an error affecting that small sum would not be considered, as the principle of *de minimis non curat lex* applies.

Same — striking evidence — harmless error.

7. Question as to whether it was error to refuse to strike out the answer of a witness, on the ground that it was not the best evidence, considered, and held not to be prejudicially erroneous.

(March 8, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Grand Forks County in defendants' favor in an action brought to recover compensation alleged to be due plaintiff under an employment contract. Affirmed.

The facts are stated in the opinion.

Messrs. H. A. Bronson, D. T. Collins, and L. A. Chance for appellant.

Messrs. Skulason & Burtness, for respondents:

The extra \$5 per week constituted a bonus, payable only at a certain time and on certain conditions, which time never arrived, and which conditions were never performed.

26 Cyc. Law & Proc. pp. 1037, 1038.

The question as to whether or not the

discharge was justified was one of law for the court.

Von Heyne v. Tompkins, 89 Minn. 77, 5 L.R.A.(N.S.) 524, 93 N. W. 901; Fuller v. Northern Pacific Elevator Co. 2 N. D. 220, 50 N. W. 359.

Unless there is an express agreement to pay for extra work, or a uniform and notorious custom sufficient to warrant the presumption that a contract was made with reference thereto, a servant cannot ordinarily recover additional compensation for extra work within the scope of his employment.

26 Cyc. Law & Proc. p. 1036; Luske v. Hotchkiss, 37 Conn. 219, 9 Am. Rep. 314; Levi v. Reid, 91 Ill. App. 430; Mathison v. New York C. & H. R. R. Co. 72 App. Div. 254, 76 N. Y. Supp. 89; Kopplitz v. Powell, 56 Wis. 671, 14 N. W. 831; Re Steam Dredge No. 1, 87 Fed. 760; Forster v. Green, 111 Mich. 264, 69 N. W. 647; Schurr v. Savigny, 85 Mich. 144, 48 N. W. 547; Cany v. Halleck, 9 Cal. 198; 20 Am. & Eng. Enc. Law, p. 19.

Morgan, Ch. J., delivered the opinion of the court:

Action for an alleged balance of wages. The plaintiff was employed by the defendants as bartender in East Grand Forks, Minnesota, and worked as such from April 23 to August 26, 1907, for the agreed wages of \$25 per week. On August 26th a new contract was entered into, under which the defendants were to pay the plaintiff \$20 per week, and, if he worked one year and kept sober, he was to receive \$5 per week in addition. According to the record, there is no substantial controversy as to the terms of the contract. A careful reading of the plaintiff's evidence clearly shows the above to have been the substance of the contract. In respect to this contract, one of the defendants testifies as follows: "At that time we made a new arrangement with him to pay him \$20 a week salary, and, if he remained sober in our employ one year, we agreed to give him \$250 at the end of the year. I cut him from \$25 to \$20 per week in order to keep him sober." In reference to the contract, the plaintiff testifies as follows: "At that time Mr. Oeschger told me he wanted to put me back to work, and he told me he would pay me the same wages he had been paying me. That was \$25. He says, 'We will pay you \$20 every week,' and at the end of the year they would pay me this holdback, and I told them this was satisfactory to me. That is, at the end of the year, if I stayed one year, I was to get an amount equal to \$5 per week through the year, and if I

kept sober." The plaintiff worked to the satisfaction of the defendants under the new contract from its date to March 30, 1908. On that day the plaintiff refused to work for an hour after his quitting hour that day, at the request of one of the defendants. On the next morning the defendants discharged him, and this action was brought to recover the sum of \$163.95 as the balance claimed to be due on the new contract. The action is brought to recover the \$5 per week and for certain extra time that plaintiff worked. The answer is a general denial and an allegation of payment in full. The trial court submitted the question of payment as to one item to the jury, under proper instructions, and they found for the defendants. Plaintiff appeals, and assigns five errors as grounds for a reversal of the judgment. We will notice the controlling assignments.

Some of them are based on the action of the court in reference to additional compensation for working outside or in addition to the regular hours. There was no showing whatever that the contract provided for pay for such extra work, if it may be called extra work, in view of the character of the employment, and that the working hours were not regular. In the absence of such showing, we deem it well settled as a proposition of law that no extra compensation is allowable. There was no error, therefore, in refusing to submit the question of compensation for working on some days more than the regular time during which the plaintiff was generally asked to work.

It is claimed that the plaintiff was discharged without cause, and is therefore entitled to pay for the \$5 per week during each week from August 26th. The facts in reference to the discharge are not in dispute. The trial court held from such undisputed evidence that the discharge was for cause. We affirm that conclusion after a careful examination of the evidence. One of the defendants requested the plaintiff to remain at work on March 30th while said defendant went to supper, which would be about an hour's extra time. The plaintiff refused to do so. No fixed hours of work for each day, nor the hours during which the plaintiff should work during the day, were specified in the contract. There were at times three bartenders, and at others two, and the hours during which each should work were fixed by the defendants, and these varied at times. And during a part of the time the hours during which the plaintiff should work were fixed, and were at times varied at the request of the defendant. March 30th, when

this request was made of the plaintiff, was an election day in said city, and plaintiff had only been on duty from 9 A. M. to 5 P. M., excepting an absence for dinner. During his employment, plaintiff had occasionally worked twelve hours, and on several occasions had worked more than the allotted hours, at the request of the defendants. Nothing had ever been said by the plaintiff or defendants as to special compensation for service during those additional hours. In view of the nature of the business and the fact that the contract did not provide how many hours should be considered a day's work, and no other fact appearing from which it may be reasonably deduced that a certain number of hours should be deemed a day's work, or that the plaintiff could not be called upon to work longer hours, there is no foundation for the claim that the discharge was without cause. On this day, plaintiff had only worked seven and one-half hours, or, at the most, eight hours. We deem the refusal to comply with the defendant's request an unreasonable one, and it justified the defendants in discharging the plaintiff. As to whether the discharge was justified, the evidence is undisputed. It is therefore a question of law whether the discharge was without cause. There was no question of fact in respect to the cause of the discharge. It was therefore not error to take that question away from the jury. We think it would have been error to submit it to the jury.

Considerable is said in the briefs as to whether the contract in question is an entire one or severable. In view of the fact that we find that the plaintiff refused to perform the contract without just cause, it is immaterial as to the nature of the contract. If the plaintiff had been discharged without cause, a different question would have been presented. We think it clear, however, that this was not a contract for a year at \$20 per week. It was a contract for \$20 per week, and, if the plaintiff worked a year, he would be entitled to an additional \$5 per week if he remained sober. Under this contract, the plaintiff could have quit at any time without affecting the obligation of the parties at all, except as to paying the extra money. There is a dispute as to whether the plaintiff has been paid for one day, being the first Monday he worked under the new contract. The trial court expressly submitted this question to the jury, and it found for the defendants. The first check which plaintiff received under the new contract was for \$24.25, and it is defendant's contention that this was a payment in full under the old contract and up to the

first Monday, at 7 o'clock P. M. under the new contract. Plaintiff has been paid \$20 each week since said day by checks which show that they are in full for all services up to date. The plaintiff is uncertain as to whether the \$24.25 check does or does not include pay for this one day, and is uncertain as to what it did include. His acceptance of these checks each week since August 26th is strong evidence that he has been paid for this day, and, the jury having so found, the verdict should not be disturbed.

We do not think that there is any question of *quantum meruit* compensation in this case. The discharge from service was for an adequate cause, and no claim for the \$5 per week extra arises, as plaintiff has not performed the contract so as to entitle him to any more than the payment of the \$20 per week, and this is admitted to have been paid.

It is also claimed that the trial court erred in refusing to direct a verdict for the plaintiff for the sum of 39 cents, claimed to be due the plaintiff. It is claimed that the check for \$24.25 should have been given for \$24.64. The weekly checks from August 26th were given and accepted for full payment for all services up to date. The checks show this fact, and the witness Thompson so testifies. The plaintiff does not testify what the items composing the check for \$24.25 were, and is unable to state what this sum was made up of. From April 26th to March 30th the parties dealt with each other in a manner showing unequivocally that there had been full payment of all sums due on the old contract, and on the new contract as well. This check was made up of eight days' work under the new contract and one-half day's work under the old contract, and was undoubtedly intended to include all sums due the plaintiff on account of all services at its date. We do not therefore think that it was error to refuse to submit this question to the jury, in view of the conduct of the plaintiff in accepting these weekly checks as full payment. If, however, it clearly appeared that there was due to the plaintiff the sum of 39 cents, we should not deem ourselves called upon to reverse the judgment for that reason, as the only question is whether the sum of 39 cents has been paid. It is a question where the doctrine or principle, *De minimis non curat lex*, should be applied. No question of costs is involved. *Hass v. Prescott*, 38 Wis. 146; *Sutherland, Damages*, 2d ed. § 11; *Kenyon v. Western U. Teleg. Co.* 100 Cal. 454, 35 Pac. 75.

It is claimed that it was error not to grant plaintiff's motion to strike out cer-

tain portions of the testimony of the witness Thompson, who was the bookkeeper of the defendants during the time that the plaintiff worked for them. Thompson drew the check for \$24.25, and testified that it was delivered and accepted as payment in full for all past services. His entire testimony, considered together, shows that he was testifying from memory principally, although on cross-examination he stated that all he knew about the matter was from the books. In view of the positive testimony of this witness that the plaintiff accepted this check as full payment, we do not think that it was prejudicially erroneous to refuse to strike out that portion of the witness's evidence relating to the payment of all sums due on

March 30th. If this testimony had been stricken out, the plaintiff's testimony would still remain upon the record as to this check, and also Thompson's testimony as to the fact that the plaintiff had accepted this check in full payment for all services. There was no motion to strike out all of the testimony of Thompson. In view of this fact, it was not prejudicial error to refuse to strike out the testimony on the ground that it was not the best evidence.

The judgment is therefore affirmed.

All concur.

Petition for rehearing denied April 13, 1910.

Note. — *Under what circumstances is a servant entitled to recover remuneration for extra work.*

- I. Recovery in the absence of an express contract to pay remuneration.
 - a. Generally, 652.
 - b. Right of recovery considered with reference to the character of the extra work.
 1. Recovery denied, 653.
 2. Recovery allowed, 656.
 - c. Right of recovery considered with reference to the time when the services were rendered.
 1. Work done on week days. Effect of decisions under the common law, 658.
 2. Work done on Sundays, 659.
 - d. Recovery for extra work performed by governmental and municipal employees, 660.
 - e. Recovery for extra work in civil-law jurisdictions, 661.
- II. Express agreements to pay for extra work, 661.

I. Recovery in the absence of an express contract to pay remuneration.

a. Generally.

It is not disputed that, under some circumstances, a person employed to perform certain work for a stated remuneration, during a specified period, may be entitled to recover additional compensation for extra services rendered at the request of his employer, although there may have been no stipulation that those services should be paid for.¹

But the enforceability of a claim for compensation in this instance is not determined on the same footing as in a case from which the element of an express contract defining the regular duties of the employee, and the wages to be paid for the discharge of those duties, is entirely absent. The nature of the difference between the principles which are controlling in the two classes of cases is indicated by the following statement: "The rule of law that, from a request to perform services, an implied promise arises to pay what the services are worth, does not apply where the services are rendered by one in the employ of the person making the request; in such case the implication is that the services were rendered under the contract of employment, particularly if the services are of the same character as those embraced in that contract."²

The effect of this doctrine manifestly is that, in an action to recover additional

¹ *Ross v. Hardin*, 79 N. Y. 84.

In one case the doctrine was broadly laid down that "if the plaintiff rendered services the jury could infer an agreement, express or implied, to pay him;" and that "the mere fact of rendering services useful to the defendants would furnish prima facie evidence of their acceptance, and, in the absence of some proof to the contrary, the law would raise an obligation to pay him what they were worth, there being no proof of special value." *Spencer v. Trafford*, 42 Md. 1, holding that the trial judge had properly rejected a prayer for an instruction to the effect that, "even if the jury believe that the plaintiff rendered extra services, not provided for in his contract, he cannot recover for said extra services unless there was an express or implied agreement to pay for the same." This ruling is clearly opposed to the general current of authority. No authorities were cited.

"A contract for a fixed salary, and an implied assumpsit, cannot stand together: otherwise any clerk engaged at a fixed sal-

² *Cincinnati, I. & C. R. Co. v. Clarkson*, 7 Ind. 595 (instruction to the opposite effect was held to be erroneous in regard to employment to attend to a branch of a business); *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.
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compensation for extra work performed during the period covered by a special contract, the employee, instead of being aided by a favorable presumption, as in the cases in which no such contract has been made by the parties, has the burden of overcoming an adverse presumption arising from the existence of the contract.³

It has been laid down that, except in that class of cases in which the right to recover is conceded on the ground of the essential distinction between the character of the extra services and that of the services stipulated in the special contract, a claimant cannot succeed in his action, unless he proves an express agreement to pay for the extra work.⁴

It has been held that, in an action against an independent contractor for work and labor, the plaintiff cannot recover for labor in excess of what was called for by his

contract, occasioned by his own unskillfulness or negligence.⁵ The same doctrine would doubtless be applied in the case of a servant.

b. Right of recovery considered with reference to the character of the extra work.

1. Recovery denied.

The doctrine upon which several decisions proceed is that, in the absence of proof of an express agreement, an action to recover compensation for extra services performed at the request of the employer cannot be maintained by a person hired for a definite term at a certain rate of wages, if the services in question were essentially of the same character as those which the plaintiff was performing in the ordinary course of his employment;⁶ or were so in-

ary would be entitled to recover in an action of assumpsit for any increased labor he might be put to, in consequence of an extension of his employer's business." *Chandler v. State*, 5 Harr. & J. 284.

See also *Schurr v. Savigny*, 85 Mich. 144, 48 N. W. 547 (where it was laid down that the existence of an express contract for one year, at a stated weekly compensation, excludes any implied agreement or understanding about wages), and the extract given in subd. b, *infra*, from the opinion in *Voorhees v. Combs*, 33 N. J. L. 494.

But this conception cannot, as it would seem, be reconciled with the standpoint disclosed by most of the decisions. It would render the servant's inability an inference of law, whereas the authorities, generally speaking, merely regard him as being required to overcome a presumption of fact. It seems to involve, moreover, a *petitio principii*; for the doctrine as to the incompatibility of an express and an implied agreement is applicable only to cases in which the subject-matter of each is the same. Where a claim for extra services is involved, the very question to be decided is whether the express contract does extend to them.

³ For a formal affirmation of the doctrine that where services are rendered by one in the employ of another, even upon request, the presumption is that they were rendered under the contract of employment, unless the contrary is shown, see *Cooper v. Brooklyn Trust Co.* 109 App. Div. 211, 96 N. Y. Supp. 56.

In a case where a request is made to a stranger to perform certain work, "the law generally implies an agreement to pay a reasonable remuneration, in the absence of circumstances showing that the service was meant to be gratuitous. In the case of the master and servant, the presumption is the other way." *Richmond, J., in Mahoney v. R.* 8 New Zealand L. R. (S. C.) 462.

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The following statement from *Bishop on Contracts*, § 222, was adopted in *Houghton v. Kittleman*, 7 Kan. App. 207, 52 Pac. 898: "If one under a salary or other regular pay performs, without any express understanding as to compensation, duties in excess of what the contract of employment demands, they will be presumed to have been rendered under the contract or voluntarily, and the law will create no promise to pay for them."

⁴ *Voorhees v. Combs*, 33 N. J. L. 494; *Mathison v. New York C. & H. R. R. Co.* 72 App. Div. 254, 76 N. Y. Supp. 89 (for both these cases, see subd. b, *infra*.)

In *Stadermann v. Heins*, 78 App. Div. 563, 79 N. Y. Supp. 674, while the plaintiff was engaged in the performance of a special contract, at certain weekly wages, for the nursing of the decedent, the latter executed, but did not deliver, an instrument stating that it was her desire that the claimant should receive \$250 for services in nursing her. The court disallowed a claim for this sum, taking the position that it was valueless as a testamentary disposition, and that it was neither a substitute for the existing agreement, nor controlling evidence of the terms under which the plaintiff was working, or of the amount which would be due as a debt after the maker's death.

⁵ *Fruin v. Crystal R. Co.* 89 Mo. 397, 14 S. W. 557.

⁶ A leading case on this aspect of extra services is *Bell v. Drummond, Peake*, N. P. Cas. 45. There a clerk to the commissioners of the land tax had been appointed clerk to the commissioners for managing other taxes. It was held that his deputy, who performed all the duties of his office, was not therefore entitled to an increase of salary. Lord Kenyon said that, had the plaintiff's case rested wholly on the fact of the new duty being imposed upon him, he should not think it such a case as would have entitled him to come into a court of justice for an additional stipend on a quan-

timately connected with his usual duties that he may reasonably be supposed to have contemplated them as being a pos-

sible incident of the work for which he was engaged.⁷

It is manifest that under no circum-

tum meruit; if it was, every porter in a shop, or clerk in an office, would, upon an increase of his master's business, be equally entitled to demand an increase of wages. But upon the evidence produced, it appeared clearly that the testator himself thought that he ought to pay something, and the only matter in controversy between him and the plaintiff was the quantum of the additional allowance.

In *Ross v. Hardin*, 70 N. Y. 94, affirming 12 Jones & S. 26, H., two days before his death, requested R., his confidential clerk, to bring to H.'s house a box of money and valuable papers, and thereupon to take charge thereof and put it in a safe deposit, all of which R. did, and, upon the appointment of the administratrix, eight days after H.'s death, delivered to her the box. R. sued her for such services, claiming compensation as upon a *quantum meruit*, besides his salary of \$60 per month, but on the trial set up no claim to special employment, and was nonsuited. The court of appeals did not determine whether a contract may be made by a person during his life, for the preservation and safety of his property after his death and until administrators are appointed, but held that, if such a contract can be so made with an employee who has had similar services to perform during the life of the employer, it will be presumed, in the absence of a stipulation for an increase, that the same rate of compensation paid before the death of the employer was to continue thereafter. The plaintiff was held to be entitled to his salary for eight days; but the court refused to grant a new trial, for the reason that it would be of no benefit to him, where so small a sum was concerned.

A person employed as the secretary of a private corporation, at a fixed rate of compensation, cannot demand extra pay for services in that capacity, although they were not anticipated at the time of his appointment, and were not enumerated in the charter or by-laws. The fair construction of his contract is that he will do whatever his employers may have occasion to employ a secretary about. *Carr v. Chartiers Coal Co.* 25 Pa. 337, 3 Mor. Min. Rep. 476 (extra services related to the numbering, filling, and countersigning of coupon bonds).

One employed by an insurance company as cashier cannot recover extra pay for acting as inspector of risks, in the absence of an express agreement therefor. *New York L. Ins. Co. v. Goodrich*, 74 Mo. App. 355. The jury were held to have been erroneously instructed that, if they found that defendant was employed by the company as its cashier, that that employment did not embrace services as inspector of risks, and that while so employed as cashier he was requested to act for the company as inspector of risks, he

was entitled to compensation for such additional service.

In *Savage v. Gibbs*, 4 Gray, 601, where the court refused to entertain a claim for extra pay for services rendered by a member of a military band, Shaw, Ch. J., said: "The order given by the defendant, being a regular military order, made by the direction of his superior officer, constituted no ground for an assumpsit, express or implied, by the defendant to the plaintiff, to pay anything for the service to be performed. It seems that the plaintiff and his associates, as a military musical band, constituted a part of the organized volunteer militia, and whether they were entitled to any pay for such occasional service, and if so, on what occasion, to what amount, and from whom to be received, must depend on the rules and regulations for the government of the volunteer militia, to which, by enlisting, the plaintiff assented."

In a case where claimant's husband contracted with her paralyzed brother's committee to take care of the brother at their home for \$35 a month, and after four years had the compensation increased to \$37.50, which was paid until the afflicted man's death, her right to recover from the estate for taking care of him and nursing him while he was at her house was denied, on the ground that it appeared that such service was contemplated by her husband's contract. *Carr v. Calvert*, 31 Ky. L. Rep. 303, 102 S. W. 282.

⁷In *Mathison v. New York C. & H. R. R. Co.* 72 App. Div. 254, 76 N. Y. Supp. 89, it was held that an engine despatcher employed to inspect and repair engines and run engines in case of emergency does not perform work so far outside of the scope of his employment that an agreement for extra compensation should be implied, when, at his employer's direction, he afterwards runs a switch engine for a few hours each day. The court said: "There are authorities holding that in certain cases, where the extra service required is entirely without the sphere of the service for which the contract was made, or where the extra service exacted was such as required special skill or qualifications, in such case the law will imply an agreement for extra compensation. This rule is based upon the probability that for such service there was an intention on the part of the master to pay extra compensation, upon which the servant might rely. But this rule must be cautiously applied, and the service must be so far outside of the sphere of the employment as to indicate a probable intention on the part of the master to allow extra compensation therefor. If the question be one of doubt, the right to extra compensation should rest only upon an express agreement. Any other rule of law would introduce dangerous uncertainty and instability into all contracts of service."

In *Bee v. San Francisco & H. B. R. Co.* 46 Cal. 248, the defendant's superintendent, the amount of whose salary was not fixed by the terms of his engagement, had, before the surveys for a new line were commenced, performed by request certain services not technically within the line of a superintendent's duty, but such as he might properly have been directed to perform, viz., the procuring of a certain contract. Held, that he could not recover remuneration for these services in addition to the amount allowed for those admitted to be within the scope of his duty as superintendent. The defendant's contention that it was error to admit evidence of those services for the purpose of ascertaining the sum recoverable was rejected, the court taking the position that it would be presumed that in rendering them he acted in his capacity as superintendent.

In *Turnell's Succession*, 34 La. Ann. 888, it was held that a man employed as a clerk could not, in the absence of a special agreement, recover additional remuneration for services rendered in the general management of his employer's business.

In a case where a servant or domestic was employed at a stipulated monthly salary, and continued in that capacity, receiving her monthly wages to the time of her employer's death, it was held that she could not afterwards maintain an action against the estate of her employer to recover increased compensation on the ground that her labors were augmented by reason of his sickness, contracted subsequent to her entering his service. *Voorhees v. Combs*, 33 N. J. L. 494. The court said: "The plaintiff made her contract of service with reference to this affliction of the deceased, and the increase of labor incident to it. She had no right to suppose that the family in which she was to serve would be exempt from the ills of life, and having made no provision in her contract for added compensation in the event of sickness, she is fully paid by the stipulated price. The presumption of law is that for all services rendered by her to her employer, which are in the line of her regular duties, or of a similar nature, whether ordinary or extraordinary, she is satisfied by the payment of her fixed salary. The object of an express contract is to guard the parties against uncertainty as to its terms, or exaction in its performance. But an express contract will furnish slender protection indeed to the master, if, for every additional or extra service, he may be subjected to the payment of such sum as a jury may award. Such a rule would give the servant a valid claim for increased pay whenever the master entertained an unexpected guest, and enable the clerk at a fixed salary, to demand an increase of wages with every increase of the merchant's business. No reason can be perceived why the master might not, with equal propriety, upon the mere diminution of the servant's labor, reduce the remuneration. The doctrine upon which the plain-

tiff rests her case is contrary to the well-settled rule that an express contract excludes an implied one. An implied contract cannot exist when there is an existing express contract about the identical subject. The parties are bound by their agreement, and there is no ground for implying a promise. It is only when the parties do not agree that the law interposes and raises a promise. Where an express contract exists, there must be a rescission of it before the parties will be remitted to the contract which the law implies, in the absence of that agreement which they make for themselves. . . . The extra services of the plaintiff were not rendered in an employment different from that for which she engaged, but were more burdensome by reason of the testator's illness. In the absence of an express agreement to pay for the extra services, no recovery can be had."

In *Murray v. John Griffiths & Son*, 48 Misc. 398, 95 N. Y. Supp. 573, a man employed as watchman of a building in course of erection, and also to attend to the boilers of an engine used in the construction work, was held not to be entitled to recover for services rendered in cleaning out a small structure used as an office during the daytime.

In *Houghton v. Kittleman*, 7 Kan. App. 207, 52 Pac. 898, the decision that a person employed as housekeeper at an agreed price per week could not recover from the estate of her employer, who had died during the employment, compensation for services as nurse, in addition to her weekly wages as housekeeper, was put upon the ground that there was no evidence going to show that an agreement was made to pay for such extra services, or that the employer had any knowledge that she expected to charge therefor.

The writer ventures to express the opinion that, in the New Jersey and Kansas cases above cited, the courts were not justified in proceeding upon the theory that the extra services in question were, in point of law, within the sphere of those covered by the contract of employment. It may be conceded that claims for compensation in respect of those slight augmentations of duty which often occur in every household should, as a general rule, be rejected. But it is extremely difficult to accept a conclusion which is equivalent to asserting that no reasonable person could be otherwise than that services rendered as a nurse to a patient suffering from an illness so serious as to cause death are within the scope of the stipulated duties of a domestic servant. The view here put forward finds some support in the ruling of a trial judge in Delaware, to the effect that, while a person who enters a household as a boarder or lodger cannot be held liable upon an implied contract for such usual attentions to his health and comfort as might reasonably be expected under the circumstances, the question whether such a person is lia-

stances will an employee be permitted to recover for work performed in excess of the explicit direction of his employer.⁸

2. Recovery allowed.

The courts, while leaning strongly against the inference of a right to recover compensation for extra work, concede that such a right may be predicable, even in the absence of an express agreement, if the work for which compensation is claimed was of such a nature as to render improbable the supposition that it was taken into account by the parties when the rate

of wages was arranged. Or, to state the doctrine in a somewhat different form, compensation is recoverable in any case in which there is evidence from which reasonable men might find that the extra services were rendered with the expectation and belief, both on the part of the claimant and on the part of the employer, that they were to be paid for.⁹ The decisions in which recovery has been allowed are collected in the subjoined note; but it is extremely difficult, if not impossible, to reconcile some of them with those cited in the preceding subdivision.¹⁰

ble for services rendered in caring for him during illness is one of fact, depending upon the circumstances of the case, including the fact of his relationship to the plaintiff, if that appears in the case. *Kenard v. Whitson*, 1 *Houst. (Del.)* 36.

Whether the fees received by a railway claim agent during his regular business hours, for his services as notary, were included in his salary, was held to be a question for the jury, in *Leach v. Hannibal & St. J. R. Co.* 86 *Mo.* 27, 56 *Am. Rep.* 408. In this case, an action to recover the fees, it was held that receipts given by the plaintiff, stating that the sums therein mentioned were in full for all demands for work done during regular and irregular hours, in the employer's service, were competent evidence to show the capacity in which the plaintiff acted and the relation which he sustained to the employer.

A member of a commercial partnership who requests a regular employee of the firm to write up his private account books does not incur an implied obligation to pay the employee compensation additional to that received from the firm. The court laid it down that, in order to rebut the presumption that the salary of an employee of a partnership is the measure of his compensation for all work done by direction of any member of the firm, "it must affirmatively appear that the work directed is so far out of the usual course, or is to be performed at or in such an unusual time or manner, that the law can safely imply that, in the nature of things, both parties must have known, and therefore contemplated, that extra compensation must follow as of course." The fact that the claimant did the extra work on holidays and in the evenings was held to be immaterial, as defendant was not aware of it. *Carrere v. Dun*, 18 *Misc.* 18, 41 *N. Y. Supp.* 35. The court observed: "An employee cannot, by taking work home which ought to have been done at the employer's place of business during business hours, conjure up a claim for extra pay. There must be some request on the part of the employer to depart from the customary course, or some approval thereof on his part, before he can be charged with impliedly contracting for extra compensation."

In *Cany v. Halleck*, 9 *Cal.* 198, a man 30 *L.R.A.* (N.S.)

employed as a collector of rents was held not to be entitled to recover for services rendered in superintending some of the real estate of his employer. It seems permissible to express a doubt as to the correctness of the decision.

In *Carter v. Hall*, 2 *Starkie*, 361, an action brought by a purser's steward on an English ship of war against the steward, there was evidence that the purser's steward was a person known as such in the King's service, who could not be appointed by the steward without the assent of the commander; that he was entitled to the pay of an able seaman from the Crown, but that he usually received pay from the purser under a private contract with him; that it was usual for the purser to pay the purser's steward at the rate of £1 for every gun by way of annual salary. Lord Ellenborough nonsuited the plaintiff, grounding his conclusion upon the considerations (1) that a principle of too extensive an operation would be established if such an action were supported, and if a person receiving a specific salary from the Crown, in respect of his situation, could recover, upon an implied contract, a remuneration for his services from the officer under whose immediate authority he acted; and (2) that the purser had no fund allowed him out of which such services were to be paid.

Under ordinary circumstances, neither the members of a ship's crew nor pilots can recover compensation for salvage services, their obligation being to do their utmost for the preservation of the property at risk. *Abbott, Merchant Shipping*, 14th ed. pp. 965, 970; *Calhoun v. Vechio*, 3 *Wash. C. C.* 169, *Fed. Cas. No.* 2,310 (pilot not entitled to salvage where he safely conducts into port a vessel in distress at sea). This rule is taken for granted in the cases mentioned in note 10, *infra*, in which recovery was allowed.

⁸ *Grabbe v. Moffit*, 133 *Iowa*, 54, 110 *N. W.* 142.

⁹ *Elwell v. Roper*, 72 *N. H.* 254, 56 *Atl.* 342.

¹⁰ One employed to farm certain lands of his employer is entitled to additional compensation for farming, at the latter's request, other lands purchased by him during the employment, but not where the

employment is for services, during a specified time, as a farm laborer. *Delaney v. Grove*, 162 Pa. 138, 29 Atl. 401.

A person employed by a railroad company as ticket and freight agent at one of its stations, at a regular salary, may recover extra compensation for services rendered in carrying mail bags to and from the postoffice, where the services are rendered at the request of the railroad company, without any agreement as to compensation, such service not being included in the general employment of ticket and freight agent. *Pittsburgh, C. C. & St. L. R. Co. v. Henderson*, 9 Ind. App. 482, 36 N. E. 376.

In *Middlebrook v. Slocum*, 152 Mich. 286, 116 N. W. 422, evidence on the part of the plaintiff was given to the effect that he was employed under a specific contract to work in a flouring mill; that subsequently the employer installed an electric light plant, that the plaintiff worked therein during hours not contemplated in the contract and after he ceased work in the mill; and that no price for the work in the light plant was agreed on. Held, that this testimony warranted the submission to the jury of the question whether there was an implied agreement as to the work in the lighting plant.

In *Brown v. Crown Gold Mill. Co.* 150 Cal. 376, 89 Pac. 86, an action to recover the value of services rendered in exploiting a machine manufactured by defendant, it was held that the question whether these services were outside the scope of the plaintiff's employment had properly been left to the jury, and that an instruction that if plaintiff rendered services outside the sphere of his employment, at defendant's request, he was entitled to recover a reasonable compensation for such services in addition to his specified salary, was applicable to the evidence, where it was shown that plaintiff was engaged to show and explain the machine to visitors and answer criticisms in the press, and that, in addition to those duties, he acted as correspondent for defendant, classified ores, revised assays, wrote scientific articles, and acted as engineer and metallurgist for the company.

In *Dull v. Bramhall*, 49 Ill. 364, the defendant, the contractor for a tunnel under a lake, employed the plaintiff, at certain stipulated wages, to plan a crib and other means of accomplishing certain difficult parts of the work, and afterwards employed him to superintend the putting down of the crib, and otherwise apply his plans to the execution of the work. Held, that he might recover of the contractor additional compensation for the latter services, although receiving wages for the time he was therein employed.

In *Wilford v. Devin*, 43 Iowa, 559, W. was employed by D. as a man of all work at a fixed weekly stipend. During the sickness of the latter, he took care of him alternate nights and alternate Sundays for a period of two years, receiving pay for 30 L.R.A. (N.S.)

his services upon Sunday, but none for those rendered at night; nor was there any agreement respecting them. The court refused to disturb a verdict awarding W. compensation for the services rendered at night. It was conceded that the fact that the plaintiff, during these two years, received regularly his weekly wages, and an extra sum every fortnight for Sunday service, without any express agreement for pay for night services, tended strongly to show that it was not understood that he was to be paid for such service. But the court was not prepared to say that this fact would necessarily overcome the evidence which went to show that there was such understanding,—more especially the great amount and the character of the night service.

The law will imply a contract between a person boarded and one furnishing the board under an express agreement for compensation, for the reasonable value of the service rendered by the latter to the former in nursing her when she fell sick. *Cates v. Gilmer* (Tenn.) 48 S. W. 280.

A contract for board, washing, and mending does not include services as nurse while the boarder is ill; and a contract to pay for such services will be implied. *Pfeiffer v. Michelsen*, 112 Mich. 614, 71 N. W. 156.

In *Elwell v. Roper*, 72 N. H. 585, 58 Atl. 507, the defendant's testatrix took the plaintiff, her niece, who was at that time about fourteen years old, to bring up and educate. Some years later the aunt married one W., and the plaintiff from that time lived and worked in the family until the year following that of Mr. W.'s death. Mrs. W. was an invalid for many years before her death. During the greater portion of the time she was unable to go up and down stairs, and the plaintiff waited upon her in her room. During the period of the plaintiff's service Mrs. W. was operated upon three or four times, and on these occasions her only nurse, day and night, was the plaintiff, excepting such attention as her husband gave. Mrs. W.'s mother was a member of the family until her death in 1885, and during the last years of her life was confined to her room by illness. The plaintiff attended to all her wants, and also acted as day nurse for Mr. W. during his last illness. Until 1891 the plaintiff also attended to the regular household duties without assistance. On one occasion Mrs. W. stated that the plaintiff was working for \$2 per week, but that "she would be fully paid in the end;" at another time she said that she had never fully paid the plaintiff for her services, but would do so when the land was sold; and about a year and a half before her death she said that the plaintiff had been very faithful and should have her pay for it. None of these statements was made in the presence of the plaintiff. The theory upon which the plaintiff sought to recover was that she had two contracts which were independent of each other,—one by which she rendered the services of an ordinary

c. Right of recovery considered with reference to the time when the services were rendered.

1. Work done on week days. Effect of decisions under the common law.

Abstracting the element of the operation

domestic in the family of the testatrix and her husband, and another under which she was to act as nurse to the three persons above referred to, and receive remuneration for her services as such. It was held that the evidence was such as to justify the inference of an understanding on both sides that the testatrix was to pay her something in addition to the wages to which she was entitled as a domestic servant. It was also held that entries upon the diaries of the deceased husband of the testatrix, showing certain payments to the plaintiff, were not competent evidence to disprove the existence of such an understanding. "It is not suggested," said the court, "that the evidence tended to prove that he paid her more than she would be entitled to for such services. Notwithstanding such employment and payment, the testatrix might employ the plaintiff to perform extra services, and legally bind herself and her estate to pay for them. Payments by the husband to the plaintiff would have no logical tendency to prove that the contract alleged in this action was not made, nor that the contract had been fulfilled, unless there was also evidence tending to show that the payments were made on account of the testatrix; and there was no such evidence, so far as appears." A third point decided was that evidence that, after the plaintiff left the employ of the decedent, the latter said she intended to give the plaintiff something more if she had stayed through the decedent's lifetime, was hearsay and therefore properly rejected.

A plain and unambiguous written contract by which a person agrees, for a stipulated salary, to take the entire charge and control of machines, boilers, and pumps in a certain mill, and see that they are satisfactorily run and operated, and keep them in good repair, does not prevent him from recovering extra compensation for superintending the construction of waterworks, under a reasonable expectation that he was to be paid for it, where the other party had reasonable grounds to believe that he expected to be paid, and accepted the work. The court observed that the contract was not one calling for the personal services of the plaintiff, in the sense that his time belonged to the defendant. *Reiser v. Stauer*, 73 Wis. 477, 41 N. W. 706.

The rule which, as already stated (note 7, *supra*), ordinarily precludes seamen and pilots from recovering compensation for salvage services, is subject to exception in cases where their contract has been dissolved by their discharge, or by the abandonment of their ship, or by its capture by

of a statute which defines the number of hours which shall constitute a legal day's work, the rule to be deduced from the decisions is that, in the absence of proof of an express agreement,¹¹ or of a custom so general, uniform, and certain that it can be said the parties contracted with reference

an enemy. *Abbott, Merchant Shipping*, 14th ed. pp. 965, 970; *Akerblom v. Price*, L. R. 7 Q. B. Div. 129 (pilot allowed to recover for services after abandonment); *The Florence*, 16 Jur. 572 (claim of seaman allowed under same circumstances); *Hobart v. Drogan*, 10 Pet. 108, 9 L. ed. 363 (seamen declared to be entitled to salvage, where extraordinary events have occurred, in which their connection with the ship may be dissolved *de facto* or by operation of law). Seamen are also entitled to salvage where they perform services distinctly in excess of their duty. *Hobart v. Drogan*, *supra*, and the cases next cited.

Where the ship salvaged and the ship whose crew rendered salvage services belong to the same owner, salvage may be recovered, provided the services performed are not within the contract which was originally made with the owner, and to which the stipulated wages apply. *The Sappho*, L. R. 3 P. C. 690; *The Scout*, L. R. 3 Adm. & Eccl. 512; *The Laertes*, L. R. 12 Prob. Div. 187.

It is settled doctrine of the English Admiralty that a pilot is not bound to go on board a vessel in distress, to render pilot service, for mere pilotage reward. Accordingly, where a vessel is seeking a port of safety out of the course of her intended voyage, a pilot, if engaged, may be entitled to additional remuneration in the nature of salvage. *Maude & P. Merchant Shipping*, pp. 267, 646. See *The Jonge Andries*, *Swabey*, Adm. 226, affirmed in 11 Moore, P. C. C. 313, where a pilot was allowed salvage fees for services not properly included in pilotage.

By the Supreme Court of the United States, the distinction taken is between extraordinary pilotage services, and salvage services properly so called,—the one going beyond the mere line of duty, the other going to the extreme line of duty. *Hobart v. Drogan*, *supra*, referring to *The Joseph Harvey*, 1 C. Rob. 306.

Where, in an action for salary, the only issue is whether compensation for the services sued on was included in a salary paid plaintiff for other services, a proposed examination, the object of which is to show plaintiff's method in performing his work, his representations respecting his ability, and the manner in which other employees perform their work, should be excluded. *Fox v. Bialy*, 151 Mich. 106, 114 N. W. 871.

¹¹ *Schurr v. Savigny*, 85 Mich. 144, 48 N. W. 547 (holding it to be error to refuse an instruction to the effect that "a servant cannot be required to labor an unreasonable number of hours, but, if the

t.¹² a person employed for a definite period at certain wages cannot recover compensation for extra work voluntarily performed at times other than those at which as stipulated or understood that his services were to be discharged. In other words, an implied promise cannot be predicated on the part of an employer to pay compensation for such work to a person who is regularly employed and receives wages at regular intervals.¹³ This rule, however, does not apply to night work performed by a person whose regular services are discharged by day,¹⁴ nor to a contract under which he is to render services during a part only of the time which would ordinarily be devoted to the service in question, and is to be paid a proportionate amount of wages, has actually rendered services for the whole of that time. Under such circumstances it may properly be inferred that the conditions of the contract have been altered, and he is entitled to recover at the specified rate in respect

of the entire time during which he has performed services.¹⁵

The annotator has not found any other direct authority for the doctrine enounced in the principal case, viz., that compensation for work within the scope of a regular employment, in addition to the usual but not fixed form of a day's work, cannot be recovered, unless the contract was entered into with reference to a controlling custom.

In a case where the servant claims merely the value of services rendered outside the regular hours of work, and the contract embraces an express provision requiring him to render a certain amount of such services without extra wages, the sum which he is entitled to recover must be estimated with reference to the effect of the contract as a whole.¹⁶

2. Work done on Sundays.

In some cases the right to recover compensation for work performed on a Sunday has been determined with reference to

whether the plaintiff does labor an unreasonable number of hours, or more than he has contracted to do. . . . he cannot recover compensation, unless there is an express promise to pay him therefor"); *Re Steam Engine No. 1*, 87 Fed. 760; *Koplitz v. Powell*, 6 Wis. 671, 14 N. W. 831; *Mathison v. New York C. & H. R. R. Co.* 72 App. 254, 76 N. Y. Supp. 89 (*arguendo*). *Schurr v. Savigny*, supra. *Levi v. Reid*, 91 Ill. App. 430. In *Wilford v. Devin*, 43 Iowa, 559, the court upheld a verdict in favor of a claimant who had been hired as a man of all trades at weekly wages, and had taken care of his employer during an illness, on alternate nights and alternate Sundays. The issue was that he had been paid extra wages for the Sunday work, but not for work done at night, and that there had been no agreement regarding the latter. *Edrington v. Leach*, 34 Tex. 285. In *Posner v. Seder*, 184 Mass. 331, 68 N. E. 335, plaintiff was employed by defendant for one year at \$17 a week, "the wages to be paid at the end of each and every week." The contract required plaintiff to work from 6:30 A. M. to 6 P. M., with the exception of an hour between 12 M. and 1 P. M., and also, without extra pay, to work overtime, not more than two hours a week, and not more than two months aggregate in the year. The plaintiff contended that the \$17 which he received each week was payment for only the time between 6:30 A. M. and 6 P. M., and not for the extra time; and that therefore he might, in case of breach of the contract, appropriate the weekly sum to the payment of the wages during the regular hours, and recover *quantum meruit* for the extra time. Defendants, on the contrary, contended that the \$17 was a payment for the services of the week, whatever they were, and R.A. (N.S.)

therefor that the plaintiff had been fully paid, and so could not recover. Commenting upon these opposing theories, the court said: "Neither view seems to us correct. The contract was to continue a year. The weekly hours of labor were variable, and it is fair to assume that there would be a weekly variation in the value of the services. The contract is to be taken as a whole. On the one hand, the defendants could not hold the plaintiff to the work during the extra hours in any week for the sum of \$17 except in connection with the other part of the contract, namely, that they were to pay him \$17 in other weeks when there was no extra time; nor, on the other hand, could the plaintiff hold the defendants to the payment of \$17 for a week in which he did not work extra time, except in connection with the other part of the contract, namely, that in any week in which he did work extra time he should receive only \$17. The true construction of the contract is that it was a hiring for a year, payments to be made by weekly instalments, without reference to the weekly variation in the amount of work done. Since the payments were made during the existence of the contract, they cannot be considered as having no reference to the other parts of the contract. If the plaintiff desires to proceed upon the theory that the contract has been repudiated, his proper course is to proceed upon *quantum meruit* for the value of all his services, less what he has received. If he has been paid what they are worth, he can recover nothing; if he has not, he may recover the balance due him. But it is plain that the sum due him is not necessarily the fair price for the extra hours in addition to the sum of \$17 per week which he has received. He cannot appropriate the \$17 to the payment of the ordinary week's work, and sue only for the bal-

the question whether the work belonged to one of the categories excepted from the prohibitive clauses of one of the Lord's Day acts.¹⁷ The doctrine upon which other cases have proceeded may be enunciated thus: Where a person is hired for a definite term, at a certain rate of wages, to render services in an occupation of such a nature that he must presumably have contemplated the performance of more or less work on Sundays, he cannot, in the absence of an express stipulation, recover any extra compensation for such work.¹⁸

ance, because, for the reasons above stated, that is not in accordance with the contract under which the payment was made."

¹⁷ In *Watts v. Van Ness*, 1 Hill, 76, the New York act was held to be a bar to an action brought by an attorney's clerk to recover extra compensation for work performed on Sunday.

In *Whitcomb v. Gilman*, 35 Vt. 297, a farm servant was held entitled to compensation for work done on Sunday for the purpose of preventing a great waste of sap from sugar maples.

¹⁸ *Lowe v. Marlow*, 4 Ill. App. 420 (feeding of cattle, etc., by farm hand); *Robinson v. Webb*, 73 Ill. App. 569 (farm hand bound to do chores); *Guthrie v. Merrill*, 4 Kan. 187 (ferryman).

¹⁹ As to the right of government employees to recover, see *Throop*, Pub. Off. § 492; 23 Am. & Eng. Enc. Law, 2d ed. p. 390.

The general rule is that an action of assumpsit will not lie in favor of a salaried officer of the state, to recover additional compensation for extra services imposed upon him after he has entered upon the performance of his duties. *State v. Chase*, 5 Harr. & J. 297 (judge); *Chandler v. State*, 5 Harr. & J. 284 (state printer).

As to the circumstances under which a public officer is entitled to recover extra compensation when he is appointed to a new position the duties of which are different in character from those of the original one, see *Converse v. United States*, 21 How. 463, 16 L. ed. 192; *United States v. Brindle*, 110 U. S. 688, 28 L. ed. 286, 4 Sup. Ct. Rep. 180.

Under the act of Congress of August 23, 1842, which declares that no allowance or compensation shall be made for any extra service which any clerk or other officer may be required to perform, it has been held that a clerk in the Department of the Interior could not recover compensation for his services in preparing an account of the London Industrial Exposition, and making a report thereon. *Stansbury v. United States*, 1 Ct. Cl. 123.

An employee who was directed to perform the duties of another who had been suspended pending the trial of an indictment against him, but who subsequently resumed his duties, was held not to be entitled to recover any compensation but the salary appointed for his own position. *Fraser v. United States*, 16 Ct. Cl. 507. The 30 L.R.A. (N.S.)

d. Recovery for extra work performed by governmental and municipal employees.

A full discussion of the right of governmental and municipal employees to recover compensation for extra work would carry us beyond the scope of this treatise. In the note below, references are given to treatises which deal with the subject, and also to some cases which seem to be of sufficient general interest to be deserving of mention in this place.¹⁹

decision proceeded on the grounds that such a suspension was not a suspension within the meaning of the tenure of office act (U. S. Rev. Stat. § 1768), and that there could not be two persons holding one office at the same time.

In a Newfoundland case, the court held that, as in the case of ordinary contracts of service, there was an implied obligation on the part of the government to compensate a police officer for the additional duties imposed upon him as a consequence of his transfer to a position of greater responsibility. *Smith v. Newfoundland, Newfoundland Rep.* (1884-96) 62.

As to the rule that a person accepting a municipal office with a fixed salary cannot claim additional compensation if his duties are increased, see *Dill. Mun. Corp.* 4th ed. § 233.

That an increase by a city council of the duties of a city officer does not imply any obligation to increase his salary was laid down in *Covington v. Mayberry*, 9 Bush, 304.

But a city officer is entitled to be paid for acts done under appointment of the common council, outside the scope of his official duty. *McBride v. Grand Rapids*, 47 Mich. 236, 10 N. W. 353, following *Detroit v. Redfield*, 19 Mich. 376. In the former case, evidence that the person rendering the services did not make claim for compensation to persons who were without authority to pay him or to make a binding agreement that he should be paid was held not to be admissible for the purpose of showing that the services rendered were gratuitous.

A municipal servant is only entitled to the statutory rate of compensation fixed for the position originally accepted by him, although he may be detailed for other work when his services are not required for that position. *McCunney v. New York*, 40 App. Div. 482, 58 N. Y. Supp. 138.

A clerk in the bureau of highways of the city of New York, finding it to be the custom among other clerks to take the affidavits of certain employees in verification of their accounts of services rendered, and thinking it to be a part of his duties, obtained an appointment as commissioner of deeds, and thereafter took affidavits, at the request of the superintendent of the bureau, without making any charge, but without, at the time, having any expectation that the city would be responsible for

c. Recovery for extra work in civil-law jurisdictions.

The doctrine of the civil law is, it would appear, virtually the same as that of the common law.²⁰

his fees. Held, that he could not, on finding that the other clerks had been receiving fees from the employees for their services, recover the amount of his fees from the city. *Benjamin v. New York*, 77 App. Div. 62, 78 N. Y. Supp. 1067. The effect of the evidence was said to be that the plaintiff had rendered the services, either in the belief that they formed a part of his regular duties, or in the expectation that his compensation was to be derived only from those who made the affidavits.

In *Merzbach v. New York*, 163 N. Y. 16, 57 N. E. 96, reversing 19 App. Div. 186, 45 N. Y. Supp. 1018, which affirmed 10 Misc. 131, 62 N. Y. S. R. 499, 30 N. Y. Supp. 908, where a municipal officer was authorized by statute to take oaths and receive fees as a notary, it was held that the services rendered by him in that capacity were not incidental to his ordinary duties, and that the burden of showing that they were rendered voluntarily lay on the defendant.

²⁰(a) *Scotland*.—In this country the accepted doctrine is that where the amount of wages has once been fixed by regular agreement, mere extra labor, though considerable, will not entitle the servant to claim an increase over the sum specified, unless he can establish some express or implied contract. *M'Whirter v. Guthrie* (1821) Hume, Dec. 760; *Fraser, Mast. & S.* p. 47.

In *Latham v. Edinburgh & G. R. Co.* 4 Sc. Sess. Cas. 3d series, 1070, an action by a salaried manager of a railway company for remuneration for extra services said to have been rendered by him during a long period of years was dismissed as irrelevant, there being no specific averment (1) of the services he was engaged to perform; (2) of the extra services performed by him; and (3) of an agreement to remunerate him for such extra services. Lord McNeill said: "This is a very peculiar case, and the claims made by the pursuer are of a very peculiar kind. He was manager of this company, which has now expired. It is wound up, and he has been in the company's service for a length of time. He was paid by salary for his services as manager, and now he makes a claim against the funds of the dissolved company for payment of a reasonable amount in respect of extra services rendered by him during the whole period of his employment as manager. That is a very peculiar case, and I do not think I ever saw a case of that character before. The pursuer was employed as manager. The particular terms of his employment are not stated, but the nature of his office involved the purchase of his services for his whole time. Then, it appears that in the course of that employment the nature of his services was considered on 30 L.R.A. (N.S.)

II. Express agreements to pay for extra work.

In some of the cases under this head, the questions involved were entirely of a general character, *vis.*, whether the alleged

more than one occasion, and his salary was more than once increased, but that is said to have been done in reference to his proper duties as manager. It is said that he performed a number of extra services, for which he now demands remuneration. It appears to me in reference to a retrospective claim of this kind, extending back over many years, that it would require to be very clearly stated what the services were which he was engaged to perform, what the extra duties were that were done by him, and what was the remuneration that was agreed to be paid to him for these extra services. I have no idea that a person employed to do certain things, and asked to do things which are supposed to fall under the general engagement, can make a demand for special remuneration, without alleging a special agreement and specifying the work done. But we have not got such a statement here. We have specimens given of the services which were rendered, but we have no specific contract alleged; on the contrary, the statement (in cond. 13) rather imply that there was no specific contract. . . . Without a more specific statement of the contract, showing how the extra services rendered clearly stand out from the ordinary duties of the pursuer's office, this case cannot be sent to trial. I am of opinion the pursuer has no case, and that we ought to dismiss the action."

In *Money v. Hannan* (1867) 5 Scot. L. R. 32, a person entered the defendant's service as clerk, cashier, and bookkeeper, on December 31, 1860, at a salary of £90 per annum, the period of services being left indefinite. The engagement was made by letter, which stipulated: "It is understood that your whole attention is to be devoted to our business, and that you shall not have any other business whatever to attend to." The pursuer continued in the employment of clerk, etc., as above, till March, 1862, when he was directed by his employers to go to Bergen, and, acting for their firm, to investigate the books of a certain company, there strike a balance, and inquire into the meaning of certain transactions. He was four months absent on this commission, when he returned to Glasgow, and resumed his former employment with the defendants, in which he continued till their firm was dissolved in October, 1862. In January, 1866, he raised an action, concluding for extra remuneration, over and above his salary of £90, in respect of the employment at Bergen, estimating the sum to which he was entitled at £250. The majority of the court were of opinion that, though the pursuer could not have been compelled to go to Bergen, yet, having consented to, without stipulating for extra remuneration, he could not now claim any.

agreement was, as a matter of fact, entered into;²¹ whether the given services had

They considered his employment abroad to be *ejusdem generis* with that for which he was engaged.

(b) *Louisiana*.—In this state it has been held that a clerk in the employment of a merchant, at a fixed salary, cannot be allowed an additional compensation against the succession of his former employer, for services rendered in the general management of decedent's business, without proving an agreement to that effect between the deceased and himself. *Turnell's Succession*, 34 La. Ann. 888.

(c) *Quebec*.—The law as applied in this province has been thus stated: "The general principle involved in a claim for extra remuneration seems to me to be very clear. If a person employed in a particular capacity by another is charged to perform some duty not theretofore performed by him, he may decline to do it, and then the question will arise nakedly whether the new employment is of a similar kind to that which he was employed to perform. If it is, he is bound to perform the duty to the best of his ability. But if the person employed performs the new duty without remonstrance, the presumption is that the new work falls within the general scope of that which he was employed to perform, and he has no legal claim to additional remuneration. This is evidently the rule of reason and of ordinary experience." *Dugdale v. Montreal* (1880; *Montr. Q. B.*) 3 *Legal News*, 204. The court then proceeded to observe that in the case under review the position of the parties was not so clearly defined, and that the general rule was therefore not perfectly applicable. The plaintiff was appointed as a health officer, and he had medical duties to perform. During this time an epidemic broke out, which required the establishment of an extra hospital, entailing far more work than was at first contemplated. Dr. Dugdale did not refuse to do the work, neither did he continue to perform it in silence. He spoke to the members of the committee as to extra remuneration, and one of them informed these gentlemen that their claims would be considered. Under these circumstances it was considered that the case was governed by the principle that the plaintiff agreed to trust to the generosity of his employer, and therefore had no claim beyond that which the corporation chose to allow.

²¹ In *Voorhees v. Combs*, 33 N. J. L. 494 (discussed under another aspect in I. b, ante), the labors of a domestic servant had been increased by the sickness of the testator, her master; discussing the contention that his execution in her favor of a promissory note for \$500, for the alleged extra services, amounted to an express promise to pay for them, the court said: "There is no pretense in the case that the plaintiff ever demanded of the testator increased pay, or that she ever had any conversation with him on the subject of her

increased labors. The evidence shows that on one occasion during the testator's illness, Duryee, his financial agent, asked him what he intended to give the plaintiff, as she had been very kind to him; the testator asked what he ought to give; Duryee said, 'Give what you please, it is all your own;' the testator then said, 'Give her \$500.' Then Duryee wrote a note for \$500, and the testator signed it. Soon after this was done, the plaintiff came into the room where the testator was, and he told her he had given her \$500. This transaction had none of the characteristics of an express promise to pay for extra services. It was a mere gratuity on the part of the testator, and was not done in discharge of any legal obligation which rested upon him. It was expressly stated to be a gift, an expression of his gratitude to the plaintiff, and could not lay the foundation of an action at law."

See also *Pearson v. Great Northern R. Co.* 90 Minn. 227, 95 N. W. 1113; and *Friedman v. Fertel*, 107 N. Y. Supp. 832,—cases containing a review of certain evidence, which did not embrace any salient points of interest worth noting here.

In *Jerome v. Wood*, 39 Colo. 197, 88 Pac. 1067, 12 A. & E. Ann. Cas. 662, plaintiff entered defendant's service as a domestic in July, 1900, knowing that defendant's wife was an invalid, and that plaintiff's service would include certain attentions to the wife. In September a change of treatment was prescribed, which increased plaintiff's services, and shortly thereafter plaintiff's wages were raised \$3 per month. Plaintiff's wages were paid at the end of each month, and on February 21, 1901, a settlement was had, in which plaintiff was paid her wages to the succeeding day, when she terminated the employment. Plaintiff testified that when her work was increased, she threatened to leave, but that defendant stated that, if she would remain, he would "make it all right,"—"that he would do well by plaintiff, or something to that effect," which defendant denied. Held, that such facts were insufficient to rebut the presumption that plaintiff was paid for all of her services, and that she was therefore not entitled to recover for extra services of a similar nature.

In *Lucas v. Boss*, 110 App. Div. 220, 97 N. Y. Supp. 112, it was held that evidence which showed merely that the defendant's testator promised that, if the plaintiff, a nurse, remained in his employ, he would provide for her in his will; that she refused to remain, and left against his protest; and that he failed to make a satisfactory provision for her,—did not justify the inference of a promise to pay the plaintiff any sum in addition to that which she had received under her special contract, and which it is evident was the sum that the plaintiff was willing to and did accept for the services that she rendered.

It has been laid down that "the promise

and duly performed by the claimant;²² and whether the defendant was, under the given circumstances, entitled to a reduction of the claim on account of time lost during the stipulated term.²³ Others proceeded upon a special doctrine which may be stated thus: In an action brought by a servant for the purpose of enforcing a promise to pay, in respect of extra serv-

ices, remuneration additional to that stipulated in an existing contract, the defense of a want of legal consideration will operate as a bar to recovery, if he was bound, under the terms of his contract, to perform the services upon which his claim is founded. If the services are not covered by the contract the action may be maintained.²⁴ Other reasons which have been

to pay extra compensation must be definite, certain, and explicit" (Jerome v. Wood, supra); and that, in order to warrant the allowance of a claim against the estate of a decedent, "the contract must not only be certain and definite, and founded upon an adequate consideration, but also that it must be established by the clearest and most convincing evidence" (Lucas v. Boss, supra).

²² Under a contract to pay a salesman an additional sum if his sales were satisfactory, it was held to lie with the employer alone to determine whether the sales were satisfactory. *Alford v. Cook*, 107 N. Y. app. 710. In that case, letters written by the employer in answer to reports sent in by the salesman, and containing words of praise for orders taken, and encouragement to keep up the good work," were held to be, at most, the ordinary messages of an employer to his employee, calculated to impute him to renewed effort.

²³ In *Keysaw v. Dotterweich Brewing Co.*, 11 App. Div. 58, 105 N. Y. Supp. 562, an action to recover for overtime work of plaintiff while in defendant's employ during a period of two years, it appeared that plaintiff had failed in many instances during the second year's service to work a full day's work, for which he had received a full day's pay, and that the arrangement between the parties as to pay for extra work extend over the entire period of service. Held, that it was error to exclude testimony showing how often and how long during the second year plaintiff failed to work the full number of hours, and to refuse to permit the jury to consider such testimony in reduction of plaintiff's claim for overtime work done during the first year.

²⁴ In *Stilk v. Myrick*, 2 Campb. 317, where some of the crew deserted a ship, and the captain, not being able to find others to supply their place, promised to divide the wages which would have become due to them among the remainder of the crew, Lord Ellenborough based his own ruling that the action was not maintainable, on the ground that "there was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had held all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case could have been quite different; or if the captain had capriciously discharged the two who were wanting, the others might

not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage, as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port."

This decision was followed in *The Araminta*, 18 Jur. 793, where wages forfeited by deserters had been distributed by the master among the members of the crew who consented to stay and navigate the ship home. Held, that the shipowners were entitled, in settling with them, to deduct from their wages the sums so distributed.

In *Harris v. Carter*, 3 El. & Bl. 559, the plaintiff, a sailor, signed articles for a voyage out to M. and home, at £3 per month. On the arrival of the ship at M., several of the crew deserted. The captain, to induce the rest to remain, signed fresh articles with plaintiff and others at the rate of £6 per month for the home voyage. Plaintiff continued in the vessel till her arrival home, and then sued the shipowner for work and labor. Defendant paid money into the court at the rate of £3 per month. Plaintiff claimed to be paid at the rate of £6 for the home voyage. On the trial, there was some evidence that at M. the captain had consented to the discharge of some of the crew. The judge asked the jury if the plaintiff himself had been discharged before entering into the fresh articles. On their answering that he had not, the judge directed a nonsuit. Held, on a motion for a rule for a new trial, that the nonsuit was right, since there was no evidence of any circumstances to free the plaintiff from his original contract, so as to enable him to give consideration for the fresh promise to him, or to authorize the captain to bind the owners by such a contract.

In *Hopkins v. M'Bride*, 50 Week. Rep. 255, a claim by seamen for additional remuneration promised in consideration of their remaining on board their ship after an accident, and working her home, was held not to be enforceable, for the reason that there was no evidence to show that the accident had rendered the ship so unseaworthy that they would have been justified in breaking their articles.

Libellants contracted with respondent, which owned a salmon-canning plant in Alaska, to perform services as sailors in navigating a vessel from San Francisco to

assigned for disallowing the claims in question are the following: That the original

contract of hiring was in writing, and constituted, under the given circumstances,

such plant and return, and in catching and canning salmon, while there, during the season, for which they were to receive a stipulated compensation. After reaching the plant they refused, without cause, to further perform the contract, unless respondent's superintendent signed an agreement to pay additional compensation. He stated that he had no authority to do so, but, being unable to procure other men, and influenced by the remoteness of the place and the shortness of the season, he complied with their demand, and a second contract was signed, identical with the first except as to the compensation to be paid. Held, that, conceding the superintendent's authority to make it, the agreement to pay additional compensation for services which libellants were legally bound to render under the old contract was void for want of consideration, there being no sufficient ground for claiming, under the circumstances shown, that respondent voluntarily waived the breach of the original contract by libellants. *Alaska Packers' Assn. v. Domenico*, 54 C. C. A. 485, 117 Fed. 99, reversing 112 Fed. 554. The court adopted the general principle laid down in *King v. Duluth, M. & N. R. Co.* 61 Minn. 482, 63 N. W. 1105, that a person who refuses to perform a contract, and thereby constrains the other party to the contract to promise to pay him an increased compensation for doing that which he was legally bound to do, cannot sue on the promise.

For other cases in which agreements to pay extra compensation for services covered by the contract have been held invalid as being without consideration, see *Frazer v. Hatton*, 2 C. B. N. S. 512 (steward of ship); *Bartlett v. Wyman*, 14 Johns. 260 (seaman threatened to abandon ship if higher wages were not paid); *Bloodgood v. Wuest*, 69 App. Div. 356, 74 N. Y. Supp. 913 (assistant clerk of a county).

The general doctrine of the law of contracts which is illustrated by the decisions above cited has been thus stated by two eminent text writers: Neither the promise to do a thing nor the actual doing of it will be a good consideration, if it is a thing which the party is bound to do by the general law, or by a subsisting contract with the other party. *Pollock, Contr.* pp. 161, 176.

"The performance of that which the party was under a previous valid, legal obligation to do" is not a sufficient consideration for a contract. 1 *Parsons, Contr.* p. 437.

In the note to the last-mentioned treatise are cited some cases in which it has been held that, if one party to a contract refuses to perform unless some further pay or benefit than the contract provides is promised, and such a promise is made, it is binding; the ground taken being that the making of a new contract shows the rescission of the 30 L.R.A. (N.S.)

original contract and the substitution of another. This was the doctrine followed in the reversed decision of the lower court in *Domenico v. Alaska Packers' Assn.* 112 Fed. 554, but there is a very decided preponderance of authority against it.

In two Scotch cases it has been laid down that, in order to show a prima facie right to recover for extra work, there must be averments stating what the services were which the claimant was engaged to render, what were the extra duties which were performed by him, and what remuneration he was promised. *Latham v. Edinburgh & G. R. Co.*, 4 Sc. Sess. Cas. 3d series, 1070; *Mackenzie v. Baird* (1906-07) Sc. Sess. Cas. 838.

With regard to the rule that a special contract to pay a public officer a larger amount of remuneration than that fixed by law is invalid, see *Mechem, Pub. Off.* 374; *Throop, Pub. Off.* 477.

Where a ship is left, before the completion of the voyage, so short-handed that it is dangerous to proceed, the crew are not bound by their articles to proceed. Accordingly, an agreement to give them higher wages to do so is not void for want of consideration. *Hartley v. Ponsonby*, 7 El. & Bl. 872.

In *Turner v. Owen*, 3 Fost. & F. 176, a ship navigated by a crew hired at a home port had put into an intermediate port in an unseaworthy condition. The crew there signed articles, by which they agreed to navigate the ship home if extra hands were taken, and then refused to proceed unless £5 was paid to each man. The master having agreed to pay the sum demanded, the sailors took the vessel home. On the trial of an action brought by one of them to recover the stipulated amount, the law applicable to the facts was thus stated to the jury by Chief Justice Cockburn: "When a seaman has signed articles, he cannot claim extra remuneration for the same services as are included in the articles. On the other hand, when he signs articles it is implied, on the part of the owner, that the ship shall be reasonably fit for navigation, i. e., shall be seaworthy. And if, before the ship sets sail, the seaman discovers that she is one in which he cannot safely embark, he can refuse to do so, and enter into a new contract."

In *Harris v. Carter*, 3 El. & Bl. 559, subd. a, supra, Lord Campbell, Ch. J., intimated that the captain might have had authority to bind the owners by a stipulation for higher wages, if there had been an entire change of the voyage.

See also the extract from Lord Ellenborough's direction to the jury in *Stilk v. Myrick*, 2 Campb. 317, subd. a, supra.

In *Clutterbuck v. Coffin*, 3 Mann. & G. 842, the plaintiff agreed to enter as captain's cook on board of a brig of war, upon an undertaking by the defendant, the comman-

only legitimate evidence of the rights obligations of the parties;²⁵ that the promise was invalid, as being contrary to public policy;²⁶ that the policy of some particular statute would be contravened by allowance of the given claim for additional remuneration;²⁷ that the promise exacted by taking an undue advantage the necessities of the employer.²⁸

of the vessel, to pay him wages beyond government pay to which he would be entitled on his rating as an able seaman. (1) that there was a sufficient consideration for the agreement to entitle the plaintiff, on the services being performed, to maintain an action against the defendant for such wages; and (2) *semble*, per Tindal, J., and Maule, J., that such an agreement is not illegal. Tindal, Ch. J., considered that the plaintiff's leaving the employment in which he was then engaged was a sufficient consideration for the defendant's promise. Referring to the case of *Harris v. Watson*, note 26, *infra*, and other authorities of the same type, which had been cited how that no debt arose between the plaintiff and the defendant, Maule, J., said: "There is this material distinction between the cases referred to and the present, that in those cases, contracts were entered into with parties who were already bound to do work for which the extra wages were to be paid. Here, the defendant, instead of contracting to do work which he was already bound to perform, was a free agent, and not *sui juris*, when he entered into the agreement."

See also *Hanson v. Royden*, L. R. 3 C. P. An able seaman succeeding to second mate's wages was held to be entitled to a second mate's wages; *The Providence*, 1 Hagg. 391 (second mate succeeding in place of discharged chief mate, held to be entitled to same remuneration as the chief mate).

In *Elsworth v. Woolmore*, 5 Esp. 84, the court held upon which Lord Alvanley held that a mariner who had signed articles for a certain pay per month could claim any further wages or gratuity by custom or usage, that the act of 2 Geo. IV. chap. 3, was express, requiring in such cases that articles should be signed by the master; that it would be a fraud on the part of the crew if the owners were permitted to make a private contract to give more wages to one than to another. Accordingly, the court was of opinion that there could not be legal contracts; that the only one allowed was that entered into by articles, and binding on the seaman.

This case was followed in *Bartlett v. Wyman*, 14 Johns. 260 (for facts, see note *infra*).

In *Harris v. Watson*, Peake, N. P. Cas. 120, it was held that no action would lie at suit of a sailor on a promise of the master to pay him extra wages in consideration of his doing more than the ordinary duty in navigating the ship. Lord Mansfield, R.A. (N.S.)

Kenyon said that if such a promise could be enforced, sailors would in many cases suffer a ship to sink unless the captain would accede to any extravagant demand they might think proper to make.

In *Stilk v. Myrick*, 2 Campb. 317, Lord Ellenborough, while he expressed the opinion that the above case was rightly decided, doubted whether public policy was the true principle on which the decision was to be supported.

But in *Harris v. Carter*, 3 El. & Bl. 559, Lord Campbell dissented from this criticism, being of opinion that "it would be most mischievous to commerce if it were supposed that captains had power, under such circumstances, to bind their owners by a promise to pay more than was agreed for."

²⁷ In *Bartlett v. Wyman*, *supra*, one of the grounds upon which a seaman who had, by threats of desertion, compelled his captain to enter into new articles at a higher rate of wages, was held not to be entitled to recover, was that, to sanction this exaction by holding the contract thus extorted binding on the master of the ship would be not only against the plain intention of the act of Congress of 1790, which required the making of a written agreement between the master of every ship bound for a foreign port and each seaman hired by him, but would be holding out encouragement to a violation of duty, as well as of contract. This statute, it was remarked, protected the mariner, and guarded his rights in all essential points; and to put the master at the mercy of the crew would take away all reciprocity.

An employee within the purview of a statutory provision fixing the number of hours that shall constitute a legal day's work "may lawfully contract to labor beyond that period, and stipulate for extra compensation for the labor rendered in excess of that time." *McCarthy v. New York*, 96 N. Y. 1, 48 Am. Rep. 601.

A promise to pay a public officer an extra sum beyond that fixed by law is not binding, though he renders services and exercises a degree of diligence greater than could legally have been required of him. *Dill. Mun. Corp.* § 234.

²⁸ *Bartlett v. Wyman* (facts stated in note 27, *supra*); *Lingenfelder v. Wainwright Brewing Co.* 103 Mo. 578, 15 S. W. 844 (services of architect involved in this case).

C. B. L.

INDIANA SUPREME COURT.

JAMES W. RAMSEY et al., Trustees, etc.,
App'ts.,
v.

JOSEPH P. HICKS et al.

(— Ind. —, 91 N. E. 344.)

Religious corporation — conclusiveness of decision.

1. The decision of a proper church tribu-

nal proceeding in manifest good faith, under color of authority, that it has jurisdiction to form a union with another church, is binding on the civil courts, although such authority is not expressly conferred by the constitution of the church.

Same — civil jurisdiction — ecclesiastical rights.

2. A civil court has no jurisdiction to examine into the regularity and validity of a church tribunal, and restrain its proceedings for nonconformity with its own laws, in a matter concerning only spiritual or ecclesiastical rights.

Same — Presbyterian and Cumberland union.

3. The decision of the General Assembly of the Cumberland Church, that the revised Confession of Faith of the Presbyterian

Church was in substantial accord with its own doctrinal tenets, is binding and conclusive upon the membership of the church and upon the civil courts.

Same — power to consolidate.

4. The power to consolidate the Cumberland Church with another ecclesiastical body resided in its General Assembly and presbytery, and not in the individual membership of the church.

Same — constitutional limitation — construction.

5. The provision of the constitution of the Cumberland Church, prescribing the jurisdiction of the session, presbytery, synod, and General Assembly, which declares that the jurisdiction of those courts is limited by the express provisions of the constitution, limits such jurisdiction as between themselves,

Note. — Union or reunion of Cumberland Church with the Presbyterian Church, U. S. A.

Since the preparation of the note appended to Mack v. Kime, 24 L.R.A. (N.S.) 692, 717, the decision of the supreme court in RAMSEY v. HICKS has taken Indiana out of the group of states in which the attempted union or reunion has been held invalid, so far as property rights dependent thereon are concerned, and added it to the majority group in which such union or reunion is sustained.

The case having been transferred to the supreme court from the appellate court, the opinion of the former court, to which it adhered on rehearing, of course, overrules the opinion of the appellate court in the same case (which is set out at page 717 of the note referred to). After the decision of the supreme court, the same question came again before the appellate court, in Bentle v. Ulay (Ind. App.) 93 N. E. 459, and the latter court, while stating that ordinarily the conclusion announced by the supreme court will be followed without remark, said that the principle involved in the question under consideration was so important, and the decision in the RAMSEY CASE so "revolutionary," that it would transfer the case at bar to the supreme court, with the recommendation that its decision in the RAMSEY CASE be overruled. This disposition of the case is followed by a vigorous opinion by the chief judge, in which apparently all the associate judges concurred, reaffirming the soundness of the position taken by the court in its previous opinion, and criticizing the opinion of the supreme court in the RAMSEY CASE.

In addition to the cases referred to in the earlier note, the position of the supreme court in the RAMSEY CASE is further sustained by a case in Arkansas (Sanders v. Baggerly [Ark.] 131 S. W. 49), and a case in Illinois (First Presby. Church v. First Cumberland Presby. Church, 245 Ill. 74, 91 N. E. 761). In both of these cases, which were decided since the note referred to, the 30 L.R.A. (N.S.)

faction of the local church, formerly in the Cumberland connection, which adhered to the united body, was held entitled to the property of the church, as against the faction adhering to the Cumberland body. Elaborate opinions were written in both cases, but both follow closely the argument and reasoning of the cases cited in the other note.

In the Sanders Case, two of the judges dissented upon the ground that the organic law of the Cumberland Church had not in express terms, or by necessary implication, conferred upon the church courts or judicatories the power to dissolve the church, and to form a union with another religious society. The inherent power of the Cumberland Church to form such a union was recognized, but the opinion was expressed that the church courts, being bodies with delegated powers, did not possess that inherent power, which rested in the body of the church itself, and which could only be exercised by the unanimous consent of the units of the church.

In spite of the contrary conclusion reached in Missouri and Tennessee and by the Indiana appellate court and by the dissenting judges in some of the other cases, it is apparent that the weight of authority sustains the validity of the union or reunion as affecting property rights. Doubtless, the reluctance of the court to throw any obstacle in the way of church unity would in any event dispose them to obviate, if possible, the effect of merely technical objections. But in view of the broad principles laid down by the United States Supreme Court in Watson v. Jones, 13 Wall. 679, 20 L. ed. 666, and especially the principle that the civil courts, in the disposition of property rights depending indirectly upon the decision of an ecclesiastical tribunal, will accept that decision as conclusive, without re-examining its merits in the light of church history or polity, it would seem that the conclusion of those courts in upholding the union is abundantly fortified by legal precedent.

does not circumscribe the sovereign
er of the church itself, or of the body
which the supreme power is vested.

ie — amendment or union — exped-
iency.

The act of a church judicatory which
authority to amend its Confession of
h and constitution so as to make them
orm to those of another ecclesiastical
ety, in effecting a union with such other
ety rather than a specific amendment
he Confession and constitution, is one
olicy or expediency rather than of pow-
er authority, and therefore cannot be
tioned by the civil courts.

ie — power to consolidate.

The Cumberland Church had inherent
er to unite with another ecclesiastical
whose doctrine and polity were deemed
army with its own.

ie — conclusive effect of decision.

A supreme church judicatory having
ority to consolidate the church with
her ecclesiastical body has power to
le upon the proper mode of procedure,
determine conclusively the regularity
validity of the proceedings.

ie — authority to adopt name.

The express assent of the presbytery
ie Cumberland Church to the union with
Presbyterian Church proposed by its
ral Assembly implied some modification
ames, and empowered the General As-
sly to adopt any name deemed by it
appropriate for the consolidated
ch.

ie — trust — conveyance — diver-
on.

A conveyance for a consideration to
trustees of the congregation of a speci-
religious denomination does not cre-
a trust in the property in favor of
bers of the congregation, which will
ont the proper authorities of such de-
nation from uniting with another ec-
astical body, and conferring upon it a
title to the property.

(March 31, 1910.)

PEAL by plaintiffs from a judgment
of the Superior Court for Vanderburg
ty in defendants' favor in a suit to re-
possession of certain church prop-
which were alleged to have been con-
in violation of plaintiffs' rights, and
ges for the alleged wrongful deten-
thereof. Affirmed.

3 facts are stated in the opinion.

ssrs. William Relster, W. C. Cald-
and George W. Shaw, for appellants.

ssrs. John M. Gant, Ogden & In-
Hastings, Allen, & Hastings, and
Williamson for appellees.

ontgomery, J., delivered the opinion
e court:

s case was transferred from the ap-
R.A. (N.S.)

pellate courts under the provisions of the
second subdivision of § 1394, Burns's Anno.
Stat. 1908. Appellants, as trustees of
the Washington Congregation of the Cam-
berland Presbyterian Church in Daviess
county Indiana, brought suit in ejectment
to recover possession of a certain lot with
the church building and manse situate
thereon, and damages for the unlawful det-
ention of the same. Appellees answered by
general denial. The cause was sent, on ap-
plication for a change of venue, to the su-
perior court of Vanderburg county, where a
trial resulted in a finding and judgment in
favor of appellees. The overruling of ap-
pellants' motion for a new trial is the only
alleged error. The grounds of the motion
for a new trial are that the decision of the
court is not sustained by sufficient evidence,
and is contrary to law.

The lot in question was conveyed in 1854
by general warranty deed to certain named
persons, "trustees of the Washington Con-
gregation of the Cumberland Presbyterian
Church, in Daviess county, Indiana," for a
stated consideration of \$85. This contro-
versy grew out of the union or merger, in
1906, of the Cumberland Presbyterian
Church with the Presbyterian Church in
the United States of America; and the ques-
tion for settlement is the legal successor of
the original grantee named in this deed.
Appellees favored union of these churches,
concurred in the action of the General As-
semblies declaring such union accomplished,
and hence represent the united church, and,
as such representatives, claim title to the
property. Appellants deny the authority
of the General Assembly of the Cumberland
Presbyterian Church to effect a merger or
union with another church, dispute the va-
lidity of the action taken, and refuse to
acquiesce therein, and, retaining the origi-
nal name, claim to be the true Washington
Congregation of the Cumberland Presby-
terian Church and the rightful and legal
owner of the property in dispute. The civil
courts have jurisdiction over the subject-
matter, the title to property, and their judg-
ment has been invoked by the parties, hence
we are required, though reluctant, to enter
upon the consideration of a controversy
which inevitably involves the domain of
ecclesiastical jurisprudence. The para-
mount question submitted is the validity or
binding force of the union of the Cumber-
land Presbyterian Church, which for brev-
ity we shall style the "Cumberland Church,"
and the Presbyterian Church in the United
States of America, which we shall desig-
nate as the "Presbyterian Church," as re-
spects both the parties to this action and
the civil courts. Under our view of the law
governing such cases as this, it will not be

necessary to set out the declared doctrines and polity of these churches at a very great length.

The distinctive name "Presbyterianism" indicates primarily a system of church government embodying the belief that the management of the New Testament Church is in the hands of representatives of the people called "presbyters." Presbyterianism as it exists is both a polity and a doctrine. Its doctrine is commonly known as Calvinism; and its polity consists of self-government through chosen representatives, rejecting alike the rule of one man, and the rule of the extemporized and irresponsible assembly. All branches of the Presbyterian Church are founded essentially on the Westminster Standards, which consist of six books: The Confession of Faith, the Larger Catechism, the Shorter Catechism, the Form of Government, the Directory of Worship, and the Book of Discipline. The first three books are doctrinal, and the last three relate to government and worship. The Presbyterian Church, represented by appellees, adhered to the Westminster Confession of Faith, which among other things declared, that

"God from all eternity did, by the most wise and holy counsel, of His own will, freely and unchangeably, ordain whatsoever comes to pass. . . .

"By the decree of God, for the manifestation of His glory, some men and angels are predestinated unto everlasting life, and others foreordained to everlasting death.

"These angels and men thus predestinated and foreordained are particularly and unchangeably designed; and their number is so certain and definite that it cannot be either increased or diminished. . . .

"Neither are any other redeemed by Christ, effectually called justified, adopted, sanctified, and saved, but the elect only.

"The rest of mankind, God was pleased . . . to pass by and to ordain them to dishonor and wrath for their sin, to the praise of His glorious justice. . . .

"Elect infants, dying in infancy, are regenerated and saved by Christ through the Spirit, who worketh when and where and how He pleaseth. So, also, are all other elect persons who are incapable of being outwardly called by the ministry of the Word."

The governing body in each Presbyterian congregation is the church session, consisting of the pastor, when there is one, and one or more elders. A presbytery consists of all the ministers, in number not less than five, and one ruling elder from each congregation, within a certain district. A synod embraces at least three presbyteries, and consists of ministers and ruling elders from 30 L.R.A. (N.S.)

the local churches. The General Assembly is the highest authority in the church, and is a representative body composed of ministers and ruling elders selected by each of the presbyteries. A controversy arising in any of these bodies may be carried by appeal to the higher judicatories successively, until the General Assembly is reached, whose decision is final. Each member joining the church agrees to abide by the church laws, rules, and regulations.

The first Presbyterian Church on this continent was formed about the middle of the seventeenth century; and in 1785 the synods of New York and Philadelphia took steps for the union of all the Presbyterian bodies, which culminated in the formation and meeting of the first General Assembly, May 21, 1789.

The first constituent body of the Cumberland Church as an independent organization was a presbytery formed by three Presbyterian ministers, on February 4, 1810, in Dickson county, Tennessee. This action was the outgrowth of a revival and spiritual awakening which swept over the Western Wilderness in 1800 and succeeding years. This movement offended the Presbyterian Church, for three reasons: (1) The joyous emotions and demonstrations of converts were looked upon as fanatical, and not consistent with soberness and good order; (2) the mourners' bench, camp meeting, and other measures adopted to promote the revival were condemned as unscriptural, and the lowering of educational standards in licensing men as exhorters and evangelists, to meet the demand for ministers, was regarded as un-Presbyterian; (3) the pleading of revivalists with sinners to accept salvation freely offered to all seemed a denial of the certainty and definiteness of the eternal decrees taught by the Westminster Confession of Faith; and, finally, the men licensed as evangelists were ordained by the revival ministers, with permission to adopt the Confession of Faith, except "the idea of fatality," as it seemed to be taught in that book. This constituted the irreconcilable offense. The Cumberlands entertained a lingering hope of reconciliation and reunion with the mother church, until the growth of the church necessitated the formation of the Cumberland synod in 1813, which was the act of final separation. In 1814 the General Assembly of the Presbyterian Church recognized the division as final, and thereafter dealt with the Cumberland Church as a sister evangelical denomination.

The distinctive belief of the Cumberland Church on doctrinal points of dissent from the Westminster Confession is concisely stated as follows: "(1) That there are no eternal reprobates; (2) that Christ did not

r part only, but for all mankind; (3) all infants dying in infancy are saved by Christ and the sanctification of the Holy Spirit; (4) that the operations of the Holy Spirit are coextensive with the atonement,—as, on the whole world in such a manner as to leave it without excuse." The civil and governmental methods of the churches are conceded to be substantial alike. In 1829 a General Assembly of the Cumberland Church was formed and organized; and in 1883 the General Assembly adopted a constitution for that church which was duly ratified and approved by the Synod. The following provisions of the constitution are deemed relevant:

The General Assembly is the highest of this church, and represents in one all the particular churches thereof. It bears the title of the General Assembly of the Cumberland Presbyterian Church, and sustains the bond of union, peace, correspondence, and mutual confidence among all churches and courts. . . . It shall assemble as often as once every two years, and shall consist of commissioners from the presbyteries."

The General Assembly shall have the power to receive and decide all appeals, and complaints regularly brought before it from the inferior courts; to testify against error in doctrine and immorality in practice, injuriously affecting the church; to decide in all controversies respecting doctrine and discipline.

To receive under its jurisdiction ecclesiastical bodies whose organization conformed to the doctrine and order of this church."

Upon the recommendation of the General Assembly, at a stated meeting, by the two-thirds vote of the members thereof, the Confession of Faith, catechism, constitutional rules of discipline, may be amended or changed when a majority of the Synod, upon the same being transferred for their action, shall approve."

Confession of Faith, Sec. III. "It is the duty of these courts, ministerially, to remove controversies of faith and questions of morals, to set down rules and orders for the better ordering of the worship of God and government of the church, . . . and authoritatively to remove the same, which determinations shall be received with reverence and submission."

In 1860 the General Assembly of the Cumberland Church passed a resolution declaring its hope that the entire Presbyterian Church might soon be represented in one General Assembly; and in 1867, appointed a committee to take preliminary action thereon. (N.S.)

looking to organic union with the Presbyterian Church. The Cumberland Church, through its committee, proposed at that time to surrender its name, standards of ministerial education, and points of difference in form of government, discipline, and directory. This attempt at union failed. Propositions for union with the Evangelical Lutheran Church and the Methodist Protestant Church were under consideration by the General Assemblies of 1882-1887. The Cumberland General Assembly, in 1903, appointed a committee on fraternity and union, to confer with like committees from other Presbyterian bodies looking to organic union among Presbyterian churches in the United States. The General Assembly of the Presbyterian Church, in 1903, disavowing the extreme fatalistic inferences drawn from statements in the Confession of Faith, and insisting that ordination vows required its reception and adoption only as containing the system of doctrine taught in the Holy Scriptures, made the following authoritative and explicit declaration:

"First, with reference to chapter III. of the Confession of Faith, that, concerning those who are saved in Christ, the doctrine of God's eternal decree is held in harmony with the doctrine of His love to all mankind. His gift of His Son to be the propitiation for the sins of the whole world, and His readiness to bestow His saving grace on all who seek it. That concerning those who perish, the doctrine of God's eternal decree is held in harmony with the doctrine that God desires not the death of any sinner, but has provided in Christ a salvation sufficient for all, adapted to all, and freely offered in the Gospel to all; that men are fully responsible for their treatment of God's gracious offer; that His decree hinders no man from accepting that offer; and that no man is condemned except on the ground of his sin.

"Second, with reference to chapter X., § 3, of the Confession of Faith, that it is not to be regarded as teaching that any who die in infancy are lost. We believe that all dying in infancy are included in the election of grace, and are regenerated and saved by Christ through the Spirit, who works when and where and how He pleases."

The committee on fraternity and union of the Cumberland Church met with the committee on church co-operation and union of the Presbyterian Church and formulated and agreed upon a joint report to be submitted to the General Assemblies of the two churches, which report embraces: (1) Plan of reunion and union of the two churches. (2) Concurrent declarations to be adopted by the respective General Assemblies meeting in 1904. (3) Recommendation.

mendations. In this report the committee said: "We believe that the union of Christian churches of substantially similar faith and polity would be to the glory of God, the good of mankind, and the strengthening of Christian testimony at home and abroad." And among the concurrent declarations to be adopted was the following: "In adopting the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, as a basis of union, it is mutually recognized that such agreement now exists between the systems of doctrine contained in the Confessions of Faith of the two churches as to warrant this union,—a union honoring alike to both." The plan of union provided that the two churches be united as one, under the name and style of "the Presbyterian Church in the United States of America," and on the doctrinal basis of the Confession of Faith of the Presbyterian Church, as revised in 1903, and its other doctrinal and ecclesiastical standards, and the acknowledgment of the Scriptures of the Old and New Testaments as the inspired word of God, the only infallible rule of faith and practice. It was further provided as follows:

"3. Each of the Assemblies shall submit the foregoing basis of union to its Presbyteries, which shall be required to meet on or before April 30th, 1905, to express their approval or disapproval of the same by a categorical answer to this question:

"Do you approve of the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church, on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards, and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice?"

"Each presbytery shall, before the 10th day of May, 1905, forward to the stated clerk of the Assembly with which it is connected a statement of its vote on the said basis of union.

"4. The report of the vote of the presbyteries shall be submitted by the respective stated clerks to the General Assemblies meeting in 1905, and if the General Assemblies shall then find and declare that the foregoing basis of union has been approved by the constitutional majority of the presbyteries connected with each branch of the church, then the same shall be of binding force, and both Assemblies shall take action accordingly."

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The joint report was adopted by the General Assembly of the Cumberland Church in 1904 by an affirmative vote of 162, and a negative vote of 74, and the basis of union referred to the presbyteries for their approval or disapproval.

The Cumberland Church contained 114 presbyteries, and its General Assembly in 1905 found that 60 had voted for approval of the reunion and union of the two churches, 51 for disapproval of the same, 1 for approval conditionally, and 2 had not voted. It was thereupon declared that a constitutional majority of the presbyteries had voted approval of the reunion and union on the basis set forth in the joint report, and that such reunion and union had been constitutionally agreed to by the Cumberland Church, and the basis of union constitutionally adopted. A minority protest was filed to the union movement.

The joint committee during the next succeeding year arranged the details of union, and agreed upon a joint report to both General Assemblies, including therein appropriate resolutions whereby the reunion and union was declared constitutionally and finally consummated. The final report of the committee on fraternity and union of the Cumberland Church, including therein such joint report, was adopted by the General Assembly convened at Decatur, Illinois, by an affirmative vote of 165 and a negative vote of 91. The moderator, in pursuance of the directions and requirements of said joint report thereupon, made the following announcements: "The joint report of the two committees on reunion and union, and the recitals and resolutions therein contained and recommended for adoption, having been adopted by the General Assembly of the Presbyterian Church in the United States of America and the General Assembly of the Cumberland Presbyterian Church, and official notice of such adoption having been received by each of the said General Assemblies from the other, I do solemnly declare and here publicly announce that the basis of reunion and union is now in full force and effect, and that the Cumberland Presbyterian Church is now reunited with the Presbyterian Church in the United States of America as one church, and that the official records of the two churches during the period of separation shall be preserved and held as making up the history of the one church." It having been provided in said joint report that after the announcement of the foregoing declaration no further business in the General Assembly of the Cumberland Church should be in order, except a motion to adjourn *sine die*, as a separate assembly, the following adjourning order was adopted:

olved that this General Assembly do adjourn *sine die*, as a separate General Assembly, to meet in and as part of the One hundred and Nineteenth General Assembly of the Presbyterian Church in the United States of America on the third Thursday of May, 1907, at 11 o'clock A. M., at the place chosen by the One Hundred and Nineteenth General Assembly of the Presbyterian Church in the United States of America. Thereupon, the moderator declared said General Assembly adjourned in accordance with the adjourning order." Immediately after the adjournment, the dissenting minority reassembled in the Grand Opera House near by, chose a temporary chairman and clerk, passed a resolution denying the above action rescinded, and adjourned to meet at a designated time and place the following year. This organization has been maintained since, and claims to be the true Cumberland Presbyterian Church, entitled to all the property, rights, and legacies owned and held by the church of that name prior to the declared reunion and separation with the Presbyterian Church.

The appellant's contentions, in substance, are that the powers of the General Assembly of the Cumberland Presbyterian Church are limited by its constitution; that no extra-territorial authority to form a union with another church is conferred, and that the attempted union and merger is accordingly void and void; that if the power to form the union existed, it was exercised so unlawfully as to make the result void; that the title to the property in question is vested with a special and limited trust which precludes its transfer to and use by any denomination other than the Cumberland Presbyterian Church.

In the early case of *Watson v. Jones*, 13 679, 722, 20 L. ed. 666, 673, controversies involving the title to property held by religious societies were classified as fol-

"(1) The first of these is when the property which is the subject of controversy has been by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument, devoted to the teaching, propagation, or spread of some specific form of religious doctrine or belief. (2) The second when the property is held by a religious organization, which, by the nature of its organization, is strictly independent of ecclesiastical associations, and, so far as church government is concerned, owes no duty or obligation to any higher authority. (3) The third is where the religious organization or ecclesiastical body holding the property is but a subordinate member of a general church organization in which there are superior ecclesiastical tribunals, R.A. (N.S.)

with a general and ultimate power of control, more or less complete, in some supreme judicatory, over the whole membership of that general organization."

We shall subsequently consider whether the terms of the deed to the property in dispute create such a special trust as to bring this case within the first of these classes. It is manifest that this controversy is not of the second class. The controlling question at issue falls clearly within the third of these classifications, and the declarations of law made in the case of *Watson v. Jones*, supra, and followed with constancy by this court, and generally by other American courts, aptly apply, and conclusively determine the matter in dispute. The case cited involved the conflicting claims of two factions of the Presbyterian Church to church property, and we quote with approval from the opinion of Mr. Justice Miller the following paragraphs: "There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the General Assembly over all. These are called, in the language of the church organs, 'judicatories,' and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases.

"In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that whenever the questions of discipline or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final and as binding on them in their application to the case before them. . . .

"It may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. . . .

"But it is a very different thing where a subject-matter of dispute strictly and purely ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction, a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the

tribunal to try the particular case, before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that, if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination, may, and must, be examined into with minuteness and care, for they would become in almost every case the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts, where property rights were concerned, the decision of all ecclesiastical questions."

The recital of portions of the constitution of the Cumberland Church and the proceedings of its General Assembly in this opinion was not for the purpose of reviewing the facts, and determining for ourselves the correctness of the conclusion reached, but chiefly to show that the question considered and decided was wholly ecclesiastical, that the proceedings were fairly regular, and not founded upon a naked usurpation of authority. If church judicatories proceed palpably without jurisdiction, and their action is clearly *ultra vires*, neither the church membership nor the civil courts should respect their decisions; but when the matter in controversy is purely of ecclesiastical cognizance, and the church tribunal proceeds in manifest good faith under color of authority, its decision upon the question of its own jurisdiction, as well as upon subsidiary questions, is binding upon the civil courts.

In the case of *Lamb v. Cain*, 129 Ind. 486, 518, 14 L.R.A. 518, 29 N. E. 13, 22, this court, speaking to the point under consideration, said: "It will scarcely be denied that the general conference, which is the highest legislative and judicial body in the church, has power to determine what is the constitution under which it acts, and to determine what is the Confession of Faith of the church which it represents. The question as to whether the old Confession of Faith and the old constitution had been superseded by the new was a question that squarely confronted the conference of 1889. Assuming that the action of commission on revision, coupled with the action of the conference of 1885, and vote upon the subject 30 L.R.A. (N.S.)

of revision and amendment, gave it jurisdiction in the premises, the general conference of 1889 adjudged and declared that what appears in the record before us as the revised Confession of Faith and amended constitution was in fact the fundamental belief and constitution of the Church of the United Brethren in Christ in the United States. Who shall question the correctness of its decision, or revise it? The civil courts? To do so would be to assume ecclesiastical jurisdiction; a jurisdiction they do not possess. It was clearly an ecclesiastical matter, pertaining to the government of the church, and the church, through its legally constituted tribunal, having adjudicated the matter, we think the civil courts are bound by such adjudications."

In the case of *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind. 136, 151, this court, by Niblack, Ch. J., said: "Civil courts in this country have no ecclesiastical jurisdiction. They cannot revise or question ordinary acts of church discipline, and can only interfere in church controversies where civil rights or the rights of property are involved. Where a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right, and nothing more, taking the ecclesiastical decisions, out of which the civil right has arisen, as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction. The civil courts act upon the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective religious denominations to which they belong. When a person becomes a member of a church, he becomes so upon the condition of submission to its ecclesiastical jurisdiction, and however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are invaded." See also *Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449; *O'Donovan v. Chatard*, 97 Ind. 421, 49 Am. Rep. 462; *Dwenger v. Geary*, 113 Ind. 106, 14 N. E. 903; *Smith v. Pedigo*, 145 Ind. 361, 19 L.R.A. 433, 32 L.R.A. 838, 33 N. E. 777, 44 N. E. 363; *State ex rel. Hatfield v. Cummins*, 171 Ind. 112, — L.R.A. (N.S.) —, 85 N. E. 359.

Appellants have cited the cases of *Smith v. Pedigo*, supra, and *Hatfield v. De Long*, 156 Ind. 207, 51 L.R.A. 751, 83 Am. St. Rep. 194, 59 N. E. 483, as sustaining their contention that civil courts will examine and construe for themselves ecclesiastical constitutions, rules, and usages, when necessary in

determination of property or civil rights. The first of these cases involved a dispute between two factions of a Baptist church which was of the congregational type, strictly independent of other ecclesiastical associations, and, so far as church doctrine or government was concerned, owing no fealty or obligation to any higher authority. The case, therefore, came within that class where there is no authorized ecclesiastical judicatory to decide the matter of difference, and it is alleged that property dedicated and held for a particular use is being diverted by the teaching of a doctrine different from that contemplated at the time the donation or dedication was made, in which case the court, however delicate and difficult the task may be, will inquire whether the party accused of violating the trust is teaching a doctrine so far in variance with that originally intended as to defeat the objects of the trust, and if the charge is found true, will make such order in the premises as to secure a faithful execution of the trust confided. See also *United Zion Baptist Church v. Whitmore*, 83 Pa. 138, 13 L.R.A. 198, 49 N. W. 81; *Christian Church v. Church of Christ*, 219 Mo. 503, 76 N. E. 703; *Hale v. Everett*, 53 Ill. 9, 16 Am. Rep. 82; *Schnorr's Appeal*, 12 Pa. 138, 5 Am. Rep. 415; *Ramsey's Appeal*, 88 Pa. 60; *Cape v. Plymouth Congregation*, 117 Wis. 155, 93 N. W. 449.

Certain declarations in the case of *Hatfield v. De Long*, supra, are not in accord with American authorities, and must be disapproved. If, as in that case, the subject-matter involved is wholly of ecclesiastical character, civil courts are without jurisdiction to act at all, or to grant any relief, legal or equitable. The right to worship according to the dictates of conscience is guaranteed to the citizens of this Republic, controversies growing out of differing religious beliefs and spiritual conceptions, involving no civil right, are too inalienable to form the basis of a civil action.

It is the exclusive prerogative of religious tribunals, when considering only ecclesiastical interests and questions, to construe their statutes and ordinances, and to define for themselves the regularity and validity of their proceedings. It cannot be for the civil authorities whether one charged with a spiritual offense be tried by an ecclesiastical tribunal, or be denied the exercise of religious rights and privileges without or without cause, since membership in an unincorporated religious society does not constitute a civil or valuable right, within the meaning of the law. *Fussell v. Hatfield*, 233 Ill. 73, 84 N. E. 42; *Shannon v. Nance*, 3 B. Mon. 253; *Nance v. Busby*, 91 Ill. 303, 15 L.R.A. 801, 18 S. W. 874.

It is not accurate or correct to say that an association for religious worship is like an ordinary fraternal or beneficial society or social club, and its membership and affairs to be determined by the same legal principles, since the one is founded upon a distinctive conception of the relation and duty of man to his Maker, and the other is concerned only with the relation of man, to his fellows. In so far as the case of *Hatfield v. De Long*, supra, holds that in a matter concerning only spiritual or ecclesiastical rights, a civil court has jurisdiction to examine into the regularity and validity of a church tribunal, and restrain its proceedings for nonconformity to its own laws, it is expressly overruled. *Fussell v. Hatfield*, supra. We have seen that the General Assembly of the Cumberland Church, by § 43 of its constitution, had specific authority to decide all controversies respecting doctrine and discipline, and that it did explicitly decide that the Confession of Faith of the Presbyterian Church as revised in 1903 was in substantial accord with its own doctrinal tenets, and that decision, under our own holdings and other authorities, is accordingly binding and conclusive, not only upon the membership of the church, but also upon the civil courts. *Ferraria v. Vasconcelles*, 23 Ill. 456; *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95; *Schweiker v. Husser*, 146 Ill. 399, 34 N. E. 1022; *Brundage v. Deardorf*, 34 C. C. A. 304, 92 Fed. 214; *Watson v. Avery*, 2 Bush, 332; *Trinity M. E. Church v. Harris*, 73 Conn. 216, 50 L.R.A. 636, 47 Atl. 116; *East Norway L. N. Evangelical Lutheran Church v. Halvorson*, 42 Minn. 503, 44 N. W. 663. This record does not present the case of a factional division of a congregation, or schism in the body of a church, on account of conflicting beliefs or doctrinal innovations, but that of a minority dissenting from the official judgment of the highest church judicatory, in which action, though protesting, they yet participated. It follows that unless the offending act was clearly unconstitutional and *ultra vires*, appellants and those allied with them were bound, and by their insubordination have become seceders, with no right to share in the property and temporalities of the church of which they were formerly a part.

This question might be judicially determined with brevity, but the sacred interests involved, and the earnest and conscientious purposes of the litigants, invite and make appropriate some elaboration of argument. It is insisted that the momentous issue of the surrender of its distinctive name and separate identity, and union and merger with a greater kindred organism, should have been submitted to and passed upon directly

by the whole membership of the Cumberland Church, and that church sovereignty is in its individual membership, and not in its governing bodies. The primary object of religious association is worship, to which the possession of property is subordinate and necessarily incident. No man can hope to receive pecuniary profit from his religious membership, and as a communicant in a church he has no private interest in its property. The action now under consideration was purely ecclesiastical, and its effect upon church property was resultant and consequential. This statement is made merely to emphasize the fact that no personal or pecuniary rights are involved in this controversy, necessitating an opportunity to individuals to be heard or to participate in the proceedings of which complaint is made. But we have already seen that the Presbyterian system of government is not that of a pure democracy, but is republican in character and wholly representative. John Calvin, who formulated the Presbyterian system of doctrine and polity, was familiar with the governmental principles of the Genevese Republic. A notable resemblance has been remarked in the governmental system of the Presbyterian Church and of this great Republic of ours. An amendment to the Constitution of the United States must first pass both houses of Congress, and be ratified by the Legislatures of two-thirds of the states. The constitution of the church may be amended by a two-thirds vote of its General Assembly and the approval of a majority of the presbyteries, but in neither case does the individual member of the society directly participate. It is a suggestive historical incident that while the first General Assembly of the Presbyterian Church was convened in Philadelphia in May, 1789, at the same time and only four blocks distant, the convention was in session framing the Federal Constitution, with the dominant purpose of conferring upon the national government supreme executive, legislative, and judicial powers in national affairs. Many of the leaders of the constitutional convention were familiar with Presbyterianism, and it is said, on trustworthy authority, that Alexander Hamilton kept the Presbyterian Form of Government on his study table during the session of the convention. No express authority is found in the Federal Constitution for the expansion of our domain by the annexation of foreign territory and peoples, but this power is an inherent attribute of sovereignty, and is validly exercised by the national authorities without reference to the states or citizens for approval.

It is contended that the jurisdiction of the General Assembly is expressly limited 30 L.R.A. (N.S.)

by § 25 of the constitution of the Cumberland Church. This section prescribes the jurisdiction of the church session, the presbytery, the synod, and the General Assembly, and concludes with the statement that "the jurisdiction of these courts is limited by the express provisions of the constitution." This provision was designed to fix definite limits to the jurisdiction of these judicatories as between themselves, but not to circumscribe the sovereign power of the church itself, or of the body in whom its supreme power was vested. This church from its inception entertained the belief that it had inherent or implied power to unite with another church of similar doctrine and order, and, as shown in the introductory statement of facts, often expressed the hope of reunion with the mother church, and made frequent overtures and efforts towards union with other denominations. It possessed, undoubtedly, all the sovereign powers of the parent church from which it sprang, and of other kindred Presbyterian branches. The General Assembly of the Presbyterian Church, in 1801, made efforts to unite with the Reformed Dutch Church, the Associated Reformed Churches, and the General Assembly of Connecticut. It divided into the old school and the new in 1838, and reunited in 1870. The Associated Reformed Church and the Associate Church united in 1858, forming the United Presbyterian Church; the Independent Presbyterian Church of the Carolinas united with the General Assembly of the Presbyterian Church (South) in 1863; and the Alabama presbyteries of the Associate Reform Church united with the Presbyterian Church (South) in 1867. The union principle finds scriptural sanction, and had for its advocate the author of Calvinism himself, who devoted the last days of his life to the interests of church unity. He prayed and labored for the union of reformed churches, wrote letters, pamphlets, and books urging this upon all the friends of evangelical religion, and earnestly longed to see these churches closing their ranks and presenting an undivided front in the promulgation of their common doctrines.

In the light of these historical facts, it cannot be plausibly denied, and is not disputed, that the Cumberland Church had power to enter into a union with the Presbyterian Church, but the specific claim is that its General Assembly with the concurrence of the presbyteries had no authority without a vote of the membership to consummate such union. The church unions above enumerated were effected in a manner substantially the same as that adopted in the instance before us. There is no such thing in the Presbyterian polity as a popular vote,

upon the General Assembly is conferred some legislative, administrative, and judicial authority in church affairs, and it constitutes the "bond of union" and presents in one body all the particular churches." It is charged with oversight of matters affecting the church as an entirety, and upon it is entered the duty of concerting "measures for promoting the prosperity and enlargement of the church," and it is expressly authorized "to receive under its jurisdiction other ecclesiastical bodies whose organization is formed to the doctrine and order of this church." The fundamental purpose of this church was to evangelize and Christianize the whole world, and if, in the promotion of that end, its General Assembly might lawfully take under its jurisdiction ecclesiastical bodies inferior in numbers and influence, it might, by the same right and with more propriety, consolidate its forces in a church of greater numbers, power, and resources, of like doctrine and polity. Its members earnestly desirous of the speedy attainment of the ultimate aim must enthusiastically applaud the acquisition of new members augmenting the power and influence of the common church, provided no surrender of conscientious convictions touches their faith and practice is required. It is conceded that the Cumberland General Assembly had power to amend the Confession of Faith and constitution of that church so as to make the same conform in every particular to the Confession of Faith and polity of the Presbyterian Church, by the precise method and vote pursued for the union of the two churches. This was the effect of the vote for consolidation, and not the mere act of effecting a union involved a question of policy and expediency rather than of power or authority. It is the conclusion that the Cumberland Church has inherent power to unite with another ecclesiastical body whose doctrine and polity are deemed in harmony with its own, and that the authority to consummate such a union was vested in its General Assembly, without the direct sanction of its lay membership; that that body did not usurp authority or transcend its powers, and so far as this court has jurisdiction to pass upon the question, the reunion and union of that church with the Presbyterian Church, as decided by the General Assembly at Decatur, Georgia, was legal and valid, and binding upon its membership and upon the decisions of the courts.

In the case of *Smith v. Swormstedt*, 16 How. 14 L. ed. 942, involved the validity of the division of the Methodist Episcopal Church, by its General Conference, and the court held that body had inherent power to

make the division, saying in part: "It is insisted, however, that the General Conference of 1844 possessed no power to divide the Methodist Episcopal Church as then organized, or to consent to such division. . . . But we do not agree that this division was made without the proper authority. On the contrary, we entertain no doubt but that the General Conference of 1844 was competent to make it; and that each division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, ecclesiastical and temporal, as the Methodist Episcopal Church first founded in the United States. The same authority which founded that church in 1784 has divided it, and established two separate and independent organizations occupying the place of the old one. . . . It cannot therefore be denied, indeed it has scarcely been denied, that this body, while composed of all the traveling preachers, possessed the power to divide it, and authorize the organization and establishment of the two separate independent churches. The power must necessarily be regarded as inherent in the General Conference. As they might have constructed two ecclesiastical organizations over the territory of the United States originally, if deemed expedient, in the place of one, so they might at any subsequent period, the power remaining unchanged." See also *Gibson v. Armstrong*, 7 B. Mon. 481; *McGinnis v. Watson*, 41 Pa. 9.

The precise questions presented by this appeal have been recently passed upon by the courts of other states. In the case of *Mack v. Kime*, 129 Ga. 30, 24 L.R.A. (N.S.) 675, 58 S. E. 197, the supreme court of Georgia announced its conclusions as follows: "The General Assembly, as the highest church court, has determined the questions arising as to the alleged differences of doctrine. The General Assembly, as the highest authority of the church, executive, legislative, and judicial, has determined that it is wise and best that the reunion should take place, and the constitution of the church, as we have interpreted it, gives that body power and jurisdiction to deal with this question, and the question of reunion has been settled in form and manner as the constitution prescribes."

In *Brown v. Clark*, 102 Tex. 323, 24 L.R.A. (N.S.) 670, 116 S. W. 364, the supreme court of Texas said: "We conclude that the General Assembly of the Cumberland Church was the embodiment and expression of the sovereign power of the whole church and its membership, and that it could do for the churches and for the membership whatever they could have done if they had been assembled for that purpose.

The General Assembly of the Cumberland Church had authority to determine, from the provisions of the constitution, whether it had the power to enter into the union with the Presbyterian Church, and having decided that it had such authority, and having acted upon that decision, the civil courts have no power to review that action." A like conclusion was reached in the following cases: *Fussell v. Hail*, 134 Ill. App. 620; *Wallace v. Hughes*, 131 Ky. 445, 115 S. W. 691; *Committee of Missions v. Pacific Synod*, 157 Cal. 105, 106 Pac. 395.

A contrary holding was made in *Landrith v. Hudgins*, 121 Tenn. 556, 120 S. W. 783, and *Boyles v. Roberts*, 222 Mo. 613, 121 S. W. 805.

The Tennessee case affirms that the sovereign power of the Cumberland Church is in its General Assembly and presbyteries, which, acting together, had power to effect a union with another church of like doctrine and order, without a vote of the separate congregations. This proposition is forcibly stated in the following paragraph: "The General Assembly then is made up of representatives of the people,—that is, elders and representatives of the church at large, that is, ministers. Thus, it is composed of all governing agencies. The sovereignty of the organization, however, does not reside in that body alone, or in the presbyteries; . . . each acting alone is limited to powers expressly given (Const. § 25); when they act together, the whole governing body acts,—the church at large, and the people themselves in and through their elders, who are the representatives of each several church. The power which makes or amends the constitution or constituent contract of the organization is the power where sovereignty is lodged. This power is that of the General Assembly and the presbyteries acting together. This was shown by the manner in which the constitution of the Cumberland Presbyterian Church was adopted in 1883. In the case referred to, the people did not vote. The power that can constitute can dissolve, or can carry the organization into the body of another organization. Persons who become members of a church with this form of organization agree, by so doing, to abide the powers vested in the organization." That court, however, holds that civil tribunals, when called upon to determine property rights dependent upon the validity of such union or action, will examine ecclesiastical constitutions and church usages, and determine for themselves whether the proper procedure has been adopted and followed; and proceeding upon this principle, finds that the doctrines of the two churches were not substantially identical, and were not brought into accord 30 L.R.A. (N.S.)

in a constitutional way, and that a material part of the plan of union was not submitted to the approval of the presbyteries. The Missouri court follows the Tennessee doctrine. Both these cases strongly rely upon the case of *General Assembly v. Overtoun* [1904] A. C. 612. The constitutional separation of church and state in this country should make the English case, if similar upon its facts, of little persuasive force as an authority in an American court.

The conclusion reached and announced, as to the jurisdiction and authority of the General Assembly, disposes of all subsidiary questions raised in argument. Appellants' counsel contended that the General Assembly of the Cumberland Church was not vested with implied power to merge that church into another body, and thereby terminate its existence and effect its death. The assumption that a union, consolidation, merger, or whatever it is pleasing to term the action in question, is the equivalent of death and the cessation of the organic functions of the church, is fallacious. Every congregation, presbytery, and synod of the church, with possibly some changes of constituent membership and geographical boundaries, will continue its existence and accustomed work without interruption,—the manifest purpose of the union being not death and disintegration, but a larger life, and, in the opinion the governing body, a greater opportunity in carrying forward the commands of the Master and Head of the Church.

Objection is made to the validity of the union because of the failure to submit to the presbyteries the agreement that by the merger the Cumberland name was to be surrendered, and the name of the Presbyterian Church adopted for the consolidated body. If it be conceded, as it is by all the civil courts which have considered the question, that the General Assembly and presbyteries had jurisdiction over the subject of making a union with another church, then, as the supreme executive, legislative, and judicial authority in the church, under our view of the law, the General Assembly had power to decide on the proper mode of procedure, and to determine conclusively the regularity and validity of the proceedings had to effect the desired object. It is manifest, however, that the fundamental and paramount point of disagreement between these two churches had been with regard to their faith and doctrine, and the vital question for decision was, Shall the reunion and union be made on the basis of the revised Confession of Faith and other standards of the Presbyterian Church? The surrender of the name distinctive of the Cumberland Church, apart from sentimental considera-

ns, was of little consequence. The inherent power conceded to the General Assembly, and the express assent of the esbyteries to the proposed union on the etrinal basis approved, authorized the rmal completion of the union, implied me modification of names, and, it seems, us under any view of the law, empowered ie General Assemblies to adopt any name eemed by them most appropriate for the onsolidated church.

It is finally contended that, by the terms f the conveyance made in 1854 to the trustees of the Cumberland Church, a special and limited trust was created in this property, which precludes its diversion to the use of the united church. This deed is a civil contract, and it is the prerogative of the civil courts to construe its terms and to determine its meaning and legal effect. In a suit for forfeiture of title by the donor or grantor of property on the ground of the breach of a special trust expressed in the deed, a civil court may be and often is required to deal with ecclesiastical questions, since church judicatories have no jurisdiction to decide such matters. But we have no such case before us. This property appears to have been purchased for \$85 in the ordinary way of business, and conveyed to the trustees by a general warranty deed, without condition or limitation. It is entirely clear that no trust, express or implied, is attached to the title. Appellants at no time had any interest in the property except as members of a congregation which was an integral part of the ecclesiastical society known as the Cumberland Presbyterian Church. Our only duty is to determine the identity of the ecclesiastical successor of the original grantee. This we have seen has been determined for us, since the union of the Cumberland Church with the Presbyterian Church carried into the united body all its property. The validity of that union appellants cannot question, and in it they must acquiesce or defy the authority and decrees of the church to which they pledged allegiance. Consciences cannot be bound, and if, in the assertion of individual opinion and conscientious dictates, appellants segregate themselves from the body of the church, they must depart as they came in,—empty handed.

The court did not err in overruling appellants' motion for a new trial.

The judgment is affirmed.

A petition for rehearing having been filed, Montgomery, J., on June 28, 1910, handed down the following response (92 N. E. 104):

It is charged in appellants' petition for a rehearing that this court abdicated its 30 L.R.A.(N.S.)

functions in accepting the decision of the General Assembly of the Cumberland Church as conclusive upon the matter in controversy. The original opinion plainly declares that there are no provisions in the deed conveying to the church the particular property involved, creating a special or limited trust or requiring construction. This being true, both parties agree that the only remaining question is the validity of the union or merger of the two churches. This is purely an ecclesiastical question, over which civil courts have no jurisdiction. The circumstance that control over certain real or personal property devoted to church uses will pass as an incident of the contested matter does not change the nature of the controversy, or operate to clothe civil courts with power to decide the real issue, if a church judicatory has been provided for the settlement of such disputes. In the instance under consideration, a church judicatory existed, clothed with jurisdiction and supreme authority in the premises, which had formally passed upon the ecclesiastical question involved, and its judgment is therefore final and binding upon the civil tribunals, under all approved American authorities.

Complaint is also made because oral argument was heard in the absence of two members of the court. The granting of such argument in this case, after its transfer from the appellate court, was exceptional, and done on motion of the court for its own purposes, and not as a matter of right to the parties. No basis of complaint can be founded on such action. The case has received such careful and conscientious consideration from the entire court as its manifest importance deserved, and our conclusion is in accord with the overwhelming preponderance of judicial authority upon the same question in other jurisdictions. *First Presby. Church v. First Cumberland Presby. Church*, 245 Ill. 74, 91 N. E. 761.

We are without any misgiving as to the soundness of the legal conclusions heretofore announced, and the petition for a rehearing is overruled.

NEW YORK COURT OF APPEALS.

WILSON R. HUNTER, Resp't.,
v.

MUTUAL RESERVE LIFE INSURANCE
COMPANY, Appt.

(184 N. Y. 136, 76 N. E. 1072.)

Foreign corporation — withdrawal
from state — service of process.

1. Merely recognizing existing insurance

policies and receiving the premiums on them at its office in another state and adjusting claims which accrue does not constitute doing business within a state by an insurance company after its asserted withdrawal therefrom, so as to continue in force its designation of the insurance commissioner as its agent to receive service of process.

Same — revocation as to nonresidents.

2. An insurance company, upon withdrawing from a state, may revoke its appointment of the insurance commissioner as its agent to receive service of process so far as claims of citizens of other states are concerned which are assigned after the withdrawal to residents of the state for collection, although the power of attorney provides that it is irrevocable so long as any liability of the company should remain outstanding in the state.

(February 27, 1906.)

Note. — Revocation by foreign corporation of appointment of attorney or agent to receive service of process.

Express statutory provision against revocation—business or transaction arising within the state.

To obviate the difficulty, under common-law rules, of bringing foreign corporations within the jurisdiction of any court other than those of their residence, many states have enacted statutes prescribing the conditions under which they will permit such corporations to transact business within their borders. A common form of such legislation is found in the North Carolina statute, provisions of which pertinent to the question here under discussion are sufficiently set forth in the above opinion. In spite of the clearness with which such statutes have pointed out when the appointment of an agent for service of process required by it of foreign corporations is to be irrevocable, many courts have been called upon to declare in the very terms of such acts that such appointment cannot be revoked so as to affect the rights of citizens of the state who, while the foreign corporation is there engaged in business, have entered into contracts with it in reliance on such appointment.

Thus, in *Collier v. Mutual Reserve Fund Life Asso.* 119 Fed. 617, in which it appeared that a foreign insurance company went into business in Arkansas while there was in full force a statute containing similar provisions to the North Carolina act referred to, but which before suit was brought withdrew from the state and revoked its agencies, which circumstances, it was contended, precluded any suit against it even if service of process was had upon the person designated by it in accordance with the statute, it was held that such corporation could not revoke the authority of such agent so as to deprive a resident holder of a policy executed by it while it 30 L.R.A. (N.S.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Second Department, in plaintiff's favor upon an agreed case submitted for the opinion of the court in a proceeding to enforce payment of certain judgments. Modified.

The facts are stated in the opinion.

Messrs. Frank R. Lawrence, George Burnham, Jr., and Gordon T. Hughes, for appellant:

The courts of a state have not general jurisdiction to render a judgment in *personam* against a foreign corporation.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Goldley v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308;

was doing business in the state, of the right to make service upon such agent and bind the corporation thereby. The court said that the statute under the circumstances became a part of the policy sued on,—as much so as if it were written on its face. To quote from the opinion: "Moreover, it was an irrevocable contract, which the company could not avoid until it satisfied the terms of the statute, which could not be done so long as any liability to any resident of this state, entered into while the company was doing business in the state, continued."

In *Magoffin v. Mutual Reserve Fund Life Asso.* 87 Minn. 260, 94 Am. St. Rep. 699, 91 N. W. 1115, it appeared that the defendant's license as a foreign corporation to transact business in the state had been revoked by the state insurance commissioner, and that thereafter and before commencement of the action the corporation attempted to revoke the stipulation which it filed in accordance with the statute authorizing service of process in any action against it on the insurance commissioner. It was contended that the sole consideration for the stipulation was the license to do business in the state and that, when the latter was revoked for any cause, the stipulation was revocable, and that the express provision of the statute to the effect that the stipulation should continue irrevocable as long as any liability of the company remained outstanding in the state was not a bar to this right to revoke stipulations, because it was not one coupled with interest. The court, in upholding service on the insurance commissioner, disposed of this contention in the following language: "The stipulation was not intended for the benefit of the insurance commissioner or of the state, but it was an agreement exacted by the state for the benefit of its citizens, as a condition precedent to the right of the company to do business in the state. It entered into and became a part of every policy which the company issued in the

le v. Commercial Alliance L. Ins. Co. 394; Jackson v. Delaware River Amusement Co. 131 Fed. 134.
 pp. Div. 297, 40 N. Y. Supp. 269; Con-
 v. Mathieson Alkali Works, 190 U. S.
 47 L. ed. 1113, 23 Sup. Ct. Rep. 728;
 v. Mathieson Alkali Works, 190 U. S.
 47 L. ed. 1122, 23 Sup. Ct. Rep. 807;
 ington v. Central P. R. Co. 198 U. S.
 49 L. ed. 959, 25 Sup. Ct. Rep. 577;
 dall v. American Automatic Loom Co.
 U. S. 477, 49 L. ed. 1133, 25 Sup. Ct.
 768; Pennsylvania Lumbermen's Mut.
 ns. Co. v. Mayer, 197 U. S. 407, 49
 ed. 810, 25 Sup. Ct. Rep. 483;
 gerald & M. Constr. Co. v. Fitz-
 ld, 137 U. S. 98, 34 L. ed. 608, 11
 Ct. Rep. 36; Barrow S. S. Co. v. Kane,
 U. S. 100, 42 L. ed. 964, 18 Sup. Ct.
 526; De Castro v. Compagnie Fran-
 Du Telegraphe, 76 Fed. 425; Martin
 ew Trinidad Lake Asphalt Co. 130 Fed.

394; Jackson v. Delaware River Amusement Co. 131 Fed. 134.

A power of attorney, although irrevocable in terms, is revocable at the will of the principal.

Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589; Knapp v. Alvord, 10 Paige, 205, 40 Am. Dec. 241; 2 Kent, Com. 643; Story, Agency, 9th ed. p. 587.

The agreement is for the benefit of those who may do business with the company under the permission granted it to enter the state. Such persons, and such only, are the beneficiaries of the agreement or power of attorney.

Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451; Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer and Connecticut Mut. L. Ins. Co. v. Spratley, supra; Mutual Reserve Fund Life Asso. v.

while it was in force, and the insured insured an interest therein to the same extent as if it were written into each policy for the parties are deemed to have contracted with reference to the statute. Such being the case, it follows, and we so hold, that the stipulation here in question was revocable for any cause as to any liability of the defendant growing out of its policy issued while the stipulation or any real thereof was in force."

recovery has been allowed by the New York courts upon judgments obtained in North Carolina by citizens of that state against the defendant insurance company for service upon the insurance commissioner in accordance with the statute, although before the North Carolina actions were instituted the company had withdrawn from the state, and had attempted to revoke the appointment of the insurance commissioner as its agent upon whom service might be made. Woodward v. Mutual Reserve L. Ins. Co. 178 N. Y. 485, 102 Am. St. Rep. 71 N. E. 10 (reversing 84 App. Div. 82 N. Y. Supp. 908); Birch v. Mutual Reserve L. Ins. Co. 91 App. Div. 384, 86 N. Y. Supp. 872 (affirmed without opinion 181 N. Y. 583, 74 N. E. 1115, and U. S. 612, 50 L. ed. 620, 26 Sup. Ct. 752); Johnston v. Mutual Reserve L. Ins. Co. 104 App. Div. 544, 550, 629, 93 N. Y. Supp. 1048, 1052, 1062; Lambert v. Mutual Reserve L. Ins. Co. 104 App. Div. 93 N. Y. Supp. 1059. The first two are referred to in HUNTER v. MUTUAL RESERVE L. INS. CO., and in both the contention was that where a policy of insurance had been issued by a foreign company before the execution of the power of attorney appointing an agent for service process, and consequently not in reliance upon the policy holder's contractual obligations were not affected by the revocation of power and such revocation was there invalid and effectual as to them; while the last two it does not appear with certainty what the contention was upon L.R.A. (N.S.)

which the defendant relied to defeat the application of the statute.

And in Biggs v. Mutual Reserve Fund Life Asso. 128 N. C. 5, 37 S. E. 955, in which apparently the defendant contended that its designation of the state insurance commissioner as its agent to receive process was revocable because it had ceased to do business in the state, and because it did not domesticate under the Craig law (sufficiently explained in HUNTER v. MUTUAL RESERVE L. INS. CO.), the court in upholding service upon the insurance commissioner used the following language: "If that appointment could be revoked by the company at will, the end sought to be attained would be as illusory as a will of the wind, which fleets when it is sought to grasp it." And this case was followed in Moore v. Mutual Reserve Fund Life Asso. 129 N. C. 31, 39 S. E. 637, and in Mutual Reserve Fund Life Asso. v. Scott, 136 N. C. 157, 48 S. E. 581, and apparently the same contentions overruled.

In D'Arcy v. Mutual L. Ins. Co. 108 Tenn. 567, 69 S. W. 768, the court upheld service of process upon the state officer appointed agent for that purpose by a foreign insurance company in accordance with the statute in force while it was transacting business in the state, though after the corporation withdrew from the state another statute was enacted expressly repealing the former and providing that another state officer should be designated by such corporation as agent for service, and no appointment was executed by the defendant as required by the later act.

In Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308, affirming 99 Tenn. 322, 44 L.R.A. 442, 42 S. W. 145, reviewed at length both in HUNTER v. MUTUAL RESERVE L. INS. CO. and in the United States Supreme Court's opinion affirming the latter decision, post, 686; and in which there was overruled a contention that the provisions of a statute giving permission to a

Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; Home Ben. Soc. v. Muehl, 109 Ky. 479, 59 S. W. 520; Germania Ins. Co. v. Ashby, 112 Ky. 303, 99 Am. St. Rep. 295, 65 S. W. 611; Moore v. Mutual Reserve Fund Life Asso. 129 N. C. 31, 39 S. E. 637; Fisher v. Traders' Mut. L. Ins. Co. 136 N. C. 217, 48 S. E. 667.

State statutes prescribing the manner of service of process upon the agents of foreign corporations do not confer jurisdiction over causes of action accruing outside the state upon contracts not made therein.

Central R. & Bkg. Co. v. Carr, 76 Ala. 388, 52 Am. Rep. 339; Sawyer v. North American L. Ins. Co. 46 Vt. 697; Smith v. Mutual L. Ins. Co. 14 Allen, 336; St. Clair v. Cox, *supra*; Newell v. Great Western R.

foreign insurance company to do business within the state on condition that the company appoint the secretary of state as its agent to receive service on behalf of the company "at any and all times" after the company had been regularly admitted within the state, "even though such company may subsequently have retired from the state or been excluded," created a contract which precluded the state from authorizing service to be made on agents of the company, the Tennessee court declared such appointment to be irrevocable, at least as to causes of action which arose within the state, and it would seem that this was admitted by the insurance company.

And in Connecticut Mut. L. Ins. Co. v. Duerson, 28 Gratt. 630, service upon the state officer designated for that purpose by a foreign corporation was upheld against the contention that the provision of law as to the revocability of such appointment was not applicable because, being subsequently enacted, it was not in force at the time the contracts sued upon were made, though such provision by its terms extended to policies previously made and the company accepted the same by complying therewith and by operating under it.

To the same effect is *Paulus v. Hart-Parr Co.* 136 Wis. 601, 118 N. W. 248, in which it was contended that the statute respecting service upon foreign corporations did not relate to interstate business, and was not applicable where the corporation's license to do business within the state was revoked.

—business or transactions not within the state.

On the other hand, the rule of law may now be said to be settled as decided in *HUNTER v. MUTUAL RESERVE L. INS. CO.* that the statutory provision as to the irrevocability of a foreign corporation's appointment of its agent for the service of process does not apply to the claims of citizens of other states which are assigned to residents of the state for collection after the company has withdrawn from the state, since that decision has been affirmed 30 L.R.A. (N.S.)

Co. 19 Mich. 336; *Parke v. Commonwealth Ins. Co.* 44 Pa. 422; *Camden Rolling Mill Co. v. Swede Iron Co.* 32 N. J. L. 15; *Alabama G. S. R. Co. v. Chumley*, 92 Ala. 317, 9 So. 286; *Pullman Palace Car Co. v. Harrison*, 122 Ala. 149, 82 Am. St. Rep. 68, 25 So. 697; *Myer v. Liverpool, L. & G. Ins. Co.* 40 Md. 595; *Cromwell v. Royal Canadian Ins. Co.* 49 Md. 366, 33 Am. Rep. 258; *Peters v. Neely*, 16 Lea, 275; *Ætna Ins. Co. v. Black*, 80 Ind. 513; *Morawetz, Priv. Corp.* 2d ed. § 981; 6 *Thomp. Corp.* §§ 8005, 8007, 8008; *Taylor, Priv. Corp.* 5th ed. § 396; *Cook, Corp.* 5th ed. § 758.

Messrs. Paul Armitage and Albert P. Massey, for respondent:

Birch v. Mutual Reserve L. Ins. Co. 91 App. Div. 384, 86 N. Y. Supp. 872, 181

by the United States Supreme Court, 218 U. S. 573, 54 L. ed. 1155, post, 686, 31 Sup. Ct. Rep. 127.

Before such affirmation the supreme court of North Carolina, in *Williams v. Mutual Reserve Fund Life Asso.* 145 N. C. 128, 58 S. E. 802, 13 A. & E. Ann. Cas. 51, arrived at the same conclusion as did the New York court in *HUNTER v. MUTUAL RESERVE L. INS. CO.*, and held that one not a resident of North Carolina suing upon a contract which by its terms was made a contract of the state of the residence of the insurance company did not come within the language or spirit of the provision of the statute which limited the power of the company to revoke its power of attorney. The court declared that, except for the purpose stated in the statute, the defendant had a right at any time to withdraw from the state and cancel its power of attorney to the insurance commissioner.

And in *Badger v. Helvetia Swiss F. Ins. Co.* 136 App. Div. 31, 120 N. Y. Supp. 161, *HUNTER v. MUTUAL RESERVE L. INS. CO.* was cited to support the proposition that a foreign insurance company which for more than five years had ceased to do business in the state and whose policies issued therein had expired could revoke its designation of the state superintendent of insurance as a person upon whom service of process could be made in accordance with the statute regulating foreign insurance companies as to all persons not within the class intended to be benefited by the requirement that such a power of attorney be filed, though the superintendent of insurance refused to recognize the revocation.

And in *Patton v. Continental Casualty Co.* 119 Tenn. 364, 104 S. W. 305, it was said that a foreign insurance company if it had no obligations outstanding in the state "might" revoke a power of attorney appointing the insurance commissioner its agent for receiving service of process.

Where no express provision against revocation.

In all the cases heretofore reviewed in

Y. 583, 74 N. E. 1115, 200 U. S. 612, L. ed. 620, 26 Sup. Ct. Rep. 752; and *Woodward Mutual Reserve L. Ins. Co. v. N. Y.* 485, 102 Am. St. Rep. 519, 71 N. E. 10, are decisive in respondent's favor in this case.

Defendant continued to do business in North Carolina after the attempted revocation of the power of attorney.

Birch v. Mutual Reserve L. Ins. Co. supra; *Connecticut Mut. L. Ins. Co. v. Spratry*, 172 U. S. 602, 43 L. ed. 589, 19 Sup. Ct. Rep. 308; *Mutual Reserve Fund Life Assn. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 3 Sup. Ct. Rep. 707.

When a foreign corporation undertakes to transact business in a state other than that in which it is incorporated, it submits

to this note the statute in question provided that the power of appointment of an agent for the service of process against a foreign corporation should be irrevocable as long as the corporation had any outstanding liability in the state. In the cases to follow, however, the statutes before the court apparently contained no such provision, no reference, except in one or two instances, being made thereto in the opinions. Whether or not, under such statutes, the appointment of an agent for service of process is irrevocable as against a claim arising against the corporation while it was doing business within the state, presents a question upon which, as will be seen, the courts are not in accord.

In *Lathrop-Shea & H. Co. v. Interior Constr. & Improv. Co.* 150 Fed. 666, reversed on other grounds in 215 U. S. 246, 54 L. ed. 177, 30 Sup. Ct. Rep. 76, it was held that where a corporation withdrew its business from the state, and held no property therein, and revoked its appointment of the person upon whom process might be served, service upon the state officer designated by statute as the proper person to be served with process upon the failure of a foreign corporation to designate an agent for that purpose was not service upon the corporation, in the absence of a further provision of the statute that such service should be good during the existence of any outstanding liability within the state.

And in *Millan v. Mutual Reserve Fund Life Assn.* 103 Fed. 764, it was held, under a statute which also omitted to place any limit to the revocability by a foreign corporation of its appointment of an agent upon whom process was to be served, that when the corporation ceased to do business in the state and revoked the authority of its agent appointed under the statute, it was no longer amendable to the jurisdiction of the courts of that state.

To the same effect is *Swann v. Mutual Reserve Fund Life Assn.* 100 Fed. 922, in which it appeared that before the beginning of the action the defendant's license to do business within the state had been canceled by the state insurance commissioner, 30 L.R.A. (N.S.)

itself to the authority of the courts of such other state.

Pringle v. Woolworth, 90 N. Y. 509; *People v. Commercial Alliance L. Ins. Co.* 7 App. Div. 297, 40 N. Y. Supp. 269; *Gibbs v. Queen Ins. Co.* 63 N. Y. 120, 20 Am. Rep. 513; *Douglass v. Phenix Ins. Co.* 138 N. Y. 220, 20 L.R.A. 118, 34 Am. St. Rep. 448, 33 N. E. 938; *Mutual Reserve Fund Life Assn. v. Phelps*, *supra*; *Gibson v. Manufacturers' F. & M. Ins. Co.* 144 Mass. 81, 10 N. E. 729; *Aldrich v. E. W. Blanchford & Co.* 175 Mass. 369, 56 N. E. 700; *People v. Fire Assn. of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380; *Vose v. Cockcroft*, 44 N. Y. 415; *Sherman v. McKeon*, 38 N. Y. 266; *Phyfe v. Eimer*, 45 N. Y. 102.

It is not material that the suits were

who was also the person designated by the defendant as its agent upon whom service of process might be made. The court, in refusing to uphold service upon such officer, declared that had the defendant actually rescinded the resolution creating such agency before the service, "there could have been no difficulty" as to the question of the invalidity of the service.

In all three cases last cited the cause of action arose within the state, and the result of the decisions reached therein would seem to be that in the absence of statutory provisions to that effect a citizen who had a claim against a foreign corporation arising out of a transaction with it in his state will be entirely powerless to collect the same in the courts of his own state, and will be left to a choice of pursuing the corporation to the state of its origin, or losing his claim. To avoid such result seems to have been the controlling influence with the courts in the following cases in denying the revocability of a foreign corporation's appointment of an agent for the service of process, in suits upon claims which arose in the state while the corporation was there doing business.

In *Mutual Reserve Fund Life Assn. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707, the facts and conclusion of which are sufficiently set forth in *HUNTER v. MUTUAL RESERVE L. INS. CO.*, the court said that it was to prevent foreign corporations from putting themselves beyond the reach of the courts of the state in which they were doing business that statutes were passed requiring such corporations to consent to service of process being made upon a permanent officer of the state, and declared that it would be obviously thwarting the purpose of such legislation if, after making a multitude of contracts with the citizens of the state, a foreign corporation should be enabled, by simply withdrawing its authority given to such officer, to compel all parties who had done business with it to seek the courts of its own state for the enforcement of their claims.

And in *Davis v. Kansas & T. Coal Co.*

based on contracts made by defendant with residents of states other than North Carolina and assigned to a resident of North Carolina.

McBride v. Farmers' Bank, 26 N. Y. 450; Jefferson County Nat. Bank v. Townley, 159 N. Y. 490, 54 N. E. 74.

Defendant will be presumed to have assented to be sued within the state by service on the insurance commissioner, and is estopped from showing either that it has not filed the requisite authority or that it has revoked it.

Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354.

Ehrman v. Teutonia Ins. Co. 1 McCrary 123, 1 Fed. 471; Berry v. Knights Templars' & M. Life Indemnity Co. 46 Fed. 439; Diamond Plate Glass Co. v. Minneapolis Mut. F. Ins. Co. 55 Fed. 27; Old Wayne

Mut. Life Asso. v. Flynn (Ind. App.) 66 N. E. 57; Stewart v. Harmon, 98 Fed. 190; Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571; Hayden v. Androscoggin Mills, 1 Fed. 93; Wilson Packing Co. v. Hunter, 8 Biss. 429, Fed. Cas. No. 17,852.

The state had the power to make the statute and power of attorney broad enough to authorize the insurance commissioner of that state to receive process in all actions of every nature of which its courts had jurisdiction.

Aldrich v. E. W. Blatchford & Co. 175 Mass. 371, 56 N. E. 700; Youmans v. Minnesota Title Ins. & T. Co. 67 Fed. 282; Johnston v. Trade Ins. Co. 132 Mass. 432; Wilson v. Martin-Wilson Automatic Fire Alarm Co. 149 Mass. 24, 20 N. E. 318; Mooney v. Buford & G. Mfg. Co. 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32; Dar-

129 Fed. 149, the court declared that a foreign corporation doing business in the state could not escape suit in the state for contracts entered into by it or for torts committed by it, by simply ceasing to do business in the state, recalling its agents, and revoking the authority of the person designated by it under the law to receive process, and accordingly upheld service upon the state officer designated by the statute as the person upon whom service might be made if the corporation ceased to maintain within the state an agent to receive process.

And in Groel v. United Electric Co. 69 N. J. Eq. 397, 60 Atl. 822, the court in upholding service upon an agent of a foreign corporation who had been designated such in accordance with a statute which also provided that the agency so designated should continue in force until revoked and some other person substituted, though the corporation had attempted to revoke such agent's authority, used the following language: "It is not necessary to enlarge upon the fatuity of legislation which would permit a foreign corporation to come within the state and transact business upon condition that it name an agency upon whom process should be served, and leave it within the power of the corporation to prevent service by discharging the agent and revoking his authority whenever it pleased, leaving suitors within the state powerless to bring the corporation into court."

And in Michael v. Mutual Ins. Co. 10 La. Ann. 737, it was held that a foreign insurance company doing business through an agent and taking risks in the state could not be permitted to frustrate a claim in the state court upon a contract made with it, by revoking the power of its agent on the eve of the institution of a suit for loss of which it had been notified, and that a service upon such agent at the suit of the policy holder was sufficient to give jurisdiction.

30 L.R.A. (N.S.)

And in Pervanger v. Union Casualty & Surety Co. 81 Miss. 32, 32 So. 909, it was held, under a statute requiring a foreign corporation to have an agent within the state upon whom service of process might be had, and in default thereof the person soliciting insurance for such company should be held to be the agent for that purpose, that a foreign corporation could not, by discharging all its agents, relieve itself from amenability to process, and accordingly service upon an agent through whom it issued the policy in suit was held to be good.

So, in Capen v. Pacific Mut. Ins. Co. 25 N. J. L. 67, 64 Am. Dec. 412, service upon one who had been duly appointed attorney and agent of a foreign corporation in accordance with a statute regulating such corporations was held to be good, though the agent so designated had resigned and his resignation had been accepted by the corporation before such service, where the plaintiff had no notice or knowledge of such resignation.

In Gibson v. Manufacturers' F. & M. Ins. Co. 144 Mass. 81, 10 N. E. 729, recovery was allowed upon a judgment obtained in New Mexico following service upon an agent who had been designated by the defendant as such in accordance with statutory provisions. The statute is not set out, but the court in referring to it used the following language: "Taking into consideration its evident purpose, and its utter fatuity if a company, appointing an agent to receive service, could, by an act known only to the agent and itself, withdraw his powers, it must be held that this appointment was irrevocable, unless this revocation might be made by the appointment, duly notified upon the public records, of a new agent, who should be competent to receive service of process in regard to any controversies arising upon contracts previously entered into."

J. A. C.

lington v. Rogers, 36 Phila. Leg. Int. 115; Palmer v. Phoenix Mut. L. Ins. Co. 84 N. Y. 63.

Hiscock, J., delivered the opinion of the court:

The defendant is a life insurance company, organized under the laws of this state. The judgment appealed from awarded recovery upon and for the amount of five personal judgments recovered against it in the state of North Carolina. The validity of said latter judgments as a sufficient basis for the present recovery is dependent upon a purported service of process upon the insurance commissioner of North Carolina as a representative for that purpose of the defendant, the latter in no other manner having been served upon or having appeared in said actions. These original judgments allowed recovery on account of five contracts of insurance issued by defendant, in one case to a resident of North Carolina while it was doing business there, and in the remaining cases to residents, respectively, of New York and New Jersey, who, long after defendant had attempted to withdraw from business in North Carolina, as hereinafter stated, assigned their claims to residents of said state. It is conceded by appellant that the judgment appealed from should be affirmed so far as it allows recovery upon the judgment under the North Carolina policy. But it is claimed that as to the other purported judgments the courts of the latter state did not acquire jurisdiction by the attempted service of process, and that as to them the judgment before us should be reversed. We think that the appellant's contention is well founded.

Some of the facts now presented to us and of the principles applicable thereto were fully considered by this court in *Woodward v. Mutual Reserve L. Ins. Co.* 178 N. Y. 485, 102 Am. St. Rep. 519, 71 N. E. 10. and it will only be necessary now to so far state the facts presented as may be necessary to make plain the reason for distinguishing this case from that. For several years before March 6, 1899, the defendant had been engaged in transacting its life insurance business in North Carolina under provision for service of process upon a local representative for that purpose. Upon the date mentioned the legislature of that state adopted a statute known as the Willard law, which created an insurance department and provided that no foreign insurance company should be admitted and authorized to do business until it had complied with certain conditions. Among these was one to the effect that it should "by duly executed instrument . . . con-

stitute and appoint the insurance commissioner, or his successor, its true and lawful attorney upon whom all lawful processes in any action or legal proceedings against it [might] may be served, and therein [should] shall agree that any lawful process against it which may be served upon its said attorney [should] shall be of the same force and validity as if served on the company, and the authority thereof [should] shall continue in force irrevocable so long as any liability of the company remains outstanding in this commonwealth." The defendant duly executed and filed an instrument in accordance with the provisions of said act, and continued for a time to transact business.

Upon February 10, 1899, the same legislature had adopted a statute known as the Craig act, which, in substance, provided that any foreign insurance company desiring to transact business in the state of North Carolina after June 1st then ensuing, must become a domestic corporation of said state, and attaching penalties to any attempt to transact business in violation of said provisions.

May 17, 1899, defendant's board of directors adopted a formal resolution referring to the Craig act and stating its determination not to comply therewith, but instead to withdraw from the transaction of business in said state, and declaring that the appointment of the insurance commissioner as an attorney upon whom process might be served be "canceled, revoked, and annulled." Upon May 20th duly certified copies of this resolution were filed with and in the office of the insurance commissioner. Upon May 18, 1899, the defendant did withdraw all of its agents from the state of North Carolina, and since that date has had no agent therein, premiums upon policies theretofore issued by it to residents of said state being remitted to it by mail at its home office in New York city, where the policies and premiums were payable, and losses upon policies issued by it being paid by checks from said office. Outside of this, the defendant does not appear to have transacted any business whatever in the state since its withdrawal, save in four specific instances, two of them occurring a considerable period before and two a considerable period after the purported institution against it in the foreign state of the suits in question. Without going into the details of these transactions, it may be briefly stated that three of them involved the settlement of losses under or readjustment of policies issued to residents of North Carolina while the defendant was regularly transacting business there, and in the fourth case a special adjuster appoint-

ed to settle a claim with a supposed resident of Washington followed him for such purpose into the state of North Carolina, whither he had removed. More than two years after its above-mentioned withdrawal from, and revocation of power of attorney in, North Carolina, residents of New York and New Jersey made assignment of alleged claims under policies there issued to them to residents of North Carolina, and upon them four of the original judgments in question were secured through a purported service of process under the power of attorney as already stated.

Defendant conceding its liability upon the judgment upon the North Carolina policy, we need spend no considerable time in reviewing and restating the decision of this court in the Woodward Case, whereby it was, in effect, held that a stipulation made by a foreign insurance company as a condition of doing business in North Carolina, that process might be served in its behalf upon some official as long as there might be any outstanding liability upon its part under any contract of insurance, is an agreement for the benefit of and enforceable by a holder of a policy issued to him in that state which could not be subsequently canceled or evaded by the insurance company so long as the liability in behalf of such policy holder continued. The only question which we need discuss is whether the principles of that case, or any others invoked by the present plaintiff, prevented defendant from so canceling and revoking its power of attorney to the superintendent of insurance under the circumstances disclosed as to bar service upon him as its representative in suits upon claims contracted with persons residing outside of the state of North Carolina, and in no way belonging or transferred to a resident of said state until after the attempted revocation. The learned counsel for the plaintiff largely bases his contention that defendant did not escape service and jurisdiction in North Carolina upon two propositions. He urges, in the first place, that it did not, as it claimed to, discontinue transacting business there, and that for that reason its attempted revocation and withdrawal from the state was ineffective. And, secondly, he insists that the strict letter of its power of attorney to the insurance commissioner for service of process provides that such authority "shall continue in force irrevocable so long as any liability of the company remains outstanding in said (this) commonwealth," and that at the time purported service was made there were existing liabilities outstanding.

It may be assumed at once that if defendant

upon a fair construction of language and of its acts did continue generally to transact and carry on the business of insurance in North Carolina after its purported revocation of its power of attorney and withdrawal from such state, the latter should be held ineffectual to prevent a continuance of the authority of the insurance official to receive service of a summons. The authorization by the company of service upon said official was a condition of its transacting business in said state, and so long as such transaction of business continued the company should not be allowed to escape the consequences of its agreement by any deceptive or apparent withdrawal. We do not, however, think that such was the true character of its acts. The Craig act, to which reference has already been made, by its provisions excluded defendant from the transaction of business unless it was willing to become a domestic corporation. It is urged that the Willard act, to which we have also referred, was passed subsequently and was so inconsistent with the former act as to repeal its prohibitory and penalizing provisions. We scarcely agree with this argument. We think that there was room for the provisions of both statutes. The courts of the state where they were passed in effect have so held, which certainly should be a matter of considerable weight with us in this discussion. *Debnam v. Southern Bell Teleph. & Teleg. Co.* 126 N. C. 831, 65 L.R.A. 915, 36 S. E. 269; *Layden v. Endowment Bank*, K. P. 128 N. C. 546, 39 S. E. 47. But whether this is so or not, the defendant apparently in good faith did regard the provisions of the Craig act as driving it from the state, in the absence of its willingness to be incorporated as a domestic corporation, and its acts then and thereafter performed indicate an intention actually and in good faith to cease doing business there, and to our minds the facts agreed upon do not show any subsequent modification of this intention. It had already issued policies and contracted liabilities in the state which could not be ignored. It dealt with these liabilities so far as it could from its office in New York, and the specific acts which are detailed in the submission arose in connection with the settlement and treatment of old liabilities and old business. We do not think that there was any such continuation of an ordinary, substantial, and active insurance business as would be necessary to keep alive the power of attorney within plaintiff's contention upon this point. *Knights Templars' & M. Life Indemnity Co. v. Jarman*, 187 U. S. 197, 204, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108; *Frawley v. Penn-*

Sylvania Casualty Co. 124 Fed. 259; *Doe v. Springfield Boiler & Mfg. Co.* 44 C. C. A. 128, 104 Fed. 684.

We therefore pass to the consideration of plaintiff's second contention, based upon the wording of the power of attorney. In so doing, and in construing this instrument, and determining whether defendant might revoke it and escape from its consequences as to the majority of the judgments involved in this action, we should keep in mind the policy which led to the adoption of the statute under which it was executed. This policy, briefly stated, involved and voiced the determination upon the part of the state that it would not allow a foreign insurance company to exercise the privilege of doing business within its limits without securing to its citizens, who might there be dealt with, and arrangement by which they might institute actions and enforce their contracts and policies at home, and without being driven into some foreign state where the company might have its origin and principal place of business. Statutes requiring the execution of some such agreement by foreign corporations as is invoked against the defendant here have always been regarded as primarily designed for the protection of the citizens of the state enacting the legislation, and who might acquire rights under contracts executed with them or for their benefit while they were such citizens. Such was the underlying principle and view which led to the decisions in the *Woodward Case*, in *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. ed. 451; in *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; and in *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354. It would be quite beyond the spirit of those decisions to hold, and we cannot believe that it was the further policy of such legislation to create and perpetuate, a local forum to which under guise of an assignment to some resident, nonresidents of far distant states might flock for the purposes of instituting litigation upon contracts issued to them at their homes, against a corporation there readily subject to service and which long before had attempted in good faith to withdraw from the jurisdiction thus hunted out.

Holding this view, we are not willing to decide that defendant's power of attorney was irrevocable as against the four foreign claims upon which recovery was had in North Carolina. It is true that, as the statute required, said power of attorney upon its face was irrevocable so long as any liability of the company should remain outstanding in said state. But it is well settled that a power of attorney, although

by its literal terms irrevocable, may be revoked, unless some interest or right founded or created upon the faith thereof requires its perpetuation and continuance. *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. ed. 589; *Knapp v. Alvord*, 10 Paige, 205, 40 Am. Dec. 241; *Story, Agency*, 3d ed. § 476. The citizens of North Carolina who had taken contracts from the defendant while it was there doing business, in reliance upon this power of attorney, which had been executed for their protection under the requirements of the statute, were entitled to have it remain unrevoked as provided by its terms. As we have already seen, they are to be regarded as having made their contracts upon the faith of it, and as against them defendant could not escape from its consequences. But the plaintiffs in the North Carolina actions, who secured their claims from nonresident assignors, occupied no such position. These claims under contracts executed in other states cannot by any possibility be regarded as having been contracted or acquired in reliance upon this provision for service within the state of North Carolina. The assignees, who saw fit to embark upon the acquisition of foreign claims, did not do so in innocent reliance upon the right to bring such suits in their own state, for long before they began the accumulation of claims against the defendant it had formally, and, as we believe, in good faith, withdrawn from the state where they lived, and given formal notice of its revocation of the power of attorney. They did not acquire any such right to enforce jurisdiction in the courts of their own state against the defendant as makes it in any way inequitable or unjust that the power of attorney should be revoked. They are not of the class for whose protection it was originally executed. They have not acquired any rights upon the faith of it. The contracts which they seek to enforce were not secured by defendant from those who expected protection under it. We not only think that it is legal and equitable that defendant's revocation should be effective as against these parties, but that it would be extremely inequitable to hold the reverse.

The learned counsel for the plaintiff has called to our attention many cases which he claims are opposed to the views expressed. While some of them may contain isolated expressions which seem to sustain his view, we think that all of them which ought to be at all controlling upon this court may be clearly distinguished from the case at bar, and we shall only refer briefly to a few of them.

In *Connecticut Mut. L. Ins. Co. v. Spratley*, *supra*, it appeared that plaintiff in er-

ror had been engaged for many years in transacting a general insurance business in Tennessee under a statute which, amongst other things, provided that any corporation that had any transaction with persons or concerning any property situated in the state through any agency whatever acting for it within the state should be held to be doing business within the meaning of the act, and also that process might be served upon any agent of the corporation found within the county where the suit was brought, no matter what character of agent such person might be. Thereafter, having issued many policies, the corporation assumed to withdraw from the state by recalling its agents and refusing to take new risks or issue new policies within the state. At this time many policies were outstanding upon which it continued to collect premiums through an agent residing in another state. Action was brought in the courts of Tennessee upon policies issued for the benefit of residents of that state while the company was regularly engaged in doing business there and before its attempt to withdraw, and service in aid action was made upon a conceded representative of the company who had come into the state for the purpose of adjusting and settling losses under said policies. It was held that under the circumstances of that case the company was doing business within the state, and that service was properly made upon it in the manner indicated. It will be at once observed that, independent of the statutory provision defining what should be held to constitute doing business within the meaning of the act under which plaintiff in error operated in the state of Tennessee, this decision was entirely in line with the principle adjudicated by this court in the Woodward Case. The rights involved were those of a policy holder resident in the state who had there contracted with the company while it was transacting business in that state under a statute which coupled with permission certain conditions for the service of process, and the principle upheld was that the company could not defeat the rights of the policy holder and by an attempted withdrawal from the state force him into some foreign jurisdiction.

Mutual Reserve Fund Life Asso. v. Phelps, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707, was based upon the same principle of upholding in favor of a citizen of Kentucky who had received from the plaintiff in error a policy of insurance while it was regularly transacting business in that state, the right to institute action by service of process upon the insurance commissioner in accordance with the provisions of a statute which permitted

the company to transact business in that state under conditions allowing such service of process, notwithstanding the company after issuing the policy had attempted to withdraw from the state and cancel the right of service upon the commissioner.

In *Birch v. Mutual Reserve L. Ins. Co.* 91 App. Div. 384, 86 N. Y. Supp. 872, affirmed without opinion in 181 N. Y. 583, 74 N. E. 1115, judgment was recovered in the state of North Carolina upon various contracts of life insurance executed in that state while the defendant was regularly engaged in transacting its life insurance business there. Action was commenced by service of process upon the insurance commissioner, and it was held that such service was good, although the defendant had attempted to withdraw from the state and revoke its power of attorney before service was made. We see nothing in any of these cases which impairs the force of the conclusions reached by us.

The judgment appealed from should be modified by reducing the same by the amount of \$8,792.42, with interest thereon from May 5, 1902, and, as so modified, should be affirmed, without costs to either party.

Cullen, Ch. J., and O'Brien, Haught, Vann, and Werner, JJ., concur. Willard Bartlett, J., not sitting.

Affirmed by the United States Supreme Court, December 12, 1910, 218 U. S. 573, 54 L. ed. 1155, 31 Sup. Ct. Rep. 127.

UNITED STATES SUPREME COURT.

WILSON R. HUNTER, Plff. in Err.,
v.

MUTUAL RESERVE LIFE INSURANCE
COMPANY et al.

(218 U. S. 573, 54 L. ed. 1155, 31 Sup. Ct. Rep. 127.)

Process — service on foreign insurance company — what is doing business.

1. The receipt by a foreign insurance company at its home office of premiums upon policies theretofore issued, together with four isolated acts extending over a period of three years, consisting in rewriting an existing policy, sending a check in payment of a policy, to be delivered upon receipt of certain unpaid assessments, and two adjustments within the state of claims

Note. — As to revocation by foreign corporation of appointment of attorney or agent to receive service of process, see the note appended to the opinion of the New York court of appeals in this case, ante, 677, affirmed by the above decision.

which have accrued, do not constitute doing business within the state after the company's asserted withdrawal therefrom in good faith, so as to preclude it from revoking its designation of the state insurance commissioner as its agent to receive service of process.

Same — revoking designation of state officer.

2. A foreign insurance company, upon withdrawing from the state in good faith, to escape the compulsion of N. C. act of February 10, 1899, requiring it to become a domestic corporation if it desires to continue to do business in the state, may revoke its appointment of the state insurance commissioner as its agent to receive service of process, so far as claims of citizens of other states are concerned, which are assigned after such withdrawal to a resident of the state for collection, although N. C. Laws 1899, chap. 54, continues the authority of the commissioner in force and irrevocable so long as any liability of the company shall remain outstanding in the state.

(December 12, 1910.)

ERROR to the Supreme Court of the State of New York to review a judgment remitted from the Court of Appeals, modifying a judgment of the Appellate Division of the Supreme Court, Second Department, enforcing, upon the submission of an agreed case, certain foreign judgments recovered upon policies of life insurance. Affirmed.

The facts are stated in the opinion.

Mr. Paul Armitage, for plaintiff in error:

A state has the arbitrary power to exclude foreign insurance companies altogether from her territory.

Hooper v. California, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. Issuing a policy of insurance is not a transaction of commerce. Such contracts are not interstate transactions, though the parties may be domiciled in different states. They do not constitute a part of the commerce between the states.

Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; *Fire Asso. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Hooper v. California*, 155 U. S. 648, 654, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

A state can inhibit the negotiation of insurance policies within her confines, even 30 L.R.A. (N.S.)

through the medium of agents sent from other states.

Ibid.

A state has the power, if she allow any such insurance company to enter her confines, to determine the conditions on which the entry shall be made, and the right to enforce any conditions so imposed. The power to exclude embraces the power to regulate, and the power to enact and to enforce such regulations.

Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

When a foreign insurance corporation undertakes to transact business in a state other than that in which it is incorporated, it submits itself to the authority of the courts of such other state, and is bound, so long as that business continues, by the statutory provisions respecting the method of such courts obtaining jurisdiction over it.

Pringle v. Woolworth, 90 N. Y. 509; *People v. Commercial Alliance L. Ins. Co.* 7 App. Div. 297, 40 N. Y. Supp. 269; *Gibbs v. Queen Ins. Co.* 63 N. Y. 120, 20 Am. Rep. 513; *Douglass v. Phenix Ins. Co.* 138 N. Y. 220, 20 L.R.A. 118, 34 Am. St. Rep. 448, 33 N. E. 938; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; *Gibson v. Manufacturers' F. & M. Ins. Co.* 144 Mass. 81, 10 N. E. 729; *Aldrich v. E. W. Blatchford & Co.* 175 Mass. 369, 58 N. E. 700; *People v. Fire Asso. of Philadelphia*, 92 N. Y. 311, 44 Am. Rep. 380; *Vose v. Cockcroft*, 44 N. Y. 415; *Sherman v. McKeon*, 38 N. Y. 266; *Phyfe v. Eimer*, 45 N. Y. 102.

It becomes a material inquiry to ascertain whether, at the time of service of process in January, 1902, the Mutual Reserve Insurance Company was engaged in doing business within the state of North Carolina. For, if it was, it cannot be seriously contested that the service on the insurance commissioner was ineffectual against it.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 610, 43 L. ed. 571, 19 Sup. Ct. Rep. 308; *Mutual Reserve Fund Life Asso. v. Phelps*, supra.

The defendant company continued to do business in North Carolina, after the attempted revocation of the power of attorney given to the insurance commissioner, and was actually doing business within the state on the date when service of process was made in each of the suits resulting in the four judgments.

Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Mutual Reserve Fund Life Asso.*

v. Phelps, supra: *Mutual Reserve L. Ins. Co. v. Birch*, 200 U. S. 612, 50 L. ed. 620, 26 Sup. Ct. Rep. 752.

So long as the defendant continued to do business in the state, it will be presumed to have assented to be sued within the state by service on the insurance commissioner, and is estopped from showing either that it has not filed the requisite authority, or that it has revoked it.

Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. ed. 354.

The state of North Carolina had the right to prescribe such conditions as it saw fit before allowing a foreign corporation to do business within its borders.

Anglo-American Provision Co. v. Davis Provision Co. 169 N. Y. 510, 88 Am. St. Rep. 608, 62 N. E. 587; *Hooper v. California*, supra.

The state had the power to make the statute and power of attorney broad enough to authorize the insurance commissioner of that state to receive process in all actions of every nature of which its courts had jurisdiction.

Aldrich v. E. W. Blatchford & Co. 175 Mass. 371, 56 N. E. 700.

The North Carolina statute applies to all causes of action owned by its citizens, no matter where the contract was entered into.

Youmans v. Minnesota Title Ins. & T. Co. 67 Fed. 282; *Johnston v. Trade Ins. Co.* 132 Mass. 432; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 149 Mass. 24, 20 N. E. 318; *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 421, 34 U. S. App. 581, 72 Fed. 32; *Darlington v. Rogers*, 36 Phila. Leg. Int. 115.

A foreign corporation cannot, as a price of admission to a state, consent to being sued there in all actions of which the courts have jurisdiction, and appoint a state officer to receive process for it, and then, while continuing to do business, revoke the appointment.

Henrietta Min. & Mill. Co. v. Johnson, 173 U. S. 224, 43 L. ed. 676, 19 Sup. Ct. Rep. 402; *State v. United States Mut. Acci. Asso.* 67 Wis. 624, 31 N. W. 229; *Connecticut Mut. L. Ins. Co. v. Spratley*, supra; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. Rep. 445; *Mutual Reserve Fund Life Asso. v. Phelps*, supra; *Ehrman v. Teutonia Ins. Co.* 1 McCrary, 123, 1 Fed. 471.

While a power of attorney is ordinarily revocable at will, yet, when it is coupled with an interest, or given as security, or as part of a contract, or for a valuable consideration which the law deems sufficient to uphold an executory contract, or when it is given to a public officer of the

state for the protection of its citizens, it is irrevocable.

Mechem, Agency, § 232; *MacGregor v. Gardner*, 14 Iowa, 326; *Ewell's Evans*, Agency, 110, note 1; 2 Kent, Com. 643; *Story*, Agency, 9th ed. 587; *Terwilliger v. Ontario, C. & S. R. Co.* 149 N. Y. 87, 43 N. E. 432; *Collier v. Mutual Reserve Fund Life Asso.* 119 Fed. 619.

In filing its power of attorney and entering into the agreement with the state that such power of attorney should be irrevocable, defendant did so with full knowledge of the provisions of the Craig act. It is conclusively presumed to have entered into this contract with full knowledge of, and subject to, the provisions of that act.

Mutual L. Ins. Co. v. Phinney, 178 U. S. 327, 44 L. ed. 1088, 20 Sup. Ct. Rep. 906.

Messrs. William Hepburn Russell and Frank H. Platt, with Mr. William Beverly Winslow, for defendants in error:

To confer jurisdiction upon the courts of a state to render a judgment against a foreign corporation, the general rule is that the two elements must exist that service be made upon an agent of the company who the law will imply is authorized to receive service of process, and that the corporation is engaged in doing business in such state.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 111, 42 L. ed. 964, 968, 18 Sup. Ct. Rep. 526; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483; *Peterson v. Chicago, R. I. & P. R. Co.* 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 245, 255, 53 L. ed. 782, 787, 29 Sup. Ct. Rep. 445.

The converse of this proposition is equally true. If service be made upon an official of the corporation who is found in the state, it will be wholly ineffective to confer jurisdiction over such corporation, unless the corporation is doing business in the state.

Conley v. Mathieson Alkali Works, supra; *Geer v. Mathieson Alkali Works*, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807.

The only modification which has been made in the above-stated rule is that where the corporation has done business in a state,

and has incurred liabilities to residents of the state, and has been, as a condition of being permitted to do such business and to enter into contracts in the state with the residents thereof, required to designate an agent in the state upon whom process might be served, that designation becomes in effect a vested right of the persons making such contracts, of which neither the act of the corporation in voluntarily withdrawing from doing business in the state, nor the act of the state itself in excluding the corporation, can deprive them.

Biggs v. Mutual Reserve Fund Life Asso. 128 N. C. 5, 37 S. E. 955; *Moore v. Mutual Reserve Fund Life Asso.* 129 N. C. 31, 39 S. E. 637; *Woodward v. Mutual Reserve L. Ins. Co.* 178 N. Y. 485, 102 Am. St. Rep. 519, 71 N. E. 10; *Birch v. Mutual Reserve L. Ins. Co.* 181 N. Y. 583, 74 N. E. 1115, affirmed in 200 U. S. 612, 50 L. ed. 620, 26 Sup. Ct. Rep. 752; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707.

The contention that service upon the insurance commissioner was sufficient to give the court jurisdiction rests upon the language of the so-called Willard act and of the power of attorney executed by the defendant corporation pursuant thereto. These were construed by the court of appeals adversely to the plaintiff's contention. Such conclusion did not constitute a denial of any right which plaintiff had under the Constitution of the United States, and was correct.

Smithsonian Institution v. St. John, 214 U. S. 19, 53 L. ed. 892, 29 Sup. Ct. Rep. 601; *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.* 217 U. S. 247, 54 L. ed. 752, 30 Sup. Ct. Rep. 510.

It is well settled that a power of attorney, although irrevocable in terms, is revocable unless coupled with an interest or given for a consideration.

Hunt v. Rousmanier, 8 Wheat. 174, 5 L. ed. 589; *Knapp v. Alvord*, 10 Paige, 205, 40 Am. Dec. 241; *Story, Agency*, 9th ed. p. 587, § 476.

The fair construction of the so-called Willard act is that only a power of attorney which should be irrevocable as to those persons who contracted with the corporation in North Carolina was required.

Moore v. Mutual Reserve Fund Life Asso. and Mutual Reserve Fund Life Asso. v. Phelps, *supra*.

There are limitations to the rule that a state may impose any condition it pleases in permitting foreign corporations to enter the state to do business.

Cable v. United States L. Ins. Co. 191 U. S. 288, 307, 48 L. ed. 188, 193, 24 Sup. Ct. Rep. 74.

30 L.R.A. (N.S.)

While the state can forbid the corporation coming into the state to make a contract, it cannot forbid its citizens lawfully making a contract with the corporation at its domicile, and thereafter performing the contract through the mail.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The state may exclude the corporation from its borders when it cannot exclude an individual, but it cannot impair the obligation of its contracts any more than it can an individual's, nor deprive it of the benefits which flow therefrom.

Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 240, 45 L. ed. 834, 844, 21 Sup. Ct. Rep. 597.

Any provision making a corporation subject to jurisdiction merely because it is "doing business" in violation of law, without service upon a then-authorized agent in the state, is in violation of the Constitution of the United States, and a judgment *in personam* against it, not based on personal service on an authorized agent, is void.

Caledonian Coal Co. v. Baker, 196 U. S. 432, 444, 49 L. ed. 540, 545, 25 Sup. Ct. Rep. 375; *Wetmore v. Karrick*, 205 U. S. 141, 51 L. ed. 745, 27 Sup. Ct. Rep. 434; *Cella Commission Co. v. Bohlinger*, 8 L.R.A. (N.S.) 537, 78 C. C. A. 467, 147 Fed. 419.

Mr. George W. Field also for defendants in error.

Mr. Justice McKenna delivered the opinion of the court:

This writ of error is prosecuted to review a judgment of the court of appeals of the state of New York, modifying a judgment of the supreme court of that state. The judgment of the court of appeals was remitted to and made the judgment of the latter court.

The action was brought by Hunter, whom we shall call plaintiff, against the insurance company, which we shall refer to as defendant, upon five judgments obtained in the state of North Carolina, recovered by one Emrick Wadsworth, a citizen of North Carolina, and owned by plaintiff. The judgments were recovered upon policies of insurance issued by defendant, one of which was issued to a citizen of North Carolina while defendant was doing business there, the others to citizens of New York and New Jersey. They were assigned to Wadsworth long after defendant had attempted to remove from North Carolina. Judgment was rendered for their full amount with interest and costs, to wit, the sum of \$9,965, by direction of the appellate division of the court, to which the case was submitted upon an agreed statement of facts. The court

of appeals reduced the same by the amount of the four judgments recovered on the policies issued in New York and New Jersey. The Federal question presented is whether due faith and credit was refused to the judgments, in violation of the Constitution of the United States.

The judgments were obtained by default, after service made upon the insurance commissioner of the state. The decision of the case turns upon the validity of the service.

The defendant is a life insurance company, organized under the laws of New York. Prior to March 13, 1899, it was duly admitted to do business in the state of North Carolina, it complying with the laws of the state successively passed, which required insurance companies to appoint agents upon whom service of process could be made.

On March 6, 1899, the legislature passed a law known as the Willard law. The law prescribed that no foreign insurance company should do business in the state until it had, by a duly executed instrument, filed in the office of the secretary of state, constituted and appointed the insurance commissioner its true and lawful attorney, upon whom all lawful process in any action or legal proceedings might be served, and agreed that such service should have the same force and validity as if served on the company, and that "the authority thereof" should "continue in force irrevocable so long as any liability of the company" should "remain outstanding in this commonwealth." Chapter 54 of the Laws of 1899.

On or about the 13th of April, defendant executed the power of attorney required, and thereupon a license was issued to it to do business, as provided by law, under which it did business in the state for a time.

The legislature which passed the Willard law passed also a law called the Craig act, by which it was provided that any foreign insurance company desiring to do business in the state after June 1 then ensuing must become a domestic corporation of the state. There were severe penalties prescribed for the violation of the act. The company was subjected to a penalty of \$200 a day for every day it "continued to operate or do business without having complied with the requirements of the act," and it was deprived of the right of suing in the state courts, or to enter into any new contracts, or enforce those it had made. In addition to the penalty of \$200, it was subjected to a penalty of \$500 for each day that it did business after the 1st day of June, 1899, "without first becoming a domestic corporation."

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The act took effect on the 10th of February, 1899. In May of that year the board of directors of defendant passed a resolution to withdraw from the state, and to dispen-
se with and terminate the services of all of its agents. It also revoked the authority of the insurance commissioner to act as its attorney to receive service of process. A certified copy of the resolution was served on the commissioner, and the agents of the company were withdrawn from the state, the premiums upon the policies theretofore issued by it being remitted by mail to its home office, where the policies and premiums were payable, and losses upon policies being paid by check from its office. Outside of this the record shows four transactions: (1) The rewriting of a policy of insurance in 1899, originally issued in 1886, which was mailed from its office in New York; (2) sending a check in payment of a policy issued prior to May 17, 1899, to be delivered upon receipt of certain unpaid assessments; (3) the adjustment in North Carolina, in June, 1902, of a loss upon a policy issued in Washington, District of Columbia, the beneficiary having removed to North Carolina; (4) the adjustment, by an attorney employed for the purpose, of a claim upon a policy written in North Carolina prior to May 17, 1899. The two first transactions were prior to the beginning of the actions in which the judgments were recovered, and the two last were subsequent to that time. These are the transactions upon which plaintiff relies to establish that defendant was doing business at that time in the state.

Three of the policies upon which judgments were recovered were issued in the state of New York long prior to the year 1899. The fourth policy was issued in New Jersey, also prior to 1899. The assignments to Wadsworth were made in December and January, 1902, and the suits were begun on January 20, 1902.

There is no controversy over the power of the state to pass the Willard and Craig acts, so called, or to make their provision conditions upon which foreign insurance corporations could do business in the state. The controversy is over the duration of the conditions. The decision upon that, plaintiff contends, depends upon the question whether the insurance company was doing business in the state at the time the actions on the policies were brought and process served; and, insisting that it was, cites *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707. Plaintiff further insists that, even if it be assumed that defendant

had withdrawn from the state in good faith, and had ceased to do business there in after May 18, 1899, it was still liable to be sued in the courts of the state "in any action or local proceeding of every nature of which the courts of North Carolina had jurisdiction," and that the insurance commissioner was its agent to receive service of process. This contention is based on the provision of the statute which continues the authority of the commissioner "in force and irrevocable so long as any liability of said company remains outstanding in said state."

If the situation of defendant, regarding what it had done and its obligations, was exactly expressed by the contentions of plaintiff, they might be irresistible. But not only the Willard act, but the Craig act, must be considered in determining defendant's conduct. It had done business in the state, and the former act became a part of its obligations to its policy holders. The latter act imposed new conditions upon it, and as an alternative to compliance with them, required it to remove from the state. An evasion of the requirement was, as we have seen, severely penalized. Money penalties, one of \$200 and one of \$500, for every day it should do business after the 1st of June, 1899, were imposed upon it, and no contract it should make or had made could be enforced in the courts of the state. Such were the alternatives presented by the Craig act. In other words, defendant was given the choice to become a domestic corporation or go out of the state. It chose to go out of the state, and adopted the only way it could to do so. We think such course was open to it, and we see no reason to question its good faith.

It is, however, contended that defendant "persisted in doing business in the state, and was so found at the time of the service of process in question." Four instances are adduced to sustain the contention, two of which occurred in 1899 and two in 1902. These instances have no relation to one another, and no relation to the transactions upon which the judgments were based. Between the first two and the last two there was an interval of three years, and yet it is insisted that there was such connection between them that they constituted doing business continuously in the state, and the defendant was hence precluded from revoking its power of attorney to the insurance commissioner. The contention of plaintiff, so far as based on the instances adduced, encounters a great difficulty. They were not new business. They related to old transactions, and were intended only to fulfil their obligations. This was the plain duty of defendant,—a duty which it could

not evade, nor could the state even prevent it. *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597. Between doing business for such purposes and doing business generally there is quite a difference. If not, the consequences are somewhat serious. The Craig act, as we have seen, imposes a penalty of \$700 a day for each day after the 1st day of June, 1899, that a foreign corporation shall do business in the state without conforming to the provisions of the act.

Plaintiff, however, presses with earnestness, in support of his contention, the following cases: *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; *Mutual Reserve L. Ins. Co. v. Birch*, 200 U. S. 612, 50 L. ed. 620, 26 Sup. Ct. Rep. 752; *Commercial Mut. Acci. Co. v. Davis*, 213 U. S. 245, 53 L. ed. 782, 29 Sup. Ct. Rep. 445.

In the *Spratley* Case the life insurance policy which was the subject of the suit was issued by the insurance company when it was concededly present and doing business in the state of Tennessee. The service was upon an agent by the name of Chaffee, sent to investigate into the circumstances of the death of *Spratley* and the claims of his widow. These facts distinguish the case from the one at bar. But certain language of the court is quoted to establish, not only was the insurance company so doing business in the state as to justify service of process upon the agent appointed by the company, but doing business generally. The court, through Mr. Justice Peckham, said:

"We think the evidence in this case shows that the company was doing business within the state at the time of this service of process. From 1870 until 1894 it had done an active business throughout the state by its agents therein, and had issued policies of insurance upon the lives of citizens of the state. How many policies it had so issued does not appear. Its action in July, 1894, in assuming to withdraw from the state, was simply a recall of its agents doing business therein, the giving of a notice to the state insurance commissioner, and a refusal to take any new risks or to issue any new policies within the state. Its outstanding policies were not affected thereby, and it continued to collect the premiums upon them and to pay the losses arising thereunder, and it was doing so at the time of the service of process upon its agent."

And further:

"It cannot be said with truth, as we think, that an insurance company does no business within a state unless it have

agents therein who are continuously seeking new risks, and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the state through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policy holders to an agent residing in another state, and who was once the agent in the state where the policy holders resided. This action on the part of the company constitutes doing business within the state, so far as is necessary, within the meaning of the law upon this subject. And this business was continuing at the time of the service of process on Mr. Chaffee in Memphis."

This reference to the law in the state must be considered. A statute of the state provided that process might be served upon any agent of a corporation doing business in the state, found within the county where the suit was brought, no matter what character of agent such person might be, and in the absence of such an agent it should be sufficient to serve process upon any person found in the county who represented the corporation at the time of the transaction out of which the suit arose took place. It was under this statute that service was made upon Chaffee. This service was held good, this court saying, in addition to what has been quoted above: "Even though we might be unprepared to say that a service of process upon 'any agent' found within the county, as provided in the statute, would be sufficient in the case of a foreign corporation, the question for us to decide is whether, upon the facts of this case, the service of process upon the person named was a sufficient service to give jurisdiction to the court over this corporation."

Further explanation of the language of the court is contained in the following passage:

"A vast mass of business is now done throughout the country by corporations which are chartered by states other than those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where the business was done, *out of which the dispute arises.*" (Italics ours.)

Mutual Reserve Fund Life Asso. v. Phelps is distinguished from the case at bar by the same features that distinguish the Spratley Case from it. The suit was brought by a citizen of the state of Kentucky upon a policy issued when the association was doing a general business in the

state through regular agents, under a license from the state. The commissioner subsequently canceled its license, and it withdrew its agents from the state. The service of process in the action was nevertheless made upon the commissioner and sustained. It was stipulated by the parties that outstanding policies were continued in force after the action of the commissioner, on which the association had collected and was collecting dues, premiums, and assessments, and this court held, on the authority of the Spratley Case, that the association was doing business in the state. These general words must be qualified, as we have seen, like words in the cited case should be qualified, to protect transactions which had been entered into, and to give them the benefit of the law in view of which they were made. This court said: "The plaintiff was a citizen of Kentucky, and the cause of action arose out of transactions had between the plaintiff and defendant while the latter was carrying on business in the state of Kentucky, under license from the state." And it was said of the statute that it and "other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen for such a controversy to seek, for the purpose of enforcing his claims, the state in which the corporation had its home."

Mutual Reserve L. Ins. Co. v. Birch was a like case. Certain judgments which were sued on in New York were obtained in actions upon policies issued when the insurance company was doing its regular business in the state of North Carolina, and antedated its resolution to withdraw from the state. The case was rested in the court of appeals of New York on Woodward v. Mutual Reserve L. Ins. Co. 178 N. Y. 490, 102 Am. St. Rep. 519, 71 N. E. 10. It was said in that case that the stipulation of the company in regard to service of process became an obligation of the company precisely as though it "had been incorporated in the policies; and thereafter, whether the company continued to do business in the state or not, policy holders could commence action by service upon the secretary of state," subsequently changed to the insurance commissioner. Woodward v. Mutual Reserve L. Ins. Co. was cited by this court in its opinion sustaining the judgment in the Birch Case.

Commercial Mut. Acci. Co. v. Davis has the same characteristics as the cases which we have reviewed, and needs no other comment than that it repeated the doctrine of the other cases.

The first contention of plaintiff is therefore untenable. The next contention is that, even if defendant did withdraw from the state in good faith, the authority to the insurance commissioner to receive service of process continued as long as the company had outstanding liabilities in the state. And this, it is insisted, constituted the duration of the authority not only for causes of action arising in the state, but for causes of action arising in other states. In other words, that the language of the statute is not limited by its purpose to protect the resident policy holders of the company, but for the benefit of every litigant upon any cause of action; and, to use the graphic language of the court of appeals, to "perpetuate a local forum to which, under guise of an assignment to some resident, nonresidents of far distant states might flock for the purpose of instituting litigation upon contracts issued to them at their homes, against a corporation there readily subject to service, and which long before had attempted in good faith to withdraw from the jurisdiction thus hunted out." [184 N. Y. 144, ante, 677, 76 N. E. 1074, 6 A. & E. Ann. Cas. 294.]

This is certainly the logical consequence of plaintiff's contention, and to sustain it he relies upon *Johnston v. Trade Ins. Co.* 132 Mass. 432; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 149 Mass. 24, 20 N. E. 318; *Biggs v. Mutual Reserve Fund Life Asso.* 128 N. C. 5, 37 S. E. 955. A statute like that of North Carolina was construed in the Massachusetts cases, and therefore the construction given to it is instructive. In all of the cases the corporation had "a domicile of business in the commonwealth," to use the language of the supreme judicial court of Massachusetts, and the court recognized that the right to sue upon cause of action arising in another state was not within "the main purpose" of the statute passed on; indeed, that it "was not framed for that purpose," but decided that "the words 'all lawful processes in any action or proceeding' must be held to include all actions which might lawfully be brought against a company thus having a domicile of business in this commonwealth." In *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* the contract sued on was made in the state, and was to be performed there.

In *Biggs v. Mutual Reserve Fund Life Asso.* the policy on which the action was based was issued to a resident of the state. The language of the court was quite general. The court did not discuss whether it was "ceasing to do business in the state" to transact that business through agents located outside of the state, by means of the 30 L.R.A. (N.S.)

mail," though it may be said that the court expressed doubt of it by referring to the *Spratley Case*. It was said:

"It is sufficient to point out that the statute requires the power of attorney to be irrevocable, not 'as long as the company continues to do business' in this state, but as long as 'any liability of the company remains outstanding' in this state, and the contract with the state, as expressed in the power of attorney filed by the company, so specifies. No amount of authorities having a more or less fancied analogy can overcome these plain words of the statute, and of the power of attorney drawn and filed in conformity thereto. *Green v. Equitable Mut. Life & Endowment Asso.* 105 Iowa, 628, 75 N. W. 635; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 213."

This general language must be considered in reference to the case,—a conclusion which is justified by the decision of the court in *Moore v. Mutual Reserve Fund Life Asso.* 129 N. C. 31, 39 S. E. 637, where it is said that the state, having the right to prescribe the terms upon which the insurance company might carry on its business in the state, and the company, "being permitted, proceeded to make contracts with citizens of the state, and became liable to them under these contracts. One of the provisions upon which defendant was allowed to do business here was that James R. Young, insurance commissioner, and his successors in office, should be constituted its agent, upon whom service of process might be made, and that said agency should continue so long as the defendant had any liabilities remaining unsatisfied in this state, arising from or out of its said business of insurance." As to the revocation of the authority of the commissioner, the court said:

"It is conceded that, as a general rule, a principal has the right to revoke a power of attorney at any time, whether it is in terms irrevocable or not. But to this general rule there are well-established exceptions, as to where it is coupled with an interest, or where it is contractual in its nature, given for a consideration and for the protection of someone or some interest. In our opinion this power falls under this exception to the general rule. It was contractual in its nature, was given upon consideration that defendant should have the right to carry on its business in this state, and for the protection of those who should deal with the defendant."

Manifestly, this means who should deal with the defendant in the state. The facts in the case at bar are different from the cited cases. The policies upon which the four judgments were recovered were not issued in North Carolina, and, not having

been issued under the faith of its laws, are not entitled to their remedial sanction. The facts in this case are also different from those in the Massachusetts cases. Defendant did not have "a domicile of business" in the state, nor were the contracts to be performed there. It in good faith withdrew from the state,—withdrew, indeed, under the compulsion of law. We say "under compulsion of law," for clearly the Craig act required that as an alternative to compliance with its provisions. It presented a choice to defendant of one of two courses. Defendant accepted one of them, that is, withdrew from the state, and revoked the power which it had given to the insurance commissioner to accept service for it. Revoked it as far as it could do so. It could not revoke it as to any "interest or right founded or created upon faith thereof," and which required its perpetuation and continuance," as the court of appeals has correctly said, and we think with that learned court, that it would be extremely inequitable to regard it as irrevocable to plaintiff and those in his situation. Indeed, it is not within the contemplation of the statute that the authority to the commissioner is to be available to those in the situation of plaintiff.

Judgment affirmed.

ARKANSAS SUPREME COURT.

E. TIGER et al., Appts.,
v.
ROGERS COTTON CLEANER & GIN
COMPANY.

(— Ark. —, 130 S. W. 585.)

Corporation — repurchase of unpaid stock — effect.

1. An insolvent corporation has no power as against the rights of its creditors to purchase its own stock at a sale thereof for nonpayment of a balance due on the subscription, and thereby relieve the subscriber from further liability, since unpaid subscriptions are a trust fund for the benefit of creditors, of the benefit of which it cannot deprive them.

Same — power of president — purchase of stock.

2. The president of a corporation cannot, without authority of the directors, purchase for it its own stock, at a sale conducted for the purpose of enforcing payment of the unpaid balance of the subscription.

Garnishment — garnishee not to be affected.

3. That a garnishee was not made a party to the principal action, and no relief was demanded against him therein, does not prevent the court from rendering judgment 30 L.R.A. (N.S.)

ment against him where the writ of garnishment was served on him, if by statute it is not necessary to commence an action against the garnishee in order to authorize the court to render judgment against him.

Appeal — garnishment — first pleading of defense.

4. A garnishee cannot plead the statute of limitations to a recovery of a claim against him for the first time in the appellate court.

(July 11, 1910.)

APPEAL by the garnishees from a judgment of the Circuit Court for Mississippi County in plaintiff's favor in a garnishment proceeding to reach certain unpaid stock subscriptions. Affirmed.

Statement by Wood, J.:

The appellee on the 14th day of May 1908, obtained judgment against the Luxora Gin & Manufacturing Company in the sum of \$476.60. Execution was issued upon the judgment against the judgment debtor, and a return of *nulla bona* was made thereon. On the 21st day of November, 1908, a writ of garnishment was issued against appellant and others summoning them as follows: "To answer what goods, property, chattels, and effects they, or either of them, had in their possession at the time this writ was served upon them, or that may have come into their possession since the service of this writ, belonging to the said Luxora Gin & Manufacturing Company. And they will further answer what sum or sums of money they, or either of them, owe the defendant, Luxora Gin & Manufacturing Company." Appellants answered "that said firm of Tiger Brothers had no goods, property, chattels, or effects in its possession, either at the time of the service of this writ or any other time within the past three years, belonging to the Luxora Gin & Manufacturing Company, and further states that it does not owe the

Note. — Right of corporation to purchase its own share of stock.

This subject is treated in a note to Hall v. Henderson, 61 L.R.A. 621, and in a late note to McGregor v. Fitzpatrick, 25 L.R.A. (N.S.) 50.

The only later case on the subject found besides TIGER v. ROGERS COTTON CLEANER & GIN Co. is that of Clark v. E. C. Clark Mach. Co. 151 Mich. 416, 115 N. W. 416, holding that the assets of a corporation cannot be used by it in the purchase of its outstanding stock to the exclusion of subsequent creditors, and hence that a mortgage given by a corporation in payment of the purchase price of its own stock is invalid to the extent that such creditors are injured thereby.

R. A. E.

said Luxora Gin & Manufacturing Company any sum whatever." This answer was filed December 2, 1908.

After hearing the evidence the court found the facts as follows: "First. That the Luxora Gin & Manufacturing Company is a corporation. Second. That the garnishees, E. Tiger and N. Tiger, subscribed and agreed to pay par value for \$500 worth of the capital stock of said corporation. Third. That said E. Tiger and N. Tiger did pay the sum of \$100 on their subscription to the capital stock of said corporation, leaving a balance due of \$400 on said capital stock, with interest thereon at the rate of 6 per cent per annum, and amounting to the sum of \$120 at this date, making a total, principal and interest, due from them to the said Luxora Gin & Manufacturing Company, of \$520. Fourth. That on the 1st day of July, 1905, said Luxora Gin & Manufacturing Company offered for sale the other \$400 worth of stock owned by the said E. Tiger and N. Tiger, to satisfy the balance of the unpaid subscription for the same, and there being no other bidders, John B. Driver, the then president of said corporation, bid for said corporation the amount of said unpaid subscription, and reported the same to the board of directors. Fifth. That when the purchase of said stock by said John B. Driver for the said Luxora Gin & Manufacturing Company was reported to said board of directors, the said board of directors expressly repudiated said transaction, and refused to ratify the same. Sixth. That on the 14th day of May, 1908, a judgment was rendered herein in favor of the Rogers Cotton Cleaner & Gin Company, and against the Luxora Gin & Manufacturing Company, on a promissory note for the sum of \$474.60, upon which there is due a credit for the sum of \$100, the amount realized from a sale of the property mentioned in said judgment. Seventh. The court further finds that at the time the stock of said E. Tiger and N. Tiger in said Luxora Gin & Manufacturing Company was sold, or attempted to be sold, to satisfy the unpaid subscription thereon, said corporation was hopelessly insolvent, and continued so down to the present time. Eighth. That at the time of the sale of said stock, or the attempt to sell said stock, the plaintiff was a creditor of said corporation, evidenced by the obligation upon which the judgment of May 14, 1908, was based." Upon these findings of fact the court declared the law to be that an insolvent corporation has no right as against its creditors to purchase its own stock, and that the purchase, or attempt to purchase, the stock of appellant on behalf of the Luxora Gin & Manufacturing Company, was null and void against the 30 L.R.A. (N.S.)

appellee, who was then and still is a creditor of the Luxora Gin & Manufacturing Company. The court entered judgment in favor of appellee, against appellant, for the sum of \$410 and costs.

From this judgment, appellant duly prosecutes this appeal.

Mr. W. J. Lamb for appellants.

Mr. J. T. Coston, for appellee:

The corporation had no right to repurchase its own stock.

1 Cook, Corp. § 311; Carter v. Union Printing Co. 54 Ark. 580, 16 S. W. 579.

Wood, J., delivered the opinion of the court:

It could serve no useful purpose to discuss in detail the evidence upon which the court based its findings of fact. It suffices to say that these findings are sustained by the evidence. Appellant contends "that at the time it filed its answer as garnishee herein, it was not, and had not been for more than three years, indebted in any sum whatever to the gin company." Appellants say this is so for the reason that their stock in the gin company was sold in July, 1905, and that thereafter appellants had no further interest in or connection with the gin company. But appellants' contention cannot be sustained. The court found, and the evidence tended to support that finding, "that, at the time the stock of appellants in the gin company was sold, or attempted to be sold, to satisfy the unpaid subscription thereon, said corporation was hopelessly insolvent." This being true, conceding for the present that there was a sale and purchase of the stock, the transaction was nevertheless void as to creditors of the corporation.

Mr. Cook in his excellent work on Corporations says: "If the corporation is insolvent at the time of the purchase, it is clearly an invalid transaction, and will be set aside. The rule goes still further, and declares that if a corporation, by a purchase of shares of its own capital stock, thereby reduces its actual assets below its capital stock and debts, . . . such purchase may be set aside, and the guilty corporate officers, as well as the vendor of the stock, may be rendered liable thereon at the instance of a corporate creditor." Cook, Corp. § 311, pp. 849, 850, and cases cited in notes 3 and 1 of above pages. The corporation in which appellants owned shares of capital stock for which they had not paid, being insolvent, the sale and purchase by it of these shares of stock was but tantamount to a voluntary release by the corporation to appellants of the balance due by them for their shares of capital stock. But the corporation

could not do this. It has no right to enter into any arrangement with the stockholder himself, or to engage in any transaction on its own motion, the effect of which would be to release from liability those who owed for capital stock in the corporation. The capital stock of a corporation is a trust fund that must be devoted to the payment of its debts. Neither the corporation nor the individual stockholder can divert it directly or indirectly from this purpose. *Carter v. Union Printing Co.* 54 Ark. 580, 16 S. W. 579. In the above case this court quoted from the Supreme Court of the United States as follows: "Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors, there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation." *Sanger v. Upton*, 91 U. S. 56, 60, 61, 23 L. ed. 220, 222.

There is therefore no merit in the contention of appellants that, when appellee sold its machinery to the gin company, it had no right to deal with the gin company in the belief that appellants' subscription to the capital stock of that company was an asset of the company at that time. The reverse is true in view of the fact that the gin company was insolvent when the stock was sold and purchased by the gin company, conceding that it was. But the purchase of the stock by the president of the company without any previous authority from the board of directors to do so, and without any subsequent ratification of his unauthorized act, as was the case here, rendered the transaction void. The stock never passed by that sale out of appellants. They still owned and owed for it at the time the debt herein sued on was contracted, and at the time the writ of garnishment was served on them.

It is next contended by appellant "that it not being a party defendant in the suit, and no relief having been asked against it and no judgment prayed, that the court was without authority to render judgment against it." Since the passage of the act of April 8, 1889 (Acts 1889, p. 168), in reference to judicial garnishments, and the amendatory act of April 19, 1895 (Acts 1895, p. 196), "it is no longer necessary . . . to commence a separate action 30 L.R.A.(N.S.)

against the garnishee in order to authorize the court to render a final judgment against him, but in the cases covered by these acts, final judgments may be rendered against the garnishee upon default made by him, or when on a trial the court finds that he is indebted to the defendant in the original judgment." *Norman v. Poole*, 70 Ark. 128, 66 S. W. 433. The writ of garnishment in the present case summoned appellants to answer what "property of the defendant they had in their possession," and "further to answer what sums of money they, or either of them, owe the defendant, Luxora Gin & Manufacturing Company." Appellee had obtained judgment against the gin company, and the writ of garnishment served on appellant gave the court jurisdiction to hear and determine the issue raised by the allegations contained in the writ. Appellant appeared and answered the writ, denying the allegations and interrogatories which the writ itself contained (which were sufficient), making the distinct issue that "it did not owe the gin company any sum whatever." In *Little Rock Traction & Electric Co. v. Wilson*, 66 Ark. 582, 587, 53 S. W. 43, 44, this court, through Judge Battle, said: "The writ of garnishment gives the person therein named as garnishee notice of the object of its issue, and commands him to appear at its return day, and answer what goods, chattels, moneys, credits, and effects he may have in his hands or possession belonging to the defendant. To this extent it serves as a summons and a pleading. The allegations and interrogatories call his attention to, specify, and remind him of the goods, chattels, moneys, credits, and effects supposed to be in his possession, touching which he is required to answer. If they had not been required by the statutes, there could be no necessity for their filing. The fact that the proceeding instituted by the writ may, so far as it affects the garnishee, be in the nature of an action against him, does not render the filing of the allegations and interrogatories a prerequisite to the investiture of the court or justice of the peace with jurisdiction."

Appellant insists that appellee is barred of any right to maintain this suit by the three-year statute of limitation. But appellant did not plead limitation in the lower court. It could have done so. *Rood, Garnishment*, § 376. It cannot be heard here on this plea for the first time.

The judgment is correct.

Affirmed.

GEORGIA SUPREME COURT.

FARMERS' BANK OF NASHVILLE,
Plff. in Err.,
v.
JOHNSON, KING, & COMPANY.

(134 Ga. 486, 68 S. E. 85.)

Check — direction as to payment — effect.

1. Where a check was drawn on a bank located in another town than that in which the drawer resided, and immediately following the direction to the drawee bank, which was in the lower left-hand corner of the check, there were stamped, at the time when the check was drawn, the words, "Payable through (a named bank in another city of the same state), at current

rate," this was a material part of the direction; and the drawee bank was not required to pay the check when not presented through the bank thus named, but directly by a third bank.

Same — protest — when authorized.

2. Under such circumstances, if the third bank, which held the check, presented it to the drawee bank, and the latter indorsed on it the statement that it would be paid when presented through the named bank, this did not authorize the bank holding the check to have it protested.

Same — wrongful protest — liability.

3. For the holder of a check to unlawfully cause a protest of it to be made, and notice to be given to the drawer and indorsers, without proper presentation for payment, according to its terms, furnishes a cause of action to the drawer.

Headnotes by LUMPKIN, J.

(May 11, 1910.)

Note. — Effect of direction on check to pay same through specified agency.

The above decision seems to be one of first impression in this country upon this point.

Attention should be called, however, to Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783, 32 L.R.A. 712, 54 Am. St. Rep. 753, 24 S. E. 524, which was an action upon a check which had stamped across its face, "This check will positively not be paid to" a named banking company or its agents. This stipulation was upheld so as to prevent any right of action on the check by the prohibited banking company against the drawee.

The lack of authority in this country upon the question here offered for discussion makes it advisable to consider the system of crossed checks in vogue in England, referred to in the above opinion; the more so, as, in the words of the text writer quoted in FARMERS' BANK v. JOHNSON, K. & Co., the English cases involving crossed checks are "precedent directly in force." A check is said to be specially crossed when the name of a bank or banking firm is written across the face of the check, and it is said to be generally crossed when the words "and company," or any abbreviation thereof, usually "& Co.," between two parallel transverse lines, are written across the check. Another form of a general crossing is recognized by the later English statutes, which consists merely of two parallel transverse lines across the face of the check without any words. That variety, however, appears in none of the cases.

The leading, though not the earliest, case declaring the law governing crossed checks, is *Bellamy v. Marjoribanks*, 7 Exch. 389, in which it was declared that crossing a check could not operate as an indorsement to the banker whose name was used, because it was not written with any intent to transfer the property in the check to him, and because it wanted the essential

part of an indorsement,—the delivery of the instrument to the indorsee; and that therefore such crossing could not have the effect of restricting its negotiability to the banker whose name was written across it, since to allow it that effect would be to hold the instrument no longer a check. Parke, B., who delivered the opinion of the court, gives such a complete account of the origin as well as the legal effect of crossing checks as to make it highly advisable to quote his language in full: "The practice of crossing checks originated at the clearing house; the clerks of the different bankers who did business there having been accustomed to write across the checks the names of their employers, so as to enable the clearing-house clerks to make up the accounts. It is quite clear that this had nothing whatever to do with the restriction of negotiability; for, at the time when this was done, the checks were in the course of payment or presentation for payment, and all their negotiability was at an end. The establishment of the clearing house is comparatively modern, and was within the memory of several of the witnesses. It afterwards became a common practice to cross checks which were not intended to go through the clearing house at all, with the name of a banker, or with the words '& Co.,' and a custom or usage has certainly sprung up in regard to this also. All the witnesses agreed as to the fact of the existence of such a custom, and we think that the great preponderance of the evidence on both sides tended to show the custom to be that which is reported to have been stated by some of the jury in the case of *Stewart v. Lee*, 1 Moody & M. 161; viz., 'that where a check is crossed, bankers generally refuse to pay it to anyone except a banker; and if they do pay it to a person not a banker, they consider that they do it at their peril, in the event of the party to whom the payment is made not being entitled to receive it. That the object is to secure the payment, not to any particular banker, but to a banker, in order that

ERROR to the Superior Court for Berrien County to review a judgment overruling a demurrer to the petition in an action brought to recover damages alleged to have been caused by the wrongful protest of a check. Affirmed.

Statement by Lumpkin, J.:

Johnson, King, & Company, a corporation doing business in Macon, brought suit for damages against the Farmers' Bank of Nashville, Georgia. The petition as amended alleged as follows: On December 30, 1905, the plaintiff issued a check of which the following is a copy:

Johnson, King, & Company.
No. 1044. \$62.

Macon, Ga. Dec. 30th, 1905.

Pay to the order of Hawley & Hoops, sixty-two and 47/100 \$62.47 dollars.

Johnson, King, & Co.,
By Jno. C. Holmes,
V. P. & Gen. Mgr.

To Bank of Nashville, Nashville, Ga.
Payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate.

On the same date the plaintiff issued three other checks drawn on the Bank of Nashville, similar in form to the one above, and differing only as to amount and the name of the payee. The words, "Payable through the Citizens' Bank of Valdosta, Val-

it may be easily traced for whose use the money was received; and that it was not intended thereby to at all restrict the circulation or negotiability of the check, but merely to compel the holder to present it through a quarter of known respectability and credit.' We are strongly inclined to think that, on a full inquiry, the usage will turn out to be no more than this; and, considering the custom in this point of view, the crossing is a mere memorandum on the face of the check, and forms no part of the instrument itself, and in no way alters its effect. There can be no doubt that such an usage is highly beneficial to the public. These instruments are in their essential character payable to bearer, they are in many respects treated as bank notes, for which of late years they have been largely substituted; but like all other things, they are liable to be mislaid, or lost, or stolen, and may get into the hands of persons who are not entitled to receive payment of them. It is manifestly, therefore, a great protection and safeguard to the real owner, that there should exist the means of tracing and ascertaining for whose use the money paid on a check is received, and to whom the money actually goes; and the payment through a banker secures this object. . . . We think, therefore, that it is a matter of great public advantage and benefit that the custom 30 L.R.A. (N.S.)

dosta, Ga., at current rate," were stamped on each check. The checks were presented to the Bank of Nashville, at Nashville, Georgia, by the Farmers' Bank of Nashville, Georgia; three of them being presented on January 8, 1906, and one on January 6, 1906. Upon presentation, the Bank of Nashville entered on the back of the checks, "Will pay when presented through the Citizens' Bank of Valdosta, Georgia." Thereupon the Farmers' Bank of Nashville caused the checks to be protested, each protest bearing the same date as the presentation for payment; and notice of dishonor was sent to certain indorsers and to the drawer. The Bank of Nashville never refused to pay the checks, but, through its officers, stated to the Farmers' Bank of Nashville that it objected to the manner in which the checks were presented, it being different from the terms expressed on their face, and that they would be honored when presented through the Citizens' Bank of Valdosta. At the time when the checks were drawn, and when presented to the Bank of Nashville by the Farmers' Bank of Nashville, the plaintiffs had a sufficient amount of money on deposit in the Citizens' Bank of Valdosta, subject to check for their payment. The plaintiff had an arrangement with the Bank of Nashville by which all checks drawn on that bank would be paid if presented through the Citizens' Bank of Valdosta. The Farmer's Bank of Nashville

or usage, which we have already mentioned as being said to exist in point of fact, should be maintained; and we think it well may, without at all improperly trenching upon or restricting the negotiability of checks. We think the crossing of a check is a protection and safeguard to the owner of the check, and that, in the event of a banker paying a crossed check otherwise than through a banker, the circumstances of his so paying would be strong evidence of negligence in an action against him. For instance, let us suppose the customer of a banker to draw and to cross a check, intending to pay it to a person to whom he was indebted, and that afterwards, and before handing it over to his creditor, he either lost it, or it was stolen from him. If this check was presented otherwise than through a banker, then, according to the custom or usage above mentioned, it would not be paid, but, if presented by a banker, it would. The mere circumstance of the necessity of placing the check in the hands of a banker would, of itself, oppose some impediment to a fraudulent holder in dealing with the check, and making it available; and the fact that it could at once be traced and ascertained for whose use the proceeds were received would give considerable aid in enabling the drawer to recover back the money, in the event of his being entitled

wilfully disregarded the terms of the checks, which were that they were "payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate," and, for the purpose of casting suspicion upon the credit of the plaintiff before the commercial world, protested the checks and thereby damaged the plaintiff. The protest was made for the purpose of causing the plaintiff to become offended with the Bank of Nashville, and of forcing it to become a depositor with the Farmers' Bank of Nashville and its associates. The defendant demurred to the petition. The demurrer was overruled, and the defendant excepted.

Messrs. Bule & Knight, Hendricks & Christian, and E. P. S. Denmark for plaintiff in error.

Messrs. W. A. Dodson and W. H. Griffin for defendant in error.

Lumpkin, J., delivered the opinion of the court:

A story is told of a distinguished writer on the subject of negotiable instruments, to the effect that, when he was asked what first suggested to him the idea of preparing such a work, he answered that he became interested in the question as to whether a demand was necessary in order to enforce by suit a promissory note or acceptance payable by its terms at a specified place, and that the extensive inquiry on this subject

into which he was led suggested to him the utility of a new work on negotiable instruments. The story further proceeds that, when the inquirer asked him whether such a demand was necessary, he humorously replied that he had forgotten. Whether this is without foundation or not, it serves to indicate the wealth of inharmonious learning which has been lavished upon a question which, at first sight, would appear to be quite narrow. Much of the conflict in authorities has arisen over the question whether, in an action against the maker of a promissory note or the acceptor of a bill of exchange payable at a particular place, it was necessary to aver and prove a demand at such place. In England the authorities were divided on the subject of such acceptances. The court of King's bench held that where there was an acceptance payable at a specified place, it was not necessary to allege or prove demand at that place, in a suit against the acceptor. The court of common pleas, on the other hand, held that this made a qualified acceptance, and that presentment at the place stipulated must be averred and proved. In 1820, the case of *Rowe v. Young*, 2 Brod. & B. 165, came before the House of Lords. It was there decided that, where the acceptance named a place of payment, demand at such place must be averred and proved. In the following year an act of Parliament was passed on the subject, declaring that an acceptance

so to do. On the other hand, if the banker disregarded the custom, and paid the check to a private individual, that circumstance would be strong evidence against him in the event of his seeking to charge his customer with the payment, if the person actually presenting it was not the lawful holder and bearer of the check. The lawful owner of a check is, of necessity, entitled to receive payment of it. He could not sue the drawee, unless he had accepted the check,—a practice not usual, but legal,—but he could sue the drawer on non-payment of it, if he was the holder for value. No prudent banker, however, would pay a crossed check otherwise than to a banker, except he was fully satisfied as to the title of the party presenting it to receive payment. If he did so, he would run the risk of the bearer of the check having no title to it. We think there is no legal objection to the custom, if thus limited and understood, upon the ground of its being repugnant to the essential quality of a check, namely, its negotiability by delivery. There is no obligation upon anyone to receive payment by a check, whether it be crossed or not crossed; but if a man receive a crossed check, he seems to us not indeed to incur the obligation of presenting it for payment through a banker as a condition precedent, but he ought not to complain if the drawee does not pay without

previous inquiry. There is really no restriction upon its negotiability, but it is, in our opinion, a reasonable and lawful practice and usage, in order to secure, as far as possible, payment of checks to honest and bona fide holders."

The earliest reported case involving a crossed check is, apparently, *Stewart v. Lee*, 1 Moody & M. 158, referred to in *Bellamy v. Marjoribanks*, supra, in which it was held a question for the jury whether bankers whose names were crossed on a check payable to the order of C. & S., assignees of P. or "bearer," were put upon notice that the proceeds of the check belonged to the assignees, and not to C., as survivor of a partnership, notwithstanding C. had directed the proceeds to be placed to the credit of the partnership, it appearing that such bankers were bankers both for the assignees and for the partnership.

Another case earlier in point of time than *Bellamy v. Marjoribanks*, supra, is *Boddington v. Schlenker*, 4 Barn. & Ad. 752, which was an action by the payee against the maker of a check upon which the latter had crossed the name of the former's banker, and in which it was held that the failure of such banker, to whom it was transmitted on the same day of its execution, to present it on that day to the clearing house before the firm upon which it was drawn had stopped payment,

payable at a banker's or other specified place, without more, should be deemed a general acceptance; but if it were expressed to be payable at a banker's or other place "only, and not otherwise or elsewhere," it would be a qualified acceptance. This statute did not deal with promissory notes, and some of the decisions make a distinction as to them, where the place of payment was named in the body of them. In this country a contrary doctrine to that declared by the House of Lords was laid down by the Supreme Court of the United States in the case of *Wallace v. McConnell*, 13 Pet. 136, 10 L. ed. 95. It was held in that case that in actions on promissory notes against the maker, or on bills of exchange against the acceptor, where the note or bill is made pay-

able at a specified time and place, it is not necessary to aver in the declaration, or prove on the trial, that a demand for payment was made, in order to sustain the action; but, if the maker or acceptor was at the place at the time designated and was ready and offered to pay the money, it is matter of defense, to be pleaded and proved on his part. This decision has been generally followed in America, and the ruling has been adopted in this state. *Dougherty v. Western Bank*, 13 Ga. 287. It was said by this court that the defendant may plead readiness to pay at the place stipulated, or damages sustained by him in consequence of the neglect or omission to make the demand, and, upon proof of his plea, the defendant shall be exonerated to the extent

though it might render him liable to his customer, did not discharge the drawer, the holder of a check being entitled by the general law to present it the day after he received it, and no custom being proved that a crossed check, if received by the payee, and sent by him to his banker in sufficient time, must be cleared the same day.

The next case in point of time after *Bellamy v. Marjoribanks*, supra, is *Carlon v. Ireland*, 5 El. & Bl. 765, in which recovery was refused against one not a banker, who innocently cashed a crossed check payable to the plaintiff or bearer, at the request of the plaintiff's clerk, who then absconded with the proceeds. It was held that the crossing of the check did not restrict its negotiability, and where the issue was who was its lawful holder, the crossing was material only on the question of good faith. Lord Justice Campbell said: "The check was payable to the bearer and negotiable. The crossing cannot, in the nature of things, at once leave it payable to bearer, and also make it not payable to the bearer. It leaves it negotiable; and, that being so, the question is the same as if it were a bank note, or any other negotiable instrument transferable by delivery; that question is whether it was taken in good faith, not whether there was due care, or whether there were circumstances that ought to have awakened suspicion."

The next case to involve a crossed check was one at nisi prius, *Springfield v. Laneczari*, 16 L. T. N. S. 361, in which the judge declared that the crossing of a check was a direction on the part of the maker that it should be paid only through a banker, and that the holder had done all that was required of him to comply with that direction by paying it in at his banker's within a reasonable time, and could not be held responsible for the delay of his bankers in presenting it for payment.

Up to the time of the last-cited case there does not seem to have been any legislation upon the subject of crossed checks, but by the statute 19 & 20 Vict. chap. 25, 30 L.R.A. (N.S.)

it was provided that crossing a check should have the force of a direction to the bankers upon whom it was made that the same was to be paid only to or through some bank, and that it should be so payable. In *Simmons v. Taylor*, 4 C. B. N. S. 463, in which the specific holding was that, under this statute, the crossing was no part of the check, and its fraudulent obligation no forgery, and that therefore a banker was justified in paying a check otherwise than to or through another banker, if, when presented, it was not crossed, this legislation was characterized by Bramwell, B., as "an abortive attempt to perform the impossible feat of rendering a draft which, upon the face of it, purports to be payable to the bearer, not payable to him. It is a thing which cannot be done: the utmost that can be done is that which the law had already done before, viz., to make the crossing of the check or draft operate as a caution to the banker to use a greater degree of vigilance. [Here the reporter in a footnote pertinently asked, 'What constitutes vigilance in a banker who has no option to exercise as to whether he will or will not pay the draft when presented?'] It may be that the statute has turned that which before was a mere caution to the banker, into an absolute direction to him not to pay the draft otherwise than to or through another banker, when the direction is put on by the drawer of the check himself. But, to hold that the direction forms part of the instrument itself, would be to attempt to perform the impossible feat I before alluded to, or to do that which would be equally impossible and inconsistent, viz., to say that the crossing should not affect the rights of the holder, and yet that the banker would not be bound to pay the draft. It is manifest to my mind that a bona fide holder of this check would have a remedy against the drawee upon it. It is plain that the negotiability of the instrument is not and never was affected by the crossing. I think the cross operates as a private direction to the banker, and that, if made by the customer, the banker would be liable to him

of the damages which he has sustained. It will be observed that the decisions above mentioned have reference to a case in which the acceptor of a bill of exchange or a maker of a promissory note is sued, not to questions involving the liability or release of indorsers or drawers of accepted bills.

In many respects a check is like an inland bill of exchange; but there are some differences. A "check" has been defined to be "a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds, for the payment at all events of a certain sum of money, to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand." 2 Dan. Neg. Inst. 5th ed. § 1566. A check does not have to be accept-

ed upon presentment, but paid, if good and if properly presented. One of the differences between a common check and an ordinary inland bill after its acceptance is in relation to the drawer. In the former, the drawer is the principal debtor, and the check purports to be made upon a fund deposited; in the latter, the acceptor is the principal debtor. The negligence of the holder of a check in not making due presentment, or as to giving the drawer notice of dishonor, does not absolutely discharge him from liability except to the extent to which he may have suffered loss or injury by reason of such negligence.

These principles have been stated because citations have been made of cases which arose under them. They do not, however,

for disobeying it,—the crossing by the customer being tantamount to a direction to the banker to pay the draft only to or through another banker. But, if the crossing is put on by someone other than the maker of the draft, I have a difficulty in seeing how the banker could be held liable for not obeying it. Whoever drew this act must have seen the difficulty, or rather the impossibility, of making the crossing part of the instrument itself, and at the same time preserving the negotiable character of the draft."

The decision just cited evidently called forth another statute, that of 21 & 22 Vict. chap. 79, which provided that the crossing should be part of the check, and its alteration or obliteration a forgery, and enacted more at large the provisions of 19 & 20 Vict. chap. 25, as to payment. It was held in *Smith v. Union Bank, L. R. 1 Q. B. Div. 31*, 4 Eng. Rul. Cas. 436, affirming *L. R. 10 Q. B. 291*, that this statute did not affect the negotiability of a check, and therefore that the payee of a check could not recover against the drawee bank, where it appeared that the check was stolen from the payee after he had indorsed his name on it, and crossed it with the name of his bankers, and it was finally passed for value to a holder who afterwards paid it into his bankers, who presented it to the payee bank, who paid it notwithstanding that it did not come through the bankers whose name was crossed on the check. Mr. Justice Blackburn, in delivering the opinion of the lower court, used the following language: "I take it that the effect of the statute is that the check still remains negotiable. The lawful holder of it cannot sue the drawer until he has presented it to the banker, and it has been dishonored; he cannot present it to the banker effectually, so as to make the check be dishonored, and enable him to fall back upon the drawer, except through the banker with whose name it has been crossed; but if he does present it through that bank (here the London and County Bank), and the banker upon whom it is drawn pays it, then the payment is

perfectly good by the banker: all is right, and nothing can be found fault with at all. But in the present case the defendants, the bankers, who have paid it to the holder through another banker, without requiring presentment to be made through the bankers whose name was crossed upon it, have done a thing by which they have disobeyed the statute; and if the defendants had paid the check through the London and Westminster Bank to a person who was not the lawful holder, and did not take it bona fide, they have paid it to a man who was not the lawful owner, and I think they would have no defense at the suit of the real owner. But they in fact paid it, though through a wrong banker, to the real holder of the check, and therefore, though they did wrong, no one is damnified. This does not diminish the security given by crossed checks; for if a check were drawn payable to order, and then crossed, and the person to whose order it was drawn indorsed it specially to his bankers, or kept it unindorsed altogether, in either of these cases, if a thief got it and were to make a forged indorsement, the person who, in ignorance, took it, even for value, would not be holder at all, and anyone who took the check from him, and converted it to his own use, would be liable to the true holder in trover.

. . . Therefore there are obvious reasons why bankers should not and do not in practice generally pay checks to any bank but the one whose name is across the check; because they can do themselves no benefit, and they do not protect their customers, and may incur a very serious liability. But when it happens that they have paid to the right holder, though through a wrong banker, I do not see how anybody can complain, or bring an action at all." Lord Cairns, in delivering the opinion of the court of appeal, declared that the earlier cases clearly showed that whatever might have been the effect of crossing the check, its negotiability was not thereby restrained, and that it was impossible to hold that the statutes had restrained it, since there was not a word in

fully cover the present case. Here the drawee of a check was a bank in a different place from where the check was drawn and the drawer resided. The direction to the drawee bank was at the left-hand lower corner of the check, and immediately under it were the words, "Payable through the Citizens' Bank of Valdosta, Valdosta, Ga., at current rate." The check was not forwarded through the Valdosta Bank, but came into the possession of a bank in Nashville, Georgia, the place where the drawee bank was located, and was thus presented to it. Whether the check was deposited with such demanding bank, or sent to it for collection, or how it became the holder, is not stated. On presentment, the drawee bank indorsed on the back of the check these words, "Will pay when presented through the Citizens' Bank of Valdosta." Thereupon the check was protested for nonpayment, and suit to recover damages was brought by the drawer against the collecting bank, which caused the protest to be made, on the ground that such protest was wrongful and was maliciously made.

Two questions are involved: (1) Whether the words, "Payable through the Citizens' Bank of Valdosta," etc., formed a part of the check, which the drawee bank was bound to regard, or which it had the right to disregard. (2) Whether this direction required payment through the Valdosta Bank, or whether it was merely permissive, so that payment could be demanded through that channel or directly from the drawee Bank of Nashville. If the presentment to the drawee was required to be made through the Valdosta Bank, then the drawee had the right to decline payment except upon presentment in that manner; and if the bank

holding the paper refused to recognize such reason for nonpayment on presentment by it, and caused the check to be protested, and notice to be given, this was unwarranted.

It was contended that the words, "Payable through the Citizens' Bank of Valdosta," etc., followed the signature, and formed no part of the check, but amounted merely to a memorandum, which the holder of the check did not have to regard. In England there is a well-known usage, which has now been made the subject of an act of Parliament, for the drawer or holder of a check to "cross" it with the name of a banker.

In 2 Daniel on Negotiable Instruments, 5th ed. § 1585a, it is stated that the effect of this was, "before the statute which now exists, a direction of the drawee bank to pay the check to no one but a banker; or rather, according to the cases, with only a caution or warning to the drawees that care must be used in paying it to anyone else."

In 1 Morse on Banks & Banking, 4th ed. § 245, it is said: "In this country the system of 'crossed checks,' strictly so called, is unknown. But of late the germ of a similar custom has begun to manifest itself. Occasionally checks have stamped or written upon them some form of words which is intended to secure their payment exclusively through the clearing house. No especial form has as yet been generally accepted, and the legal effect of none of those in use has ever been passed upon. It is safe to say, however, that there is no question but that the drawer could embody in his order a direction to his bank to pay only upon presentation of the instrument in the usual course through the clearing house, and that such a direction would be as valid and as

them to that effect, their sole object being to give a direction to the drawee banker.

On the other hand, in *Bobbett v. Pinkett*, L. R. 1 Exch. Div. 368, recovery was allowed the maker of a crossed check payable to order, which was stolen from the payee, and his indorsement forged, though the defendant took it bona fide, in ignorance of the forgery, since the latter was therefore not the lawful holder of the check. One of the judges declared that not only could the payee maintain an action against the defendant, but that it was no less certain that the drawee bankers could have done so if the plaintiff had refused to allow them to debit his account with the amount of the check.

The statutes just referred to were repealed by the crossed checks act of 1876 (39 & 40 Vict. chap. 81), which in its turn was repealed by the bills of exchange act of 1882 (45 & 46 Vict. chap. 61), by which, with the amendment of 6 Edw. 7, chap. 17, crossed checks are now governed. By these acts it was provided that where a banker

in good faith, and without negligence, received payment from a customer of a crossed check, and the customer had no title or defective title thereto, the banker should not incur any liability to the true owner of the check by reason only of having received such payment, and this provision has been the subject of interpretation in the following cases: *Great Western R. Co. v. London & County Bkg. Co.* [1901] A. C. 414; *Capital & Counties Bank v. Gordon* [1903] A. C. 240, affirming [1902] 1 K. B. 242, which allowed an appeal from the judgment of the trial court, reported in 83 L. T. N. S. 762; *Matthiessen v. London & County Bank*, L. R. 5 C. P. Div. 7; *Kleinwort v. Comptoir National D'Escompte* [1894] 2 Q. B. 157; *Lacave v. Crédit Lyonnais* [1897] 1 Q. B. 148; *Clarke v. London & County Bkg. Co.* [1897] 1 Q. B. 552; *Akrokerri (Atlantic) Mines v. Economic Bank* [1904] 2 K. B. 465; *Bevan v. National Bank*, 23 Times L. R. 65.

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binding upon the bank as a direction to pay only to the order of a particular person. If the check be payable to the order of A. B., it is probable that the privilege of including such instructions in his order, when indorsing over, might be accorded to him; certainly indorsements in this form are very frequent, and no bank would be safe in disregarding them. Supposing the direction to be properly given, the collecting and the paying bank must both respect it, and the English cases above mentioned would be precedent directly in force. It would amount to an express designation by the drawer, or the payee, of the manner in which alone payment is authorized to be demanded or made."

A check being in the nature of an order on a bank or banker to pay a certain sum purporting to be on deposit, there would seem to be no reason why the drawer could not direct the bank to pay only when presented through a specified channel or by a particular person or bank. The drawer is not compelled to make the check payable to bearer or order. Likewise, no sound reason is perceived why, in giving direction to the bank of deposit, he cannot make an addition to the mere order for payment. If the person to whom the check is delivered is not willing to accept it with such direction, he can reject it; but if he accepts it payable only through a particular bank, or through a particular banker, he cannot insist that the bank on which it is drawn must disregard this direction given to it by a depositor on the face of the paper. No ground has been suggested why such a direction by one to his banker, in ordering the latter to pay money, is illegal or unreasonable, the banks being in the same state and not far distant from each other. The case in hand does not present the question of whether the drawer of the check has been wholly or partially discharged by negligence or delay in presentation, but whether, in giving direction to his banker to pay the check, he can lawfully direct payment to be made through a certain medium, and whether the bank, when so instructed, is bound to disregard such direction at the demand of another collecting bank.

In *Nazro v. Fuller*, 24 Wend. 374, it was held that an alteration of a promissory note by the payee thereof, so as to make it purport to be payable at a particular place, vitiates it in the hands of an indorsee, so that he cannot recover upon it in an action against the maker; and that, if it be doubtful whether it be an alteration of a note or a mere memorandum by the payee, indicating

where demand for payment should be made to charge him as indorser, the question, it seems, should be submitted to a jury.

In *Warrington v. Early*, 2 El. & Bl. 763, a promissory note was made payable six months after date, "with lawful interest." After it had been signed, without the assent of the maker, but with the assent of the holder, there was added, in the corner of the note, "interest at 6 per cent per annum." It was held that this addition materially altered the contract, and that the holder could not recover on the note against the maker.

As to alterations in written contracts in this state, see Civil Code 1895, §§ 3702, 3703; *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 43; *Hotel Lanier Co. v. Johnson*, 103 Ga. 604, 30 S. E. 558; *Pritchard v. Smith*, 77 Ga. 463. See also *Woodworth v. Bank of America*, 19 Johns. 391, 10 Am. Dec. 239; *Polo Mfg. Co. v. Parr*, 8 Neb. 379, 30 Am. Rep. 830, 1 N. W. 312; *Farmers' Bank v. Ewing*, 78 Ky. 264, 39 Am. Rep. 231; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; 1 Dan. Neg. Inst. 5th ed. §§ 149, 150, pp. 173, 174, and citations; 4 Am. & Eng. Enc. Law, 2d ed. pp. 137(11), 140; *McCalla v. McCalla*, 48 Ga. 502; *Griffin v. City Bank*, 58 Ga. 584.

It is commonly stated that the contract must be collected "from four corners" of the document, and no part of what appears there is to be excluded; and Mr. Daniel, in his work on Negotiable Instruments, has somewhat broadly declared that, as indorsements are made on the back of a negotiable instrument, it might be said that the purport of the instrument is to be collected from "the eight corners." 1 Dan. Neg. Inst. 5th ed. § 151, p. 175. A distinction is sometimes made between an entry upon a note or check at the time when it is made, and which is intended as a part of it, and a mere memorandum made by some person for convenience, and forming no part of the instrument. In the case before us the direction immediately follows the name of the drawee bank. From the allegations of the petition it appears to have been placed there when the check was drawn, as a part of the direction to the bank. It was a material part of such direction, and the drawee bank had the right to decline to disregard it.

It was argued that the statement that the check was "payable" through the Valdosta Bank did not indicate the exclusive method of collection, but gave to the holder an option to present it through that medium or through any other medium to the Nashville

Bank. If a negotiable instrument is payable at one of two banks, it may be presented for payment to either. The word "payable" has been defined as follows: "That may, can, or should be paid; suitable to be paid; that may be discharged or settled by delivery of value; matured; now due." Webster's Dict. As commonly employed in commercial paper or contracts, in stating the time or manner of payment, the word "payable" does not give to the debtor an option or privilege of paying at such time or in such manner, but signifies that payment is to be thus made. If it should be stated in a note or bill of exchange that the amount mentioned was payable in thirty days, clearly the expression would mean that such amount was to be paid at that time, not merely that the debtor might then pay it. So, if an obligation should be declared to be payable in gold coin of a certain fineness, it would mean that it was to be thus paid. And so numerous illustrations might be given. A direction in a check to the drawee bank that it is "payable" through another named bank means that it is to be paid in that way. *Alma v. Guaranty Sav. Bank*, 8 C. C. A. 564, 19 U. S. App. 622, 60 Fed. 203; *Cate v. Patterson*, 25 Mich. 191, 194; *Johnson v. Dooley*, 65 Ark. 71, 40 L.R.A. 74, 44 S. W. 1032; *Easton v. Hyde*, 13 Minn. 90, Gil. 83; *Webster v. Cook*, 38 Cal. 423. Taken in connection with the direction from the drawer of the check to the drawee bank to pay a certain sum, the addition meant that the sum was to be paid through the Valdosta Bank.

It follows, from what has been said, that, under the allegations of the petition, the drawee bank had a right to decline to pay the check until presented through the Valdosta Bank, and that, upon its entering upon the back of the check that it would pay when so presented, the collecting bank was not authorized to cause the check to be protested and notice to be given. It was therefore not erroneous for the trial judge to overrule the demurrer to the petition. We have not discussed the motive which it was alleged actuated the collecting bank in causing the protest to be made, as without it we hold that the petition set out a cause of action. *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 51 Am. St. Rep. 139, 23 S. E. 190; *Hilton v. Jesup Bkg. Co.* 128 Ga. 30, 11 L.R.A. (N.S.) 224, 57 S. E. 78, 10 A. & E. Ann. Cas. 987; *State Mut. Life & Annuity Asso. v. Baldwin*, 116 Ga. 855, 43 S. E. 262.

Judgment affirmed.

All the Justices concur.
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INDIANA SUPREME COURT.

WILLIAM C. SMITH et al.

v.

WILLIAM H. STEPHENS, County Treasurer, Appt.

(173 Ind. 564, 91 N. E. 167.)

Tax — discrimination — bank stock — constitutional rights.

1. Stockholders of a bank are not denied constitutional privileges and immunities, uniformity of taxation, or the equal protection of the laws, by a statute allowing a deduction, in fixing the value of its capital stock for taxation, of only the assessed value of real estate held by it, rather than the amount invested in real estate, although it results in the taxation of the real estate to its full value, while such property is assessed to others at only a fraction of its value, if the statute provides that it shall be assessed at its full value.

Same — method of computing.

2. In determining the amount of capital and surplus of the stock of a bank for taxation, under a statute permitting the assessed value of real estate held by the bank to be deducted from the valuation of the capital stock, if the amount invested in real estate is deducted by the bank from its capital and surplus in making its return, the tax officers must treat that sum as disposed of in the real estate assessment, and cannot add it to the amount of capital and surplus returned, and deduct from the total merely the actual value at which the real estate was assessed.

Same — deduction of real estate.

3. If a bank, in making a return of its capital and surplus for taxation, deducts the amount invested in real estate, under a statute providing that the assessed value of its real estate may be deducted from the valuation of its capital stock, it is not entitled to a further deduction of such assessed valuation, such item being eliminated from the account.

(March 8, 1910.)

Note. — Constitutionality of statute which allows a deduction of only the assessed value of the real estate in assessing the capital stock of a corporation.

This is one phase of the more general question of constitutional equality in relation to corporate taxation treated in the note to *Bacon v. State Tax Comrs.* 60 L.R.A. 321. No cases decided since the preparation of the earlier note have been found which pass upon the precise question raised in *SMITH v. STEPHENS*.

It will be noted that in that case the contention was that a statute was invalid which authorized the deduction of only the assessed value of real estate, upon the ground that, since the real estate repre-

A PPEAL by complainants from a judgment of the Circuit Court for Warren County sustaining a demurrer to the complaint in a suit to enjoin the collecting of alleged unlawful taxes assessed on certain corporate stock. Reversed.

The facts are stated in the opinion.

Messrs. Hanly, McAdams, & Artman for appellants.

Messrs. Stansbury & Billings for appellee.

Myers, J., delivered the opinion of the court:

Complaint by appellants, as stockholders of Warren County Bank, to enjoin the treasurer from collecting alleged unlawful taxes assessed against them on their shares of stock.

The questions for determination arise upon the construction to be given Burns's Anno. Stat. 1908, §§ 10,208-10,210, inclusive. The complaint discloses that appellants

were all the shareholders of the Warren County Bank. In making the statement for taxation in 1907, the cashier of the bank reported to the auditor, under § 10,210, that the capital stock of the bank was \$50,000, its surplus \$20,000, and its undivided profits \$2,800; that \$14,800 of its surplus, over and above the \$20,000, had been invested in real estate, which the bank had been compelled to take in the course of its business, which real estate was situate in different townships from the township of the location of the bank; and the officer in his statement deducted the sum of \$14,800 so invested from the surplus, and reported the remainder of its surplus, and undivided profits, together with its capital, for taxation at the sum of \$72,800. The board of review added the \$14,800 to the surplus and undivided profits, making a total of \$87,600, upon which it imposed an assessment of 80 per cent on the whole, which was the rule applied in assessing all other bank

sent an investment and an actual value greater than the assessed value, the deduction of the latter operated to render the residue, although still representing real estate, taxable in the guise of an assessment against stock, with the result that real estate owned by the bank was taxed to its full value, whereas real estate owned by individuals was assessed at only a fraction of its real value. There are cases involving statutory construction in respect of the method of computing values. Such cases come within the note to State Board v. People, 58 L.R.A. 513, on taxation of capital stock of corporations. Cases of this kind which hold that a deduction of the assessed value of real estate must be made may, in some sense, be regarded as resting on considerations applicable to a determination of the validity of a statute expressly providing for a deduction of the assessed value. For instance, it was said in State ex rel. Dillon v. Graybeal, 60 W. Va. 357, 55 S. E. 398, a case decided since the note in 58 L.R.A. was prepared: "The claim of right to deduct the actual value of the real estate, instead of its assessed value, is predicated upon the failure of the legislature to limit the word 'value' in the latter part of § 79 by the use of the word 'assessed' in connection with it, as it did in the first part of the section. To sustain this contention would impute to the legislature either a grave oversight, by which the taxes on vast amounts of values in the capital of banks and trust companies would be lost to the state, counties, and municipalities, or an intention to allow these values to escape taxation. Such institutions are located in the cities and towns of a prosperous and rapidly growing state. Their real-estate holdings are nearly always city property, constantly increasing in value. The assessment, of real estate made in 1905 is to remain unchanged until the year 1909, while the assessment 30 L.R.A.(N.S.)

of banks and trust companies is to be made annually. As the real-estate assessment cannot be changed, opportunities would be afforded in many instances, if the actual, instead of the assessed, value could be deducted, of cutting down the taxable value of the capital of the banks by deducting large valuations on account of real estate, due to appreciation since 1905, on which no taxes could be assessed or levied. In this case \$35,700 was presumably the value of the bank's property when the real-estate assessment was made. Now it is over \$70,000. To allow this large deduction, we must say the legislature intended that, under such conditions, \$35,000 of the value of the capital of the bank should be released from taxation. The statement of the proposition works its own refutation. In limiting the reduction to the assessed value, no possible injustice is done the bank. In paying taxes on the assessed value of its real estate, and in addition thereto taxes on the aggregate value of its real estate and capital, surplus, and undivided profits, less the assessed value of the real estate, a bank pays taxes on nothing more than it owns. If allowed to deduct a sum larger than the assessed value of the real estate, as an actual value, it would pay on only a part of what it owns." It does not seem to have been urged that the statute as so construed was invalid, and it is cited merely for purposes of illustration.

A note on taxation of shares of stock and corporate assets as double taxation, which supplements a narrow phase of the note to 60 L.R.A. 321, to which reference has already been made, is appended to East Livermore v. Livermore Falls Trust & Bkg. Co. 15 L.R.A.(N.S.) 952.

On the question of state taxation of national banks, see the note to 45 L.R.A. 737.

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shares, making \$70,080; from this latter sum the board deducted \$7,070, the assessed value of the real estate in which the bank had invested \$14,800, leaving \$63,010 for taxation. The bank appealed from this assessment to the board of state tax commissioners, which board dismissed the appeal on the ground that there was no right of appeal in the bank. The stockholders then paid the taxes based upon the amount which they admitted as correct, to wit, \$58,240, and brought suit to enjoin collection of the difference by the treasurer alleged to be then threatened. A demurrer was sustained to the complaint, the ruling on which is the only error assigned.

The controversy arises over the wording of § 10,210, Burns's Anno. Stat. 1908, respecting the manner of assessing the shares of stock in a banking business represented by shares, that "whenever any such bank, banking association, or trust company shall have acquired real estate, the assessed value of such real estate shall be deducted from the valuation of the capital or capital stock of such bank, banking association, or trust company;" it being insisted, first, that if the bank is not permitted to deduct the amount it has invested in the real estate, but only the assessed value, then, as to the difference between the amount invested and the assessed value, such difference is twice or doubly taxed, in violation of the 14th Amendment of the Federal Constitution guarantying due process of law, unabridged privileges and immunities, and the equal protection of the laws, and § 1, art. 10, of the state Constitution, providing that taxation shall be upon a uniform and equal rate of assessment, and § 23, art. 1, of the state Constitution, prohibiting privileges and immunities to one class which, upon the same terms, shall not belong to all citizens. Taking the last proposition first, together with the equal protection and the privilege and immunity clauses of the Federal Constitution to which it is allied, if all who are in the same class or like situated are dealt with alike, there is no discrimination inimical to either Constitution. We have lately had occasion to go into these questions. *Johnson County v. Johnson* (1909) 173 Ind. —, 89 N. E. 590, and cases there collected, and it is unnecessary to cite the cases again. And whether the legislation is applicable to a large or small class is a purely legislative question. *Johnson County v. Johnson*, supra, and cases there cited.

What property shall be assessed, and how taxed, is a legislative question, so long as there is uniformity and equality of rate, as to those of the same class. *Johnson County v. Johnson*, supra, and cases cited; *State* 30 L.R.A. (N.S.)

ex rel. Lewis v. Smith, 158 Ind. 543, 63 L.R.A. 116, 63 N. E. 25, 214, 64 N. E. 18; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 18 L.R.A. 729, 33 N. E. 421; *Gilson v. Rush County*, 128 Ind. 65, 11 L.R.A. 835, 27 N. E. 235; *Cooley, Taxn.* 5, 169; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759. The due process of law, equal protection of the laws, and the privilege and immunity clauses of § 1, art. 14, of the Amendments to the Federal Constitution, do not abridge the right of the states to adjust their systems of taxation in all proper and reasonable ways, so long as discrimination is not made against particular classes or particular persons. *Johnson County v. Johnson*, supra, and cases cited. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Jennings v. Coal Ridge Improv. & Coal Co.* 147 U. S. 147, 37 L. ed. 116, 13 Sup. Ct. Rep. 282; *Travellers' Ins. Co. v. Connecticut* (1901) 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673. It is not claimed here that there is discrimination, save in the one particular that the shareholders would be doubly taxed, in violation of the equality clause, by reason of being taxed on the difference between the assessed value of the real estate and the amount invested in the real estate upon which they are taxed, as surplus, in that the surplus to that extent is represented by the real estate, and so taxed. The object and the express letter of the statute, the system of taxation as a whole, is one thing; its application to administration is quite a different thing, and it is by reason of this difference, and not by reason of a deficiency or inequality in the law itself, that the condition arises which is here presented. The statute with respect to the assessment of both personal and real property is the same; it requires that each be assessed at its "true cash value," or "full true cash value, . . . being the price which could be obtained therefor at private sale, and not at force or auction sale." Burns's Anno. Stat. 1908, §§ 10,197, 10,202, 10,256. Take the case before us. It is alleged that the bank has invested \$14,800 in real estate, and that it is of that value, yet it is only assessed for taxation at \$7,070, less than half its "true cash value." Had it been assessed at its "true cash value," it would have been assessed at at least \$14,800, so that it is seen that the fault lies not with the statute, but with the assessing authorities. It is no answer to say that the taxes are assessed upon an equal valuation with other lands, for if so, that only proves that none of them are assessed at their full true cash value; but, so far as the statute is concerned, that is the command in valuing. *State ex rel. Lewis v. Smith* (1901) 158 Ind. 565, 63

L.R.A. 116, 63 N. E. 25, 214, 64 N. E. 18; Willis v. Crowder, 134 Ind. 515, 34 N. E. 315; Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 535, 18 L.R.A. 729, 33 N. E. 421. It can be no fault of the law that the valuing officers have failed in their duty.

If the land is assessed at less than one-half its admitted value, then appellants are not paying, by so much, as much as they ought to pay, but are paying relatively the same on the real estate, supposing the assessment upon all other lands to be made in the same manner; and the amount they are assessed on the difference in their surplus invested in the land would probably be about the equivalent, allowing for the difference in the rate between the township where the land is located and taxed and the township where the bank is located and taxed; but even that condition and that inequality is not one created by the statute, or one contemplated. The statute intends just the contrary; it intends equality, and if the true cash value of all property were made the basis for taxation as the statute intends, it would result in about as equal and uniform a rate as is possible to be devised. If that were the case, then, where it is provided, as in § 10,210, that "whenever any such bank, banking association, or trust company shall have acquired real estate, the assessed value of such real estate shall be deducted from the valuation of the capital or capital stock of such bank, banking association, or trust company," we have no difficulty in understanding, what was intended, and that is that the assessed value is intended by the statute to be the "true cash value," and this would result in equality among all classes of taxpayers, and on all classes of property. We are referred to § 10,234, Burns's Anno. Stat. 1908, referring to the taxation of domestic corporations, providing that "where the capital stock or any part thereof is invested in tangible property returned for taxation, such capital stock shall not be assessed to the extent that is so invested," as placing stress on the difference between the amount invested in land or tangible property and the assessed value of the tangible property, and permitting deduction of the amount so invested in assessing the stock or the corporation itself. It should be noted that this section applies to domestic corporations other than banking, and a different method of assessment is used, but the one idea is paramount as to the stock, and that is to ascertain its cash value, which, for the purposes of taxation, does not represent the tangible property, whilst for all other purposes it does; and if the capital stock exceeds in value that of the tangible property,

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the stock is taxable on the excess, but if the tangible property exceeds in value the capital stock, the latter is not taxable. Hyland v. Central Iron & Steel Co. 129 Ind. 68, 13 L.R.A. 515, 28 N. E. 308; Hyland v. Brazil Block Coal Co. 128 Ind. 335, 26 N. E. 672.

If the land were assessed, as the statute commands, at its "full cash value," that would be the limit of the amount which should be paid upon, and manifestly not the amount invested. For example, suppose the bank had invested \$14,800 in real estate, which was in fact only worth \$7,070. Its surplus is in fact reduced \$7,730, through a failing investment of \$14,800, but it would be manifestly unjust to tax the shares for \$14,800, when \$7,070 is invested in real estate which is taxed, and as equally manifest that it would be unjust to tax the shares on the basis of a surplus of \$7,730 which did not exist; so, for the purposes of taxation only, and to avoid double taxation, the real estate is separated, and taxed the same as other real estate, upon the theory that all real estate in the taxing district is assessed at its true cash value, and, as the representative of an equal amount of the surplus, this valuation is deducted from the valuation of the shares, and the remaining surplus, if any, goes to make up the valuation of the shares, as distinct from the real estate. But if the whole amount invested in the real estate were deducted, and the real estate taxed at one half its value, or less, as in this case, and only that amount taxed, an actual value of one half would not be taxed at all. In the absence of some showing, the land would be presumed to be equal in value to the amount invested in it. Take the other side of the question, and suppose that upon an investment of \$14,800 the bank had acquired real estate of the value of \$25,000. The shares are worth \$10,200 more than the apparent assets, or nominal surplus; here again the value of the shares must be ascertained, but how ascertained. Fourteen thousand eight hundred dollars of the surplus is invested in the real estate, and the additional sum of \$10,200 is an actual surplus. If the real estate were assessed at its full cash value, as the statute contemplates, it would represent not only the \$14,800, but \$10,200 additional, and that value would be taxed as land, not as shares, and that sum would be deducted from what would otherwise be the value of the shares, and the result would be the same in the taxing process as in case of the land being less in value than the amount invested, but it could not be insisted in such case that the land should be taxed, and the shares taxed for the difference between the investment and the added value, for that would clearly be double taxation, neither

er to be presumed to be intended or given effect. The value of the stock for the purposes of taxation should not be confounded with its value as representing the actual value for any other purpose. The statute does not provide that the amount invested in the land shall be deducted, as in case of domestic corporations other than banking, for the obvious reasons that, in assessing the stock in such domestic corporations, the stock is only assessed on the excess value of the stock above the value of the tangible property, which may consist of land or other tangible property, or both, as important parts of the business; whilst as to banks they are supposed and intended to have their assets in money, as being quasi public institutions and servers of the public, and those incorporated under the state law can only acquire and hold real estate for certain defined purposes, and cannot hold other real estate for a longer period than five years. *Burns's Anno. Stat. 1908, § 3340.*

The statute provides for the deduction of the assessed value of the land upon the theory that that is the cash value, and upon that theory the one would, approximately at least, equal the other, and upon that theory of the statute there is no double taxation in the proposition. That it may not so occur in practice is not the fault of the law, but of those charged with its execution. Assessments upon true cash values would operate equally, and that is the design of the statute. We agree with counsel for appellants that the matter of deduction of the assessed value of the real estate from the valuation of the stock is an administrative matter, the basis for which is one of pure calculation from the statement required to be furnished. Its discretion and judgment must be exercised by the board of review in fixing the value of the stock, but the direction for the deduction arises, not from any discretion in that board, but from the positive and mandatory statute, binding on all alike, and the deduction should be made by the bank as a necessary part of its statement for the information and guidance of the board of review, whose duties with respect to the deduction are purely administrative. *Owen County v. Spangler (1902) 159 Ind. 575, 65 N. E. 743; Monroe County v. Conner, 155 Ind. 484, 58 N. E. 828; Huntington County v. Heaston, 144 Ind. 583, 55 Am. St. Rep. 192, 41 N. E. 457, 43 N. E. 651; Vigo County v. Davis, 136 Ind. 503, 22 L.R.A. 515, 36 N. E. 141.*

The subjects and methods of taxation are legislative matters, and cannot be disturbed so long as the method prescribed is applicable alike to all within the prescribed class. Corporations, individuals, wholesale

and retail dealers, domestic and foreign corporations, may be separately classified and taxed differently, so long as the constituent classes are treated alike. *Johnson County v. Johnson, supra, and cases there cited; Pomeroy v. Beach, 149 Ind. 516, 49 N. E. 370; Duckwall v. Jones, 156 Ind. 685, 58 N. E. 1055, 60 N. E. 797; Chicago & N. W. R. Co. v. Oshkosh, A. & B. W. R. Co. 107 Wis. 192, 83 N. W. 294; State ex rel. Abbot v. McFetridge, 64 Wis. 150, 24 N. W. 140; Pingree v. Michigan C. R. Co. 118 Mich. 314, 53 L.R.A. 274, 76 N. W. 635; Com. v. Interstate Consol. Street R. Co. 187 Mass. 436, 11 L.R.A.(N.S.) 973, 73 N. E. 530, 2 A. & E. Ann. Cas. 419; Buffalo East Side R. Co. v. Buffalo Street R. Co. 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; Tullis v. Lake Erie & W. R. Co. 175 U. S. 349, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Dow v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 22, 25 L. ed. 989; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 163, 24 L. ed. 95; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.*

We see no ground of constitutional objection to the statute, but its construction is so involved with the constitutional questions urged that we are constrained to depart from the ordinary rule of declining to pass upon constitutional questions where the case may be disposed of on other grounds, for the judgment must be reversed on other grounds. In making the assessment the taxing officers added to the nominal surplus of the bank, \$14,800 of that surplus invested in real estate, which was clearly erroneous under any theory of the law. In such a case, where the sum invested in real estate is deducted from the capital stock or surplus, before or in making the return, the assessed value of the real estate should not be deducted in fixing the value of the stock, because, if it is eliminated from one side of the account, it should not be included in the other.

The language "deducted from the valuation of the capital or capital stock," in the statute, means deducted for the purposes of taxation, in fixing the valuation of the stock for taxation. Upon the basis adopted by the board making the assessment, there should have been taken 80 per cent, leaving for taxation \$58,240, instead of \$63,010; and for this error, the judgment must be

reversed, with instructions to the court below to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

WASHINGTON SUPREME COURT.

S. K. BOWES and Wife, Appts.,

v.

CITY OF ABERDEEN, Resp't.

(58 Wash. 535, 109 Pac. 369.)

Constitutional law — filling low land.

1. The police power extends to filling, against the protest of their owners, and assessing the expense upon the property benefited, lots located in or near the business portion of a city, which are covered by flood tide, and because of inability to drain them are a menace to the public health and a hindrance to the growth of the city, where the tract is of considerable extent, and the proposed improvement will allow proper drainage and the construction of needed streets.

Note. — Power to fill low lands at expense of owner.

Under ordinary circumstances, the power of health authorities to require property to be altered to protect the public health extends only to the abatement of the nuisance itself, leaving the manner of doing so to the property owner. *Durgin v. Minot*, 24 L.R.A. (N.S.) 241 and note.

There seems to be no doubt, however, that in particular cases, when necessary for the abatement of a nuisance, or to protect the public health, the authorities may fill or require low lots to be filled at the expense of the owner.

Thus, in *Nickerson v. Boston*, 131 Mass. 300, where a statute authorized the city to require the owners of lands in a certain district to raise the grade of same by filling with good materials to such a permanent grade as should be determined by the board of aldermen, in order to secure complete drainage, so as to abate and prevent nuisances and preserve the health of the city, and, in the event of failure of the property owners to do so, authorized the city to do the filling, and make the entire expense a lien on the land, the court, in sustaining the constitutionality of the statute, says: "It is not a statute to levy a tax, but its object is to abate and prevent nuisances, and to preserve the public health. It belongs to that class of police regulations to which private rights are held subject, and is founded upon the right of the public to protect itself from nuisances and to preserve the general health. The authority of the legislature to pass laws of this character is too well settled to be questioned."

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Statute — title — sufficiency.

2. The right to exercise the police power to fill low land in a city may be conferred by an act the title of which is, *An Act Empowering Cities to Fill Low Lands within Their Borders, and for That Purpose to Exercise the Right of Eminent Domain.*

Tax — local improvement — area assessment — validity.

3. The assessment for filling a low tract of land in a city may be laid upon the lots benefited according to area, although they are of different value, and some are filled to a greater depth than others, so that the cost of the work is greater.

Same — due process of law — right to hearing.

4. The assessment of an area tax upon property does not deprive the owner of his property without due process of law, if he has a right to be heard, either before the assessing body or in the courts.

(Fullerton, J., dissents.)

(May 31, 1910.)

APPEAL by plaintiffs from a judgment of the Superior Court for Chehalis County,

In *Bliss v. Kraus*, 16 Ohio St. 54, an ordinance requiring the filling and drainage of lots in the city of Toledo, so as to remove therefrom all stagnant water, and providing that, on failure of the owners to do so, the filling was to be done by the city, and each lot assessed the cost thereof, was held to be constitutional and valid, the decision being put clearly on the right of the city to prevent nuisances.

In *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33, an ordinance required the owner of a lot, when the same had been declared dangerous to the public health, to fill it up, and provided that, in the event of his failure to do so, it should be filled by the city, and the expense charged to the owner, to be recovered by action. In sustaining the validity of the ordinance, the court says: "The object of this proceeding is not to raise money to support the city government, or to improve the value of property in a particular locality (which may, however, be incidentally the result), but to put in operation the police power granted to the city council for the purpose of preserving the health of the city. It is the machinery provided for enforcing the law against nuisances which menace the health of the public."

... We must not, therefore, confound an exercise of the police power with the nice distinctions which belong to the doctrine of taxation for local improvements."

But the authority to construct drains will not authorize the filling of lots: and in *Re Van Buren*, 55 How. Pr. 513, it was held that an assessment for the construction of drains was invalid, where the greater part of the expense was in filling low ground.

R. L. S.

dismissing a bill filed to enjoin the making of certain public improvements. Affirmed.

The facts are stated in the opinion.

Mr. J. B. Bridges for appellants.

Messrs. A. M. Wade and Theo. B. Bruener for respondent.

Chadwick, J., delivered the opinion of the court:

The city of Aberdeen, a rapidly growing city of approximately 20,000 inhabitants, is situated on the Chehalis river at or near its junction with Grays Harbor, an inlet of the sea. Bordering the stream there is a wide flat or tidal marsh, intersected by sloughs, through which the tide and flood waters and storm drainage from the hills have been accustomed to flow. At certain times of the year and upon certain tides the water stands over the whole flat to a depth of from 3 to 4 feet, while at all times the ground water stands a few inches beneath the surface of the sloughs. The business part of the city, as well as a part of the residence district, is built upon these tide flats. The business of the city and the comfort and convenience of the citizens demand that the grade of the streets be raised so as to bring them above the level of the high tides. Up to this time it has been possible, as well as feasible, to make elevated plank streets or roadways and sidewalks, but the increasing price of lumber, its lack of durability, and other reasons, make it necessary to improve the streets in some permanent manner. It is possible to do this in one of two ways: to grade or fill the streets and alleys up to the required level, or fill the whole district, including the lots and blocks. To accomplish the first plan would require the erection of banks or retaining walls along the street lines, with openings left thereunder for drainage. To carry out this plan would cost approximately 50 cents a cubic yard. The other plan, being the one adopted by the city council, could be accomplished by hydraulicking the mud and silt from the harbor or river channels, or dirt from the adjacent hills, and would cost approximately 18 cents per cubic yard. The answer of the city to the petition of the appellants recites the further condition as warranting the improvement in the manner contemplated: "That the lands within the said improvement district have become and now are an important part of the city of Aberdeen, and are fast becoming of more importance as a part of the said city; that many houses, barns, outbuildings, and other structures have been built upon the private property within the said district, and many other like structures are being built thereon, and many more will be built thereon; that because of the low, swampy condition of said

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lands, and because of the inability to drain the same, and because of the stagnant waters standing thereupon, and because of the many dwellings, barns, stores, and other structures located upon said lands, the said lands have become and are greatly detrimental to the public health and to the public welfare of the persons residing within the said district, and the city of Aberdeen generally, and that said condition is an unsanitary one, and dangerous to the public health and welfare of the citizens of the said district and of all of the citizens of the said city of Aberdeen; . . . that to fill the said streets and alleys as aforesaid without filling the said private property would leave all of the said private property low, wet, and marshy ground, and would cause the same to be more unsanitary than the same now is without said streets and alleys being filled, and would cause the water to stand upon the said private lands throughout the year, even to a greater extent than the same now stands thereupon, and would cause the same to be very unsanitary and detrimental and dangerous to the public health and welfare of the said citizens; that it is necessary, for the purposes aforesaid, to fill the said streets and alleys, and to fill the private property to the grade aforesaid; and that the public health and public welfare of the said citizens of the said district and of the said city of Aberdeen require that such filling be done; that the said public health and public welfare of the said citizens required the said grades to be re-established and raised because the old grade of the said streets and alleys was too low, and did not, in any manner, provide for the drainage of the said district. the said grade as formerly established being a level one throughout the said district, and that for sanitary reasons and in order to keep the water from standing upon the said streets and private property, and in order that the same might be drained, it was necessary that the said grade of the said streets and alleys be raised as described in the complaint herein; that the public health and public welfare required and requires the raising of the grade of the said streets and alleys aforesaid, and the filling of the said streets and alleys, as aforesaid, and the filling of the said lots, as described in the petition herein."

While it is provided, in § 5 of the act of 1909 (chapter 147, p. 572 [Rem. & Bal. Code, § 7975]), under which the city is probably proceeding, that the filling of unimproved and uncultivated lowlands of the character described in the answer and in the ordinance declaring the intention of the city, shall not be considered a taking or damaging within the constitutional meaning of

these terms, the city in its answer disclaims any intention or purpose to condemn the right to fill the lots and blocks belonging to private owners. We are of the opinion that the constitutional question thus raised may be safely disregarded, for, if the city can fill the property of a private owner under the act of 1909 or the act of 1907 (Laws 1907, §§ 53-56, p. 657 [Rem. & Bal. Code, §§ 7636-7639]), in the manner contemplated, it must be done under the exercise of its police power, and not because the legislature has undertaken to say what shall be, or rather what shall not be, a taking or damaging of property. This is a judicial question, and were we inclined to pursue it further, we would not, as at present advised, feel bound by the declaration of the legislature. The regularity of all antecedent proceedings on the part of the council is not challenged by plaintiffs, so that the case is squarely before the court upon the question whether, under the facts as we have outlined them, a city can, in the exercise of its police power, fill the property of a protesting landowner so as to make a present condition sanitary, or anticipate a condition which is reasonably certain to follow the ordinary growth of a thrifty city.

While the evidence is conflicting, in the sense that a witness testified that present conditions were not unsanitary, the weight of the evidence is overwhelmingly in favor of the city's contention. Mr. Benn, the mayor, who has been a resident of the city since the first house was erected, says the conditions are unsanitary, and attributes present and possible conditions to the natural growth of the city, and the stoppage of the natural ditches and drains, resulting from ordinary use. The health officer of the city testifies that there has been a greater mortality, especially among children living upon or over the tidal marshes, than upon the hill districts, and attributes the fact to the pollution of the soil consequent upon human habitation without proper drainage.

Mr. Ewart, the city engineer, whose description of the physical conditions is accepted by the petitioners, and whom we therefore conclude to be skilled in his profession, says:

Q. What effect does the levelness of this land have upon the drainage and sewerage?

A. To put a sewer system on the level of this ground is impracticable. They are too flat. The sewer pipe would have to be laid on a gradual slope of the river, and it would make them above the level of the lots in the district proposed to be filled:

Q. In the proposed fill, Mr. Ewart, are these lands to be leveled more on the back side?

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A. They will have an incline of 6 inches to the block from the hill to the river; that is the least practical fall you can make on the streets. . . .

Q. Do you consider, Mr. Ewart,—you have heard the testimony as to the sanitary conditions in this district,—do you consider that the land within this district, or that this district as it stands, is unsanitary?

A. Very.

Q. Will you give your reasons why?

A. The presence of human beings tends to make it unsanitary. The offal from the table, from the animal excrement, is bound to accumulate more or less in this soggy ground, and makes it unsanitary.

Q. Your idea then would be that the more people live in that district the more unsanitary it would be?

A. Yes, sir.

Q. Do you consider this property was unsanitary in its original condition?

A. It was by itself. Of course, if there was nobody there, no one would likely to get sick.

Q. To make as favorable illustration as you can, suppose there was no one living but one man in that district?

A. Outside the dampness, it would not be unsanitary.

Q. Would the dampness be unsanitary?

A. It is; yes. A great many people suffer from cold and on account of dampness.

Q. You have never known of any plague or great amount of sickness on account of this condition, have you, in the city of Aberdeen or Hoquiam and that neighborhood?

A. Yes.

Q. You think that there is more sickness from the people living on the more level ground than on the high ground, or hill district?

A. This particular place has not been settled thick enough to cause that condition yet, but where it is more thickly settled, it is; yes.

Q. Then your idea, boiled down, amounts to this: That in its original condition, when the tide came and went, and the sloughs were not interfered with, it was simply unsanitary; but that it would become more unsanitary as the district became more populated?

A. Yes, sir.

Q. And that it would become more unsanitary than it is now?

A. Yes, sir. . . .

Q. I want to get at your idea as to the necessity of filling this property, because of sanitary conditions; as I understand you, you think it is necessary?

A. I do. If you confine a few people in the district, and dike the district, and you

allow no more people to go in there, and keep them absolutely clean, make them keep their houses clean and their sewerage and garbage out of the way, you might have a sanitary district; but it is not practicable to do that. For instance, the district immediately west of this it is planned to dike, and the people living there are widely separated, and for the present that would answer; but if heavily populated, it would not be practicable or sanitary.

Q. Is there not some way of making this land sanitary without so much expense and without filling it?

A. I do not think so. You could make it more nearly sanitary by diking it, but we have the tide water from the river; and whenever you dam that out you also dam in the storm water, and all your water will be dammed in at the same time that your tide water is dammed out.

Plaintiffs asked for an order restraining the city from further prosecuting its design. After a trial upon the merits, the complaint was dismissed, and the plaintiffs have appealed.

But one assignment of error is made; that is, that the court erred in dismissing plaintiffs' complaint with prejudice. This is argued under two subdivisions: (1) That the ordinance is void, inasmuch as it takes and damages appellants' property without due process of law; (2) because the ordinance, as shown upon its face and by the testimony, is unreasonable and arbitrary. It is admitted that "the property owner has not an absolute control over his property, but that he holds it subject to the rights of the community at large, and that it is one of the conditions of his tenure that he hold or use his property so as not to injure others." But it is said that "the police power, except in cases of extreme emergencies or of imminent danger, cannot take from the property owner his property without paying full compensation therefor, and without proving a public necessity for such taking." Just what the police power of a state or city may be is, as all of the authorities agree, or, at least, those following the Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394, incapable of exact definition or limitation; for, as was most pertinently said in *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079, "it is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate."

Incapability of definition, however, does not destroy the right of the public to safeguard property, insure the general health, protect the morals, preserve the peace, or 30 L.R.A. (N.S.)

compel the use of property consistent with surrounding conditions by the exercise of arbitrary power, and in disregard of the primary right of the individual. A subject when measured by other conditions may warrant its exercise, whereas, if the relative condition be lacking, the power will be denied. Its exercise in proper cases marks the growth and development of the law rather than, as some assert, a tyrannical assertion of governmental powers denied by our written Constitutions. Although the fundamental truths must, from their very nature, remain unchanged, the right of property is a legal right, and not a natural right, and it must be measured always by reference to the rights of others and of the public. Neither an individual nor the public has the right to take the property of another and put it to a private use. But it would be manifestly destructive to the advancement or development of organized communities to put the public to the burden of rendering compensation to one, or to many, when the individual use is, or might be, a menace to the health, morals, or peace of the whole community. These are the principal grounds upon which the right to exercise the police power rests, and the only question confronting us is whether the present attempt comes within these recognized principles. Freund, in his work on Police Power, § 143, says: "The questions which present themselves in the examination of a safety or health measure are: Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles? Does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?"

The first test proposed—does the danger exist—may be almost summarily disposed of. Although we are not prepared to indorse the rule asserted by some case writers,—that a court will be bound by a legislative direction to that effect,—we are not put to a consideration of that question in this case. The evidence, as we have shown, abundantly sustains the declaration of the city council that the land proposed to be filled is unsanitary, and is or may become a menace to the public health. That it is of sufficient magnitude, and concerns the whole public in so far as the municipality is concerned, is likewise shown. The area to be filled covers approximately 1,000 city lots, with adjoining streets and alleys. These are located partly within and partly adjoining the business portion of the city,

where permanent streets are necessary, and where undrained land would jeopardize health and retard the growth of the city. So, too, the proposed improvement will remove the danger, leaving the area affected above the higher waters at flood tides or storm periods, and insure perfect drainage as well as an entire absence of stagnant water. The proposed improvement is not disproportionate to the danger, for it is shown that, if the danger is removed at all, it cannot be done in any other practical or economical way.

The remaining tests require more extended argument, and may be discussed together. They are covered by the appellants' objection that the exercise of the power asserted in this case is unjust and arbitrary. Appellants base their contentions primarily upon the statement in *Lewis on Eminent Domain*, (2d ed.) vol. 1, p. 473: "The police power, so far as it relates to property, is a power to regulate its use, and is negative or inhibitory in its character. A man cannot be compelled under the police power to devote his property to any particular use, however advantageous to himself or beneficial to the public; but he may be compelled to refrain from any use which is detrimental to the public. This is the beginning and the end of police power over private property. No instance can be cited outside of the mill and drainage acts (which are in controversy) in which the owner of private property has been compelled to devote it or submit to its devotion to a particular use by virtue of the police power or of any power except that of eminent domain." The rule is also quoted from 10 *Am. & Eng. Enc. Law*, 2d ed. p. 223: "To effect the drainage of large tracts of land, and thereby make them fit for habitation and use, is a purpose substantially public to justify the exercise of the right of eminent domain." To say that the police power can only be exercised in given cases, and then call a halt, would be to fix a limitation which, from the very nature of the power itself, cannot be done.

It is asserted however, that, if the case falls within the drainage cases, this court has expressly held that the right to proceed thereunder cannot be sustained by reference to the police power, but must be carried out under the law of eminent domain, and the following decisions of this court are cited and relied upon: *Askam v. King County*, 9 Wash. 1, 36 Pac. 1097; *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116; *Snohomish County v. Hayward*, 11 Wash. 429, 39 Pac. 652. The *Askam* Case was properly decided. In that case suit was prosecuted by one over whose land it was proposed to run a ditch for the purpose of draining the lands of others. He was not in fault, nor

was he using his property to the detriment of the public. As was said by the writer of the opinion: "Even if we concede that the requirements of the law are such that the board of county commissioners must decide that the swamps to be drained are a nuisance, before they will proceed in the matter, yet the intention does not appear in the act to declare the nuisance to be of such imminent danger to the public welfare as to require private property of others than those maintaining the nuisance to be taken without compensation." While the other cases relied upon affirm correct principles of the law, they were, in the opinion of the writer, considering the facts of each particular case, improperly decided. At any rate, in the light of subsequent decisions of this court, they should not be considered authority in this case. The difference between one whose land is taken or damaged in the aid of a public improvement, and one whose land is actually improved, was noticed in *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779. In *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086, the reasoning of Chancellor Zabriskie in *Coster v. Tide Water Co.* 18 N. J. Eq. 70, is adopted as a correct statement of the law: "The principle of them all is to make an improvement common to all concerned, at the common expense of all. And to effect this object, the acts provide that the works to effect the drainage may be located on any part of the lands drained, paying the owner of the land thus occupied compensation for the damage by such use. So far private property is taken by them; farther, it is not. In none of them is the owner divested of his fee, and in most there is no corporation in which it could be vested, and for all other purposes the title of the land remained in the owner. To effect such common drainage, power was in some cases given to continue these drains through adjacent lands not drained, upon compensation. All this was an ancient and well-known exercise of legislative power, and may well be considered as included in the grant of legislative power in the Constitution."

That the legislature has the right to assert its police power in this regard cannot now be questioned. *Cooley, Const. Lim.* 7th ed. p. 868; *Cooley, Taxn.* 2d ed. 617; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441. It would unnecessarily and unreasonably extend the limit of this opinion to notice the long line of cases where the state courts have construed this power. But whether the facts of the par-

ticular case warrant the assertion of the power is a judicial question, to be resolved by the courts. Freund, Pol. Power, § 142. "It is sometimes difficult to draw a precise line of distinction between the public and private objects of improvements of the nature under consideration here. It is true, the owner of land may use it and cultivate it as he desires, so long as he does not injuriously affect the rights of others. But the public also has an interest beyond that of the mere sanitary condition of land, and founded upon other and different principles than the controlling or abatement of nuisances, where any considerable number of persons are concerned, or tract of land is useless, and improvements may be made commensurate to the benefits received, and the land itself may be taxed for such benefits. The principle requires careful application, but many illustrations of its existence can be found, sustained by the highest authority." *Lewis County v. Gordon*, supra.

It will thus be seen that the conflict of authority upon the right to exercise the police power or to proceed by eminent domain is apparent rather than real. Both rules exist, but their application, as Judge Reavis has said in the *Lewis County Case*, requires careful application, and must be made to depend in every case upon the subject of the particular action when measured by the public interest. Resting upon the principle that it is the duty of a landowner to so keep his property that no menace to the public health shall come therefrom, courts have held that a city could, under its police power, fill up low-lying lands and recover the cost thereof. *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33; *Rochester v. Simpson*, 134 N. Y. 414, 31 N. E. 871; *Nickerson v. Boston*, 131 Mass. 306.

It is also urged that the title of the act of 1909—"An Act Empowering Cities of the Second and Third Class to Fill Low Lands within Their Borders, and for That Purpose to Exercise the Right of Eminent Domain for the Taking and Damaging of Property, and Providing a Method for Making Compensation Therefor, and Providing for Levying and Collection of Special Assessments on the Property Benefitted, and Declaring an Emergency"—is insufficient to warrant an exercise of the police power. Although the city probably has the right to exercise its police power in all proper cases as an incident to its general governmental powers, or under the general-welfare clause of its charter, we nevertheless believe the title to be sufficient. The employment of the words "to exercise the right of eminent domain" can be held to apply only to such property or improvements

as may be actually taken or destroyed, and not to the filling of the land itself, which is in no sense taken, but is left to the free use of the owner. Section 3 of the act makes this plain. The purpose need not be expressed in words; the power to fill is sufficiently broad to include any reason recognized by the law for the exercise of the power.

It was said in *Re Morgan*, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071, with some hesitation, though why is not made clear to us, that "when it is clearly perceived from the terms of an act that the thing prohibited necessarily affects the public health, it may not be necessary expressly to declare therein what the object of the act is." If the title advises the citizen that the subject of the act is to fill low lands, and gives notice of a procedure, it is enough, and will be sustained so long as the right can be rested on any recognized principle, although the "purposes" be not stated in terms. *Lien v. Norman County*, 80 Minn. 63, 82 N. W. 1094.

Finally, it is urged that the plan of assessment—that is, that "the several parcels of land located in the improvement district to be assessed for such improvement shall be assessed according to and in proportion to the surface area, 1 square foot of surface to be the unit of assessment" (*Laws 1909*, p. 572, § 5; *Rem. & Bal. Code* § 7975)—would deprive the owner of his property without due process of law. It is said that it would be manifestly unreasonable and arbitrary to assess the property of one who may have a lot worth only \$750 the same amount as one whose lot is worth \$5,000, or one whose lot is filled only 3 feet deep the same as one whose lot is filled 5 or 6 feet. No system of taxation or assessment is fair and equal in the abstract. We can only approximate equality. The right to assess the cost of improvements by area in this class of cases has been sustained by the highest authority. *Parsons v. District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Bauman v. Ross*, 167 U. S. 548-589, 42 L. ed. 270-288, 17 Sup. Ct. Rep. 966; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

The right to assess by area has been most frequently upheld in the drainage and levee cases coming out of the Southern states, although it is affirmed in most all of the states, the courts holding that the provision of the Constitution which requires all property to be taxed according to its value is applicable only to taxation in its ordinary and received sense, and not to local assessments, where money is raised to be expended on the property taxed. In *Egyptian Levee*

Co. v. Hardin, 27 Mo. 405, 72 Am. Dec. 276, a tax not exceeding 50 cents per acre was upheld. The court said: "The present case may be taken as an illustration, and will show the folly of judicial interference. The charter of the levee company requires the tax to be regulated by the number of acres, and not their value. This, upon first impressions, might carry an appearance of injustice; but it is not very easy, from all the facts disclosed in the record of this case, to infer that any practical injustice whatever has been done. Lands in the neighborhood of Alexandria are rated at \$75 an acre, and, for aught that appears were so rated before the company was organized. The lands of the complainants are only estimated at \$20 per acre. If the improvement increases the value of each class of lands *pari passu*, there is no injustice. If the levee or embankment and canals raise the price of Alexandria lands to \$75 per acre, and increase the value of the complainant's land, distant perhaps 15 miles from Alexandria, to \$25 an acre, where is the hardship complained of? Where lands were unequal in value before the proposed adventure or improvement, it was surely not the purpose of the company to bring these lands to an equality of valuation. It was not contemplated that land worth \$20 an acre should be brought up to \$100 at the same time that land worth previously \$75 an acre should be raised to \$100 per acre. This difference in value, if it arose from causes entirely independent of the overflow or its prevention, must of course still continue after the completion of the works. Neither party has a right to complain if the increase of value in each has been in the same proportion to the original value in both cases. Indeed, it is quite apparent that a taxation upon value, and not quantity, would, in the hypothesis stated, produce great inequality. The burden would not be distributed in proportion to the benefit. How this may be in point of fact, we, of course, do not pretend to know; but there is nothing in the record to show that the facts may not be exactly as we have supposed." To the same effect is *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557. The cases will be found in *Cooley*, Const. Lim. 7th ed. p. 735; 25 Cyc. Law & Proc. p. 201, and 25 Am. & Eng. Enc. Law, 2d ed. p. 1201.

Nor do we believe that appellants are in any way deprived of their property without due process of law, within the rule of *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, and *Hagar v. Reclamation Dist. No. 108*, *supra*. If it be conceded that the legislative department has not the right to arbitrarily fix the amount of the tax, the act of 1909 is within that

line of cases holding that, if the citizen be given an opportunity to be heard, either before the assessing body or in the courts, then the levy of such special assessments will not operate as a deprivation of rights of property without due process of law. The act in question provides for a hearing upon the assessments levied, and that at such time the board may hear, consider, and determine objections and protests, and make "such alterations and modifications in the assessment roll as justice and equity may require."

It may be understood that we have not overlooked the point made by appellants that, but for an embankment made by a railroad operated along the water front under a franchise granted by the city council, the present improvement would not be necessary. There is evidence tending to show that the railroad grade is not responsible for present conditions; but, whether it is so or not, its removal would operate to restore original conditions, which are shown to be equally inconsistent with the present necessities of the public.

The judgment of the lower court is affirmed:

Rudkin, Ch. J., and Gose and Morris, JJ., concur.

Fullerton, J., dissenting:

The legislature of the state of Washington, at its 1909 session; passed an act relating to filling lands by cities of the second and third classes. Laws 1909, p. 569, chap. 147 (Rem. & Bal. Code, §§ 7971 et seq.) Section 1 of the act provides that whenever the city council of any such city shall deem it necessary or expedient, on account of the public health, sanitation, the general welfare, or other cause, to fill or raise the grades or elevation of any marsh lands, swamp lands, tide lands, or lands commonly known as "tide flats," or any other low lands situated within the limits of such city, and to clear and prepare said lands for such filling, such city council shall have power to do so, and to tax the cost thereof to the property benefited. Section 3 provides that "the filling of unimproved and uncultivated low lands of the character mentioned in § 1 of this act shall not be considered as damaging or taking of such lands." Section 4 provides for preparing plans and specifications of the improvement, and for an estimate of the cost and expense thereof, in which shall be included "the cost of supervision and engineering, abstractor's fees, interest and discounts, and all other expenses incidental to said improvement." Section 5 provides for the making of an assessment roll, and further provides that

the "entire amount of compensation . . . including all of the costs and expenses incidental to the condemnation proceedings . . . with the entire cost and expense of making the improvement may be assessed against the property within the district, subject to assessment;" and that "the several parcels of land located within said improvement district, to be assessed for such improvement, shall be assessed according to and in proportion to surface area, 1 square foot of surface to be the unit of assessment." Further sections provide for condemning the improvements upon such property, and others relate to the procedure, the act containing elaborate provisions for carrying into effect the declared purposes.

Within the corporate limits of the city of Aberdeen, and lying immediately west of its principal business section, is a large area of level land that was formerly marsh land, so situated that it is subject to the ebb and flow of the tide. In its natural state it was penetrated by sloughs, which admitted the tides, and served as drains for seepage and surface waters. The surface of the land, while above the normal, was below the extreme tides, and would be covered entirely with water when these occurred. This caused no ill effects to the public health, however, as the drainage was complete and effectual. But with the advent of population came highways and railroads. These were constructed down the bank of the river, across the mouths of the sloughs, partially damming them up; and while they have a tendency to cut off the inflow of the tides, they also cut off the outflow of the seepage and surface waters, thus causing the waters to accumulate in stagnant pools, menacing the health of the community. The tract in question is of considerable area, being triangular in shape, having a base of some 4,000 feet, with an altitude of perhaps 3,200 feet. It was long since platted into lots, blocks, streets and alleys as a part of the city of Aberdeen. The streets have been dedicated to public use, and the city early established grade lines over them. The lots number about 1,000, and are divided among a number of owners, who hold in severalty; they range in value from \$750 to \$5,000, owing to location. A few business houses and a number of dwellings with their accompanying outhouses have been erected on lots within the district, but in the main they remain unimproved.

In the early summer of 1908, the city council conceived the idea of improving the above described district. To that end on June 23, 1909, it passed an ordinance establishing new grades over the entire tract, making them higher than the earlier established grades. On September 15, 1909, it 30 L.R.A. (N.S.)

adopted a resolution declaring it to be the intention of the city council to "clear, grub, and fill up to the established grade . . . all of the lots, lands, and parcels of lands, . . . and all of the streets, alleys, and public places, on that portion of the town site" of the city of Aberdeen above described, reciting that it appeared to the city council that it was to the best interests of public health, sanitation, and general welfare of the inhabitants of the city of Aberdeen so to do; reciting, further, that it was necessary to condemn certain private property in order to make the improvement, but that the cost thereof, including the costs of making the improvement, with incidental costs, would not exceed \$330,000. On November 17, 1909, the city council passed an ordinance directing the improvement to be made. In the ordinance it directed the city attorney to bring all necessary suits to ascertain the amount of damages to be awarded for property taken or damaged by reason of making the improvement; it directed that the total cost and expense of making the improvement, "including the cost of making compensation for property taken or damaged, and including the cost of supervision, engineering, abstract fees, interest and discounts, and all other expenses incidental thereto, not exceeding the estimated cost, three hundred and thirty thousand dollars (\$330,000), . . . be taxed and assessed against all of the lots, lands, and parcels of land included in such tract, and that the several parcels of land . . . be assessed according to and in proportion to surface area, 1 square foot of surface to be the unit of assessment." Immediate payment for the work is provided for by the issuance of bonds, which in turn will be taken up when the assessments are paid. After the passage of the ordinance, the city brought condemnation proceedings against certain property holders who had improvements on their lots which it was conceived would be damaged by the fill, but no proceedings were instituted against persons owning unimproved lots in the district. This action was thereupon begun by the appellant to enjoin the prosecution of the work. In his complaint he alleged that he was the owner of unimproved property in the district sought to be improved; that his property would be greatly and irreparably injured and damaged by the proposed fill, and that such damages had not been first ascertained and paid to him. He then alleged that the ordinance and the laws under which the ordinance was passed were unconstitutional and void for various reasons, among which were that it sought to take his property without compensation and without due process of law. To the com-

plaint the city answered, expressly admitting that the complainant's property would be irreparably injured by the fill, but alleged that the tract sought to be filled was fast becoming unsanitary and a menace to the public health, and that the necessity for the work was imperative because of this fact; further answering, the defendants alleged that it is not the "intention of the city of Aberdeen to at any time condemn or appropriate the right to raise the said grade and fill the said streets and the said private property as aforesaid; that because of the matters and things hereinbefore set out, the condition of the district is such that the city of Aberdeen has a lawful right to raise the said grade and fill said streets, alleys, and private property without the payment at any time of any damage, . . . and that the city intends to and will make such fill in the manner set out herein, and in the complaint,"—that is, at the cost of the private property therein according to area, without reference to benefits or injuries, or any consideration of relative values. On the issues made a trial was had, in which evidence was introduced on the part of the city, tending to show that the tract in question was unsanitary, and that it was necessary to make the fill proposed to render it healthful, and, indeed, it may be conceded that such was the distinct weight of the evidence. The trial judge concluded therefrom that the plaintiff was without cause of complaint, and entered a judgment dismissing his action, with prejudice to his right to further litigate the questions involved. This is the judgment from which the present appeal is taken, and the judgment this court affirms in the foregoing opinion.

The judgment is affirmed on the ground, as I understand it, that the acts of the city, both committed and contemplated, are but a legitimate exercise of its police powers, and therefore invade no lawful right of the appellant. With this doctrine I am unable to agree. I have no doubt that when the owner of private real property suffers it to become a menace to the public health, either through the accumulation of stagnant water thereon or other causes, the municipality can, under its police powers, interfere and correct the evil, even to the extent of destroying the property if the necessities of the case require it to go to that extent; and that it can, furthermore, if the nuisance is one created by the property owner, abate it at his expense. But this, as I understand the rule, is the beginning and the end of the police power over private property. The state cannot lawfully, under the guise of abating a nuisance, compel an owner to make his property conform to some previ-

ously conceived scheme of public improvement; it cannot compel him, at his own expense, or at the expense of his property, to abate a nuisance on his own land created by another than himself; nor can it compel him to abate a nuisance in the public streets, or subject his property to the expense of abating it, beyond the benefit the removal of the nuisance confers upon it. All these principles have been violated in the case before us. Nowhere is it pretended that it is necessary, for the purpose merely of abating the nuisance existing upon the appellant's property, to raise it up to the grade the city has adopted as its scheme of street improvement. No doubt that it will conduce to the public welfare to grade the streets to that extent, but it is clear that this goes far beyond the necessities of the case, if abatement of the nuisance is the ultimate purpose. Not only did the city raise the grades of the streets above those formerly existing, but the very resolution by which the proceedings were initiated calls it an "improvement," and to carry out the work it is proposed to "clear and grub" the lots preparatory to filing them,—a proceeding wholly unnecessary if the mere abatement of a nuisance is the purpose of the city. That the city in the abatement of a nuisance is limited in its procedure to the removal of the cause of the nuisance is maintained by all authority. In 29 Cyc. Law & Proc. p. 1218, the rule is stated as follows: "A public nuisance may be summarily abated by the public authorities, but this power must be reasonably exercised, without doing unnecessary damage or injury to property, and is limited to a removal of that in which the nuisance consists." So in *Eckhardt v. Buffalo*, 19 App. Div. 1, 46 N. Y. Supp. 204, it was held that the officers of the municipality exceeded their authority and rendered themselves personally liable, where, under the guise of abating a nuisance, they caused a new structure to be erected at great expense to the owner, when the result sought to be accomplished could have been obtained by repairing and cleansing the old structure at a very moderate cost. In the course of the opinion this language was used: "In *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, it was held that, while the legislature may determine that laws are required to protect and secure the public health, comfort, and safety, it may not, under the guise of police regulations, arbitrarily infringe upon personal or property rights; and its determination as to what is a proper exercise of the power is not final or conclusive, but is subject to the scrutiny of the courts. With more persuasive force it may be said that no sanitary board or officer can be per-

mitted, under the guise of a power to abate nuisances detrimental to health, not only to remove or abate the nuisance in so far as the public health and welfare may be endangered by its existence, but also to proceed in a summary manner, and cause new erections to be made and new appliances, contrivances, and conveniences to be used and adopted, at a large expense to the owner, and far beyond what the exigencies of the particular case may require."

That an owner of land cannot be compelled to abate at his own expense a nuisance thereon caused by the municipality itself or by some third person without the owner's connivance or consent is also in accord with the great weight of authority. In the case of *Hannibal v. Richards*, 82 Mo. 330, the city constructed an embankment in the street in front of defendant's lots, which occasioned the water to accumulate on them, and injuriously affect the health of the city. The defendant having refused to comply with an ordinance requiring him to fill the lots, the work was done by the city, and it brought an action to recover the cost and expense thereof. The court say: "Now, we are asked to hold, also, that the city may create a nuisance upon the lot of an individual, and then have it abated at his expense, if he refuse to do it when ordered. As well at once declare that no one can acquire any rights to town or city lots which the municipal corporation is bound to respect. The city cannot create a nuisance upon the property of a citizen and compel him to abate it. *Weeks v. Milwaukee*, 10 Wis. 269. The cost of filling the lots was the extent of defendant's liability, if any existed, and we see no reason why defendant should not have been permitted to show that it was less than plaintiff claimed. There is no law declaring municipal corporations infallible, or that their demands are incontestable. The charter authorizing the city to fill a lot, on default made by the owner, gives her a demand against him for the cost of filling it, if done by the city, and the averment of the amount and cost of the work is one upon which an issue may be made. At a trifling expense at the time plaintiff passed the ordinance requiring these lots to be filled, the pond could have been drained; and but for the neglect of the plaintiff to make such drain, the nuisance complained of would never have existed."

In *Weeks v. Milwaukee*, 10 Wis. 243, the defendant city graded an alley adjoining, and made a fill in the street in front of plaintiff's lots, causing the water to flow and remain stagnant thereon, and a special tax of \$498.75 was levied upon the lots by the city, \$111.25 of which was to pay for 30 L.R.A. (N.S.)

the grading, and \$387.50 for abating the nuisance created by the city as aforesaid. Plaintiff instituted an action to restrain the collection of the special assessment, and the trial court held the nuisance tax illegal. This view was sustained by the supreme court, on a review of the case, *Paine, J.*, in delivering the opinion of the court, saying: "I am also of the opinion that the tax assessed against the plaintiff's lots to abate a nuisance which, it appears, was created entirely by the act of the city, in so constructing a street as to cause the water to flow and remain upon the lots, which it would not otherwise have done, is illegal. I cannot recognize the right of a corporation to create a nuisance on the lot of an individual. But to create the nuisance, and then tax him to abate it, is a double wrong. I shall not attempt any examination of the question upon authority, but I am satisfied such a right cannot be sustained. I think this conclusion results from the reasoning of Mr. Justice Smith in *Goodall v. Milwaukee*, 5 Wis. 32, which I fully approve. And until I am prepared to say that private rights must yield, even to the extent of total destruction, rather than place any impediment in the way of whatever proceedings corporations may see fit to take, I cannot say that a city may create a nuisance on the lot of a citizen without making him any compensation for the damage, and then tax him to abate it." In *Lasbury v. McCague*, 56 Neb. 220, 78 N. W. 862, it appeared that the city of Omaha in grading a street dammed the outlet of a stream, preventing the water from escaping, and causing it to back up on land owned by one Baer, where it stagnated and became a nuisance. The city passed an ordinance directing the lot to be filled with earth, and levied the cost thereof on the lot. In a suit to declare invalid the assessment, the court said: "It requires no argument to show that whatever nuisance existed on the lot in dispute by the reason of the accumulation of stagnant water was directly chargeable to the city of Omaha. The foregoing quotation from the written stipulation of facts makes it perfectly plain that the nuisance abated by the city was created by its agents. This being so, to permit the city to assess the costs and expenses of abating the nuisance it created against plaintiff's lot would, indeed, be a reproach upon the law. If this special tax can be upheld in an equitable proceeding, then, by a parity of reasoning, one who creates a nuisance upon the land of his neighbor may have it abated at the expense of the latter, and a court of equity could not afford relief. The mere statement of the proposition shows its absurdity."

That the nuisance sought to be abated in the present case was not caused by the appellant cannot be gainsaid. As long as the tides of the sea were permitted to ebb and flow over it as they were wont to do in a state of nature, the land was wholesome. It became to the contrary only when the embankments by the railroads and by the public for highways were constructed, which cut off this flow. These were not of the appellant's construction, and to charge him with the abatement of a nuisance caused thereby violates every principle of justice.

I have found no adjudicated case where a municipality has attempted under its police powers to abate a nuisance in the public streets at the expense of the abutting and adjoining property, where the owners of the property were not the creators of the nuisance. Heretofore it has been supposed that this required the exercise of the powers of eminent domain, proceedings in which the property holder had a right to be heard on the question of the cost of the proceeding and the amount it was proposed to tax against his property. In this proceeding the appellant has been denied this right. He at no time had or has had an opportunity to question either the necessity of the work, the amount it is proposed to pay for it, or the proportionate share thereof it is proposed to assess upon his property. This is taking his property for a public use without compensation and without due process of law. But this particular case has peculiar hardships. It will be remembered that the appellant alleged in his complaint that his property would be irreparably damaged by the fill the city proposed to make, and that this allegation was expressly admitted in the answer of the city; not by mere silence or failure to deny the allegation, but in express words. It will be remembered, also, that certain lots in the district have buildings upon them recognized as improvements, and which the city has condemned and paid for; that the lots sought to be filled are unequal in value, and unequal in respect that some of them require more material to fill them than will be required to fill the appellant's lot, and also that some of the lots will be materially benefited by the fill, yet it is proposed to pay the cost of the work by an assessment upon the lots within the district according to area. In other words, the appellant's lot, which is irreparably damaged by the fill, is taxed to pay not only for the fill itself, but to pay damages assessed to other lots which may be materially benefited by the fill. Aside from the fact that this seems directly contrary to the first section of the act 30 L.R.A. (N.S.)

under which the city is proceeding, I can find no authority that justifies it, even where the principle is seemingly favored by the legislature.

The drainage cases are cited by the majority as maintaining this doctrine, but I cannot think them in point. None of them lay down the rule that property in the district proposed to be drained can be taxed indiscriminately to pay the cost of the work, regardless of the question of the originator of the nuisance, or whether the property proposed to be assessed is benefited or damaged by the work. On the contrary, the assessment is sustained on one or both of two theories: either that the owner of the land was responsible for the nuisance, and under obligations to remove it, or its removal distinctly benefited his property. I have referred to some of the cases where the first question was involved; examples of the second can be found in the main opinion. Take, for instance, the case of *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663. There the tax was upheld on the express ground that it was levied on property benefited, as witness the following extract from the opinion of the court: "In some states the reclamation is made by building levees on the banks of streams which are subject to overflow; in other states by ditches to carry off the surplus water. Levees or embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received."

To the same effect is *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56. And so Cooley in his work on Taxation, at the place cited by the majority, says that the "special benefits from the enhancement of values must accrue mainly to the owners of the lands drained, who ought therefore to bear the expense,"—clearly indicating that the basis of the right to assess in such cases was the fact that the work conferred a benefit. But it is needless to pursue the inquiry. As I say, I can find no case where private property damaged by a fill is taxed not only to make the fill causing the damage, but to fill other property, both public and private, some of which is actually benefited by the fill.

I regret, also, that the majority have seen

fit to declare that a front-foot or area assessment, whether in proportion to or in excess of benefits conferred on property by the improvement, violates no constitutional inhibition. In *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557, it was held, it is true, that such an assessment did not violate the provisions of the Constitution relating to equality and uniformity in taxation, but the principle of that case, as I understand it, has been repudiated by a long line of cases decided by us since that time. In *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791, an assessment for a street improvement was attacked on the ground that it was made on a front-foot basis, and not in accordance with benefits. In its opinion the court conceded that the true rule was that an "assessment must be tested by the benefits, and that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation;" holding, however, that the statute under which the assessment was made did require an assessment according to benefits, and not a front-foot assessment. To the same effect are the following cases: *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686; *New Whatcom v. Bellingham Bay Improv. Co.* 16 Wash. 131, 47 Pac. 236. This, to my mind, is the only rule that can logically stand the constitutional test; for any rule that taxes property in excess of benefits, that is not applied to all property alike, takes such property for public use without compensation.

It is finally suggested in the opinion that the relator may find relief in a hearing up on the assessment roll. But in the face of the statute declaring that his property, being unimproved, shall not be considered damaged by the fill, the positive declaration of the city in its answer to his complaint, that it "has a lawful right to . . . fill private property without the payment of damage," and intends to exercise that right, and the announcement earlier in the opinion of the majority that the city will not exceed its powers in so doing, I am afraid the appellant's chances of remuneration from this final test are not of the best. But the argument is not sound for another reason; it overlooks the constitutional requirement that damages to property taken for a public use must be ascertained and paid into court for the owner before his property is taken.

The judgment appealed from should be reversed.

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GEORGIA SUPREME COURT.

J. S. COWART, Plff. in Err.,
v.

W. E. CALDWELL COMPANY.

(134 Ga. 544, 68 S. E. 500.)

Garnishment — funds in hands of trustee in bankruptcy.

1. A fund in the hands of a trustee in bankruptcy, which the referee has ordered him to pay to a named person, cannot be reached by a creditor of such person by a summons of garnishment, directed to and served upon the trustee.

Same — attachment — dismissal — improper process.

2. It is not erroneous to dismiss an attachment when the only levy of the same is by the service of such a summons of garnishment.

Judgment — attachment — dismissal — general demurrer — effect.

3. Although an attachment may be dismissed because of its invalidity, the plaintiff is entitled to proceed for a verdict and general judgment on his declaration, if the defendant has appeared and made defense.

(a) The filing of a general demurrer to the declaration is equivalent to pleading to the merits of the case.

[June 14, 1910.]

Headnotes by FISH, Ch. J.

Note. — Right to attach or garnish funds in the hands of officer of court after he has been ordered to pay same to party.

This was the subject of a note to *Boylan v. Hines*, 13 L.R.A. (N.S.) 757; hence, only cases decided subsequently thereto are included herein. The doctrine therein stated, that "in the absence of express statutory authority therefor, it is settled law that, in general, funds in *custodia legis* are not subject either to attachment or garnishment," was applied in *COWART v. W. E. CALDWELL COMPANY* as to the right to garnish funds in the hands of a trustee in bankruptcy.

Under very similar circumstances it was also applied in *Rockland Sav. Bank v. Alden*, 103 Me. 230, 14 L.R.A. (N.S.) 1220, 68 Atl. 863, 13 A. & E. Ann. Cas. 806, and *Re Hollander*, 181 Fed. 1019. In the latter case it was stated that the law is well settled that dividends in the hands of a trustee in bankruptcy are not subject to attachment.

The reason for this rule is well stated in *Rockland Sav. Bank v. Alden*, *supra*.

In *National Lumber Co. v. Turner*, 2 Ga. App. 750, 59 S. E. 15, the doctrine is stated without reservation or exception that, without the aid of a statute, an administrator or an executor cannot be garnished for the funds which he holds as such administrator or executor. Since he is an officer of the

ERROR to the Superior Court for Early County to review a judgment dismissing an attachment proceeding to recover the amount of a debt alleged to be due and unpaid. Reversed.

Statement by Fish, Ch. J.:

On October 18, 1907, J. S. Cowart sued out an attachment against W. E. Caldwell & Company to recover the amount of a debt alleged to be due the plaintiff, the ground of the attachment being that "the said W. E. Caldwell & Company resides out of this state." The proceeding was returnable to the April term, 1908, of the superior court of Early county, and upon it summons of garnishment was issued against D. W. James, individually and as trustee in bankruptcy of the estate of T. A. Bailey. On October 25, 1907, James, in response to the summons of garnishment, filed an answer in which he stated that he had been served with summons of garnishment in the case of J. S. Cowart v. W. E. Caldwell & Company, that he "owed the defendant nothing, and had no property, money, or effects of it at the time of the service of said summons, and that between that time and the date of this answer had neither owed the defendant anything, nor received nor gotten possession of any property, money, or effects belonging to it, ex-

cept that at the time of such service he, as trustee in bankruptcy of T. A. Bailey, had in his hands \$5,000," the same being the net proceeds of the sale of certain lumber, which sale was made by him under an order of the referee before whom the bankruptcy proceeding was pending, in which order he was directed to pay the net proceeds of the sale to the Caldwell Company or its attorneys. On the same date the W. E. Caldwell Company gave a bond to dissolve the garnishment. On April 6, 1908, Cowart filed in the superior court his declaration in attachment against "W. E. Caldwell Company." On August 8, 1908, the W. E. Caldwell Company entered what it termed "its first and special appearance" before the court. In this pleading it was stated that the "special appearance" was made for the purpose of bringing to the attention of the court the following facts, which the pleader stood ready to prove: (1) "There is no such concern as the 'W. E. Caldwell & Company,' named as defendants to the above-stated action, and alleged to be a resident of Louisville, Kentucky, but that is the place whereat the 'W. E. Caldwell Company,' resides and conducts business." (2) From the allegations in the declarations in attachment "the movant herein has gathered the impression that the plaintiff's intention was to sue out at-

court, and as such must account for all funds in his hands, therefore it is improper and against public policy for another court to interfere with the administration.

In *Thorsen v. Hooper*, 50 Or. 497, 93 Pac. 361, the right to garnish funds in the hands of an administrator was denied because no order had been made, settling the claim or directing its payment. The right to garnish after such order, however, was recognized, the court saying: "Until the share of a creditor, heir, or legatee of an estate has been ascertained and ordered paid by the court, the money or funds of the estate are in the custody of the law, and not subject to levy under execution or process of garnishment."

Money in the clerk's hands, directed by decree to be paid to a third person, cannot be reached by a foreign attachment, since such money is in the custody of the law. "It was the *res* which was the subject-matter of the action brought to determine its ownership and disposition. Such being its status, the court alone had authority over it, and that authority was one which could be properly exercised only through the medium of proceedings had in or relating to the pending cause. The jurisdiction which the court had over it could not be invaded by *scire facias* proceedings in the court of common pleas, or for that matter, any other court." *Shelton v. Wolthausen*, 80 Conn. 599, 125 Am. St. Rep. 131, 69 Atl. 1030.

But the general rule, that property in the 30 L.R.A. (N.S.)

possession of the court cannot be attached, has no application to a deposit with the clerk of the court, not made by or under the authority of the court. *Lemly v. Ellis*, 143 N. C. 200, 55 S. E. 629.

The general rule that property in the hands of a receiver is not subject to garnishment except by leave of the court appointing the receiver has no application where nothing remains to be done except to pay the money on a final decree. *Robertson v. Detroit Pattern Works*, 152 Mich. 612, 110 N. W. 196, 15 A. & E. Ann. Cas. 131.

In *Re Shelly* (Del.) 73 Atl. 796, the court, while denying the right to attach the distributive share of the proceeds of a sheriff's sale while in the sheriff's hands, before the confirmation of the sale and an order of distribution, said that money in the hands of the sheriff cannot be attached until after he has performed his fiduciary duties by applying the proceeds of the sale to all legal demands; and added: "When the money is applied to all legal demands, and a balance or overplus is ascertained, then such balance or overplus is held by him otherwise than in his fiduciary capacity and for it he is liable either to be sued or attached."

And see *Boylan v. Hines*, 62 W. Va. 486, 13 L.R.A. (N.S.) 757, 125 Am. St. Rep. 983, 59 S. E. 503, which holds that money may be garnished in the hands of special commissioners after a decree directing same to be paid to the owner. A. G. S.

tachment proceedings against movant, but, not knowing the correct name by which movant should be styled, used the misnomer, 'W. E. Caldwell & Company,' in naming the defendant to the . . . suit, and in referring to the defendant in the attachment proceedings." (3) "Movant is interested in bringing about a conclusion and determination of this attachment suit, inasmuch as the property and funds now in the hands of" the garnishee belong to it, and it is unjustly deprived of the use and benefit thereof, as the garnishee declines to turn over the same to movant pending the attachment proceedings. (4) Movant "is unwilling to voluntarily submit itself to the jurisdiction of this court, and voluntarily appear and defend said attachment suit, which is a nullity, because: (1) Said proceeding is not brought against any legal entity, the said named defendant being neither a natural nor an artificial person; (2) The attachment bond is void, and the writ of attachment issued on said bond and accompanying affidavit made by the plaintiff is a mere nullity, because there is no such person as the 'W. E. Caldwell & Company,' and (3) this court has not, by virtue of said attachment proceeding, acquired jurisdiction over either the person or property of movant herein." There was a prayer to be allowed to enter a special appearance for the purpose of proving the facts above alleged, that "upon due proof made thereof . . . said attachment proceeding be dismissed at the cost of the plaintiff, and that the garnishee be authorized and required to surrender possession of the property levied upon to movant." On the same day, the W. E. Caldwell Company "before pleading to the merits," but without referring to its "special appearance," filed a general demurrer, and also several special demurrers to the declaration in attachment. On the same date, subject to the motion to dismiss the plaintiff's proceedings and to the demurrers, it filed an answer to the declaration in attachment. The plaintiff, by leave of the court, amended his pleadings by striking the words "W. E. Caldwell & Company," whenever they occurred, and inserting in lieu thereof the words "W. E. Caldwell Company, a corporation," alleging that the words stricken were used in lieu of the correct name of the corporation by mistake and were a mere accidental misnomer. This amendment was allowed over the objection of the W. E. Caldwell Company; and the court thereupon overruled the motion to dismiss the plaintiff's proceedings, based upon the grounds above indicated. The defendant then made an oral motion to dismiss the proceedings, upon the 30 L.R.A. (N.S.)

ground that the "court had not acquired jurisdiction *in rem* over any property belonging to the defendant, and that the defendant had not, by its filing of a bond to dissolve the garnishment, or by pleading without reservation to the merits, or otherwise, voluntarily submitted itself to the jurisdiction of the court, and personal service had not been perfected on said defendant." This motion the court sustained by dismissing the entire attachment proceeding, including the declaration in attachment. The plaintiff thereupon excepted and sued out a writ of error. No cross bill of exceptions was filed by the defendant.

Messrs. L. M. Rambo and Pope & Bennet for plaintiff in error.

Messrs. Pottle & Glessner, for defendant in error:

It is only where a defendant voluntarily appears and pleads to the merits, "without pleading to the jurisdiction, and without excepting thereto," that he can be deemed to have thereby admitted or waived the jurisdiction of the court.

Macon & B. R. Co. v. Gibson, 85 Ga. 24, 21 Am. St. Rep. 135, 11 S. E. 442; Adams v. Lamar, 8 Ga. 95; Epps v. Buckmaster, 104 Ga. 701, 30 S. E. 959; Thomas v. Morrisett, 76 Ga. 402; High v. Padrosa, 119 Ga. 651, 46 S. E. 859; Associated Press v. United Press, 104 Ga. 54, 29 S. E. 869; Cox v. Potts, 67 Ga. 521; Parker v. Brady, 56 Ga. 373.

The W. E. Caldwell Company, by giving a bond to dissolve the garnishment, in order to obtain the money in the hands of the garnishee, did not submit itself to the jurisdiction of the court, so as to authorize the court to proceed against it *in personam*.

Henry v. Lennox-Haldeman Co. 116 Ga. 9, 42 S. E. 383; Beasley v. Lennox-Haldeman Co. 116 Ga. 13, 42 S. E. 385; Glower v. Glidden Varnish Co. 120 Ga. 983, 48 S. E. 355; Brumby v. Rickoff, 94 Ga. 429, 21 S. E. 232; Perryman v. Pope, 94 Ga. 672, 21 S. E. 715.

Money held by a trustee in bankruptcy is not subject to attachment or any other process issuing from a state court.

Loveland, Bankr. 3d ed. §§ 268, 269; 2 Remington, Bankr. §§ 2224, 2225, p. 1363; Field v. Jones, 11 Ga. 413; Fulghum v. J. P. Williams Co. 114 Ga. 647, 1 L.R.A. (N.S.) 1055, 88 Am. St. Rep. 48, 40 S. E. 695; Fountain v. Mills, 111 Ga. 122, 36 S. E. 428; Zorn v. Wheatley, 61 Ga. 438; Lowe v. Stephens, 66 Ga. 607.

A void attachment will neither uphold the levy nor a bond given to supersede the levy.

Bruce v. Conyers, 54 Ga. 678; Walter v. Kierstead, 74 Ga. 25.

Fish, Ch. J., delivered the opinion of the court:

The question whether the court erred in allowing the amendment to the plaintiff's proceedings, by which the words "W. E. Caldwell Company, a corporation," were inserted in lieu of the words "W. E. Caldwell & Company," wherever the latter occurred, is not before this court, as no exception to this ruling was taken. For a like reason the overruling of the "special appearance" motion to dismiss is not before us. This last mentioned ruling, of course, naturally followed the other, as, after the amendment was allowed, the proceedings were clearly against the W. E. Caldwell Company as a corporation. We must treat the case, therefore, as if the proceedings were originally against the W. E. Caldwell Company, a foreign corporation. So treating it, did the court err in sustaining the defendant's oral motion to dismiss the entire proceedings, upon the grounds that the court had acquired no jurisdiction *in rem* over any property belonging to the defendant, and nothing had occurred by which the court had acquired jurisdiction to render a personal or general judgment against the defendant? The judgment of the court was partly right and partly wrong. As to the attachment and garnishment proceeding, it was right; as to the declaration in attachment, it was wrong. The untraversed answer of the garnishee showed that at the time of the service of the summons of garnishment, he, as an individual, owed nothing to the defendant in attachment, the W. E. Caldwell Company, a nonresident corporation, and had nothing in his hands belonging to that corporation, and had not since such service become indebted to that company, or received any of its property or effects; but that, as trustee in bankruptcy of the estate of T. A. Bailey, he had in his hands \$5,000, the net proceeds of certain lumber, which had come into his possession as such trustee, and which he had sold under an order of the referee in bankruptcy, which directed him to make such sale, and to pay over the net proceeds thereof to the W. E. Caldwell Company. The general rule is that while property or money is in *custodia legis*, the officer holding it is the mere hand of the court; his possession is the possession of the court; to interfere with his possession is to invade the jurisdiction of the court itself; and an officer so situated is bound by the orders and judgments of the court whose mere agent he is, and he can make no disposition of such

money or property without the consent of his own court, express or implied. Among the legal custodians to whom these principles have been applied are trustees or assignees in bankruptcy. Rood, Garnishment, § 27, and citations. It has been so held in Georgia, in regard to receivers. Zorn v. Wheatley, 61 Ga. 437 (2), 441; Lowe v. Stephens, 66 Ga. 607; Fountain v. Mills, 111 Ga. 122, 36 S. E. 428; Fulghum v. J. P. Williams Co. 114 Ga. 643, 647, 1 L.R.A. (N.S.) 1055, 88 Am. St. Rep. 48, 40 S. E. 695. It has been held that, even after the bill has been dismissed, the receiver is still the officer of the court, and not subject to garnishment. Field v. Jones, 11 Ga. 413.

It is contended, however, in the present case, that, inasmuch as the order of the referee directed the trustee to pay over the net proceeds of the sale to the W. E. Caldwell Company, it was thereby segregated and became a direct indebtedness or amount due to that company, and hence was subject to garnishment by its creditor. If a garnishment is served, a judgment rendered upon it against the garnishee must be upon it either against him in his individual capacity or in his official capacity,—either against his personal funds or against the funds in his hands as trustee. This was not a transaction between James individually and the Caldwell Company, nor an individual indebtedness by him to that company, even though the company might have a right to proceed against him if he failed to pay it in accordance with the order of the court; for such right would arise out of the fact that he had not carried out such order. The garnishment recognizes the action of the court ordering the sale and the payment of the net proceeds as a valid order, and is founded upon it. Without that order there would have been no sale and consequently no proceeds to pay. The garnishment proceeding, therefore, is necessarily against the trustee in his representative capacity, and is an effort to subject funds which he holds in that capacity under an order of the referee or bankrupt court. That court has exclusive jurisdiction in matters of bankruptcy; the state court has none. In the regular order of proceedings, after distribution has been made, the bankrupt will seek a discharge, and the trustee, upon filing his report and account and vouchers, will also apply for a discharge. The court of bankruptcy will hardly grant him a discharge from his trust so long as he had money in his hands arising under an order of the court, not finally paid out or disposed of as the court had directed. If a state court could garnish a trustee in bankruptcy, to catch funds in his hands which had been

ordered paid by the court to which he was directly amenable, but which he had not actually paid out, and could compel him to withhold the payment, regardless of the order of the court of bankruptcy, it will be readily perceived that confusion and conflicts of jurisdiction would at once arise, and that a state court, by means of a garnishment, could indefinitely delay the final winding up of the matter in bankruptcy and the final discharge of the trustee. It has accordingly been held that a garnishment will not lie from a state court to a trustee or assignee in bankruptcy, to catch dividends which have been declared in favor of certain creditors, or the amount which will be going to them under a composition. *Re Cunningham* Iowa Dist. Ct. 9 Cent. Law J. 208, Fed. Cas. No. 3,478; *Loveland*, Bankr. 3d ed. § 268, p. 782; 2 *Remington*, Bankr. §§ 224, 225, p. 1363. As the garnishment, in so far as it was directed to and served upon James as trustee in bankruptcy of the estate of Bailey, was without authority of law and void, and in so far as it was directed to and served upon him in his individual capacity, it failed to reach and fasten upon any property or asset belonging to the defendant, no lawful levy of the attachment was made; and consequently the court was without jurisdiction of the attachment proceeding, and therefore properly dismissed it.

The error which the court committed was in also dismissing the declaration in attachment. The Civil Code of 1895, § 4575, declares: "When the defendant has given bond and security, as provided in this Code, or when he has appeared and made defense by himself or attorney at law, or when he has been cited to appear, as provided in this Code, the judgment rendered against him in such case shall bind all his property, and shall have the same force and effect as when there has been personal service." Section 4557 provides that where notice in writing has been given, as therein provided, to the defendant, of the pendency of the attachment and the proceedings thereon, "the judgment rendered upon such attachment shall have the same force and effect as judgments rendered at common law; and no declaration shall be dismissed because the attachment may have been dismissed or discontinued, but the plaintiff shall be entitled to judgment on the declaration filed, as in other cases at common law, upon the merits of the case." These two sections of the Code have been construed together; and 30 L.R.A. (N.S.)

it has been accordingly held that under their provisions, although the attachment may be dismissed because of its invalidity, still the plaintiff is entitled to proceed for a verdict and a general judgment on his declaration, if the defendant has appeared and made defense (*Joseph v. Stein*, 52 Ga. 332 [2]), or if he has replevied the property levied upon under the attachment (*Camp. v. Cahn*, 53 Ga. 558 [2]), or if he has been duly cited to appear (*McAndrew v. Irish American Bank*, 117 Ga. 510 [2], 43 S. E. 858).

In the present case the defendant filed a general demurrer to the declaration in attachment. It is well settled that the filing of a general demurrer is equivalent to pleading to the merits of the case. *Lyons v. Planters' Loan & Sav. Bank*, 86 Ga. 485 (1), 12 L.R.A. 155, 12 S. E. 882; *Savannah, F. & W. R. Co. v. Atkinson*, 94 Ga. 780, 21 S. E. 1010; *Southern R. Co. v. Cook*, 106 Ga. 451 (3), 32 S. E. 585; *Paulk v. Tanner*, 106 Ga. 219 (1), 32 S. E. 99; *Dykes v. Jones*, 129 Ga. 99, 103, 58 S. E. 645.

Counsel for defendant in error, however, contend that the demurrer was filed subject to the motion for which the defendant made its "special appearance." There was no express reservation to this effect in the demurrer; but admitting that the demurrer was so filed, and that, being so filed, it did not, when it was filed, amount to pleading to the merits, or to appearing and making defense in the case made by the declaration in attachment; still, when this written motion to dismiss was overruled by the court, and no exception was taken by the defendant to this ruling, the general demurrer stood permanently uncovered; it was stripped of the protection afforded by the motion under cover of which it was made, and thenceforth stood as the equivalent of a plea to the merits without reservation. Being made subject to the final determination of the motion to dismiss which preceded it, and this motion having been finally decided against the defendant, the demurrer was, of course, no longer subject to this motion. In other words, the demurrer was made for the purpose of being considered in the event that the precedent motion to dismiss should be overruled, and, when this motion was overruled, the demurrer stood as unconditional pleading in the case.

Judgment reversed.

All the Justices concur.

ILLINOIS SUPREME COURT.

ELBERT N. MANNING et al.

v.

MERCANTILE SECURITIES COMPANY

et al.

and

BIRCH F. RHODUS et al., Appts.

SAME

v.

BIRCH F. RHODUS et al., Impleaded, etc.,
Plffs. in Err.

(242 Ill. 584, 90 N. E. 238.)

Appeal — contempt proceedings — title of cause.

1. An appeal in a contempt proceeding is properly entitled the same as in the principal proceeding, where the contempt proceeding is really but an incident of the original suit.

Witness — incrimination — delivery of books — sufficiency of answer.

2. The mere statement by an officer of a corporation who has been directed to turn its books over to a receiver, that he has been indicted for an offense connected with the management of the corporation, and that the contents of the books may tend to incriminate him, is not sufficient to excuse him from obeying the order of the court, but it is necessary to state facts from which the court can determine that such is the fact.

Same — partial obedience — necessity.

3. That some of the books of a corporation might tend to incriminate its officers

will not excuse them from complying with an order of the court directing them to turn over to a receiver all books and papers belonging to the corporation, so far as it can be obeyed without incriminating them.

Same — receivership — privilege of officer.

4. An officer of a corporation cannot refuse to comply with an order of an equity court to turn over its books to a receiver, because they may have a tendency to incriminate him, since in such cases the books go into the custody of the court, and the constitutional protection of witnesses does not apply, because the court can protect the officer from the use of the books against him.

Sequestration — corporate books — pendency of appeal.

5. The pendency of an appeal from an order committing officers of a corporation for contempt in disobeying an order directing them to turn over the corporate books to a receiver will not prevent the nisi prius court from sequestering the corporate property.

Constitutional law — property rights — corporate books — sequestration.

6. Securing, by writ of sequestration, the books and property of a corporation pending an appeal by its officers from an order adjudging them in contempt for refusing to turn them over to a receiver, does not deprive the officers of any of their constitutional property rights.

(Farmer, Ch. J., and Vickers, J., dissent.)

(December 22, 1909.)

Note. — Right of officer of a corporation to refuse to turn over its books to a receiver, upon the ground that they have a tendency to incriminate him.

This question appears to have arisen for the first time in *MANNING v. MERCANTILE SECURITIES CO.* A few cases closely analogous will, however, be discussed.

The decision in the *MANNING CASE*, that an officer of a corporation cannot refuse to comply with an order of an equity court to turn over its books to a receiver, because they may have a tendency to incriminate him, is placed principally on the ground that the officer is not asked to turn over the books for testimonial purposes, but to aid the receiver in ascertaining the assets and liabilities of the corporation; and that, as the receiver is an officer of the court, his custody is that of the court, which will protect the officer of the corporation against any improper use of the books as evidence against him. It is, at least, extremely doubtful whether the constitutional rights of the officer will not be violated if the officer can be compelled to turn over the books to the receiver, and then the receiver can voluntarily turn over the books to a criminal or other court, or 30 L.R.A. (N.S.)

can be compelled to do so by process, because the effect would be the same as if he were compelled in the first place to turn over the books to some court to be used against him. Yet this is practically what happened in *McElree v. Darlington*, 187 Pa. 593, 67 Am. St. Rep. 592, 41 Atl. 456. There a receiver was appointed for a banking corporation at the request of certain depositors, creditors, and stockholders. Later, its president was indicted for receiving a deposit with knowledge that he and the corporation he represented were then insolvent, and with intent to embezzle the same. It was held to be error for the court to refuse to grant leave to the district attorney and another to examine the books of the corporation, then in the hands of the receiver, to secure evidence for the prosecution of the president for the embezzlement. The court said: "This ruling was obviously made on the assumption that the books and papers were the property of said party, and that an examination of them by persons interested in the affairs of the corporation as shareholders, bondholders, or depositors was not admissible, because it might result in the discovery of transactions having a tendency to criminate him. But the books and papers of the corporation are not the property of the officers or employees, nor are

SEPARATE APPEALS by defendants Birch F. Rhodus et al. from a judgment of the Circuit Court for Cook County, punishing them for contempt of court in failing to comply with an order entered in a suit to wind up the affairs of the Mercantile Securities Company, of which they were officers, directing them to turn over the corporate books and papers to John C. Fetzer, receiver. Affirmed.

ERROR to the Circuit Court for Cook County to review a judgment granting a writ of sequestration to secure possession of the books and papers of the Mercantile Securities Company. Affirmed.

The facts are stated in the opinion.

Messrs. Joseph B. David and Benjamin C. Bachrach, for appellants and plaintiffs in error:

A witness is not bound to answer any question, either in a court of law or equity, the answer to which will expose him to any penalty, forfeiture, or punishment, or which will have a tendency to accuse him of any

crime or misdemeanor, or to expose him to any penalty or forfeiture, or which would be a link in a chain of evidence to convict him of a criminal offense.

Lamson v. Boyden, 160 Ill. 618, 43 N. E. 781; Minters v. People, 139 Ill. 363, 29 N. E. 45; 1 Greenl. Ev. § 453; Story, Eq. Pl. § 846; 1 Wharton, Ev. § 534; Henry v. Bank of Salina, 1 N. Y. 83.

Whenever a witness is excused from giving testimony upon the ground that his answers might tend to incriminate him, or subject him to fines, penalties, and forfeitures, he cannot be compelled to produce books or papers which will have the same effect.

Lamson v. Boyden, supra; 1 Wharton, Ev. § 533; Boyle v. Smithman, 146 Pa. 255, 23 Atl. 397; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

One cannot be compelled to produce his own books, or the books of another which are under his control as agent, or otherwise,

they intended to protect them against the consequences of the frauds they may have perpetrated in their respective spheres of labor or duty. An officer or employee of a corporation who is under indictment for embezzlement of its funds may not require of his employer a suppression or concealment of his own entries in its books, although the entries may furnish the material clue to his crime, and possibly afford satisfactory evidence of it." It is doubtless true that a corporation or employer will not be prevented from producing books and documents which will incriminate an officer or employee; but a different question arises when they are in the possession of the officer himself, and he is asked to turn them over. The rule is, then, as stated by Wigmore on Evidence, § 2259, that "where the corporate misconduct involves also the claimant's misconduct [as well as that of the corporation's], or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own, and to that extent his privilege protects him from producing them."

To like effect, see *Ex parte Chapman*, 153 Fed. 371.

In *McElree v. Darlington* it did not appear how the receiver became possessed of the books in the first instance, whether by a voluntary turning over of the books by the president, or otherwise. But that would be immaterial because, strictly speaking, there could be no voluntary turning over if the court would coerce it in case of refusal, as was pointed out in *Blum v. State*, infra. It is difficult to see how *MANNING V. MERCANTILE SECURITIES CO.* and *McElree v. Darlington* can be harmonized without destroying the constitutional privilege.

It was held in *Tolleson v. Greene*, 83 Ga. 499, 10 S. E. 120, that an officer of a bank could not refuse to turn over its assets to

a receiver, or to tell what he did with them, on the ground that to do so would furnish evidence which would convict him of crime, although he was at the time under indictment for embezzling certain drafts intrusted to him, presumably as agent of the bank, by the president of another bank, and although in his answer to a rule nisi to turn over the assets, he denied having had such property in his control at the time the rule was served upon him, which answer the court found to be false. In giving its judgment the court said: "The mistake, we conceive, of counsel for the plaintiff in error, is in not drawing the distinction between discovery and relief. No discovery of facts which would tend to criminate the party can be compelled. . . . But as a measure of relief, to compel a party to part with property which he may have stolen is no violation of any privilege which the law gives. . . . There certainly can be no privilege in any person to hold on to the fruits of crime as a means of preventing punishment." And again: "How would his surrender of them [the assets] tend any more to convict him of embezzling or stealing than would his retention of them? It seems to us that a prompt surrender in obedience to an order of the proper court would be favorable to innocence rather than evidence of guilt." But surely, if a man is indicted for stealing a horse, and under the penalties of contempt is compelled to deliver up the horse alleged to have been stolen, one very material link in the chain of evidence against him is proven, to wit, his possession of the horse.

In *Blum v. State*, 94 Md. 375, 56 L.R.A. 322, 51 Atl. 26, receivers appointed for a firm at the request of one partner, and with the consent of the others, took charge of the firm books. The partners were subsequently indicted on the charge of obtaining prop-

where their production would tend to criminate him.

Re Moser, 138 Mich. 302, 101 N. W. 588, 5 A. & E. Ann. Cas. 31; Ex parte Chapman, 153 Fed. 371.

Where the records of a corporation disclose the commission of a criminal offense by the corporation, and also show an officer's complicity therein, such officer may properly refuse to produce such books and records before the grand jury for the purpose of enabling such body to determine whether an offense had been committed, because the production of such books would tend to criminate him.

Ex parte Chapman, supra.

Where the corporate misconduct involves also the claimant's misconduct, or where the document is in reality the personal act of the claimant, though nominally that of the corporation, its disclosures are virtually his own, and to that extent his privilege protects him from producing them.

3 Wigmore, Ev. § 2059, p. 3116; R. v. Pur-

erty under false pretenses. It was held that to allow at the trial the introduction, in evidence against them, of the firm books in the possession of the receivers, was a violation of the constitutional provision "that no man ought to be compelled to give evidence against himself." In answer to the objection that the books had been voluntarily turned over to the receivers, the court said: "But it is not correct to say that the books had been voluntarily turned over to the receivers for the purpose for which they are now sought to be used. If we should grant, for the sake of argument, all that may fairly be implied from the fact that the proceeding for receivers was by consent, the fact would remain that the books were surrendered under the order of the court, and what is far more important, and indeed vital to the determination of the question, the further fact that it cannot for a moment be contended that the appointment of receivers contemplated any criminal proceeding against the traversers, and that they can therefore be held to have waived any constitutional privilege in their defense. The purpose of a receivership is the preservation and proper disposition of the subject of litigation. The receiver is not the representative of the state, nor even of the creditors, but the hand of the court, whose control is exerted for the benefit of those ultimately found entitled to the subject of litigation, and not to aid the state in making out a case in a criminal prosecution."

In State v. Strait, 94 Minn. 384, 102 N. W. 913, one of two partners doing a private banking business filed a voluntary petition in bankruptcy, and turned over the assets and books of the firm to the receiver. The receiver, without any process of the court, took the books before a grand jury, and, largely because of the evidence there contained, an indictment was returned against

nell, 1 Wils. 239; R. v. Cornelius, 2 Strange, 1210; United States Exp. Co. v. Henderson, 60 Iowa, 40, 28, N. W. 426.

When the thing forbidden in the 5th Amendment, namely, compelling a man to be a witness against himself, is the object of the search and seizure of his private papers, it is "an unreasonable search and seizure" within the 14th Amendment.

Boyd v. United States, 116 U. S. 616, 20 L. ed. 746, 6 Sup. Ct. Rep. 524.

The meaning of the 5th Amendment to the Constitution of the United States is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself, but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself has committed a crime.

Counselman v. Hitchcock, supra.

The seizure or compulsory production of a man's private papers to be used in evi-

the partners for receiving money while insolvent. It was held, criticizing Blum v. State, supra, that the evidence was properly received, and that the indictments could not be set aside because of its admission.

It was held in Re Kanter, 117 Fed. 356, that a bankrupt will not be compelled to turn over to the receiver all his books of account, records, etc., where he is, at the time, under indictment in a state court for fraudulently removing, secreting, and disposing of his property, and of obtaining goods under false pretenses, and explicitly swears that the books, etc., sought will furnish evidence against him, and from the circumstances the court thinks that such would probably be the case.

In Re Hess, 134 Fed. 109, it was held that, as to whether the books and papers of an involuntary bankrupt actually contained incriminatory matter, the bankrupt is not the judge. Says the court: "Where, under these circumstances, a bankrupt pleads this privilege, he should be required to bring the books and papers which he alleges contain the incriminating evidence before either the court or referee in bankruptcy; and, when it is made to appear that his plea is well founded, the court can make such order in the case as will fully protect him from discovery of such evidence, and, at the same time, if possible, enable the trustee to obtain such information from the books as is always necessary and indispensable in the settlement of bankrupt estates." Accordingly, the matter was referred to a referee "to take such testimony as the bankrupt may offer to show his answer that his books and papers contain evidence which may tend to incriminate him is made in good faith, to protect him against a criminal prosecution that has been instituted, or which will probably be brought, against him, and report such evidence and his conclusions

dence against himself is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty, or forfeiture, is equally within the prohibition of the 5th Amendment.

Boyd v. United States, *supra*.

Sequestration to enforce obedience to an order of court will not issue where one adjudged to be in contempt is not in actual custody for such contempt.

Fletcher, Eq. Pl. & Pr. § 735, p. 759; Hosack v. Rogers, 11 Paige, 603; Adams, Eq. 324; Kinsey v. Yardley, 1 Dick. 265; 2 Dan. Ch. Pl. & Pr. §§ 1048-1050.

The granting of the order allowing the writ of sequestration to issue was in contravention of §§ 6 and 10 of article II. of the Constitution of the state of Illinois, in that the same constituted an unreasonable search and seizure.

Boyd v. United States, *supra*; Lester v. People, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004.

Messrs. Weissenbach & Meloan and Kraus, Alschuler, & Holden, for appellees and defendants in error:

The order to turn over the books and papers in question to the receiver involves no privilege of a witness, and does not admit of disobedience on the ground of constitutional privilege against giving self-incriminating evidence in a criminal case.

Story, Eq. Pl. § 525; Tolleson v. Greene, 83 Ga. 499, 10 S. E. 120; 1 Greenl. Ev. 16th ed. § 469F; 3 Wigmore, Ev. § 2264, pp. 3123-4; Haught v. Irwin, 166 Pa. 548, 31 Atl. 260; United States v. Price, 163 Fed. 904; Re Harris, 164 Fed. 292; Re Hark, 136 Fed. 986.

thereon to this court; specifying which of said documents, if any, do or do not contain such alleged incriminating evidence." This course was followed in Re Hark, 136 Fed. 986, and in Re Edward Hess & Co. 136 Fed. 988.

In Re Harris, 164 Fed. 292, where a bankrupt was merely threatened with prosecution, and objected to delivering up his books of account to the receiver on the ground that they contained incriminatory matter, but had permitted and was willing to permit the receiver to consult the books while in the custody of his attorney, provided that he was assured that no use would be made of any information contained in them in aid of any criminal information, the court directed the following order to be made: "An order may be entered directing that the attorney for the bankrupt deliver the books to the receiver, who is to receive them as the agent of the bankrupt, and is to use them or permit their use by any other person only for the purpose of the civil administration of the estate in bankruptcy. The order may contain a provision that, in case any sub-

The 14th and 5th Amendments to the Federal Constitution do not apply to procedure in state courts.

Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672.

It is essential that the witness asserting privilege show reasonable probability that the evidence which he is called upon to give will tend to incriminate, and he must support his claim by his unequivocal oath that the evidence called for, if produced, will tend to incriminate.

Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 A. & E. Ann. Cas. 658; People ex rel. Akin v. Butler Street Foundry & Iron Co. 201 Ill. 248, 66 N. E. 349; State v. Thaden, 43 Minn. 253, 45 N. W. 447; Ex parte Hedden, 29 Nev. 352, 90 Pac. 743, 13 A. & E. Ann. Cas. 1173; McElree v. Darlington, 187 Pa. 593, 67 Am. St. Rep. 592, 41 Atl. 456.

The answers of the defendants wholly fail to show that there was anything in the books or papers that would tend to incriminate.

Kanter v. Circuit Court Clerk, 108 Ill. 301; People ex rel. Taylor v. Seaman, 8 Misc. 152, 29 N. Y. Supp. 329; United States v. Collins, 145 Fed. 709, s. c. 146 Fed. 555; State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 532, 67 N. W. 1052; Re Knickerbocker S. B. Co. 139 Fed. 716.

No Federal constitutional provisions are involved.

Re Consolidated Rendering Co. 80 Vt. 55, 66 Atl. 790, 11 A. & E. Ann. Cas. 1069; State v. Miller, 71 N. J. L. 527, 60 Atl. 202; Barron v. Baltimore, 7 Pet. 243 8 L.

poena or other process is issued for the purpose of obtaining possession of the books in the receiver's custody, it shall be the duty of the receiver to notify the bankrupt, and not to part with the books until the bankrupt has had an opportunity to raise the question of his constitutional privilege in the same manner as though his books had remained in his own possession."

As to conclusiveness of witness's statement that the answer to questions against which he pleads his privilege would tend to criminate him, see note to McGorray v. Sutter, 24 L.R.A. (N.S.) 165, especially on page 170 as to production of documents. As to admissibility against defendant of documents or articles taken from him, see note to State v. Fuller, 8 L.R.A. (N.S.) 762. As to admissibility of schedules filed in Federal bankruptcy proceedings in a prosecution against a bankrupt for concealment of property, see note to Johnson v. United States, 18 L.R.A. (N.S.) 1194. As to constitutional protection against being forced to furnish evidence against one's self in a civil case, see note to Levy v. Superior Court, 29 L.R.A. 811.

R. A. E.

ed. 672; *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; *Jack v. Kansas*, 199 U. S. 372, 50 L. ed. 234, 26 Sup. Ct. Rep. 73, 4 A. & E. Ann. Cas. 689.

Sequestration is process to enforce the decree appointing the receiver, and is collateral to the order of commitment.

Barnesly v. Powell, 1 Dick. 130; *Tatham v. Parker*, 1 Smale & G. 506.

Attachment and sequestration are concurrent and alternative processes, both or either being available.

Blake v. Blake, 80 Ill. 523.

Sequestration was a proper measure of protection.

Keighler v. Ward, 8 Md. 254; *Lovett v. Rogers*, 3 Hoffman, Ch. Pr. cxvii.; *Trigg v. Trigg*, 1 Dick. 325; *Lupton v. Hescott*, 1 Sim. & Stu. 274; *Detillin v. Gale*, 1 Sim. & Stu. 275, note; 2 *Barbour*, Ch. Pr. 2d ed. 281; *Hayes v. Hayes*, 4 Del. Ch. 22; *Sykes v. Dyson*, L. R. 9 Eq. Cas. 228.

Hand, J., delivered the opinion of the court:

The several appeals of Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus from a judgment entered by the circuit court of Cook county on September 24, 1908, finding the said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus guilty of contempt of court, and committing them to the jail of Cook county not to exceed six months, for the failure of said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus to comply with an order theretofore entered in a certain chancery suit then pending in the circuit court of Cook county, wherein John C. Fetzer had been appointed receiver of the Mercantile Securities Company, requiring them, said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus, as officers of said corporation, to turn over to said John C. Fetzer, as such receiver, all the books of account, papers, documents, correspondence, stock books, stock register, check books, canceled checks, and other papers, of whatsoever kind and character, in their possession belonging to the Mercantile Securities Company, together with a writ of error sued out by Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus to review the action of said circuit court in granting an order of sequestration, have been consolidated in this court.

The bill in the chancery suit in which John C. Fetzer had been appointed receiver of the Mercantile Securities Company was filed by Elbert N. Manning, Louis P. Hugel, Herbert N. Cheetham, and the Stadler Photographing Company against the Mercantile Securities Company, Birch F. Rhodus,

Thomas Rhodus, Edward T. Rhodus, Minnie C. Scully, and eight corporations other than the Mercantile Securities Company, which corporations had been organized by said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus. The said Birch F. Rhodus was the president, Thomas Rhodus the vice president, Edward T. Rhodus the vice president and secretary, and Minnie C. Scully the treasurer of said Mercantile Securities Company, which corporation was organized under the laws of the state of Maine, the objects of which were stated in its charter to be the buying and selling of municipal bonds and other municipal securities, also stocks, bonds, mortgages, and commercial paper, and which corporation had a nominal capital stock of \$2,500,000. It was averred in the bill that all of the said corporations, including the Mercantile Securities Company, were fraudulently organized by Birch F. Thomas, and Edward T. Rhodus, and that said Mercantile Securities Company had no other business than that of dealing in the fraudulent and worthless stocks of said corporations, and that its assets represented moneys received from the sales of stock to the public, and that the complainants were stockholders of said corporation; the object of the bill being to wind up the affairs of said Mercantile Securities Company.

It appears from the record that on the 18th day of September (the day upon which he was appointed receiver) John C. Fetzer made a demand upon the appellants to turn over to him, as such receiver, the books, etc., of the Mercantile Securities Company, and that said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus, upon the advice of counsel, refused to turn over to said receiver the books, etc., of said Mercantile Securities Company; that on the 19th day of September John C. Fetzer, as such receiver, applied to the circuit court in said chancery suit for a rule upon said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus to require them to turn over to him all books, etc., of the Mercantile Securities Company, whereupon the court entered an order that said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus turn over said books, etc., to said John C. Fetzer, as receiver, on or before the 22d day of September, or show cause on that day why they should not be attached for a contempt of court; that on September 23d the said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus filed a joint answer to the order which required them to turn over the said books, etc., or show cause, in which they averred, among other things, that on the 23d day of July, 1908, an indictment was returned by the grand jury into the district

court of the United States for the northern district of Illinois against them, charging them with having devised a scheme to defraud, and, for the purpose of carrying said scheme into effect, they had deposited in the postoffice at Chicago certain letters, in violation of § 5480 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3696); and attached to their answer a copy of said indictment, and averred that, from an inspection of the said indictment, it would appear that the matters and things required by the court to be turned over and delivered by the said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus referred directly to and were a part of the matters and things charged in said indictment against them, and in which answer Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus admitted they had in their possession the books, etc., of the Mercantile Securities Company, but averred that they had declined to turn over said books to said John C. Fetzer, as receiver, as the said books of account, papers, documents, correspondence, stock books, stock register, check books, canceled checks, and other papers "might tend to incriminate" them, the said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus. The answer further averred that they were then under said indictment in the United States district court, and that they availed themselves of their rights under §§ 6 and 10 of article 2 of the Constitution of this state, and the 14th Amendment to the Constitution of the United States, and further said that they should not be required to give evidence against themselves, and should not be required to furnish evidence which could be used in any criminal proceeding against them, and averred that the circuit court was without power to order them to give or furnish evidence which might be used against them in any criminal proceeding. It also appears from the record that on September 24th, after a full hearing, the court held that said answer showed no good cause why said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus should not turn over said books, etc., to said John C. Fetzer, as receiver, and entered an order adjudging them to be in contempt of court, and committing them to the county jail of Cook county, which is the order from which the several appeals are prosecuted.

The several contentions of the parties will be considered in what we deem to be their logical order.

As a preliminary question, it is insisted that the several appeals are not properly entitled in this court. In *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004, it was held that, ordi-

narily, whether a contempt proceeding should be entitled and prosecuted as an independent proceeding in the name of the people, or carried on as a part of the civil proceedings to which it is incident, is of comparatively little importance, and that the practice is not uniform. It was, however, said that, where the proceeding is for a criminal contempt, it was more appropriate to prosecute in the name of the people, but where the contempt proceeding is really but an incident of the principal suit, the usual practice is to entitle the papers in the original cause. The contempt proceeding was really but an incident of the original chancery suit, and we are of opinion the appeals were properly prosecuted to this court under the same title as the chancery suit bore in the circuit court.

It is contended that the answer filed by Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus does not show that their constitutional right not to be compelled to give evidence against themselves will be impaired or infringed upon by said Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus being required and compelled to deliver to the said John C. Fetzer, as receiver, the possession of the books, papers, documents, correspondence, stock books, stock register, check books, canceled checks, and other papers of the Mercantile Securities Company in their possession as officers of the said company. The appellants averred in their answer that they had been indicted in the United States district court for a violation of § 5480 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 3696, for having devised a scheme to defraud, and having used the United States mails to carry into effect said scheme; that, from an inspection of the indictment found against them by the United States grand jury, it would appear that the matters and things required to be turned over and delivered to the receiver refer directly to and are a part of the matters and things charged in said indictment, and that they had declined to turn over the said books, etc., to said receiver, as they might tend to incriminate them; and the question now presented for decision is: Does said answer, admitting its averments to be true, make such a case as entitles the appellants to claim their constitutional privilege to not be witnesses or to furnish evidence against themselves?

The right of a witness to refuse to furnish evidence which will incriminate himself is a constitutional right, too firmly established to be questioned. *Lamson v. Boyden*, 100 Ill. 613, 43 N. E. 781; *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep.

195. To hold, however, that a party to a chancery suit may assert his constitutional privilege by saying, in response to an order of court that he turn over to a receiver the books, etc., of an insolvent corporation, "I have been indicted for a criminal offense by reason of my connection with the corporation of which I am an officer, as will appear from reading the indictment found against me, and if I obey the order of the court, and turn over to the receiver the books, etc., of the corporation, they may contain matters which may tend to incriminate me," would be to hold that an officer of an insolvent corporation ordered to turn over the books, etc., of the corporation might set himself up as the sole and absolute judge as to whether the books, etc., which he had been ordered by the court to turn over to the receiver would incriminate him, which would be to place in the hands of an officer of an insolvent corporation the power to withhold from the receiver of said corporation the books, papers, documents, and assets of the corporation to whatever extent he might see fit. We think, therefore, that the bare statement of a party to such a proceeding, that the books, etc., which he had been ordered to turn over to the receiver might tend to incriminate him, is not sufficient to excuse him from obeying the order of the court; but that his answer should place the matter in such shape that the court can intelligently determine the question from an examination of the averments of the answer, or, if necessary, from an inspection of the books, etc., whether they would tend to incriminate the party required to surrender them to the receiver. We think the rule announced by Chief Justice Cockburn in *R. v. Boyes*, 1 Best & S. 311, to be a practicable one, where he said: "To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer." Applying this rule to the case at bar, we think it apparent that it does not appear from the averments of the answer of the appellants that the books, etc., of the said corporation contain any evidence of an incriminating character as against the appellants, and that their surrender to the receiver would tend to incriminate the appellants. *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349; *State v. Thaden*, 43 Minn. 253, 45 N. W. 447; *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

The books, etc., declined to be turned over
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to the receiver of the Mercantile Securities Company by the appellants may be presumed to be numerous, and it may be safely presumed that a large proportion of them—at least some of them—evidence transactions which would not tend to prove the appellants were guilty of the commission of a crime. By reason of the fact, therefore, that some of the books, etc., of said corporation, in the hands of the appellants, might show guilt, and others might not furnish evidence of criminal misconduct, the fact that some would tend to incriminate them would be no reason for their withholding other books, papers, documents, etc., from the receiver, which would in no way tend to incriminate them. We think their answer should therefore have pointed out, from the numerous books and documents in their hands, such books and documents as were incriminating in their character, and accompany their answer by an offer to turn over to the receiver the remaining books, etc., in their possession. Such seems to be the practice with reference to the discovery and inspection of documents which are privileged, and we can see no reason why the rule thus established should not be applied to a case like this, if the constitutional privilege contended for by the appellants can be invoked in a case like this, which question we will consider hereafter in this opinion. In 4 Elliott on Evidence, chap. 162, § 3289, that author says: "The adverse party cannot be required to produce documents which are privileged. If he claims any document in his possession to be privileged, he must so state in his affidavit, and must specify which, if any, of the documents referred to, is the document he objects to producing, stating fully upon what grounds the objection is based, and as far as possible verify the facts upon which the objection is founded. It has been held that an affidavit is insufficient which merely states that the documents are privileged. The facts must be stated under oath on which the claim of privilege is made. These must be so stated that the court may determine from the facts set out whether or not the document is privileged." In *People ex rel. Akin v. Butler Street Foundry & Iron Co.* supra, on page 248 of 201 Ill., this court quoted with approval the following excerpt from *Brown v. Walker*, supra, where it was said: "The constitutional privilege is not, however, to be so far extended that it 'may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person who is interested in concealing the facts to which he would testify.'" Our conclusion is, upon

this branch of the case, that the trial court did not err in holding that the appellants' answer was not sufficient to excuse them from turning over to the receiver the books, etc., of said corporation in their possession.

We have proceeded thus far on the theory of the appellants, which is that they can claim their constitutional privilege in this proceeding the same as they could had they been subpoenaed as witnesses to give evidence, or been required by *subpoena duces tecum* to produce the books, etc., of the corporation of which they were officers, before a petit or grand jury in a case pending in court or under investigation before a grand jury. We do not think, however, the position of appellants that they can claim their constitutional privilege in this proceeding in the same manner that they could were they called as witnesses, or called upon by a *subpoena duces tecum* to produce books, etc., correct. It is apparent that a party called to give evidence as a witness, or to produce in court, to be used in evidence, the books, etc., of a corporation, of which he is in possession as its officer, is in entirely a different situation from what an officer of an insolvent corporation is, who is directed by the court in which the affairs of the corporation are being wound up, and to which proceeding he is a party, to turn over the books, etc., of the corporation in his possession, to a receiver of the corporation. In one case the party is required to produce the books, etc., of the corporation to be used as evidence, and in the other case the court is granting to the complainant the relief prayed for in his bill; and, while a court of equity will not force a party to subject himself to punishment for a criminal offense, it will not permit him to protect himself against equitable relief by alleging that if he answers the bill filed against him, or turns over to a receiver property belonging to an insolvent corporation of which he is an officer, he will subject himself to the consequences of a crime. Story, Eq. Pl. § 525. In this case the complainants by their bill made a case against the appellants and the corporation of which they were officers, which entitled them to equitable relief, a part of which relief was to have turned over to the receiver of the corporation the books, etc., of said corporation. If an officer of a corporation could, by claiming that the books, etc., of the corporation in his possession contained evidence of his criminal misconduct in the management of the affairs of the corporation, prevent the receiver of the corporation from obtaining the possession of the books, etc., of the corporation, which were necessary for him to have in order to properly administer the affairs of the corporation, and close up its

business under the direction of the court, such officer would have the power, in effect, to deprive a court of equity of jurisdiction to close up the affairs of an insolvent corporation, by declining to deliver possession of the books, etc., of the corporation to the receiver appointed by the court. We are of the opinion that while the appellants could not be called upon to explain any of their conduct as officers of said Mercantile Securities Company, which would tend to incriminate them, they could be required by the court to turn over to the receiver the books, etc., of the corporation. Tolleson v. Greene, 83 Ga. 499, 10 S. E. 120.

The possession of a receiver is the possession of the court making the appointment, the property being regarded, while in the hands of the receiver, as in the custody of the law. The receiver's possession, therefore, is neither adverse to the complainant nor to the defendant in the litigation, but the possession of the property is in the court, through its receiver, where it must remain for the protection of all parties in interest, until the court disposes of the possession by ordering the receiver to sell the property, or to turn it over to the party to whom it may ultimately be found to belong. High, Receivers, § 134. If, therefore, the books, etc., turned over to the receiver under the order of the court entered in this case should, upon examination by the court, be found to contain evidence which would incriminate appellants, the appellants could be fully protected by the court from the use of such evidence against them, while the books, etc., are in the hands of the receiver and under the direction of the court. Where books and other documents are produced upon the service of a *subpoena duces tecum* they are brought directly into court to be used as evidence, while books, documents, and other papers turned over to a receiver under the direction of the court remain in the custody and control of the court, and could not be used as evidence against the party turning them over, except by the order of the court whose receiver had them in his possession. "A bare possibility of legal peril" is not sufficient to entitle a witness to protection, and, as there is no reasonable probability of the defendants being deprived of their constitutional rights, they were not excused from obeying the order of the court. People ex rel. Akin v. Butler Street Foundry & Iron Co.; Brown v. Walker; R. v. Boyes,—supra.

It will be observed that all the cases cited by the appellants to sustain their contention that their constitutional privilege would be infringed by being required to surrender said books to said receiver are cases

where a witness was required to testify, or to produce books and papers in court to be used in evidence, notably the cases of *Lamson v. Boyden* and *Counselman v. Hitchcock*, *supra*, and *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524,—all of which cases are clearly distinguishable from the case at bar.

After the order had been entered finding the appellants to be guilty of contempt of court, and committing them to the county jail of Cook county, they prayed an appeal from that order to the appellate court for the first district, and gave bond in accordance with the order allowing the appeal. While that order was in force, John C. Fetzner, as receiver, applied to the circuit court for an order of sequestration against the property of the appellants, which order was made, and a writ of sequestration was issued. Subsequent to the issuing of the writ, the order allowing the appeal to the appellate court was set aside by the trial court, and thereupon a writ of error was sued out from this court to review the action of the trial court in granting said order of sequestration against the appellants' property. It is contended that the court erred in granting said writ while the appeal was pending in the appellate court from the order committing the appellants to the county jail or Cook county for contempt of court. The writ of sequestration is said to have been introduced as a process in chancery proceedings by Sir Nicholas Bacon in the reign of Elizabeth, and that it was brought to the United States with the chancery system of England, and that its office in equity practice is to furnish a remedy by which property is taken possession of by a court of chancery, in order to enforce obedience to a decree, and that, while the writ has gone almost out of use since the courts of chancery have power to issue executions against real estate, to enforce the payment of chancery decrees, it has not been abolished or prohibited, and may be resorted to whenever it is deemed necessary. 19 Enc. Pl. & Pr. p. 540. The writ of sequestration is recognized by §§ 42 and 47 of the Chancery Code of this state, and it was invoked with effect in the case of *Wightman v. Wightman*, 45 Ill. 167, where it was used to enforce the payment of alimony where the defendant was contumacious, and refused to pay alimony although he had an estate, and was committed to jail for a failure to pay alimony. The writ of sequestration in chancery runs against the property of a contumacious defendant, and is a proceeding *in rem*, while a contempt proceeding is against the person of a contumacious defendant, and is *in personam*. The Chancery Code of this state, as was the case in the chancery prac-

tice of England, provides for those two methods of enforcing a chancery decree, and the fact that the appellants had prosecuted an appeal in the contempt proceedings, which they afterwards abandoned, did not prevent a resort to the writ of sequestration, to enforce obedience to the order of the court to turn over the books, etc., of said corporation to the receiver. *Blake v. Blake*, 80 Ill. 523; Rev. Stat. 1908, chap. 22, §§ 42, 47. The remedies are concurrent and alternative.

It is next urged that the order for the writ of sequestration was improperly made, as it is said it deprived the appellants of their constitutional rights under §§ 6 and 10 of article 2 of the Constitution of this state, and the 14th Amendment to the Constitution of the United States. As we have seen, the surrender of the books, etc., of the Mercantile Securities Company to its receiver by the appellants was not a deprivation of their constitutional rights, either state or Federal. The bill filed by the complainants charged that Birch F. Rhodus, Thomas Rhodus, and Edward T. Rhodus, individually and through the corporations owned and controlled by them, had appropriated the common stock of the Mercantile Securities Company, \$1,250,000 in amount, and had appropriated to their own use more than \$300,000 of the proceeds of the sale of its preferred stock, and the appellants admitted they were in possession and control of all of the books of account, papers, documents, correspondence, stock books, stock register, check books, canceled checks, and other papers, of whatsoever kind and character, of the said Mercantile Securities Company, but refused to obey the order of the court to turn them over to the receiver of said corporation, on the ground that the turning over of said books, etc., to said receiver "might tend to incriminate" them, and, when adjudged guilty of a contempt of court, they appealed from that order, the result of which was to leave them in the possession of all the books, etc., and assets of said Mercantile Securities Company, without any security that said books, etc., and assets of the corporation would be forthcoming in case it should be adjudged it was their duty to obey the order of the circuit court requiring them to turn over said books, etc., to said receiver, from which decree no appeal had ever been prayed or perfected. We think that the trial court therefore properly issued the writ of sequestration against the property of the appellants, to the end that the decree of the circuit court requiring them to turn over to said receiver said books, etc., might not be defeated and rendered fruitless in case it

was finally held the appellants were bound to obey said decree.

The judgment of the Circuit Court in adjudging the appellants guilty of a contempt of court, and the judgment of the Circuit Court awarding the writ of sequestration, will be affirmed.

Cartwright, J., concurring:

I agree with the conclusion reached in this case, for the reason that the answer of the defendants was not sufficient to show that the books and papers which they were ordered to turn over to the receiver contained evidence which would tend to incriminate them.

Farmer, Ch. J., and Vickers, J., dissent.

Affirmed by Supreme Court of the United States, May 31, 1910, 217 U. S. 597, 54 L. ed. 896, 31 Sup. Ct. Rep. 696.

KANSAS SUPREME COURT.

HENRY FLIEGE

v.

KANSAS CITY WESTERN RAILWAY COMPANY et al., Appts.

(82 Kan. 147, 107 Pac. 555.)

Servant — employer and vendor of purchased machine — injury in installation — joint liability.

1. A manufacturing company sold a machine to a railway company, retaining the title thereto until payment was made, and undertook to furnish a competent engineer

Headnotes by **JOHNSTON, Ch. J.**

Note. — Joint liability of master and person installing machine to employee injured during installation.

The authorities are not entirely harmonious in respect to what constitutes joint liability for negligent injuries, and no clear and comprehensive statement can be given which will entirely harmonize the different authorities.

One of the clearest statements upon this point is given in *Matthews v. Delaware, L. & W. R. Co.* 56 N. J. L. 34, 22 L.R.A. 261, 27 Atl. 919, where the court says: "If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tort feors may be held. But when each of two or more persons owes to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the negli- 30 L.R.A. (N.S.)

to superintend the erection and installation of the machine on the railway company's premises, and the railway company undertook to furnish employees to assist in installing and starting the machine. While the work was in progress, an employee of the railway company, acting under the direction of the engineer of the manufacturing company, was negligently injured. Held, that the manufacturing company and the railway company were engaged in a joint operation, and there was imposed on them the joint duty to use due care towards those employed in the work; and, as an employee was injured through the omission or negligent performance of that duty, the companies were guilty of a joint tort, upon which arose a joint and several liability to the injured employee.

Same — contributory negligence.

2. Under the facts in the case, it is held that the employee was not guilty of contributory negligence in not adopting another and safer method of performing the task assigned to him.

(March 12, 1910.)

A PPEAL by defendants from a judgment of the District Court for Leavenworth County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Affirmed.

The facts are stated in the opinion.

Mr. H. L. Alden, with Messrs. J. E. McFadden and Lathrop, Morrow, Fox, & Moore, for appellants:

As a matter of law, Ray was not, as to the work in which he was engaged at the time the plaintiff was hurt, a servant of the defendant the General Electric Company, and defendant cannot be held liable for his negligence, if any, in connection with that work.

gence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tort feors are subject to a like liability."

This statement is quoted with approval in 1 Cooley on Torts, p. 247.

Under such a definition it would seem that there could be no question of the joint liability of the defendants in *FLIEGE v. KANSAS CITY W. R. Co.*

The decision in *Old Times Distilling Co. v. Zehnder*, 21 Ky. L. Rep. 753, 52 S. W. 1051, set out at length in the *FLIEGE CASE* fully sustains the latter decision.

A few other decisions may be cited as supporting the proposition that the owner of premises and a person engaged in installing a machine upon the premises for the owner are jointly liable to a servant who is injured by their concurring negligence.

Thus, in *American Cotton Co. v. Simmons*, 39 Tex. Civ. App. 189, 87 S. W. 842,

Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205; Donovan v. Laing [1893] 1 Q. B. 629; Standard Oil Co. v. Anderson, 212 U. S. 215, 53 L. ed. 480, 29 Sup. Ct. Rep. 252; Byrne v. Kansas City, Ft. S. & M. R. Co. 24 L.R.A. 693, 9 C. C. A. 666, 22 U. S. App. 220, 61 Fed. 607; Chicago, R. I. & P. R. Co. v. Stepp, 22 L.R.A. (N.S.) 350, 90 C. C. A. 431, 164 Fed. 791; Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381; Hasty v. Sears, 157 Mass. 123, 34 Am. St. Rep. 267, 31 N. E. 759; Coughlan v. Cambridge, 166 Mass. 268, 44 N. E. 218; Samuelian v. American Tool & Mach. Co. 168 Mass. 15, 46 N. E. 98; Consolidated Fireworks Co. v. Koehl, 190 Ill. 148, 60 N. E. 87; Ewan v. Lippincott, 47 N. J. L. 192, 54 Am. Rep. 148; Swackhamer v. Johnson, 39 Or. 383, 54 L.R.A. 625, 65 Pac. 91; Hardy v. Shedden Co. 37 L.R.A. 33, 24 C. C. A. 261, 47 U. S. App. 362, 78 Fed. 610; Miller v. Minnesota & N. W. R. Co. 76 Iowa, 655, 14 Am. St. Rep. 258, 39 N. W. 188; Powell v. Virginia Constr. Co. 88 Tenn. 692, 17 Am. St. Rep. 925, 13 S. W. 691; Anderson v. Boyer, 156 N. Y. 93, 50 N. E. 976; Delory v. Blodgett, 185 Mass. 126, 64 L.R.A. 114, 102 Am. St. Rep. 328, 69 N. E. 1078.

Mr. Samuel Maher, with Messrs. A. E. Dempsey, Pierre R. Porter, and H. W. Wolcott, for appellee.

Johnston, Ch. J., delivered the opinion of the court:

This was an action by Henry Fliege against the Kansas City Western Railway Company and the General Electric Company to recover damages for personal injuries alleged to have been negligently inflicted upon him by the two companies. The railway company purchased from the electric com-

pany a heavy machine, called a "rotary converter," which was to be installed at a station on the railway company's line, and to that end the electric company was to furnish a competent engineer to have charge of the erection and starting of the engine. The electric company sent W. W. Ray to superintend the installation and starting of the machine, and the railway company co-operated in the work, and furnished Jeffers, its consulting engineer, Fliege, and other of its employees to assist Ray in the work. In the course of installing the machine they were moving a heavy part of it, called the "field piece," to its place on a metal bed. Across the metal bed some heavy planks had been placed, upon which the field piece rested while being moved to its place. Ray and Jeffers were on one side of this ponderous machine, and Fliege and others upon the opposite side. Jeffers suggested that it was necessary to put another block or wood cushion under the field piece, and Ray directed that it be done. In obedience to the order, Fliege procured a scantling and was placing it under the heavy field piece, when Ray and Jeffers, who were standing with crowbars on the other side of the machine, without any notice, pried the field piece and pushed it over, thereby catching and crushing Fliege's hand before he had time or opportunity to withdraw it. The reckless action of Ray and Jeffers in shoving this heavy machine over on Fliege when he was underneath and in a position of danger, without warning, and without reference to whether he had executed the order and withdrawn to a place of safety, was a clear case of culpable negligence on the part of those who had charge of the work. It is contended by the companies that Fliege was

where one of the defendants was engaged in erecting a gin plant for the other upon the latter's premises, and during the course of the construction of said plant it became necessary to lower two large oil tanks into an excavation, the work being done under the supervision and direction of one who was alleged to be the common foreman of both of the defendants, it was held that both owed the plaintiff the duty to use ordinary care in furnishing him with reasonably safe appliances to use in the work of lowering the tanks, and the failure to perform this duty upon the part of their common foreman rendered both corporations or either liable to the plaintiff for damages resulting from such failure.

The court held untenable the defendants' contention that, as they had separate contracts with the foreman, and consequently negligence could be charged on either of these companies only through separate channels of imputed negligence, this cause of action could not be prosecuted jointly against the defendants.

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So, the owners or operators of an amusement park and plumbers who were doing work there under contract may be held jointly liable to a servant of the plumbers who was injured by the concurring negligence of the park owners and the plumbers. Bagley v. Wonderland Co. 205 Mass. 238, 91 N. E. 317.

And where a contractor undertakes to place a structure on foundations to be furnished by the landowner, and the landowner knowingly furnishes an insufficient foundation, and the contractor, knowing of such insufficiency, directs his employees to work upon the structure, whereby they are injured in consequence of the giving way of the foundation, a joint recovery for injuries to one of such employees may be had against the contractor and the landowner. Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799.

W. M. G.

guilty of contributory negligence in failing to adopt a safer method of putting the block under the machine. There is nothing substantial in this contention. Nothing in the machine itself or its position suggested danger to Fliege. He had a right to assume that it would not be moved until the cushion was placed and he had reached a position of safety, and at least would not be moved without giving him notice. It may be that, standing on the other side of the machine, they could not see just when Fliege had completed the task; but that fact only made the duty to warn Fliege more obligatory. Any method of putting the timber under the machine was safe enough, if the ordinary precautions had been taken. The only peril in the case arose from the action of Ray and Jeffers in shoving the machine over upon Fliege while he was under it, without giving him warning and an opportunity to protect himself.

After insisting that the injury was not the result of the negligence of either, each of the appellants contends for itself that Fliege was not its servant, and if the injury was negligently inflicted, it was the negligence of the other appellant. The railway company contends that, under the contract, the electric company was to furnish a competent engineer to superintend the installation and erection of the machinery, and in effect to set up the machine, and turn it over complete to the railway company. It contends, further, that Ray did not represent the railway company, was not subject to its orders, and that the employees of the railway company were turned over to and were in fact working for the electric company. On the other hand, the electric company insists that Ray was not acting as its employee, when Fliege was injured; that he had been merely loaned to the railway company to assist in installing the machinery which that company had purchased, and, although he remained the general servant of the electric company, and was paid by it, he was really serving the railway company in doing the work; and that the railway company must answer for his negligence. The attitude of the companies depended upon the contract made in the sale of the machine and their action under it. Some of its provisions are obscure; but taken together and in the light of other evidence as to its execution, they show that the erection and installation of the machine was a joint undertaking, and that each was responsible for the negligence of the other. The electric company, which sold the machine, and retained the title until payment for it should be made, undertook to furnish a competent engineer and help install the machine. This was done for itself, and

was more than the mere loaning of an employee to the railway company. It agreed to co-operate in the setting up of the machine. The railway company, which had purchased the machine, undertook, among other things, to furnish its employees, who were to assist the electric company in installing the machine, and these employees were paid by itself. They acted, it is true, under the direction of Ray; but he, it appears, was in fact a common foreman for both companies in installing the machine. Being a joint undertaking, and both companies having co-operated in an act which directly caused an injury to Fliege, they are jointly and severally liable to him.

It has been said to be "well settled that the law will not undertake to apportion consequences between two or more persons jointly guilty of wrongful conduct toward another, though their contributions to the injury were in unequal degrees and from different motives." *Chicago, R. I. & P. R. Co. v. Durand*, 65 Kan. 380, 69 Pac. 356; *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877. In *Old Times Distilling Co. v. Zehnder*, 21 Ky. L. Rep. 753, 52 S. W. 1051, *Hoffman, Ahlers, & Company* contracted to make a heater and place it in a distillery. The foreman of the distillery company directed one of its employees to go and assist in lifting the heater to its place, and it appears that the distillery company had agreed to furnish men to assist in putting the heater in the distillery, and was to pay certain employees according to the time employed. It was held that the putting of the heater in the distillery was a joint undertaking of the distillery company and the makers of the heater, and that both parties were liable to a servant of the distillery company, who assisted in the work and was negligently injured while doing so. As the appellants in this case were engaged in a joint operation, there was a joint duty imposed upon them to use due care towards Fliege while he was under the machine; and as he was injured through the omission or negligent performance of this duty, there was a joint tort, upon which arose a joint and several liability against the companies. As tending to support this view, see *American Cotton Co. v. Simmons*, 39 Tex. Civ. App. 189, 87 S. W. 842; *Walton v. Miller*, 109 Va. 210, 132 Am. St. Rep. 908, 63 S. E. 458; *Olson v. Phoenix Mfg. Co.* 103 Wis. 337, 79 N. W. 409; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799; *Cleveland, C. C. & St. L. R. Co. v. Gossett*, 172 Ind. 525, 87 N. E. 723; 4 *Thomp. Neg.* § 5003; 6 *Thomp. Neg.* § 7435; *Cooley, Torts*, 3d ed. 223; 33 *Cyc. Law & Proc.* p. 726.

The case appears to have been fairly submitted to the jury as to the liability of either or both of the companies for the injury of the appellee. Whether Fliege was the servant of one or both companies when injured, and their relation to him, depended not alone upon the contract, but also upon the manner in which the contract was executed, and the conduct of the companies at the time of the injury. We see no good reason to complain of the instructions, and the objections to rulings on testimony are not deemed to be material.

The judgment of the District Court is affirmed.

All the Justices concur.

Petition for rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CORNELIUS W. STYNES

v.

BOSTON ELEVATED RAILWAY COMPANY.

(206 Mass. 75, 91 N. E. 998.)

Damages — personal injury — inability to labor — value of substitute.

While, upon the question of damages to be awarded for a personal injury, plaintiff, as proof of his personal incapacity to perform labor, may give evidence that he was compelled to employ servants to perform labor formerly done by himself, he cannot show the amount which he is compelled to pay for such service, since it would have no bearing upon the diminished value of his own services.

(May 18, 1910.)

EXCEPTIONS by defendant to rulings of the Superior Court for Middlesex County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff. Sustained.

The plaintiff was injured in a collision between a team driven by him and one of defendant's cars.

Further facts appear in the opinion.

Mr. Hugh D. McLellan for defendant.

Messrs. Coakley & Sherman and R. H. Sherman for plaintiff.

Braley, J., delivered the opinion of the court:

The plaintiff, when injured, was engaged in buying secondhand barrels, which, after they had been cleaned and repaired, 30 L.R.A. (N.S.)

he put upon the market and sold. By his personal efforts a profitable business had been established, which was seriously interrupted by his being wholly unable to carry it on for some time after the injury; and it was not until quite a long period of partial incapacity had elapsed that he could resume full control. The defendant, while conceding that the plaintiff was entitled to damages for physical and mental pain and suffering, with the expenses incurred for medical attendance and nursing, and to be fully recompensed for loss of time and for partial or permanent disability, contends that evidence of the employment of those whom he hired to perform his work at the shop while disabled, and of the amount of wages paid to them, was erroneously admitted. In form and substance the plaintiff seeks to recover

Note. — Admissibility, on question of damages for personal injuries, of amount paid for services of substitute during incapacity.

As affecting earning capacity.

In a number of cases it has been held, contrary to the decision in *STYNES v. BOSTON ELEV. R. Co.*, that the amount paid for a substitute during the plaintiff's incapacity due to his injuries is admissible upon the question of his personal incapacity to perform labor.

Thus, in *Grady v. St. Louis Transit Co.* 102 Mo. App. 212, 76 S. W. 673, it was held that from the plaintiff's evidence as to his earning capacity *per diem* prior to the casualty, and as to the fact that thereafter he had been compelled to employ assistance in the conduct of his business at a rate of compensation specified, the jury could with facility compute the extent to which his earning power had been lessened and impaired as the result of the injury sustained by him.

And in *Batten v. St. Louis Transit Co.* 102 Mo. App. 285, 76 S. W. 727, it was held that evidence that the plaintiff was keeping a boarding house when she was injured, that prior to her injury she did certain necessary work in and about the keeping of the house, that after her injury she was unable to do any of this work, and was compelled to hire others to do it for her, and that this hired help cost her a certain sum each week, furnished a substantial and reasonable basis from which the jury could, with reasonable correctness, estimate the value of the plaintiff's individual labor in the conduct of her business.

So, in *Galveston City R. Co. v. Chapman*, 35 Tex. Civ. App. 551, 80 S. W. 856, it was held that the fact that the plaintiff was compelled to hire a man at \$25 per week to do the work he himself had previously done was evidence bearing on the value of plaintiff's earning capacity.

And in *Robinson v. St. Louis & Suburban*

damages which necessarily resulted from the personal injuries inflicted by the defendant's wrong. The impairment of earning capacity is generally regarded in suits of this character as a very appreciable and well-recognized element of damage. To prove the value of the deprivation, the plaintiff may introduce evidence not only of his average earnings before and after the injury, but of his diminished capacity for labor, or of his entire loss of ability to earn money in the future. If, because of greater skill, he received higher wages than the ordinary workman in the same calling, this fact may be shown, or, if described as a physician, his professional reputation and the fact of his having had a lucrative practice before the accident, which had diminished because of it, are admissible, even if these circumstances ordinarily tend to prove that the plaintiff's

time was of more than usual importance as compared with the average workman or medical practitioner. *O'Brien v. Look*, 171 Mass. 36, 50 N. E. 458; *Murdock v. New York & B. Despatch Exp. Co.* 167 Mass. 549, 550, 46 N. E. 57; *Conklin v. Consolidated R. Co.* 196 Mass. 302, 307, 82 N. E. 23, 13 A. & E. Ann. Cas. 857; *Sibley v. Nason*, 196 Mass. 125, 12 L.R.A. (N.S.) 1173, 124 Am. St. Rep. 520, 81 N. E. 887, 12 A. & E. Ann. Cas. 938; *Braithwaite v. Hall*, 168 Mass. 38, 40, 46 N. E. 398; *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567; *McNamara v. Clintonville*, 62 Wis. 207, 51 Am. Rep. 722, 22 N. W. 472; *Wade v. Leroy*, 20 How. 34, 15 L. ed. 813. The reason is given by *Holmes, J.*, in *Braithwaite v. Hall*, supra, where, after having stated that such evidence was admissible under a declaration alleging general damages, he continued: "If any distinctions in the val-

R. Co. 103 Mo. App. 110, 77 S. W. 493, it was held that the plaintiff, a horse trainer, was, upon proof that prior to his injury he had trained his horses himself, but subsequently thereto had been compelled to hire such training done, entitled to recover for such loss of earnings.

As is stated in *STYNES v. BOSTON ELEV. R. Co.*, it was held in *Macon Consol. Street R. Co. v. Barnes*, 113 Ga. 212, 38 S. E. 750, that evidence of the amount paid for the services of substitutes was admissible as bearing on the impairment of the plaintiff's earning capacity. In this case the plaintiff was a court stenographer, and introduced proof that after his injury he was compelled to hire typewriters at the cost of \$25 per month to do part of the work, as he himself could no longer do that part of it which necessitated continued use of a typewriting machine. The court said that in view of this it seemed clear that the additional proof to the effect that he was obliged to employ help at least tended to show decreased power to labor, and the cost of the help was relevant as to the extent of the decrease.

The jury is warranted in regarding the amount which it became necessary to pay the person who took the plaintiff's place, and performed her duties as housekeeper, as a fair measure of the value of such duties and of the earning power of the plaintiff. *Olin v. Bradford*, 24 Pa. Super. Ct. 7.

Where the plaintiff's testimony showed that he was necessarily compelled to employ a man to perform the work he was engaged in at the time of the injury, and he stated without objection that the value of the services of the person so hired by him did not exceed \$50 per month, it was held in *Welmeyer v. St. Louis Transit Co.* 198 Mo. 527, 95 S. W. 925, that from such testimony it might reasonably be inferred that the loss of the plaintiff's earnings during the time he was incapacitated for the work by reason of his injuries was at least 30 L.R.A. (N.S.)

equal to the amount he paid another to fill his place during that time.

Although the employment of a substitute cannot be made to support proof of damages in the absence of a specific allegation, it is admissible as a fact corroborative of the plaintiff's disability. *Brachfeld v. Third Ave. R. Co.* 30 Misc. 425, 62 N. Y. Supp. 470.

In *Denison & S. R. Co. v. Powell*, 35 Tex. Civ. App. 454, 80 S. W. 1054, it was held that there was no error in the action of the trial court overruling the objections of the defendant to the admission of the testimony of the plaintiff's wife that the plaintiff kept hired help to do the household work as long as he was able, and that afterwards her husband and children did the most of it, as this testimony tended to corroborate her other testimony showing that she was unable to do her household work.

But damages for decreased earning capacity of a traveling salesman by reason of an accident cannot be based on the facts that he was made lame thereby, and could not visit his customers as readily, and that he had to employ an assistant, where it does not appear what he earned under these conditions. *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 15 L.R.A. (N.S.) 775, 92 Pac. 922.

In *Paquin v. St. Louis & Suburban R. Co.* 90 Mo. App. 119, it was held that it was not competent for the plaintiff to introduce evidence of what he had paid others to perform the same services in carrying on his business that he would have performed but for the injury. But it is pointed out in *Welmeyer v. St. Louis Transit Co.* supra, that in the *Paquin Case* there was an entire absence from the petition of any allegation with respect to loss of earnings.

Amount paid substitute as a disbursement.

In a number of actions for personal in-

ue of men's time are admitted, there is no reason why the whole actual difference should not be recognized. To this extent a tortfeasor takes the risk of the value of what he destroys." It is, however, to be remembered, as often pointed out, that such inquiries are descriptive only of the plaintiff's loss of earning power, and the estimated income based upon previous earnings, which if it had not been for the injury, he probably would have received, cannot as such be considered an element of damages. The principle upon which these decisions rest is that the plaintiff can recover only for the loss or impairment of his productive power as an individual, which may be ascertained and estimated according to the nature and scope of his employment, calling, or profession. If, in

the case at bar, the plaintiff's physical or mental disability, or both combined, prevented him from performing his accustomed work, whether it consisted in manual labor or the discharge, in combination with such labor, of the duties required to manage the business, as skillfully as before, it was competent in proof of damages for him to introduce evidence of the nature and extent of his employment, with the importance of his personal oversight, in order that the jury might be able to estimate the fair value of all the services out of which he acquired a livelihood, and of which he had been deprived. *Ballou v. Farnum*, 11 Allen, 73, 79; *George v. Haverhill*, 110 Mass. 506; *Turner v. Boston & M. R. Co.* 158 Mass. 261, 266, 33 N. E. 520; *Harmon v. Old Colony R. Co.* 168

juries, it has been held or assumed without discussion that the plaintiff is entitled upon proper pleadings to recover as a part of his disbursements or damage, the wages he was obliged to pay to a substitute during his confinement or incapacity. *The Joseph Stickney*, 31 Fed. 156; *Ashcraft v. Chapman*, 38 Conn. 230; *White v. People's R. Co.* 6 Penn. (Del.) 476, 72 Atl. 1059; *Chicago v. Hoy*, 75 Ill. 530; *North Chicago Street R. Co. v. Zeiger*, 182 Ill. 9, 74 Am. St. Rep. 157, 54 N. E. 1006; *Sachra v. Manilla*, 120 Iowa, 562, 95 N. W. 198; *Williams v. Edmunds*, 75 Mich. 92, 42 N. W. 534; *Schreck v. Jersey City, H. & P. Street R. Co.* (N. J. L.) 55 Atl. 650; *Munk v. Watertown*, 67 Hun, 261, 22 N. Y. Supp. 227; *Friedman v. Brooklyn Heights R. Co.* 52 Misc. 477, 102 N. Y. Supp. 525; *Gumb v. Twenty-Third Street R. Co.* 26 Jones & S. 1, 30 N. Y. S. R. 253, 9 N. Y. Supp. 316; *Moran v. New York City R. Co.* 94 N. Y. Supp. 302; *Willis v. Second Ave. Traction Co.* 189 Pa. 430, 42 Atl. 1; *Olin v. Bradford*, supra.

So, in *North Chicago Street R. Co. v. Zeiger*, supra, it was held that the expense necessarily incurred by a plaintiff disabled because of the negligence of the defendant, in procuring competent help in his business, to do the work which he would have performed by himself had he not been disabled, was a proper subject of allowance for damages in an action for the injuries.

And one who, because of an injury caused by the negligence of a railroad company, is compelled to employ help, is entitled to recover whatever the help cost. *Willis v. Second Ave. Traction Co.* supra.

So, the amount paid by a farmer injured by the negligence of the defendant, for labor on his farm while he was disabled, which he himself otherwise would have performed, is a proper element of damages, as an expense necessarily incurred as a result of the injuries. *Ashcraft v. Chapman*, supra.

But a recovery cannot be had both for the amount paid to substitutes and for the value of the time of the person injured.

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Indianapolis & M. Rapid Transit Co. v. Reeder, 42 Ind. App. 520, 85 N. E. 1042; *Kendall v. Albia*, 73 Iowa, 241, 34 N. W. 833; *Blackman v. Gardiner & P. Bridge*, 75 Me. 214; *Gumb v. Twenty-Third Street R. Co.* supra.

So, in *Indianapolis & M. Rapid Transit Co. v. Reeder*, supra, which was an action by a husband for the loss of his wife's services, it was held that an instruction was erroneous by which the jury were required to allow the plaintiff both the value of the wife's services and the sums paid to the domestics who took her place in consequence of the injury.

And upon the question of the value of the plaintiff's time in his business, evidence that he had to hire someone to do his business, and that he paid him a certain amount per day, is not subject to the objection that it would allow the plaintiff to recover double damages, where the total amount paid to the substitute is not given, as in such a case the jury could have allowed him only nominal damages for the wages of such substitute. *Kendall v. Albia*, supra.

So, in *Blackman v. Gardiner & P. Bridge*, supra, it was held that the law would not allow the plaintiff to recover for her own loss of time and loss of capacity to labor, and, in addition thereto, recover what she had been obliged to pay a domestic to supply that loss of labor.

The cost of hiring substitutes being a special damage, no recovery is allowable unless it is expressly pleaded and proved. *Nelson v. Metropolitan Street R. Co.* 113 Mo. App. 659, 88 S. W. 781; *Gumb v. Twenty-Third Street R. Co.* 114 N. Y. 411, 21 N. E. 993; *Haszlacher v. Third Ave. R. Co.* 26 Misc. 865, 56 N. Y. Supp. 380; *Brachfeld v. Third Ave. R. Co.* supra.

Nor is a recovery allowable for money paid to substitutes where the reasonable value of the services of the substitutes is not shown, nor is it shown that such help was necessary. *Costello v. New York City R. Co.* 91 N. Y. Supp. 23.

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Mass. 377, 47 N. E. 100; Finken v. Elm City Brass Co. 73 Conn. 423, 47 Atl. 670; Pennsylvania R. Co. v. Dale, 76 Pa. 47, 49; Silsby v. Michigan Car Co. 95 Mich. 204, 54 N. W. 761; Moore v. Kalamazoo, 109 Mich. 176, 66 N. W. 1089; Ehrgott v. New York, 96 N. Y. 264, 48 Am. Rep. 622; Wallace v. Pennsylvania R. Co. 195 Pa. 127, 52 L.R.A. 33, 45 Atl. 685; District of Columbia v. Woodbury, 136 U. S. 450, 459, 34 L. ed. 472, 475, 10 Sup. Ct. Rep. 990; Phillips v. London & S. W. R. Co. L. R. 5 C. P. Div. 286, 290, s. c. L. R. 5 Q. B. Div. 78, 81, 87, 8 Eng. Rul. Cas. 447, L. R. 4 Q. B. Div. 406, 408.

In further proof of his personal incapacity, but not as an independent element of recovery, the plaintiff also could show that for some months he was compelled to employ servants to perform work formerly done by himself. Ballou v. Farnum, 11 Allen, 73; Rooney v. New York, N. H. & H. R. Co. 173 Mass. 222, 53 N. E. 435; Silsby v. Michigan Car Co. 95 Mich. 209, 54 N. W. 761; District of Columbia v. Woodbury, supra. In Macon Consol. Street R. Co. v. Barnes, 113 Ga. 212, 38 S. E. 756, it was further held that evidence of the amount paid for such services was also admissible. But we are unable to adopt this view. It was the plaintiff's own earning power which is to be ascertained and valued. The cost of the services of these employees being contingent upon the wages they could command, which would depend upon their competency or upon the sum the plaintiff's necessity might have compelled him to pay, evidence of the compensation demanded or received by them had no substantial tendency to measure the diminution of the plaintiff's ability either to perform labor or to conduct his business in person, and should have been excluded. Ballou v. Farnum, supra; Braithwaite v. Hall, 168 Mass. 38, 46 N. E. 398. It may be true, as the plaintiff urges, that when viewed with all the testimony relating to his injuries, to which no exceptions were taken, this evidence had little or no effect in the enhancement of damages, yet we are unable to say that it was manifestly so immaterial as not to have increased the verdict.

The exceptions must be sustained, but as the defendant admits there was evidence for the jury of its liability, the new trial will be limited to damages only. Whipple v. Rich, 180 Mass. 477, 63 N. E. 5. 30 L.R.A. (N.S.)

OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.

DALPHUS EASTHAM et al.

(— Okla. —, 110 Pac. 887.)

Mail — legal papers — delay beyond filing time — effect.

In an action filed in a county court, the answer day was July 21, 1908. July 20, 1908, counsel for defendant in another county deposited in the United States postoffice, postage paid, an envelop addressed to the clerk of the county court, containing a motion directed to plaintiff's petition. In due and regular course of mail, the said motion would have reached its destination in time, but, by reason of the miscarriage of the mail, the same was delayed, and arrived a day late. At the time of its arrival, the court was engaged in trying the cause. Counsel for defendant, prior to the conclusion of the trial, and the rendition of judgment, asked leave to file the motion, which was by the court denied, and judgment rendered as on default. Counsel for defendant filed a motion for a new trial, alleging accident and surprise, setting up the foregoing facts with a showing of defense to plaintiff's action. This motion the court denied. Held, error.

(July 12, 1910.)

Headnote by DUNN, Ch. J.

Note. — Delay of mail or train or loss of mail, as accident or surprise for which judgment by default may be set aside.

The decision in CHICAGO, R. I. & P. R. Co. v. EASTHAM seems to be in accord with the general rule that where a party to an action has acted in good faith and with due diligence, a delay or loss in the mails or a delay of a train, resulting in his suffering a default judgment, is a cause for which such judgment may be set aside.

A case involving the same facts and holding as CHICAGO, R. I. & P. R. Co. v. EASTHAM, and decided by the same court at the same time, is Chicago, R. I. & P. R. Co. v. Reese (Okla.) 110 Pac. 1071; and another case involving a similar situation is Corning v. Tripp, 1 How. Pr. 14, set out in the opinion to CHICAGO, R. I. & P. R. Co. v. EASTHAM, where, defendant's attorney having duly and properly mailed to the clerk of the court an answer, which, in the ordinary course of mail, should have been received within two days and in ample time, but was not received until seven days later, one day after judgment had been entered by default, the default was set aside, and defendant permitted, on terms, to come in and defend.

ERROR to the Coal County Court to review a judgment in plaintiffs' favor in an action brought to recover damages caused by the inundation of plaintiffs' lands, which was alleged to have been caused by the obstruction by defendant of a natural water course. Reversed.

The facts are stated in the opinion.

Mr. J. G. Ralls, for plaintiff in error:

It was the duty of the trial court to consider the grounds alleged for a new trial, and to overrule the motion *pro forma* requires the appellate court to look into the questions of facts.

Leavenworth, L. & G. R. Co. v. Cook, 18 Kan. 271; Manhattan, A. & B. R. Co. v. Keeler, 32 Kan. 163, 4 Pac. 143; Larabee v. Hall, 50 Kan. 311, 31 Pac. 1062; Smith v. Benton, 54 Kan. 708, 39 Pac. 701.

The action of the county court was arbitrary and *pro forma*.

Leavenworth, L. & G. R. Co. v. Cook, and Manhattan, A. & B. R. Co. v. Keeler, *supra*;

So, also, in Boyd v. Williams, 70 N. J. L. 185, 56 Atl. 135, a judgment by default was opened for the purpose of letting the defendant in to plead, where a plea was prepared and verified and duly mailed to the clerk of the court in time for filing within the time limited by law, but was lost in the mails.

And where defendant's attorney, three days before the expiration of the statutory time to answer, forwarded by express, under a special agreement with the express agent, no United States mail being then established there, a letter containing a demurrer to be filed, which should have been carried through and delivered for filing in one day, but, through delay of the express agent, was not delivered until one day after the time for answering had expired, there was held to be no abuse of discretion of the court below in setting aside the default judgment. Loeb v. Schmith, 1 Mont. 87.

In Williams v. Richmond & D. R. Co. 110 N. C. 466, 15 S. E. 97, set out in the opinion to CHICAGO, R. I. & P. R. Co. v. EASTHAM, a delay in the transmission of papers "by railway mail, a method of transmission of papers and letter through baggage masters, universally adopted by this and other railroads, and usually safe and reliable," was one circumstance among several, during the course of the handling of a summons by many different agents of the defendant, in accordance with its system, leading to a failure to appear and answer in time, and resulting in a default judgment, which, upon the facts shown, was set aside for surprise and excusable neglect, the court finding that "the default was occasioned by unavoidable accident."

Where, in a case involving a large sum of money, an amended complaint, after a demurrer had been sustained on appeal, was mailed to defendant's attorney, and in due course of the mails should have reached him 30 L.R.A. (N.S.)

Larabee v. Hall, 50 Kan. 311, 31 Pac. 1062; Smith v. Benton, 54 Kan. 708, 39 Pac. 701.

Messrs. C. O. Blake, Thomas R. Beaman, and Fooshee & Brunson also for plaintiff in error.

Mr. D. H. Linebaugh, for defendants in error.

Dunn, Ch. J., delivered the opinion of the court:

This action was begun on June 25, 1908, by R. M. Eastham, as plaintiff, against the Chicago, Rock Island, & Pacific Railway Company, as defendant, in the county court of Coal county, Oklahoma. Judgment was rendered for plaintiff, and the defendant appealed the case to this court. While pending here, suggestion of the death of the plaintiff was made, and by stipulation the case is revived by Dalphus Eastham and Arthur Eastham, as the sole and only heirs at law of R. M. Eastham, deceased. In the petition filed by the said decedent, it was

in two or three days, but was not received until a month later, when, supposing that it had come in due course, the postmark not showing otherwise, and neither the defendant nor his grantees having received notice of the amended complaint, the attorney served a demurrer within ten days and within what he supposed was the required time, but after judgment by default had been entered, it was held that the defendant's default should be set aside, under a statute providing that a party may be relieved from a judgment taken against him through mistake, inadvertence, surprise, or excusable neglect. Malone v. Big Flat Gravel Min. Co. 93 Cal. 384, 28 Pac. 1063.

So, a default judgment entered against a defendant after the overruling of his demurrer to the complaint will be set aside where it appears that a regular notice of overruling the demurrer and of time to answer was given by mail, addressed to one of the members of the firm of attorneys representing the defendant, but was never received, and neither that member nor the firm nor the defendant had any notice of the overruling of the demurrer or knowledge that the court had passed thereon, until after judgment had been entered upon default. Clark v. Oyharzabal, 129 Cal. 328, 61 Pac. 1119.

Where an attorney whom defendant had employed to be present when the cause was called for trial, and procure, if possible, a continuance, took a train in time to reach the place of trial the evening before the case was called, but was detained in consequence of an unavoidable accident on the railroad, the court, on appeal from an order setting aside the default judgment, said: "This shows a perfectly satisfactory reason why he did not reach the place of trial until after the cause was reached and judgment rendered." Omro v. Ward, 19 Wis. 233.

alleged, in substance, that plaintiff was the owner of lot No. 2 in block No. 27, in the city of Coalgate, together with all the improvements thereon; that the defendant company, subsequent to the acquisition by plaintiff of this property, constructed a branch line of railroad from near its Coalgate station to the city of Lehigh, and in the construction of said road erected a heavy embankment of dirt from 6 to 8 feet high, which filled up and stopped a natural water course about two blocks east of the property mentioned; that this embankment during the months of April, May, and June, 1908, and at other times, caused the water naturally flowing in this stream to accumulate, back up, spread out, inundate, and cover plaintiff's property, which was his home; and that the water compelled him to abandon the same,—all of which acts resulted in damages in an amount averred to be \$750. Summons was issued and served upon the defendant requiring it to answer on or before the 21st of July, 1908. The defendant company having failed to answer or otherwise plead, on July 22, 1908, counsel for plaintiff filed a motion asking that judgment be rendered against the defendant as on default, and that the court impanel a jury for the purpose of assessing damages. This motion was by the court, at 2 P. M. on the said 22d of July, 1908, sustained, and the plaintiff, after waving a jury, requested the

court to hear the evidence and assess the damages, which was done, and a judgment was rendered for plaintiff in the sum of \$745. In the transcript before us immediately following the recital of judgment, there appears a paper entitled "motion to require the plaintiff to make his petition more definite and certain," and which sets out in detail wherein the petition of plaintiff is averred to be indefinite and uncertain. This paper appears to be indorsed: "2:40 P. M., refused to file for the reason that it was offered during the trial and before judgment. R. H. Wells, County Judge. July 22, 1908. Filed at 4 P. M. after judgment rendered by court. J. F. Threadgill, Ex Officio Clerk of County Court." On the same day counsel for defendant filed a motion to set aside and vacate the default judgment entered, in which was set up a number of grounds tending to show accident and surprise which prevented counsel from having filed, prior to the expiration of the statutory time, the motion last above referred to. Within three days thereafter and on July 25, 1908, counsel for defendant filed a motion for a new trial setting up the statutory grounds, and thereafter filed a paper entitled "amendments to motion for a new trial," which is merely a statement in detail of the grounds for the same.

This showing is verified, and one of the paragraphs thereof is as follows: "The court was informed prior to entering judg-

And in *Smith v. Rawlings*, 83 Va. 674, 3 S. E. 238, set out in the opinion in *CHICAGO, R. I. & P. R. Co. v. EASTHAM*, where it appeared that plaintiff started for court in time to have reached there before the trial of his case, but failed to arrive in time by reason of delays in trains and their failure to connect, it was held that a verdict found in his absence for defendant should have been set aside and a new trial granted, as "his failure to reach the court in time should be imputed to an accident which he could not foresee."

In *Williams v. Kessler*, 82 Ind. 183, however, it was held that plaintiff did not show a legal cause for having his default and a judgment against him set aside, where he was delayed on his way to the place of trial by a failure to make train connections, but thereafter could have arrived in time if he had not stopped off to get a witness with whom he had arranged to meet the earlier train, which he had expected to be on, and to go with him.

And where it appears that defendant's answer containing affirmative matter as a defense was duly served on the clerk during term time, and immediately mailed to plaintiff's attorney, who resided outside the county, but on account of delay in the mail was not received by them until the day before the last for pleading thereto, and too late for them so to plead within the time

required, it was held in *Payne v. Savage*, 51 Or. 463, 94 Pac. 750, that there was not such an abuse of discretion on the part of the trial court as will be disturbed on appeal, in its refusing to set aside a judgment for defendant on the pleadings, on the ground that it was taken against the plaintiff by mistake, surprise, inadvertence, and excusable neglect, as plaintiff's attorneys were negligent in not appearing within the time for pleading to the answer, as required by statute and the rules and the practice of the court, "and the excuse offered was not such as to require the court, in exercise of a sound discretion, to relieve them from the consequences."

So, in *Meadows v. Hudson*, 90 Ark. 294, 119 S. W. 269, where defendant's attorney had conducted the trial of the case in defendant's absence, and judgment had gone against him, it was held that the appellate court could not say that the trial court erred in a matter addressed to its discretion, in refusing to grant defendant a new trial because of "accident," upon his showing, as a reason for his absence from the trial, that his attorney had agreed to notify him of the date his case was set for trial, and had duly mailed him a letter for that purpose, at least, a week before the date set, but that such letter had been lost in the mail, and he had never received it.

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ment that the general attorney for the defendant had mailed to the clerk of said court pleadings to be filed, and had mailed same in time for them to have reached said court on the answer day, and, this case not being set for trial, the court should have given reasonable time for said pleadings to reach its destination, and defendant shows that in truth and in fact in cases pending in the county court of Coal county, Oklahoma, it is the duty of the general attorney, C. O. Blake, and his assistant, Thomas R. Beaman, to prepare all pleadings to be filed in court, and that the local attorneys, Fooshee & Brunson, had no authority to prepare such pleadings, and are not general attorneys for this defendant, but only act under special direction from the general attorney; that said pleadings were prepared by the said Thomas R. Beaman, and deposited in the United States postoffice at El Reno, Oklahoma, about 6 o'clock P. M. on the 20th day of July, 1908; that in due course of mail the same should have arrived at Coalgate at 12:45 P. M. on the 21st of July, 1908, going from El Reno to Oklahoma City on the Chicago, Rock Island, & Pacific, and from Oklahoma City to Coalgate on the Missouri, Kansas, & Texas; that the mail was making said time regularly, and defendant had a right to and did rely upon said mail making said time; and that, if it did not, it is not the fault of this defendant. Defendant says that said pleading was a motion to require said plaintiff to make his petition more definite and certain by paragraphing his different causes of action, and by stating the dates of the alleged overflow, and alleging the value of the various items for which he claims damages; that such pleading should have been sustained, and the plaintiff should have been required to have amended his petition in conformity therewith. The defendant says that it inclosed said motion with a letter in an envelop together with a general motion in the case of O. T. Reese v. this defendant, and addressed said envelop to the clerk of the county court, Coal county, Oklahoma, and that said envelop containing said pleadings was placed in the outgoing mail by the postmaster at El Reno at 8:30 P. M. July 20, 1908, as shown by the original envelop, which is attached to the defendant's motion to set aside and vacate default judgment, which was filed July 22, 1908, and marked 'Exhibit A;' and defendant says that said envelop containing said motion and letters, in due course of the mail, should have been received by the clerk of this court not later than 1:30 P. M. the 21st day of July, 1908, and should have been filed on said day; and defendant says that it is informed that said envelop did not

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reach Coalgate until after said hour, and that, on examination of the back of said envelop, the same appears to be stamped as follows: 'Coalgate, Okl., Jul. 22 8 a m 1908.' And defendant says that said envelop had been carried by Coalgate to Atoka, by an oversight of the mail clerk, and returned to Coalgate on the evening of the 21st day of July; and defendant says that this was an unavoidable accident which ordinary prudence could not have guarded against." And further that "the plaintiff was the only witness in his behalf, and he, for the purpose of deceiving the court, falsely testified that the damages to the house and orchard were about \$250, and that a reasonable value of the lot with the orchard before the railroad was constructed was \$450, and that after its construction it was of no value at all, and that the damage to the household effects and the house was \$200, when in truth and in fact said lot was not worth over \$50 and said house was not worth over \$75, and that the damage to the said house was not over \$10, if anything, when in truth and in fact there was no damage done to the said household effects of said plaintiff,—all of which the plaintiff well knew at the time he was so testifying, and defendant says that plaintiff so testified for the purpose of perpetrating a fraud not only upon this defendant, but upon the court." In support of the proposition last noted, there was filed a number of affidavits of parties living in and around Coalgate. The court denied both the motion to set aside the judgment and the motion for a new trial. Counsel for defendant prepared, had allowed, and filed a bill of exceptions making the matters hereinbefore referred to a part of the record, and have brought the same to this court on transcript, and we are asked to review and reverse the action of the trial court.

In the case of Corning v. Tripp, 1 How. Pr. 14, it appears that counsel for defendant mailed his answer to the clerk of the court. He placed the same in the postoffice, prepaying the postage thereon. In the ordinary course of mail it would have reached the clerk two days thereafter, but the same was not received by the clerk until seven days thereafter. On the day before it was received, judgment was entered for the plaintiff by default. The court, on a showing of these facts by the defendant, opened the case and allowed him to plead.

The case of Williams v. Richmond & D. R. Co. 110 N. C. 466, 15 S. E. 97, was a case wherein judgment was entered by default, and was afterwards set aside by the supreme court of North Carolina upon a showing of facts as follows: "The summons was served July 7th, on the station agent at

Goldsboro, and by him duly forwarded to the headquarters of the company at Atlanta, according to regulations, by the managing officer delivered to the general southern counsel, and by them, on July 18, 1891, all the papers were sent to David Schenck, the counsel of the North Carolina division. That by mistake the papers were sent to Mr. Cothran, the counsel for the South Carolina division, along with papers in two other cases. On July 20th, fifteen days before court met, Mr. Cothran sent the papers to Mr. Schenck, but by some mischance the papers were not received by Mr. Schenck until the night of August 4th. That these papers were sent by railway mail, a method of transmission of papers and letters through baggage masters, universally adopted by this and other railroads, and usually safe and reliable. That Mr. Schenck was sick when the papers were received, but on the next day sent the papers to F. H. Busbee, who was an attorney, resident in Raleigh, North Carolina, having charge of the business of the Richmond & Danville Railroad in eastern North Carolina, including Duplin county. That Mr. Busbee had left Raleigh, by the advice of a physician, the day the papers were sent, August 5th, and did not receive them. That if he had been in Raleigh on August 5th, he could not have reached Duplin court by August 6th, at noon. That as soon as the fact of Mr. Busbee's absence was communicated to Mr. Schenck by wire, he telegraphed Mr. I. F. Dortch, local attorney of the company at Goldsboro, to repair to Duplin court, but the court had adjourned the same day the message was received. Upon these facts the court adjudged that the default was occasioned by unavoidable accident, and ordered that the judgment by default be vacated, and that the defendant be allowed to file an answer or demurr." The court in the consideration of that case said: "It must be remembered that the effect of the decision of this court is to strike out a judgment rendered under a technical rule, and allow the defendant to answer, so that the case may be tried hereafter by a jury upon its merits. If, therefore, the court has done more than justice to a corporation, an impartial jury of the country can be trusted, with the aid of a judge, to apply the law to the facts, and determine whether the plaintiff is entitled to recover at all, as well as fix the amount of damage, if any, that shall be awarded. I am unable to perceive how a grievous wrong can be done to the plaintiff by leaving the merits of his cause to be reached by the ancient method of trial by a jury of the country. . . . The right to relief against a judgment rendered under a technical rule of practice

must not be made to depend solely upon the movements of the sand in the hourglass, or the uncertain progress of the judge in disposing of the docket, but upon sound principles of equity and justice. Where there is doubt as to the proper method of disposing of such an application, it is always safe, when it can be done without violating the law, to have an action tried upon its merits, rather than determined upon a technicality."

In the case of *Smith v. Rawlings*, 83 Va. 674, 3 S. E. 238, it appeared that when the case was called for trial, counsel for Smith moved for a continuance because Smith desired to be a witness on his own behalf and was absent. This motion was overruled, and the case proceeded with. Two days thereafter Smith appeared in court and filed an affidavit in which he stated: "That he had started for Amherst Courthouse on the morning of the 10th of April, 1884, the first day of the term, on the Richmond & Alleghany Railroad, to connect at Lynchburg with a train running to Amherst Courthouse; that the train on the Richmond & Allegheny Railroad failed to connect at Lynchburg, the early freight train having just left; and that he then took the next train, which started at 10:30 o'clock A. M.; but that this last-named train was delayed on the route; and that when he reached Amherst Courthouse the trial was over." In the consideration of these facts the court said: "The failure of Smith to attend at the trial cannot fairly be imputed to negligence on his part. He started for court in time to have reached there before the case was tried, we may safely assume from the failure of the record to disprove it, if the trains on the Richmond & Allegheny Railroad had not failed to connect at Lynchburg with the train running to Amherst Courthouse. He then took the next train for that place, and but for its being delayed on the route, it seems probable that he would have reached court before the trial had ended. In any event, he, the plaintiff in error, seems to have used reasonable and proper efforts to attend the trial, and his failure to reach the court in time should be imputed to an accident which he could not foresee, rather than negligence on his part."

The uncontroverted showing made in the record before us is that, had there been no miscarriage in the mail, the motion prepared by counsel would have reached Coalgate at about noon of the 21st day of July, 1908, instead of the next day. The record shows that defendant's motion reached the hands of the court during the taking of the evidence, and prior to the rendition of judgment, and on the reasoning of the foregoing

cases we hold the court erred in the exercise of its discretion in denying to defendant the right to file it, and be heard upon it, and in proceeding to render judgment as was done. No testimony was taken on the hearing except that of plaintiff, and the affidavits filed show conclusively that plaintiff's recovery is far in excess of his damage. Every litigant is entitled to his day in court. Being free from fault no mere accident should foreclose against plaintiff his right to have his claim against the defendant tried and determined; but the scales of justice should be held in equipoise, and the defendant is likewise entitled to have its day in court, and to have its defense against the claim of plaintiff heard, and no accident not its fault should foreclose this right on its part.

The cause is accordingly remanded to the County Court of Coal County, with instructions to set aside the judgment heretofore entered, and allow defendant to file its motion.

Turner, Williams, Kane, and Hayes, JJ., concur.

SOUTH DAKOTA SUPREME COURT.

GEORGE H. MONTAGUE, Appt.,
v.

INEZ MAY MONTAGUE, Respnt.

(— S. D. —, 127 N. W. 639.)

Marriage — annulment — residence in state.

Statutes prescribing a term of residence in actions for divorce do not apply to actions for annulment of marriage.

(May 24, 1910.)

APPEAL by plaintiff from an order of the Circuit Court for Lincoln County sustaining a demurrer to the complaint in an action brought to annul a marriage. Reversed.

The facts are stated in the opinion.

Mr. Joseph Mitchell Donovan, for appellant:

The statutory provisions on divorce have no application to suits to annul a marriage.

Price v. Price, 124 N. Y. 589, 12 L.R.A. 359, 27 N. E. 383; Berry v. Berry, 130 App. Div. 53, 114 N. Y. Supp. 497; Conrad v. Conrad, 124 App. Div. 780, 109 N. Y. Supp. 387; Erkenbrach v. Erkenbrach, 96 N. Y. 456; Burtis v. Burtis, Hopk. Ch. 557, 14 Am. Dec. 563; Griffin v. Griffin, 47 N. Y. 138; Ensign v. Ensign, 54 Misc. 289, 105 N. Y. Supp. 917; de Meli v. de Meli, 120 N. 30 L.R.A. (N.S.)

Y. 485, 17 Am. St. Rep. 652, 24 N. E. 996; Mitchell v. Mitchell, 63 Misc. 580, 117 N. Y. Supp. 671; Livingston v. Livingston, 173 N. Y. 389, 61 L.R.A. 800, 93 Am. St. Rep. 600, 66 N. E. 123; Avakian v. Avakian, 69 N. J. Eq. 89, 60 Atl. 521; 26 Cyc. Law & Proc. p. 87.

Mr. William G. Porter, for respondent:

The term "divorce" was intended to include nullity suits.

Piper v. Piper, 46 Wash. 671, 91 Pac. 189; Wilson v. Wilson, 95 Minn. 464, 104 N. W. 300.

Smith, J., delivered the opinion of the court:

Plaintiff brought an action in the circuit court of Lincoln county for annulment of marriage. The complaint states, in substance, that plaintiff had been a bona fide resident in good faith of the state of South Dakota for a period of more than six months next preceding the commencement of the action, and at the time of the commencement

Note. — Local domicil or residence as a condition of jurisdiction of action for annulment of marriage.

It will be observed that the question is not whether jurisdiction of a suit to annul a marriage may rest upon local domicil, but whether a local domicil or residence is a necessary condition of the jurisdiction, including the point as to the length of the domicil or residence necessary for that purpose.

Most of the cases cited in this note seem to assume that a local domicil, or at least a local residence, at the time the action is commenced, is a condition of jurisdiction of an action to annul a marriage.

But in *Simonin v. Mallac* (1860) 2 Swabey & T. 67, the fact that the ceremony was performed in England, between persons domiciled in France, was held in itself sufficient to confer jurisdiction upon the English courts of a suit for nullity, irrespective of the domicil of the parties at the time of the suit. As a matter of fact, however, the petitioner (the woman) was actually residing in England at the time of the suit, and England was her domicil if the marriage was not valid.

In *Avakian v. Avakian*, 69 N. J. Eq. 89, 60 Atl. 521, the defendant having appeared by solicitor and answered the bill without taking any exception either to the jurisdiction of the subject-matter or of his person, the vice chancellor said that under the circumstances he was not sure that any residence on the part of complainant within the state was essential to the jurisdiction of a court of New Jersey to entertain a suit to annul the marriage, remarking in this connection that such a suit is not limited by the terms of the divorce statute as to residence, etc., but is based on the original inherent and general jurisdiction of the court over questions arising out of contract

thereof was a citizen and elector of the state of South Dakota; that plaintiff and defendant entered into a form of marriage in the state of New York on the 17th day of May, 1907; that the marriage was procured by fraud of the defendant, and was voidable under the laws of New York, and is likewise voidable under the laws of the state of South Dakota; that plaintiff would not have entered into said marriage but for the fraudulent representations of defendant, and that the parties have not lived together since the discovery of the fraud; that four years have not elapsed since the discovery of the fraud. Defendant demurred to the complaint on the ground that the complaint shows that the plaintiff had not been a resident of the state of South Dakota for one year, and of the county of Lincoln for three months, prior to the commencement of the action. The contention of the defendant is that chapter 132, Laws S. D. 1907, relating to residence in divorce actions, applies to a suit to annul marriage. The court having sustained the demurrer, plaintiff brings the action to this court for review.

The question presented by the record is whether a residence of one year in the state is a jurisdictional prerequisite to maintaining an action for the annulment of a marriage. No other question is presented. Section 1, chapter 132, Sess. Laws 1907, provides: "Section 1. Plaintiff in an action for a divorce must have been an actual resi-

dent in good faith of this state for one year, and of the county where such action is commenced for three months, next preceding the commencement of said action, except as herein otherwise provided." The other provisions of the statute have no relevancy to the question presented here. There is no statute of this state specifically prescribing a period of residence in actions for annulment of marriage. The marriage contract and the annulment of marriage are treated under article 1 of part 3 of the Civil Code, while divorce is treated in article 2 of the same chapter as a distinct action. The fundamental distinction between the annulment of a marriage contract and its dissolution by divorce is very well stated in § 566, Nelson on Divorce & Separation: "The term 'divorce' in its accurate sense denotes a dissolution or suspension by law of the marital relation. As a legal term and unaided by context, it means a dissolution of the bonds of matrimony. When a marriage is dissolved, the action of the court proceeds upon proof that a valid marriage existed and created rights and liabilities. The decree of divorce usually proceeds to make a final adjustment of these liabilities. The decree of annulment declares, in effect, that no valid marriage ever existed, and restores the parties to their former position, and relieves them from civil and criminal liability. The decree of divorce operates from the time it is rendered, but the nullity

inter partes. The case next cited was distinguished upon the ground that the defendant was not personally subject to the jurisdiction of the court, and that, without a domicile of the complainant, there was no such *res* in the state as would give the court jurisdiction to proceed against the defendant in the absence of service within the jurisdiction. As a matter of fact, however, the court in the Avakian Case seems to have been of the opinion that the complainant was not only residing in New Jersey, but was domiciled there.

In *Blumenthal v. Tannenholz*, 31 N. J. Eq. 194, referred to in the last case, the jurisdiction of a court of New Jersey of a suit to annul for fraud a marriage celebrated in New Jersey was denied upon the ground that neither of the parties was domiciled in New Jersey, the defendant, who was served by publication, not being even a resident of New Jersey, and the domicile of the plaintiff, who was a minor, being constructively in Canada, where her parents were domiciled, although she appears to have been residing in New Jersey at the time suit was brought. The decision is expressly referred to the ground that the jurisdiction rests upon a local domicile of at least one of the parties at the time the suit is commenced.

In *Roberts v. Brennan* [1902] P. 143, the president of the probate division declared 30 L.R.A. (N.S.)

that in his opinion the jurisdiction of suits of nullity depends on residence, and not upon domicile, and, accordingly, pronounced a judgment of nullity against respondent, whose domicile was Irish, the ceremony having taken place in the Isle of Man. Apparently, neither the petitioner nor respondent was domiciled in England, though presumably one or both were actually residing there.

In *Barney v. Cunes*, 68 Vt. 51, 33 Atl. 897, the court quotes with approval the statement in *Bishop on Marriage, Divorce, & Separation*, § 73, that a suit to declare a marriage void from the beginning may and should be carried on in the courts of the domicile. In this case, however, the petitioner was domiciled in the state both at the time of the pretended marriage and at the time suit was brought, so that there was in reality no question as to the necessity of a local domicile.

And in *Hall v. Hall*, 67 Misc. 267, 122 N. Y. Supp. 401 (reversed on another ground in 123 N. Y. Supp. 1118), the court disposed of the contention that it was without jurisdiction, by the statement that both parties to the action were residents of the state when the action was commenced, and that it was immaterial that the marriage sought to be annulled was celebrated in another state.

In *Mitchell v. Mitchell*, 63 Misc. 580, 117

decree relates back to the time the void marriage was entered into." Under the provisions of § 61, Civil Code, a marriage may be annulled by an action in the circuit court "for any of the following causes existing at the time of the marriage." The statute then specifies six separate grounds upon which a marriage may be annulled, each of which relates to causes existing at or prior to the time of the marriage. Section 67 of the Civil Code provides that divorces may be granted "for any of the following causes," and then specifies six grounds for divorce, each of which relates to the conduct of the parties subsequent to the marriage contract. Section 62 of the Civil Code prescribes a distinct period of limitation within which an action for annulment must be commenced, and prescribes a distinct and different period of limitation for each of the six grounds or causes for annulment. The only limitation as to the time within which actions for divorce may be begun is found in § 84 of the Civil Code, which provides that a divorce must be denied when there is an unreasonable lapse of time before commencement of the action, defines what is an unreasonable lapse of time, and further provides that the presumption arising from lapse of time may be rebutted by showing reasonable grounds for the delay in commencing the action. Section 85 provides: "There is no limitation of time for commencing actions for divorce, except such as are contained in the foregoing § 84." Section

29 of the Code of Civil Procedure provides: "The circuit court possesses chancery as well as common-law jurisdiction." In 26 Cyc. Law & Proc. p. 908, ¶ 2, it is said: "A court of chancery, in the exercise of its ordinary powers and jurisdiction, and without the authority of a statute, may take jurisdiction of a suit to annul a marriage where the cause alleged is one of the well-known grounds on which equity gives relief in cases of contract, such as fraud, error, duress, or mental incapacity." The grounds upon which a marriage may be annulled in a court of chancery are clearly defined by text writers and the decisions of the various chancery courts, and an examination of the decisions and rules thus recognized makes it entirely clear that the provisions of § 61 of the Civil Code, defining the causes for annulment of marriage, constitute simply a very clear, full, and exact codification of the rules established by the decisions of the chancery courts. From these decisions it is apparent that actions for the annulment of a marriage, and actions for divorce, are entirely separate and distinct in their grounds, object, and effect. A valid marriage creates a marriage "status," but a marriage which is void by reason of any of the matters specified as grounds for annulments in § 61 logically does not create the marriage "status."

In the case of *Avakian v. Avakian*, 69 N. J. Eq. 89, 60 Atl. 521, an action to annul a marriage for duress, the court says: "But

N. Y. Supp. 671, upholding the jurisdiction of a court of New York to entertain a suit to annul a marriage celebrated in Canada, the parties were domiciled in New York both at the time of the marriage and at the time of the suit, so that there was no question as to the necessity of a local domicile or residence in order to sustain the jurisdiction. And that is also true of *Bater v. Bater*, 21 Times L. R. 517.

It will be observed that in *MONTAGUE v. MONTAGUE*, also, the plaintiff was domiciled in, or was at least a resident of, the state at the time the action was brought; and the question was simply whether the statutory provisions prescribing the term of local residence or domicile of a plaintiff in a divorce suit apply to a suit to annul a marriage, and, as there suggested, that question may be affected by the context and legislative history of the statutory provisions.

Thus, the decision in *Wilson v. Wilson*, 95 Minn. 464, 104 N. W. 300, that the provision of § 4792 of the General Statutes of 1894, that no divorce shall be granted unless the complainant has resided in the state one year immediately preceding the time of exhibiting the complaint, is applicable to a suit to annul a void or voidable marriage under §§ 4785-4789, was influenced, if not controlled, by the consideration that chap. 62 of the General Statutes, 30 L.R.A. (N.S.)

bearing the general heading "Divorce," had its origin in chap. 66 of the Statutes of 1851, and, as originally enacted, contained the same general provisions as now exist under the general head "Divorce." The court said that it was not reasonable to suppose that the legislature intended to make any distinction when, at a later period, what is now § 4792 was added.

In *Eliot v. Eliot*, 77 Wis. 634, 10 L.R.A. 568, 46 N. W. 806, the court said that the statutory provision that "no divorce shall be granted unless the complainant shall have resided within this state one year immediately preceding the time of the commencement of the action" was undoubtedly applicable to an action to annul a marriage on the ground of nonage. There was no discussion of the point, however, and the decision was merely to the effect that the averments of the complaint in that respect were sufficient to satisfy the statute.

The decision in *Piper v. Piper*, 46 Wash. 671, 91 Pac. 189, that a statute providing for service by publication in actions for divorce authorizes such service in suits for annulment, is therefore not in point. As pointed out in *MONTAGUE v. MONTAGUE*, the two actions had been treated by the legislature together and as belonging to one subject.

J. D. C.

another important consideration intervenes. The jurisdiction of this court over the subject-matter of this cause is not based upon or derived from the divorce statute. Hence, it is not limited by any of the terms of that statute as to residence, etc. It is based on the original, inherent, and general jurisdiction of this court over questions arising out of contracts *inter partes*, and is exercised over contracts of marriage in which is found some vice inherent in their origin, precisely as in cases arising out of ordinary contract. . . . I shall add the suggestion that this action is not properly classified as a suit for a divorce, which is almost universally based upon some cause of action arising after the marriage, and which dissolves a valid marriage." In 1907 the New Jersey legislature passed an act requiring a residence in the state for one year in actions for annulment, while in divorce actions it requires a residence of two years. In some states, as in Minnesota and Washington, the statutes regulating divorce and annulment actions are contained in a single act. The statute in Washington (Rem. & Bal. Code, § 984) provides that "in divorce and nullity suits, the complainant must reside in the state for one year prior to suit." It is apparent, therefore, that the ruling in *Piper v. Piper*, 46 Wash. 671, 91 Pac. 189, is not pertinent to the question before us. The same statutory rule exists in West Virginia. *Martin v. Martin*, 54 W. Va. 301, 46 S. E. 120, 1 A. & E. Ann. Cas. 612. In South Carolina there is no statutory provision whatever authorizing divorces, but the chancery courts of that state exercise jurisdiction to annul marriage as in other chancery or equity cases. *Mattison v. Mattison*, 1 Strobb. Eq. 387, 47 Am. Dec. 541. See *Lawless v. Chamberlain*, 18 Ont. Rep. 296.

In view of these well-settled rules, in the light of which the act of the legislative assembly must be construed, and which act in its terms applies only to actions for divorce, we are clearly of opinion that the act was not intended to, and does not, apply to actions for annulment of marriage. The order and judgment of the trial court are reversed.

VERMONT SUPREME COURT.

CORA E. CROMPTON, Appt.,
v.

ALBERT H. BEEDLE et al.

(83 Vt. 287, 75 Atl. 331.)

Sale — misrepresentation by purchaser — rescission.

1. A vendor of a farm may maintain a bill to secure a reconveyance, where he had 30 L.R.A. (N.S.)

never seen the property and was ignorant of the fact that it contained valuable deposits of stone, and sold the property at one fifth of its value, upon the representation of the vendee, who desired to secure it for the value of the stone, that he knew the value of the property, and that it was only the amount paid; that the property was inaccessible, and that he desired to secure it for another purpose.

Same — negligence — effect.

2. That a sale induced by the fraudulent representations of the purchaser was made in pursuance of an option, and that, pending the option, the vendor made no effort to ascertain the truth of the representations, will not defeat a bill by the vendor to secure a reconveyance of the property, if the false representations were relied on in making the conveyance, and induced the vendor to forbear making an investigation.

Pleading — conflicting allegations — construction.

3. The allegation that a quarry is undeveloped does not conflict with another that it is of great value, so as to make demurrable a bill to annul a conveyance of the property secured by fraud.

Rescission — fraud — estoppel.

4. One who induces a sale of real property by fraudulent representations as to its value cannot avoid liability to reconvey, on the theory that the vendor has no right to rely on his representations.

(February 16, 1910.)

Note. — Effect of purchaser's concealment or misrepresentation of fact affecting the value of real estate.

I. Where vendor seeks affirmative relief.

a. Distinction between mere failure to disclose and fraudulent concealment, misrepresentation, etc., 748.

b. What amounts to a fraudulent concealment or misrepresentation.

1. Value, location, 750.

2. Valuable minerals, 751.

3. Interest of vendor, 753.

4. Miscellaneous, 753.

c. Failure to disclose, 754.

II. Where purchaser seeks specific performance, 755.

I. Where vendor seeks affirmative relief.

a. Distinction between mere failure to disclose and fraudulent concealment, misrepresentation, etc.,

While ordinarily the mere failure by the purchaser of real estate to disclose facts in his knowledge which materially enhance the value of real estate he is purchasing does not constitute fraud entitling the vendor to affirmative relief on the ground of fraud, yet the purchaser must say or do nothing to disarm the vendor, or induce

A PPEAL by oratrix from a decree of the Chancery Court for Orange County dismissing a bill filed to set aside a deed of certain lands, the execution of which by her was alleged to have been induced by fraud of defendants, the purchasers. Reversed.

The facts are stated in the opinion.

Messrs. Clarence P. Cowles, Sherman R. Moulton, and March M. Wilson, for appellant:

Misrepresentations made for the purpose of inducing the person to whom made to forbear from investigation are fraudulent.

Haygarth v. Wearing, L. R. 12 Eq. 320; Morgan v. Dinges, 23 Neb. 271, 8 Am. St. Rep. 121, 36 N. W. 544; Mountain v. Day, 91 Minn. 249, 97 N. W. 883; Robinson v.

Reinhart, 137 Ind. 674, 36 N. E. 519; Burr v. Willson, 22 Minn. 206; McKnight v. Thompson, 39 Neb. 752, 58 N. W. 453; Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Andrews v. Jackson, 168 Mass. 266, 37 L.R.A. 402, 60 Am. St. Rep. 390, 47 N. E. 412; Medbury v. Watson, 6 Met. 247, 39 Am. Dec. 726; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 316; Kimball v. Bangs, 144 Mass. 321, 11 N. E. 113; Boddy v. Henry, 126 Iowa, 31, 101 N. W. 447; Vernon v. Keyes, 12 East, 632; Gustafson v. Rustemeyer, 70 Conn. 125, 39 L.R.A. 644, 66 Am. St. Rep. 92, 39 Atl. 104; People v. Peckens, 153 N. Y. 576, 47 N. E. 887; Scott v. Haynes, 12 Mo. App. 597; Cox v. Gerkin, 38 Ill. App. 341; Bacon

him to refrain from investigation, or otherwise prevent him from ascertaining the truth, since very slight circumstances in addition to intentional concealment are sufficient to constitute fraud entitling the vendor to affirmative relief. Stackpole v. Hancock, 40 Fla. 362, 45 L.R.A. 814, 24 So. 914; Akers v. Martin, 110 Ky. 335, 61 S. W. 465; Livingston v. Peru Iron Co. 2 Paige, 390, reversed on other grounds in 9 Wend. 511; Smith v. Beatty, 37 N. C. (2 Ired. Eq.) 466; 40 Am. Dec. 435; Turner v. Harvey, Jacob, 178; Dolman v. Nokes, 22 Beav. 402; Fox v. Mackreth, 2 Bro. Ch. 400.

Thus, in Turner v. Harvey, supra, Lord Eldon, adverting to the general principle that parties dealing for the purchase of real estate have a right to put each other at arm's length, and if the purchaser knows of facts enhancing the value of the property, and the vendor makes no inquiry with reference thereto, the former is not bound to give him information thereof, added: "But a very little is sufficient to affect the application of that principle; if a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate."

In Dolman v. Nokes, supra, Sir John Romilly, the master of the rolls, remarked that it is not generally the duty of a purchaser to inform a vendor of any of the circumstances he may be acquainted with which may make it desirable for him to purchase, or make it available, still, if at the time of the purchase the purchaser makes an express statement of fact which causes the contract to be made, and on the faith of which alone the contract is made, and that fact is false, or if there is a fact which it is well known will prevent the contract, and this fact is suppressed by the purchaser for that reason, it may invalidate the whole transaction, depending upon the circumstances and facts of the case.

And in Livingston v. Peru Iron Co. supra, the lord chancellor, while conceding that the simple suppression by the buyer of a fact which materially enhanced the

value of the property is not sufficient to set aside the sale on the ground of fraud, remarked that very slight circumstances in addition to the intentional concealment of a fact are sufficient to constitute a fraud upon the vendor.

Akers v. Martin, supra, while conceding the general rule that a purchaser of real estate does not commit a fraud upon the vendor by failing to communicate to him knowledge of facts of which the vendor is ignorant, and of which the purchaser is informed, which enhance the value of the property, held that if, in addition to the purchaser's silence, there was any statement, word, or act on his part which tended affirmatively to a suppression of the truth, covering up or disguising the truth, or to a withdrawal or distraction of the party's attention from the real facts, then the line is overstepped, and the concealment becomes fraud. Applying the doctrine, a purchaser of real estate who fraudulently represented that there was no timber of certain kinds upon land he was seeking to buy, which would enhance the value of the land, was held to commit a fraud upon a vendor selling in reliance upon such representations, against which a court of equity will relieve.

One of the leading cases on this subject is Fox v. Mackreth, supra. Although in this case there was evidence of actual fraud other than mere concealment, yet the latter question was also discussed. On this point Lord Chancellor Thurlow said: "Without insisting upon technical morality, I don't agree with those who say that where an advantage has been taken in a contract, which a man of delicacy would not have taken, it must be set aside. Suppose, for instance, that A, knowing there to be a mine in the estate of B, of which he knew B was ignorant, should enter into a contract to purchase the estate of B for the price of the estate without considering the mine, could the court set it aside? Why not, since B was not apprised of the mine, and A was? Because A, as the buyer, was not obliged, from the nature of the contract, to make the discovery. It is

v. Frisbie, 15 Hun, 26; McClellan v. Scott, 24 Wis. 81; Harris v. McMurray, 23 Ind. 9; Ladd v. Pigott, 114 Ill. 647, 2 N. E. 503; Stevens v. Allen, 51 Kan. 144, 32 Pac. 922; Turner v. Harvey, Jacob, 178; Walters v. Morgan, 3 DeG. F. & J. 718, s. c. 4 L. T. N. S. 758; Turner v. Green [1895] 2 Ch. 209; 1 Story, Eq. Jur. 13th ed. § 192; Livingston v. Peru Iron Co. 2 Paige, 393; Hanscom v. Drullard, 79 Cal. 234, 21 Pac. 736; Brady v. Finn, 162 Mass. 260, 38 N. E. 506; Malory v. Leach, 35 Vt. 156, 82 Am. Dec. 625; Howard v. Gould, 28 Vt. 523, 67 Am. Dec. 728; Graham v. Stiles, 38 Vt. 578; Central R. Co. v. Kisch, 36 L. J. Ch. N. S. 849, 6 Eng. Rul. Cas. 759; Thompson v. Randall, 28 Ky. L. Rep. 716, 90 S. W. 251; Merwin, Eq. & Eq. Pl. p. 269, § 500.

therefore essentially necessary, in order to set aside the transaction, not only that a great advantage should be taken, but it must arise from some obligation in the party to make the discovery. The court will not correct a contract merely because a man of nice honor would not have entered into it; it must fall within some definition of fraud; the rule must be drawn so as not to affect the general transactions of mankind." While the foregoing language supports the proposition that, in the absence of some confidential relation, mere concealment of a fact affecting the value of real estate will not ordinarily constitute fraud upon the part of the purchaser, it does not, however, support cases citing it, to the extent of holding that the fact of concealment, together with any other representation or conduct, to induce the sale, would not constitute fraud. Indeed, taking the language of the learned jurist as a whole, it is clear that he intended to limit the doctrine to cases involving the mere fact of concealment, for later in the opinion he added that if a stranger had said to the vendor, "I will deal fairly with you," and afterward misrepresented the value, that alone would have been sufficient to render fraudulent a conveyance made in reliance thereon.

In *Smith v. Beatty*, supra, it was said that a vendee or lessee of land who knows that there is a mine on the land is not compelled to disclose that fact to the vendor or lessor; but if he is interrogated as to his knowledge of such a thing, and he then denies any knowledge of the mine, this denial will make the transaction fraudulent.

And in *Stackpole v. Hancock*, supra, it was said that, "according to the rule of the common law, a vendee who has information of a mine on the land of another, of which he is ignorant, is under no legal obligation to disclose such fact in making a purchase. Under such circumstances, the vendee may remain silent as to the real facts, and purchase; but such situation places him under legal obligation to do no act or make any representation calculated

Representations of value made by one having knowledge of the true value, to one who is ignorant thereof, and has not equal means of knowledge, are statements of fact.

Morehead v. Eades, 3 Bush, 121; *Stones v. Richmond*, 21 Mo. App. 17; *White v. Loudon*, 90 Hun, 218, 28 N. Y. Supp. 619, 36 N. Y. Supp. 1135; *Cahn v. Reid*, 18 Mo. App. 115; *Murray v. Tolman*, 162, Ill. 417, 44 N. E. 748; *Borders v. Kattleman*, 142 Ill. 96, 31 N. E. 19; *Newton v. Ganss*, 7 Tex. Civ. App. 90, 26 S. W. 81; *Miner v. Medbury*, 6 Wis. 295; *Nowlin v. Snow*, 40 Mich. 699; *Chase v. Boughton*, 93 Mich. 285, 54 N. W. 44; *Cressler v. Rees*, 27 Neb. 515, 20 Am. St. Rep. 691, 43 N. W. 363; *Jackson v. Collins*, 39 Mich. 557; *Smith v. Richards*, 13 Pet. 26, 10 L. ed. 42; *Tacoma*

to mislead the owner into the belief that there was no mine on the land. If the vendee undertakes to speak under such circumstances, he must utter the truth."

So, in *Caples v. Steel*, 7 Or. 492, 15 Mor. Min. Rep. 1, the court remarked that "a person who knows that there is a mine on the land of another, of which fact the owner is ignorant, may nevertheless buy it without disclosing his knowledge of its existence to the owner, and this will be no fraud on the part of the purchaser. . . . Where, however, one about to purchase a tract of land willfully misstates any material fact to the owner, or by any act intentionally misleads him in regard to the value of the land, and through these misrepresentations succeeds in inducing the owner to part with his property for less than its value, a court of equity will relieve him, and set aside the contract thus made as a fraudulent transaction."

b. What amounts to a fraudulent concealment or misrepresentation.

1. Value, location.

False representations by the purchaser of real estate as to the value of the real estate, coupled with false representations as to location, condition, etc., constitute fraud which will entitle the vendor to rescind a sale made in reliance upon such representations, he being ignorant with reference thereto, and the purchaser informed in that regard. *Lofgren v. Peterson*, 54 Minn. 343, 56 N. W. 44 (false representation as to value, location, and the price allowed in exchange for other real estate); *Manley v. Carl*, 20 Ohio C. C. 161 (false representations that land was worn out, in bad repair, and of "but little value"); *Masterton v. Beers*, 6 Robt. 368 (falsely asserting an event had happened, the happening of which influenced the owner in fixing the selling price); *Morgan v. Dinges*, 23 Neb. 271, 8 Am. St. Rep. 121, 36 N. W. 544 (concealing facts affecting the value, and in effect belittling the owner's interest, and falsely asserting that it had been cut off by tax sale).

v. Tacoma Light & Water Co. 17 Wash. 458, 50 Pac. 55; Cruess v. Fessler, 39 Cal. 336; McClellan v. Scott, supra, 81; Hetland v. Bilstad, 140 Iowa, 411, 118 N. W. 422; J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231, 7 A. & E. Ann. Cas. 505; Picard v. McCormick, 11 Mich. 68; Neil v. Cummings, 75 Ill. 170; Gifford v. Carvill. 29 Cal. 589, 6 Mor. Min. Rep. 558; Wall v. Stubbs, 1 Madd. Ch. 80; 1 Story, Eq. Jur. 13th ed. p. 206, note.

The oratrix had the right to rely upon the representations made to her by the defendant.

Mountain v. Day, supra; Smith v. McDonald, 139 Mich. 225, 102 N. W. 738; Endsley v. Johns, 120 Ill. 469, 60 Am. Rep.

Compare with People v. Tynon, 2 Colo. App. 131, 29 Pac. 809, which holds that a statement by a purchaser of land familiar with its value that it is worth \$12 per acre, when as a matter of fact it is worth \$25 per acre, does not constitute a fraud upon the vendor, although ignorant of the value, which will authorize him to rescind a conveyance made in reliance upon such representations, since such representations are simply statements of opinions as to the value of property considered generally with reference to its market price, as to which there might be wide differences of opinion. The court said this was a matter upon which the vendor had as full and ample knowledge or opportunity for information as had the vendee.

Where a purchaser of land, knowing that the vendor was ignorant of conditions existing in the locality of the land enhancing its value, makes false representations to the vendor as to the value of the land, these facts are sufficient to justify the court in submitting to the jury the question of fraud, in an action by the vendor against the vendee for fraudulent representations as to the value of the land. Mountain v. Day, 91 Minn. 249, 97 N. W. 883.

A cause of action against a vendee of real estate, for fraud and deceit in procuring the sale thereof, is established by showing that the vendor was a deaf mute, mentally weak and ignorant of the value of the land conveyed, and was induced to sell and convey the same in reliance upon false representations as to its value by the purchaser, who knew of the ignorance of the vendor, and made such representations with knowledge of their falsity and for the purpose of misleading and deceiving him. Culley v. Jones, 164 Ind. 168, 73 N. E. 94.

Generally, the value of real estate is a mere matter of opinion, and representations of value should be grossly and palpably false to authorize an inference of fraud therefrom which would entitle the vendor of real estate to rescind a conveyance thereof. A representation by a brother to his sister that certain land owned by her is worth \$8 per acre, when as a mat-

572, 12 N. E. 247; Clark v. Ralls (Iowa) 24 N. W. 507.

One who has made misrepresentations cannot be heard to say that the person to whom he has made them should not have believed him, and the latter cannot be charged with negligence in so doing.

Chamberslin v. Fuller, 59 Vt. 247, 9 Atl. 832; Chamberlain v. Rankin, 49 Vt. 133; Kendall v. Wilson, 41 Vt. 567; Reynell v. Sprye, 8 Hare, 222, affirmed in 21 L. J. Ch. N. S. 633; Shepherd v. Kain, 5 Barn. & Ald. 240; Robinson v. Reinhart, supra; Riley v. Bell, 120 Iowa, 618, 95 N. W. 170; Wilson v. Nichols, 72 Conn. 173, 43 Atl. 1052; Borders v. Kattleman, supra; Reid v. Flippen, 47 Ga. 273; Harvey v. Smith, 17 Ind. 272; Ladd v. Pigott, 114 Ill. 647, 2 N.

ter of fact it is worth \$10 to \$12 per acre, is not sufficient to justify an inference of fraudulent intent entitling the sister to rescind a conveyance of real estate to the brother, where her interest therein was subject to the dower right of her mother, and the brother purchased subject thereto. Marshall v. Lewis, 4 Litt. (Ky.) 140.

In Pennybacker v. Laidley, 33 W. Va. 624, 11 S. E. 39, the court said that where parties deal at arm's length, and there is no fiduciary relation between them, then the mere silence on the part of the purchaser, or failure to disclose knowledge on his part of peculiar value belonging to the property sold, would not be sufficient to set aside a sale fairly made, and which was otherwise unimpeachable. Applying this doctrine to the facts, it was held that an attorney at law who knew that a deed by a married woman of real estate worth upwards of \$200,000 was void because not acknowledged as required by law did not commit a fraud upon her by procuring from her a conveyance of such land for the sum of \$500, even though he falsely represented that her interest therein was merely her dower right, she, at the time of making the conveyance, believing she was only conveying such right in the property, although she did not think that she had any interest whatever therein, the effect of the defect in acknowledgment being a question as to which lawyers might differ.

2. Valuable minerals.

A purchaser of real estate commits a fraud upon the vendor entitling the latter to rescind a sale of the real estate, where the former, with knowledge of the existence in the land of some valuable mineral, of which the latter is ignorant, makes misrepresentations with reference thereto, or upon direct inquiry by the vendor fails to disclose same.

Thus, where the vendor of land was without knowledge of the existence of an oil well therein, and the purchaser, with knowledge in regard thereto, upon inquiry,

E. 503; *Stevens v. Allen*, 51 Kan. 144, 32 Pac. 922; *American Nat. Bank v. Hammond*, 25 Colo. 367, 55 Pac. 1090; *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. 85; *Boddy v. Henry*, 126 Iowa, 31, 101 N. W. 447; *May v. Loomis*, 140 N. C. 350, 52 S. E. 728; *Hutchinson v. Gorman*, 71 Ark. 305, 73 S. W. 793; *Western Cottage Piano & Organ Co. v. Anderson*, 45 Tex. Civ. App. 513, 101 S. W. 1061; *Hanson v. Kline*, 136 Iowa, 101, 113 N. W. 504; *Eastern Trust & Bkg. Co. v. Cunningham*, 103 Me. 455, 70 Atl. 17; *Turner v. Kuehnle*, 70 N. J. Eq. 61, 62 Atl. 327; *Handy v. Waldron*, 19 R. I. 618, 35 Atl. 884; *Smith v. Werkheiser*, 152 Mich. 177, 15 L.R.A.(N.S.) 1092, 125 Am. St. Rep. 406, 115 N. W. 964; *United States Gypsum*

Co. v. Shields (Tex. Civ. App.) 106 S. W. 724, affirmed in 101 Tex. 473, 108 S. W. 1165; *Perry v. Rogers*, 62 Neb. 898, 87 N. W. 1063; *Smith v. McDonald*, supra; *Manuel v. Shafer*, 135 Wis. 241, 115 N. W. 801; *Steen v. Weisten*, 51 Or. 473, 94 Pac. 834; *Judd v. Walker*, 215 Mo. 312, 114 S. W. 979; *Rollins v. Quimby*, 200 Mass. 162, 86 N. E. 350; *Tacoma v. Tacoma Light & Water Co.* 17 Wash. 458, 50 Pac. 55; *Buckley v. Acme Food Co.* 113 Ill. App. 210; *Wells v. Adams*, 88 Mo. App. 215; *White v. Loudon*, supra; *Miller v. John*, 111 Ill. App. 56.

Messrs. John C. Sherburne, William B. C. Stickney, and W. A. Dutton, for appellees:

If A, knowing of a mine on the estate of

informed the former that he had no such knowledge, such concealment constitutes fraud sufficient to entitle the vendor to a cancelation of the contract for the sale of the land. *Burrows v. Fitch*, 62 W. Va. 116, 57 S. E. 283.

The same result was reached in *Livingston v. Peru Iron Co.*, 2 Paige, 390, reversed on other grounds in 9 Wend. 511, where a vendee represented to the vendor that certain wild land he desired to purchase was worth nothing except for the purpose of sheep pasture, he at the time knowing of a valuable iron bed on the property, of which the vendor was ignorant.

And in *Stackpole v. Hancock*, 40 Fla. 362, 45 L.R.A. 814, 24 So. 914, where a vendee represented that he wanted the land to add to land of his own in order to complete a body of timber land, and that the land was valuable only for the timber on it, he at the time knowing of valuable deposits therein of phosphate, of which the vendor was ignorant.

Also, in *Bowman v. Bates*, 2 Bibb, 47, 4 Am. Dec. 677, 6 Mor. Min. Rep. 363, where a purchaser of land concealed from the vendor the fact that it contained valuable salt deposits, and also induced the agent of the vendor to refrain from sending him information in that regard.

So, it amounts to fraud on the part of purchasers of land at judicial sale, which will invalidate a conveyance of the property, after having discovered upon the land prior to the sale a valuable cave of great dimensions, with numerous avenues and apartments containing grand and magnificent curiosities, to secretly explore it by day and night, and carefully stop up and conceal the entrance thereto, to prevent any other prospective purchaser from gaining any knowledge of the extent and magnificence or real value of the cave, and, instead of divulging the discovery, to report that the cave on the premises was nothing but a mud hole, the report being made to persons who might be prospective bidders for the property, and to ask others who had some information as to the value of the cave to "keep mum" with 30 L.R.A.(N.S.)

reference thereto. *Merchants' Bank v. Campbell*, 75 Va. 455.

But in *Caples v. Steel*, supra, it was held not to constitute a fraud entitling the vendor of real estate to set aside a conveyance or thereof, for the vendee, who lived near the land and was acquainted with it, to refrain from informing the vendor of indications of coal in the land; and neither was he under any obligation to take the vendee to the several places where shafts had been sunk or tunnels run into the ground in prospecting for veins of coal, although he was showing the vendor over the property.

And in *Storthz v. Arnold*, 74 Ark. 68, 84 S. W. 1036, a purchaser of land residing near it, by representing to the owners, who resided at a distance therefrom, that its value was much less than it really was, was held not to have committed a fraud upon the vendors sufficient to authorize a rescission of the conveyance, although he also believed the land to contain valuable minerals, and bought it for this purpose, and concealed this fact from the vendors, who were poor ignorant negro girls, they, however, advising with their adult relatives in regard thereto.

An interesting point is made in *Williams v. Spurr*, 24 Mich. 335, 7 Mor. Min. Rep. 17, which held that it did not constitute fraud entitling the vendor of real estate to avoid a conveyance thereof, for the purchaser to fail to disclose the fact that certain indications of iron upon the property, with reference to which both parties were familiar, had been carefully analyzed and sufficiently developed by him to enable him to determine that the land possessed great value because of the existence of this mineral, he having expert knowledge along this line, an advantage not possessed by the vendor. The court reasoned that the purchaser had a perfect right, under the circumstances, to make use of his superior and scientific acquisitions, which were his own property, and not that of the vendor, and the latter had no right or claim to profit by the better opinion the purchaser might thereby be enabled to form. The

B, of which he knows B to be ignorant, should contract to purchase that estate, the contract would be good, although B should be left in ignorance of the existence of the mine.

Snell, Eq. 11th ed. 471; Story, Eq. Jur. §§ 147, 148, 205-207; Fox v. Mackreth, 2 Bro. Ch. 420; Pom. Eq. Jur. 3d ed. § 903, note; Eichelberger v. Barnitz, 1 Yeates, 307; Sugden, Vendors, p. 6; 2 Kent, Com. p. 460; Pratt Land & Improv. Co. v. McClain, 135 Ala. 452, 93 Am. St. Rep. 35, 33 So. 185; Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634; Smith v. Beatty, 37 N. C. (2 Ired. Eq.) 456, 40 Am. Dec. 435; Hoyt v. Hanbury (Shields v. Hanbury) 128 U. S. 584, 32 L. ed. 565, 9 Sup. Ct. Rep. 176; Williams v.

Spurr, 24 Mich. 335; 7 Mor. Min. Rep. 17; 2 Warvelle, Vendors, §§ 1, 845.

The law assumes that the owner has better opportunities than anyone else to know all the material facts concerning his own property, and is thus able under all ordinary circumstances to protect his own interests.

Pom. Eq. Jur. 3d ed. § 903; Robins v. Hope, 57 Cal. 493.

A vendor is presumed to know the condition of his own property, and does not occupy so favorable a position as regards statements made in negotiating a trade as the vendee, and, even in the case of a vendee, statements made to him as to value and quality are usually treated as matter of

court suggested, however, that had the purchaser been employed by the vendor to make an examination for his benefit, or had he stood in any fiduciary relation to him, or had the vendor been ignorant of any show of iron upon the lands, the case might have been different. But said that, under the circumstances, the purchaser was not only at liberty to conceal from the vendor any opinion he might have formed as to the value of the ores, but any discoveries he might have made, so long as he did nothing to prevent the vendor from making any examination he might choose to make, or from adopting his own course to obtain such information as he might choose to obtain at his own expense and in his own way.

8. Interest of vendor.

Misrepresentations to the owner of real estate as to the extent of his interest therein, he being ignorant with reference thereto, and the purchaser having knowledge thereof, constitute actionable fraud, where relied upon by the vendor. Wilson v. Nichols, 72 Conn. 173, 43 Atl. 1052; Hays v. Meyers, 32 Ky. L. Rep. 832, 17 L. R.A. (N.S.) 284, 107 S. W. 287; Obney v. Obney, 26 Pa. Super. Ct. 116. And see Morgan v. Dinges, supra.

Thus, a purchaser of the interest of certain heirs in the real estate of their ancestors, who misrepresents to them the amount of such estate, he being informed with reference thereto, and they being ignorant of the facts and relying upon his representations in regard thereto, commits a fraud entitling them to maintain an action at law for damages. Wilson v. Nichols, supra.

So, it constitutes fraud entitling the remainderman of real estate to rescind his conveyance thereof, for the purchaser, with knowledge that the life tenant was on his death bed, in reply to the remainderman's query as to the health of the life tenant, to give a misleading answer which tended to create the impression in the mind of the remainderman that the life tenant

was in ordinary good health. Hays v. Meyers, supra.

And see, to the same effect, Obney v. Obney, supra. In this case, however, the purchaser falsely represented to the remainderman that the life tenant was hale and hearty.

And see Faxon v. Baldwin, 136 Iowa, 519, 114 N. W. 40, which held it to amount to fraud invalidating a conveyance of land, for the purchaser, with knowledge that the vendor was mistaken as to the extent of her interest in the real estate she was selling, to conceal from her the true facts affecting her interest, and thereby obtain same at much less than its true value. The case, however, is disposed of on the theory of the concealment of quantity rather than facts affecting value.

4. Miscellaneous.

A misrepresentation of the value of standing timber by a purchaser thereof constitutes fraud entitling the vendor to a rescission of the conveyance, where the former, by artifice and a promise of fair dealing induces the latter to refrain from making a personal investigation of the value of the timber. Garr v. Alden, 139 Mich. 440, 102 N. W. 950.

It constitutes fraud entitling the vendor of standing timber to rescind a contract for its sale, where the purchaser, after having negotiated for its purchase, either by the acre or in gross, measured the timber, and at the time of the contract, upon inquiry of the vendor, assured him that he had not made a full measurement, but, in so far as he had, he had found the timber in quantity to be substantially as estimated by the vendor, where as a matter of fact he had made a complete measurement, and found the timber in quantity to be about double the estimate of the vendor. Prescott v. Wright, 4 Gray, 461.

A trustee to sell real estate, who purchases it himself without informing the owner that he had already sold it to another at a much higher price, is guilty of a fraud which will entitle the vendor to a

opinion, so as not to entitle him to any remedy therefor on a charge of fraud.

Lake v. Tyree, 90 Va. 719, 19 S. E. 787; Spencer v. King, 3 Ohio N. P. 270; Speiglemyer v. Crawford, 6 Paige, 254; Kennedy v. Richardson, 70 Ind. 534; Neidefer v. Chastain, 71 Ind. 363, 36 Am. Rep. 198; Byrne v. Stewart, 124 Pa. 450, 17 Atl. 19; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379; Bradbury v. Haines, 60 N. H. 123; Page v. Parker, 43 N. H. 368, 80 Am. Dec. 172, 6 Mor. Min. Rep. 544; Shanks v. Whitney, 66 Vt. 405, 29 Atl. 367.

As a general rule representations as to value, although known to be false, will not constitute fraud.

Merwin v. Arbuckle, 81 Ill. 501; Foley v.

Cowgill, 5 Blackf. 18, 32 Am. Dec. 49; Wise v. Fuller, 29 N. J. Eq. 257; Taylor v. Fleet, 4 Barb. 102; Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315.

No reliance can be placed on representations as to quality and value.

Castleberry v. Scandrett, 20 Ga. 242.

If the statements are in regard to the quality and value of land, they must, in order to be fraudulent, be shown to have been so extreme as to exclude the possibility of honest mistake or difference in opinion.

Brownlee v. Hewitt, 1 Mo. App. 360.

Statements as to the value of land by the buyer are not sufficient to entitle the seller to a cancellation of a deed.

People v. Tynon, 2 Colo. App. 131, 29

rescission of the conveyance, to the extent of holding the vendee for the amount he actually received for the property. Fox v. Mackreth, 2 Bro. Ch. 400, affirmed in 4 Bro. P. C. 258.

A purchaser of land commits a fraud upon the vendor which entitles him to rescind a conveyance thereof, where he induces the vendor to sell at a valuation to be appraised by four individuals, two each to be chosen by the vendor and the vendee, where the vendee chooses as one of the appraisers a person secretly his partner in the purchase, who conceals this fact, and uses his position as appraiser to secure the appraisal of the property at much less than its real value. Haywood v. Marsh, 6 Yerg. 39.

c. Failure to disclose.

Although not necessary to the decision, in considering this subject in Mitchell v. McDougall, 62 Ill. 498, the court remarked that where two parties between whom there existed no fiduciary relation "are treating for an estate, and the purchaser knows from surface indications or otherwise, by actual boring, there is a valuable mine upon the land, the purchaser is not bound to disclose that fact to the owner, for the means of information on the subject were as accessible to the owner of the land as to the purchaser.

In Smith v. Beatty, 37 N. C. (2 Ired. Eq.) 456, 40 Am. Dec. 435, the court refused to set aside a lease of land for mineral purposes, on the ground that the lessee had committed a fraud upon the lessor in procuring the lease with knowledge on his part of the existence upon the land of a valuable gold mine, which fact he did not disclose to the lessor.

The mere fact that the vendee of real estate knew that there was sand chrome on the vendor's land, of which fact the vendor was ignorant, and which he did not disclose, is no ground for impugning the validity of the conveyance, although it would be otherwise had the purchaser of the land, during the negotiations for the

purchase, wilfully made any misstatement concerning a material fact, thereby misleading the plaintiff and inducing him to sell at a lower price than he otherwise would. Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634.

But see Williams v. Beazley, 3 J. J. Marsh, 578, wherein, after referring to the general doctrine that mere silence by a purchaser of real estate as to some fact within his knowledge enhancing the value thereof did not constitute fraud, the court remarked that this doctrine would not justify the purchaser in withholding from the seller knowledge of any recent discovery of valuable mines of which he was informed, and of which the seller was ignorant. This doctrine was, however, not applied in that case, as it was disposed of upon another question.

In Perkins v. M'Gavock, Cooke (Tenn.) 416, the court denied relief to a party to a partition of lands, who sought relief therefrom on the ground that he had agreed to the division under the mistaken belief that a valuable spring on the property was included in the portion taken by him, which belief was induced by the acts and conduct of the defendant. The complainant, however, failed to show that the defendant knew that the spring would not be included within the lines of the property set off to complainant, or that he made any representations to that effect, and it appeared that both parties surveyed the property together, and hence one had as good an opportunity to judge of the lines thereof as had the other. The court remarked that had there been proof that defendant knew the spring would fall within his lines, and concealed this knowledge from the complainant at the time the partition was made, the complainant would have been entitled to relief; and the doctrine was asserted that "each party to a contract is bound to disclose to the other all he may know respecting the subject-matter, materially affecting a correct view of it, unless common observation would have furnished the information; not disclosing facts within the knowledge of one, and not the other, would

Pac. 809; Storthz v. Arnold, 74 Ark. 68, 84 S. W. 1036; Maney v. Porter, 3 Humph. 347; Randall v. Farnum, 52 Vt. 539.

Misrepresentations as to value are not ground for rescission.

Graham v. Pancoast, 30 Pa. 89; 2 Kent, Com. 658; Lawrence v. Gayetty, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382, 17 Mor. Min. Rep. 169.

Merely inadequacy of price is not sufficient to set aside a deed.

Harris v. Tyson, 24 Pa. 347, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634; 2 Pom. Eq. Jur. § 926; Mann v. Betterly, 21 Vt. 326; Wood v. Boynton, 64 Wis. 265, 54 Am. Rep. 610, 25 N. W. 42; Griffith v. Spratley, 1 Cox, Ch. Cas. 383.

in equity be esteemed a concealment which is both immoral and unjust."

No legal or moral obligation rests upon a purchaser of real estate to inform the seller that there is talk, or even a prospect, of a railroad coming upon or near the land, although he knows that such fact would greatly enhance the value of the land, and hence the vendor is not entitled to rescind the conveyance on the theory that the concealment of this fact constituted a fraud upon him. Burt v. Mason, 97 Mich. 127, 56 N. W. 365.

That purchasers of land were agents and in the employ of a railroad, by virtue of which fact they had knowledge that a railroad would be constructed so near the property purchased as to greatly enhance its value, which information they did not disclose to the vendor, does not constitute a fraud upon their part which will entitle the vendor to damages. Boyd v. Leith, (Tex. Civ. App.) 50 S. W. 618.

A vendee of real estate is entitled in ejectment to enforce his contract for the purchase thereof, and it is no defense that, at the time he secured the contract he knew that a large manufacturing plant intended to locate near the property, thereby greatly enhancing its value, and concealed this fact from the vendor. Guaranty, Safe Deposit, & T. Co. v. Liebold, 207 Pa. 399, 56 Atl. 951. To the same effect is Standard Steel Car Co. v. Stamm, 207 Pa. 418, 56 Atl. 954.

A vendor of real estate is not entitled to rescind a conveyance thereof on the ground of fraud practised upon her by the vendee, where the only fraud alleged was the fact that she did not know her property was rapidly increasing in value by reason of improvements in a near by city, which fact the vendee had knowledge of and concealed from her, since whatever moral or ethical duty may have rested on the vendee to furnish the vendor such information, except in special instances where a confidential relation exists, he is under no legal obligation to do so. Ordinarily, a purchaser having superior judgment of

In the absence of fraud, inadequacy of price is not a ground for rescission.

2 Warvelle, Vendors, 981; Troy Conference Academy v. Nelson, 24 Vt. 189; Kidder v. Chamberlin, 41 Vt. 62.

Representations of the vendee as to his motives in purchasing, or for limiting the amount of his offer, are not representations on which a person can reasonably rely.

Hayner v. McIlwain, 53 Ill. App. 652; Barrow v. Nashville & C. Turnp. Co. 9 Humph. 304.

The oratrix had no right to rely upon the representations made by defendant Beedle, when, by the exercise of reasonable diligence, she might have ascertained the facts.

Smith, Fr. ¶ 61; Cooley, Torts, 487; 2 Kent, Com. 485; Saunders v. Hatterman, 24

values does not commit fraud merely by purchasing without disclosing his knowledge of value. Pratt Land & Improv. Co. v. McClain, 135 Ala. 452, 93 Am. St. Rep. 35, 33 So. 185.

It is not fraud entitling the second mortgagee to affirmative relief, for the first mortgagee to purchase his interest in the real estate at a discount, without disclosing the fact that he had entered into an arrangement (not binding), for the advantageous sale of the mortgaged property. Dolman v. Nokes, 22 Beav. 402.

II. Where purchaser seeks specific performance.

There is much conflict of opinion as to the distinction between the rights of the vendor and vendee where either party is seeking a rescission of a contract for the conveyance of real estate, or damages for fraud in procuring such a contract, and where the relief sought is the specific performance of the contract.

The rule generally prevails that, in order to rescind a contract for the sale of real estate, or to recover damages for fraudulent representations in procuring same, the party seeking such relief must allege and prove all the elements which constitute the fraud. In many jurisdictions, however, it has been asserted that this rule does not apply to actions for the specific performance of a contract for the sale of real estate, and it is said that such actions are equitable in their nature and appeal to the discretion of a court of equity, and the court will not exercise its discretionary powers to compel a specific performance where the contract is at all tainted with fraud, or is unfair, or there has been a concealment of facts, together with an inadequate consideration. On the other hand, in other jurisdictions the rule prevails that it requires the same degree of proof of fraud as a defense to an action for the specific performance of a contract as is necessary for affirmative relief by way of rescission. While in still other jurisdictions a rule is asserted not as rigorous

N. C. (2 Ired. L.) 32, 37 Am. Dec. 405; Cagney v. Cuson, 77 Ind. 494; Zilke v. Woodley, 36 Wash. 84, 78 Pac. 299; Cobb v. Wright, 43 Minn. 83, 44 N. W. 662; Langdon v. Green, 49 Mo. 363; Steinmeyer v. Schroepel, 226 Ill. 9, 10 L.R.A. (N.S.) 114, 117 Am. St. Rep. 224, 80 N. E. 564; 1 Bigelow, Fr. 436.

A vendee is not bound to disclose facts which a vendor ought to know.

Eichelberger v. Barnitz, 1 Yeates, 307; McDaniels v. Bank of Rutland, 29 Vt. 230, 70 Am. Dec. 406; Durkee v. Durkee, 59 Vt. 70, 8 Atl. 490; Ripton v. McQuivey, 61 Vt. 76, 17 Atl. 44.

If, at the time the deed was delivered, the oratrix had discovered the alleged fraud, or had an opportunity to discover it, she is without remedy.

Note to McDonough v. Williams, 8 L.R.A. (N.S.) 452; 6 Cyc. Law & Proc. p. 298; Cagney v. Cuson and Cobb v. Wright,

supra; 1 Bigelow, Fr. 436; Zilke v. Woodley, supra.

Haselton, J., delivered the opinion of the court:

The oratrix in this cause, a resident of Worcester, Massachusetts, sets out in her bill as amended that, at a time named, she was the owner in fee simple of a farm in Randolph, in this state; that she purchased the farm for the use of a relative, and had herself never been in Randolph, and had never seen the farm, and was ignorant of its true value; that there was and is an undeveloped and valuable granite quarry in and under the pasture of the farm, but that at the time named she had no knowledge of such quarry. She further sets out that at the time in question, which was October 22, 1908, the defendant Beedle called upon her in Worcester, and stated that he desired to buy the pasture men-

as the latter rule, and not as liberal as the former.

It is not the purpose of this note to discuss these different rules, although cases are included which involve the right of a purchaser of real estate to the specific performance of his contract of purchase, as affected by fraudulent representations or concealment by him of facts affecting the value thereof.

In *Livingston v. Peru Iron Co.* 2 Paige, 390, this distinction was made, and it was said that the simple suppression by the buyer of a fact materially enhancing the value of the property is not sufficient to set aside the sale on the ground of fraud, but that the rule is different where the purchaser applies to a court of equity to enforce the specific performance of an agreement, as in such a case a court will not enforce a specific performance of the contract if the complainant has intentionally concealed a material fact from the adverse party, the disclosure of which would have prevented the making of the agreement.

In *Clitherall v. Ogilvie*, 1 Desauss. Eq. 250, misrepresentations as to value, where made by a purchaser of real estate who was familiar with the land, and was a man of experience, were held sufficient to justify the court in refusing to enforce a contract for sale made by the seller in reliance upon such representations, where the seller was a young man inexperienced, and had just reached his majority.

To the same effect is *Bowman v. Irons*, 2 Bibb, 78, 4 Am. Dec. 686, 13 Mor. Min. Rep. 312, wherein the court refused specifically to enforce a contract for the sale of land, where the purchaser concealed from the vendor the fact that there was salt water upon the land, which fact greatly enhanced its value, the property at the time of the contract for its sale, by reason of this fact, being actually worth £600 30 L.R.A. (N.S.)

to £1,000, whereas it was supposed to have been worth only about £100.

A purchaser of real estate living near it and possessing knowledge of its value superior to that of the vendor, who lives in another state, a considerable distance therefrom, who makes misstatements of its value and of facts affecting its value to the vendor, and thereby secures a contract for a conveyance of the property at a price much less than its value, commits a fraud upon the vendor entitling him successfully to defend a suit by the purchaser for the specific enforcement of the contract. *Swimm v. Bush*, 23 Mich. 99.

So, in *Merritt v. Wassenich*, 49 Fed. 785, the specific performance of a contract for the sale of real estate was denied the purchaser where his agent, in procuring the contract, had made false representations to the vendor as to conditions existing which would affect the value of the property, and also as to the value of the property itself, the agent residing in the locality of the property, while the vendor resided at a considerable distance therefrom.

And in *Kelley v. Sheldon*, 8 Wis. 258, the court refused specifically to enforce, in behalf of the purchaser, a contract for the sale of real estate, where the vendor resided a considerable distance therefrom, and the purchaser visited the land before buying, and at the time of the purchase misrepresented the value thereof and the value of land in that vicinity.

But specific performance will not be defeated because a purchaser of land knew that a railroad had been constructed in the vicinity of the land, and he did not inform the vendor of that fact, the latter being ignorant thereof, even though the construction of the railroad added to the value of the land. *Whitted v. Fuquay*, 127 N. C. 68, 37 S. W. 141. A. G. S.

tioned, and that she told him that she did not know the value of the pasture apart from the farm; that thereupon the defendant Beedle told her that the pasture was poor and of comparatively little value; that it adjoined some land that belonged to him, and that the only way of access to the pasture was over his land, and that it annoyed him and his family to have his land gone over for such access, and that that was the only reason why he desired to purchase the pasture. The oratrix alleges that she thereupon asked Mr. Beedle to consult with one Thayer, who was her attorney, and that Mr. Beedle thereupon called upon Thayer and represented that the pasture was worth not more than \$400, and that he was familiar with the value of lands in Randolph; that he repeated to Thayer, as his sole reason for wishing to buy the pasture, the reason which he had given to the oratrix; that Beedle further represented to Thayer that he had no plan or scheme in regard to the purchase of the land other than he had stated, and that he represented to the attorney that the fair value of the entire farm was \$4,000.

The oratrix alleges that the defendant Beedle acted in partnership with the defendant Thomas in the purchase of the farm, and in the negotiations in respect thereto, and that in those regards he was the agent of the defendant Thomas; that he made the representations stated in behalf of himself and of the defendant Thomas; and the oratrix further alleges that the defendants knew of the existence of the granite quarry, and knew that she was ignorant of its existence, that the representations made as above stated were false, and were known to the defendants to be false, and were fraudulently made for the purpose of inducing her to sell the farm to the defendants at a price much less than its true value, and for the purpose of inducing her to forbear inquiry as to the existence and value of the granite quarry, and as to the value of the farm as affected thereby; that the pasture was not, as represented, of little value, \$400, but \$15,000; that the reason of the desired purchase was not that given, but that the existence of the quarry was such reason, and that the defendants had a plan or scheme in regard to the purchase of the land, which was to develop the quarry, or to sell the farm at a great price by reason of the quarry, and that \$4,000, was not the fair value of the farm, but that it was of much greater value, of the value of \$20,000. The oratrix further alleges that she relied upon the representations made to her and her attorney, and that, in reliance thereon, and not otherwise, on the day named she

gave the defendant Beedle an option to purchase the entire farm for \$4,000, and that about a month thereafter, at the request of the defendant Beedle, and in reliance upon the representations already set forth, she deeded the farm to the defendants. The oratrix alleges that, in reliance upon the representations made, as stated, she was induced to forbear, and did forbear, inquiry as to the real value of the farm, and as to the existence or value of the quarry, and that she would not have sold the farm as she did if she had known of the existence of the quarry. The oratrix tenders the defendants the purchase price of the farm, and prays that they may be ordered to reconvey the farm free of encumbrance, upon payment to them of the purchase price. Other prayers appropriate to the special relief sought are made, and the bill contains a prayer for general relief. The defendants answering, deny the material allegations of the bill, and incorporate into their answer a demurrer to the bill. The case was heard on the demurrer, and, after allowing amendments, the court of chancery sustained the demurrer, adjudged the bill insufficient, and decreed that it be dismissed, with costs to the defendants. The oratrix appealed. Some of the allegations of the bill are made on information and belief, but there is a distinction between such allegations and allegations of information and belief merely, and the averments on information and belief are of things which may properly be pleaded in that way. So, the recitals hereinbefore made are to be taken as true. *Watkins v. Childs*, 80 Vt. 99, 66 Atl. 805, 11 A. & E. Ann. Cas. 1123; *Quinn v. Valiquette*, 80 Vt. 434, 14 L.R.A.(N.S.) 962, 68 Atl. 515.

In an early Pennsylvania case cited by the defendants, it is said that "concealment on the part of the vendee is a novel objection." But the question presented has, in its various aspects, been discussed for many centuries. Cicero puts the case of one who buys for a trifle gold which the seller, in his ignorance, supposed to be brass, and he moots similar questions regarding sales of personal property and of real estate as well. But we pass over the discussions of the ethical writers and the civilians,—discussions which are in some cases luminous and in others obscure. It has long been settled in common-law jurisdictions that, in general, the mere failure of a buyer to disclose something extrinsic or intrinsic to the thing bought, known to him, and not known to the seller, is not in legal sense fraud. *Fox v. Mackreth*, 2 Bro. Ch. 420; *Harris v. Tyson*, 24 Pa. 347, 64 Am. Dec. 661, 14 Mor.

Min. Rep. 634; *Smith v. Beatty*, 37 N. C. (2 Ired. Eq.) 456, 40 Am. Dec. 435.

In *Laidlaw v. Organ*, 2 Wheat. 178, 4 L. ed. 214, it appeared that in February, 1815, the defendant got, through private sources, news of our treaty of peace with England, of which the plaintiffs were ignorant, and that, without disclosing the news, the defendant bought of the plaintiffs 111 hogshead of tobacco, the price of which was greatly enhanced by news of the peace. It appeared that the plaintiffs inquired, in the course of the transaction, if there was any news calculated to enhance the value of tobacco, and that no reply was made to their inquiry. In the district court it was held, as matter of law, that there could be no recovery. Chief Justice Marshall in delivering the opinion of the Supreme Court said: "The question in this case is whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor. The court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits where the means of intelligence are equally accessible to both parties. But, at the same time, each party must take care not to say or do anything tending to impose upon the other." In accordance with these views the court held that in the circumstances disclosed it was a question of fact whether any imposition was practised by the vendee upon the vendor, and so the judgment was reversed and the cause remanded. This case arose in Louisiana, and in view of the eminence of the reporter, the fact should be noted that he puts at the head of the case the designation "local law." But the opinion of the court is based on no principles peculiar to the civil law there prevailing, and indeed makes no reference to the civil law. The reversal in that case was, in view of the silence of the party benefited by the contract, an extreme course. It is so commented on in *Lapish v. Wells*, 6 Me. 188, and in *Bayard v. Shunk*, 1 Watts & S. 92, 37 Am. Dec. 441.

In *Paddock v. Strobridge*, 29 Vt. 470, there is a *dictum* by Chief Judge Redfield to the effect that the disposition of the case was unwarranted. The *Paddock* Case, however, fully recognizes the doctrine of negative deceit, and that there is a wide field for the application of the principle that in some circumstances the suppression of a truth may be equivalent to the assertion of a falsehood. It may be noted that we have it upon unimpeachable authority that Judge Redfield's opinion in *Paddock v.* 30 L.R.A. (N.S.)

Strobridge, supra, was prepared by way of dissent, and that by mistake it happened to get printed as the opinion of the court. R. Dig. 125, Vt. Dig. Advance Sheets, 445. However, this court has since referred to the case as a leading one in this state. *Maynard v. Maynard*, 49 Vt. 297, 300. In *Etting v. Bank of United States*, 11 Wheat. 59, 6 L. ed. 419, a case which went to the Supreme Court from the circuit court of Maryland, *Laidlaw v. Organ*, supra, was cited in argument, and the effect of the concealment or suppression of material facts by one party to a contract was the main question under discussion; but, as the justices were equally divided in regard to the aspect of the question presented in the case, the opinion contributes nothing to the subject, and the case is of interest chiefly for the abstract of the arguments of counsel, of Mr. Webster and Mr. Taney on the one side, and of Mr. Wirt and Mr. Emmett on the other. *Laidlaw v. Organ* had to do with extrinsic circumstances affecting the market value of the thing purchased. The matter of something intrinsic in the thing itself is here involved, and in a case decided a few years later than *Laidlaw v. Organ*, Lord Eldon, in a carefully considered case, gave expression to the law here applicable. He said: "If an estate is offered for sale, and I treat for it knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge. But a very little is sufficient to affect the application of that principle. If a word, if a single word, be dropped which tends to mislead the vendor, that principle will not be allowed to operate." *Turner v. Harvey*, Jacob, 169, 178.

In *Walters v. Morgan*, 3 De G. F. & J. 718, Lord Chancellor Campbell expressed his full concurrence in the doctrine of *Turner v. Harvey*, and said that not only a single word but "a nod or a wink or a shake, of the head, or a smile from the purchaser," might defeat the application of the principle that mere reticence on the part of a purchaser does not in law amount to fraud. In *Livingston v. Peru Iron Co.* 2 Paige, 390, Chancellor Walworth expresses his approval of what was said by Lord Eldon in *Turner v. Harvey*, and applies the doctrine in the case before him, which was this: One of the defendants had found out that there was a valuable mine on lands of Livingston, which were remote from the latter's residence. Thereupon, he represented to Livingston that the land was of no value except for a sheep pasture. By these representations Livingston was thrown off his guard, and contracted to sell the prem-

ises in question at the usual price of pasture land in the region where it was located, and did not inquire as to its true value, although he had an agent near the premises. It was held that the purchaser was guilty of fraudulent deception which equity would take notice of and act upon. The case, however, turned upon another point. The doctrine with respect to the legal duty of a vendee to refrain from deceitful statements with respect to the property of the vendor is firmly maintained in well-considered cases. *Haygarth v. Wearing*, L. R. 12 Eq. 320; *Mountain v. Day*, 91 Minn. 249, 97 N. W. 883. In the latter case the syllabus by the court is this: "An action will lie for fraudulent representations made by the prospective purchaser of land as to its value and condition; the land being at a distance from the place of purchase, and the vendor being ignorant as to its condition and value, and relying upon the truthfulness of such representations."

We have thus far referred to no cases in which a confidential relation existed, but only to cases in which it was deemed that the parties dealt at arm's length. In *Mallory v. Leach*, 35 Vt. 156, 82 Am. Dec. 625, it appeared that the defendant desired to purchase certain stock of the plaintiff, a woman, that he knew that she was ignorant of its value, and that, for the purpose of getting her stock at less than its value, he told her a half truth of a damaging character about the stock, and suppressed facts which necessarily qualified the effect of what he did disclose, and that so he succeeded in purchasing the stock at a price much less than its true value. It was held by the supreme court that there were confidential relations between the parties, and that, in view of such relations, the course of the defendant was fraudulent and actionable. It is difficult to say from the charge of Judge Pierpoint, who tried the case below, and whose charge was sustained, that the existence of confidential relations, in any proper sense, was made essential to recovery by the plaintiff, and the opinion of the supreme court, written by Judge Aldis, contains a *dictum* in accordance with which recovery might have been had irrespective of the existence of a confidential relation. Bigelow in his work on *Frauds* (vol. 1, pp. 504, 505) states this case in his text without reference to the evidence of a confidential relation, but in a note refers to that matter, and says: "The result must have been the same without that."

Unfairness and fraud may be collected from a variety of circumstances, and it is ordinarily enough to establish fraud that a vendee has actively attempted to ensnare, and has in fact ensnared, the vendor into

the making of an unconscionable contract. Where concealment of an essential thing is effected by an industrious course of misleading and deceptive talk or conduct, there is fraud against which equity will relieve. The law distinguishes between passive concealment and active concealment. Where one has full information, and represents that he has, if he discloses a part of his information only, and by words or conduct leads the one with whom he contracts to believe that he has made a full disclosure, and does this with intent to deceive and overreach, and to prevent investigation, he is guilty of fraud against which equity will relieve, if his words and conduct, in consequence of reliance upon them bring about the result which he desires. The jurisdiction of courts of equity to relieve against active and effective fraud is so essential to the administration of justice therein that such courts often, indeed to use the language of Chief Justice Crew, as reported by Sir William Jones, will "take hold of a twig or twine thread to uphold it." We have in this state several cases to the effect that, even where there is no confidential relation, one party to a sale may, without direct misrepresentation, be guilty of fraud by means of words or acts calculated and intended to produce a false impression, and which do in fact deceive and induce the sale. *Howard v. Gould*, 28 Vt. 523, 67 Am. Dec. 728; *Graham v. Stiles*, 38 Vt. 578; *Chamberlin v. Fuller*, 59 Vt. 247, 257, 9 Atl. 832.

In the case before us the positive representation mainly relied upon as fraudulent related to value. Such a representation is ordinarily a matter of opinion, and is not deemed fraudulent. But it may be otherwise. If it is made as an assertion of fact, and with the purpose that it shall be so received, and it is so received, it may amount to a fraud. A statement of value may be of such a character, may be so made and intended, and so received, as to constitute fundamental misrepresentation. *Belka v. Allen*, 82 Vt. 456, 74 Atl. 91; *Stone v. Robie*, 66 Vt. 245, 29 Atl. 257; *Howard v. Edgell*, 17 Vt. 9; *Brown v. Sawyer*, 1 Aik. (Vt.) 130; *Hetland v. Bilstad*, 140 Iowa, 411, 118 N. W. 422; 2 Cooley, *Torts*, 3d ed. 922. Here some of the allegations are that the defendant Beedle represented that the pasture in question was worth no more than \$400, and the entire farm not more than \$4,000, that he lived near the land in question, and represented that he knew the value of lands in that vicinity, whereas in fact the so-called pasture, the thing coveted, was worth thirty or forty times the value stated, because of the undeveloped granite quarry of which the defendants had knowl-

edge, and of which the oratrix, who had never seen the farm, was, to the knowledge of the defendants ignorant. The bill, too, sets out that the representations as to value, accompanied with false representations as to the accessibility of the land and the object of the purchase, calculated to allay suspicion and to ward off inquiry and investigation; and here the statements of value, put forth as based on knowledge and accompanied with the talk set forth at length in the earlier part of this opinion, were fraudulent representations. They were calculated and intended to impose upon the oratrix, and to enforce the conviction that what was in fact a valuable tract of quarry land was a mere pasture, and a poor pasture at that, and to lead the oratrix into selling something which she did not know she was selling.

Pollock in his work on Contracts, after treating of misrepresentation and fraud in ordinary cases of sales, adds: "All this proceeds on the supposition that the vendor's property and title are best known to himself, as almost always is the case. But the position of the parties may be reversed. A person who has become the owner of a property he knows very little about may sell it to a person well acquainted with it, and in that case a material misrepresentation by the purchaser makes the contract, and even an executed conveyance pursuant to it, voidable at the vendor's option." Williston's *Wald's Pollock on Contracts*, 670. The case cited as authority for this proposition is one in which the false representations of the purchaser related to the question of value.

It is urged in behalf of the defendant that it does not appear from the allegations of the bill how the oratrix was in any way hindered or prevented from ascertaining the existence of the quarry and the value of the pasture and the farm. The allegation in the bill is that the oratrix was induced to forbear inquiry in those respects, and the bill sets out with sufficient particularity how she was so induced.

It is further urged that since the conveyance was made in pursuance of an option, and since the oratrix forbore investigation in the interval between the option and the deed, she is in no position to maintain the bill. But the bill alleges that the same fraudulent representations and active concealment on which the oratrix relied in giving the option, and which induced her to give the option, were relied on by her in giving the deed, and induced her to forbear investigation before so doing.

It is made a ground of demurrer that the bill is inconsistent in that it alleges both that the granite quarry is of great value,

and also that it is undeveloped; and it is said that there can be no such thing as an undeveloped quarry of great value, and that the court should take judicial notice that such is the fact; and Webster's definition of a quarry, to the effect that a quarry is a place whence stone is taken, is quoted. But in the bill the word "quarry" is modified by the word "undeveloped," and the phrase "an undeveloped granite quarry" naturally signifies a place from which granite may be taken. An undeveloped quarry is like an undeveloped mine, and in the cases cited on both sides the courts talk very much in the language of the bill. There are no verbal difficulties here.

It is urged that the oratrix ought not to have relied upon the representations of the defendants, though such representations were fraudulent, because actual knowledge of their falsity could have been obtained by due diligence and inquiry, and that to afford the oratrix relief would encourage culpable negligence. The Vermont cases relied on to support this claim are the following: *McDaniels v. Bank of Rutland*, 29 Vt. 230, 70 Am. Dec. 406; *Durkee v. Durkee*, 59 Vt. 70, 8 Atl. 490; *Ripton v. McQuivey*, 61 Vt. 76, 17 Atl. 44. But these were cases where there was no fraud or circumvention, and it is not for courts of equity to relieve a party from the mere results of his own carelessness, negligence, or laches not induced by the conduct of the other party. *Hyde v. Hyde*, 50 Vt. 301; *Freeman v. Holt*, 51 Vt. 538; *Francis v. Parks*, 55 Vt. 80; *Bishop v. Allen*, 55 Vt. 423.

But if a party is led to forbear inquiry by false representation as to matters material, and not collateral, intentionally made with knowledge of their falsity for the purpose of inducing such forbearance, or by fraudulent artifice or deceitful maneuvers resorted to with the like knowledge and purpose, upon which he in fact relies, the question of whether a careful and prudent man would have been misled in like circumstances is immaterial. *Chamberlin v. Fuller*, 59 Vt. 247, 256, 9 Atl. 832; *Chamberlain v. Rankin*, 49 Vt. 133; *Delaney v. Brown*, 72 Vt. 344, 47 Atl. 1067; *Kendall v. Wilson*, 41 Vt. 567. The case last cited grew out of a transaction the memory of which is still green in a section of the state. The plaintiffs therein bought a machine called "Leache's curious invention called perpetual motion," which was in fact a machine operated by deftly concealed clockwork. It was held that the plaintiffs were not as matter of law chargeable with knowledge that they were buying a humbug. "For," said Judge Steele in delivering the opinion of the court, "the law will

afford relief even to the simple and credulous who have been duped by art and falsehood." Still more emphatic is the language of Judge Taft, speaking for the court, in *Chamberlin v. Fuller*, above cited.

The doctrine of the cases just above cited is now clearly discerned, though there has been some confusion about it. Bigelow, after adverting to this confusion, says: "It matters not, it has well been declared, that a person misled may be said in some loose sense to have been negligent (in reality negligence is beside the case where the misrepresentation was calculated to mislead, and did mislead); for it is not just that a man who has deceived another should be permitted to say to him. 'You ought not to have believed or trusted me,' or 'You were yourself guilty of negligence.'" "Nor," continues this textwriter, "is the rule applicable merely to cases which in some respects stand upon special grounds, *e. g.*, suits for specific performance; it applies to rescission equally, and indeed is a general rule." 1 Bigelow, Fr. 524, 525. The doctrine inconsistent with that which has been declared by this court is said by the writer last quoted to be dead in England, if it ever existed there, and to be moribund in this country. His exact words are not quoted, for they are not at the moment of writing at hand.

So, Sir Frederick Pollock says: "In the case of active misrepresentation, it is no answer, in proceedings either for damages or for setting aside the contract, to say that the party complaining of the misrepresentation had the means of making inquiries,"—and he quotes the principle that "no man can complain that another has too implicitly relied on the truth of what he has himself stated." Williston's *Wald's Pollock on Contracts*, 693, 694. In a House of Lords case this principle was thus declared by Lord Chancellor Chelmsford: "When once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it, to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.'" *Central R. Co. v. Kisch*, L. R. 2 H. L. 99, 120, 6 Eng. Rul. Cas. 759. This is the expression of no obscurantist. The bare statement proves itself. It expresses a doctrine the soundness of which the sages and votaries of the common law per- 30 L.R.A. (N.S.)

ceive, not always altogether clearly, but with a vision which sufficed. Any different doctrine carried to its logical conclusion would facilitate transactions in gold bricks, salted mines, bogus diamonds as real, facsimiles as originals, and would permit a variety of things destructive of commercial integrity. The maxim which requires a party to a trade to look out for himself has a wise and broad application. We would not traduce it, or deny to it the legitimate application to which it is entitled. But it cannot be permitted that that maxim should be so construed as to portray the law in caricature, and to render it an instrument of craft, a tool of fraud, a tailman of injustice, a key by the use of which one man may plunder another. For the commerce of the world is promoted, not by cunning, but by such wisdom as is consistent with that good faith which underlies everything in the social order that has stability.

Whether in a given case a party did rely upon the misrepresentations of another, instead of upon his own judgment and knowledge, or means of knowledge, is a question of fact to be determined upon a hearing; and where the allegations are such as are here made, a defendant cannot prevail on demurrer. *Whitton v. Goddard*, 36 Vt. 730; *Hoyt v. Hanbury* (*Shields v. Hanbury*) 128 U. S. 584, 32 L. ed. 565, 9 Sup. Ct. Rep. 176.

The result is that the decree sustaining the demurrer and adjudging the bill insufficient is reversed, and the case is remanded.

INDIANA SUPREME COURT.

DANIEL P. BALDWIN, Appt.,

v.

MATTHEW MORONEY et al.

(173 Ind. 574, 91 N. E. 3.)

Tax — drainage assessment.

1. The making of assessments for drainage improvements is an exercise of the power of taxation.

Same — displacing mortgage lien.

2. A statute making a drainage assessment take priority over existing mortgages,

Note. — Superiority of lien of local assessment over prior lien.

This note is supplementary to a note to *Seattle v. Hill*, 35 L.R.A. 372, having the same title. It deals with local assessments as distinct from general taxes. The question as to the rights and duties as between vendor and vendee in paying assessments is without the scope of the note, and is not discussed. As to whether life tenant or remainderman must bear the cost of a public improvement, see note to *Meador v. Goldsmith*, 10 L.R.A. (N.S.) 342. As to effect upon an assessment levied for

without notice to the mortgagees out of possession, does not deprive them of their property without due process of law.

Same — obligation of contract.

3. The obligation of the contract of a mortgagee is not impaired by the passage of a drainage law providing that the assessment upon the property shall have priority over the mortgage, without requiring notice of the assessment to be given the mortgagee.

Appeal — cross errors — consideration.

4. Cross assignments of error will not be considered where appellees ask an affirmance of the judgment, which can be done without considering them.

(March 9, 1910.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Cass County in defendants' favor in a suit to foreclose certain real-estate mortgages and to enjoin the assertion against the real estate described

public improvements, of the subsequent condemnation of the property for other city purposes, see *Re Spring Valley Park*, 15 L.R.A.(N.S.) 834. As to personal liability of the property owner to pay assessments for local improvements, see note to *Brookings v. Natwick*, 18 L.R.A.(N.S.) 1259.

Power of legislature to make special assessments superior to other prior liens.

Both taxes and special assessments for local improvements are levied under the sovereign power of the state, and under the theory that they are for the general good. The same means may be given for their enforcement. As, therefore, the legislature has the constitutional power to declare that taxes shall be a lien on land prior to all other liens, so it has the power to declare that special assessments shall be a lien prior to all other liens of a private nature, even though they may have attached before the assessment was made.

Thus, the legislature may make the lien of a special assessment superior to a prior mortgage. *Wilson v. California Bank*, 121 Cal. 630, 54 Pac. 119; *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *German Sav. & L. Soc. v. Ramish*, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020; *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81; *State v. Kilburn*, 81 Conn. 9, 129 Am. St. Rep. 205, 69 Atl. 1028; *Lybass v. Ft. Myers*, 56 Fla. 817, 47 So. 346 (given after the statute went into effect); *State ex rel. Ely v. Aetna L. Ins. Co.* 117 Ind. 251, 20 N. E. 144; *Pierce v. Aetna L. Ins. Co.* 131 Ind. 284, 31 N. E. 68 (*dictum*); *Murphy v. Beard*, 138 Ind. 560, 38 N. E. 33; *Bloomington v. Phelps*, 149 Ind. 596, 49 N. E. 581; *O'Brien v. Bradley*, 28 Ind. App. 487, 61 N. E. 942; *Dressman v. Farmers' & T. Nat. Bank*, 100 Ky. 571, 36 L.R.A. 121, 38 S. W. 1052; *Re New Orleans Draining Co.* 11 La. Ann. 338; *Ranney v. Burthe*, 15 La. Ann. 343; *Auditor* 30 L.R.A.(N.S.)

therein of any lien for certain ditch assessments. Affirmed.

The facts are stated in the opinion.

Messrs. George A. Gamble, and McConnell, Jenkines, Jenkines, & Stuart for appellant.

Messrs. Myers & Yarlott for appellees.

Monks, J., delivered the opinion of the court:

Suit by appellant against appellees for strict foreclosure of certain mortgages, and that they be forever barred and enjoined from asserting any lien on the real estate described in said mortgages for a ditch assessment against the same, under the ditch law approved March 7, 1891 (Acts 1891, pp. 455-467), being §§ 5690-5717, Burns's Anno. Stat. 1901. After issues were formed, the case was tried by the court, a special finding of facts made, and conclusions of law stated thereon in favor of

General v. Bishop, 161 Mich. 117, 125 N. W. 716; *Morey v. Duluth*, 75 Minn. 221, 77 N. W. 829; *Howell v. Essex County Road Board*, 32 N. J. Eq. 672; *Hudson Trust & Sav. Inst. v. Carr-Curran Paper-Mills Co.* 58 N. J. Eq. 59, 43 Atl. 418; *Shaler v. McAleese*, 73 N. J. Eq. 536, 68 Atl. 416; *Clifton v. Cincinnati*, 5 Ohio Dec. Reprint, 570 (purchase money mortgages); *Donohue v. Brotherton*, 7 Ohio N. P. 367; *Toledo use of Horan v. Barnes*, 8 Ohio C. C. 684; *Bellevue v. Umstead*, 38 Pa. Super. Ct. 116; *Kirby v. Waterman*, 17 S. D. 319, 96 N. W. 129; *Richmond v. Williams*, 102 Va. 733, 47 S. E. 844.

Or to a prior mechanics' lien. *Pennock v. Hoover*, 5 Rawle, 291; *Pittsburg's Appeal*, 70 Pa. 142.

Or to a homestead. *Nevin v. Allen*, 15 Ky. L. Rep. 836, 26 S. W. 180.

Under a constitutional provision that the school fund shall "remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public, or common, schools," and that "no law shall ever be made authorizing said fund to be diverted to any other use," the legislature cannot constitutionally authorize a municipality to make a special assessment a lien superior to that of a mortgage in which such school fund had been invested; at least, it will not be deemed that the municipality has been given such power, without a clear and unmistakable expression of the legislative will: and such power will not be deemed to be given by a charter provision that assessment of benefits "shall be a lien upon the land on account of which they were assessed." *State v. Kilburn*, *supra*.

—by statute subsequent to creation of prior lien.

It is within the power of the legislature not only to make the lien of a special assessment prior to mortgages given after

appellees, and that said ditch tax was a prior and paramount lien to the lien of said mortgages, and rendered judgment against appellant.

It appears from the special finding that a proceeding was commenced before the board of commissioners of Cass county in 1893, under the drainage law approved March 7, 1891, known as the "5-mile drainage law" (Acts 1891, pp. 455-467; §§ 5690-5717, Burns's 1901). Such proceedings were had that said drain was established by said board of commissioners in all respects as provided in said act, and the same was constructed pursuant to and in conformity with said proceedings and as required by said act. That before the enactment of said "5-mile drainage law" of 1891, and before said ditch proceedings were commenced, appellant was the owner of two mortgages executed by one Hale and his wife on certain real estate in said Cass county, owned by

said Hale, to secure his promissory notes calling for \$7,500. The real estate described in said mortgages was assessed with benefits for the construction of said ditch. All the owners of the lots and parcels of land affected by said proposed drain were notified of said proceedings in all respects as required by said drainage law. No summons or other process was served on appellant notifying him of such proceedings, nor was he named as a party thereto, but his mortgagor, Hale, who was then in possession of the mortgaged premises, as owner thereof, after he was served with notice of said proceedings and before the day fixed for the hearing of said petition and report, personally notified appellant of the pendency of said ditch proceeding, and that said real estate was assessed with benefits. Said appellant was at that time, and ever since has been, a resident of said Cass county, and has, at all times since said notice was given

the passage of a statute giving such liens superiority over prior mortgages, but even to give such liens priority over mortgages given before the passage of such a statute. *German Sav. & L. Soc. v. Ramish and Murphy v. Beard*, supra.

And such act of the legislature is not open to the objection that it impairs the obligation of a contract. *German Sav. & L. Soc. v. Ramish*, supra.

Nor is it in violation of the 14th Amendment to the Constitution of the United States. *Ibid*.

In discussing its reasons for this conclusion, the court, in *Murphy v. Beard*, supra, said: "The ownership in fee of the the real estate affected by such uses, while a vested right, is not more sacred than the right of the public to appropriate such real estat to such uses. When ownership is acquired, it is necessarily with the implied understanding that it is subject to this paramount right of the public. . . .

Treating the appellant's security as a vested right, we may ask, Is it more potent against the rights of the public than the ownership of the land itself? Certainly not." And, again, the court said: "If the gravel road enhanced the value of the security, and it is upon the presumption that it did that the assessment was authorized and was made, it is only equitable to charge the assessment against the land senior to the mortgage; and if the power to do so were denied, the necessary functions of government exercised under the powers of eminent domain could be obstructed and practically defeated by the execution of liens by the property owner opposed to public improvements."

It was held in *Sinking Fund Comrs. v. Linden Twp.* 40 N. J. Eq. 27, that a statute allowing a reassessment because a former one was defective, and providing that from and after the filing of the map and report on such reassessment, the assessments shall be and remain a lien upon each lot of prop-

erty assessed, until they shall be paid and satisfied notwithstanding any devise, descent, or alienation thereof, or any judgment, mortgage, or encumbrance thereon, is constitutional; and assessments made on such reassessment take precedence over a mortgage given after the original defective assessment, but before the enactment of the statute permitting the reassessment.

The legislature may constitutionally make the property of a street car company liable to a lien for the cost of paving between its tracks, and make such lien superior to a mortgage given, prior to the passage of the statute, where the Constitution provided that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof." *Storrie v. Houston City Street R. Co.* 92 Tex. 129, 44 L.R.A. 716, 46 S. W. 796.

Where statute does not expressly give preference over pre-existing liens.

—in general.

In the absence of statutory authority on the subject, the lien of a special assessment will not be superior to that of a lien of a private nature prior in time. *State ex rel. Ely v. Aetna L. Ins. Co.* 117 Ind. 252, 20 N. E. 144; *Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700; *Pierce v. Aetna L. Ins. Co.* 131 Ind. 284, 31 N. E. 68; *State ex rel. Vawter v. Loveless*, 133 Ind. 600, 33 N. E. 622; *Morey v. Duluth*, 75 Minn. 221, 77 N. W. 829; *Lincoln Street R. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802; *Shaler v. McAleese*, 73 N. J. Eq. 536, 68 Atl. 416; *Bellevue v. Umstead*, supra.

But the intention of the lawmaking power to give priority to a municipal lien for local improvements over contract liens of individuals may be implied from the lan-

him by said Hale, had actual notice and knowledge of said proceedings and of the assessment of benefits against said land. Bonds were sold on the strength of said assessment made for the purpose of paying for the construction of said drain, and the same was finally constructed. Afterwards, to wit, in March, 1905, a judgment and decree of foreclosure of said mortgages in favor of appellant was rendered against said Hale and wife, and afterwards, on June 7, 1905, appellant purchased said land at sheriff's sale under said decree, and on the expiration of one year from said day of sale, received a sheriff's deed therefor. Afterwards this action was brought by appellant for a strict foreclosure of said mortgages against appellees.

Appellant insists that "as said act of 1891 provides that assessments upon real estate made to pay for the construction of a ditch or drain shall be a first and paramount lien upon the real estate assessed, and does not provide in any manner for notice of any kind to be given to the holder and owners of mortgages in existence and of record at the time such ditch law went into force, it is unconstitutional and void, because in conflict with § 24, art. 1, of the Constitution of Indiana, and with § 1, art. 14, of the Constitution of the United States, which provide that no person shall be deprived of his property without due process of law, and because such statute, as applied to mortgage contracts executed and of record prior to its enactment, impairs the obligation of

guage of the law creating the lien, and from the nature and purpose of the lien. *Lybass v. Ft. Myers*, 56 Fla. 817, 47 So. 346; *State ex rel. Ely v. Aetna L. Ins. Co.* 117 Ind. 251, 20 N. E. 144; *Morey v. Duluth*, supra (even when the statute does not specifically declare the lien of the assessment paramount).

And it has been held that, to give the lien of the assessment priority, the statute need not expressly declare that the lien of the assessment is paramount to all other liens, if the intent of the legislature to make it so may be gathered from the various provisions read together. *Morey v. Duluth*, supra; *Richmond v. Williams*, 102 Va. 733, 47 S. E. 844.

—particular statutes held to make assessment lien superior.

The intent of the legislature to make the lien of a special assessment for sidewalks in a municipality superior to prior liens of a private character attaching subsequent to the passage of the statute may be inferred from a provision in a municipal charter that, upon a lotowner failing to construct or repair a sidewalk in front of his lot, the municipality may do so, and make the cost a lien on the lot, and from a general law providing that in case the lotowner fails to construct or repair the sidewalk, the municipality "may have the same done, which shall be a lien against said lots, which lien may be enforced in the manner prescribed," etc. *Lybass v. Ft. Myers*, supra.

A special assessment is made superior to a prior mortgage by a statute declaring that "such assessment . . . shall be a lien upon the property so assessed, . . . and shall have precedence over all other liens excepting taxes, and shall not be defeated by any judicial sale." *Bloomington v. Phelps*, 149 Ind. 596, 49 N. E. 581 (terms of statute given in *O'Brien v. Bradley*, 28 Ind. App. 487, 61 N. E. 942).

Where, by the terms of its charter, a street railway company is required to pave the space between its tracks, the lien of a special assessment to pay for such paving 30 L.R.A. (N.S.)

is superior to the lien of a mortgage given before the assessment. *Cambria Iron Co. v. Union Trust Co.* (*Union Trust Co. v. Richmond City R. Co.*) 154 Ind. 291, 48 L.R.A. 41, 55 N. E. 745, 56 N. E. 665. The court in the above case said: "The right the appellants seek to enforce is more than a general claim for money, for it is a right blended with the right of the mortgagor to occupy and use the streets, and one which the mortgagees were required to take notice of and estimate in the acceptance of their mortgage. The liability does not rest upon a claim against the mortgagor, but upon the duty which arises out of the occupancy of the streets."

Where it is declared by statute that the lien of a sewer assessment shall remain a lien until fully paid, and shall have precedence over all other liens except taxes, a sale under a precept for the collection of the assessment confers upon the purchaser an incipient title, subject to the statutory right of the owner, or the mortgagee for him, to redeem within the year; and upon execution of the treasurer's deed, the holder thereof will take an absolute estate in fee simple, freed from the right of redemption, his title being unimpeachable and unencumbered. *O'Brien v. Bradley*, supra.

A lien for a street assessment is by necessary implication given priority in rank to an antecedent mortgage on the property, by a city charter authorizing such assessments, and providing that "a lien is hereby given on the lots, . . . which costs and expenses may be listed and collected as other taxes," although such charter does not expressly declare that they shall be prior in rank to other liens. *Dressman v. Farmers' & T. Nat. Bank*, 100 Ky. 571, 36 L.R.A. 121, 38 S. W. 1052, followed in *Dressman v. Simonin*, 104 Ky. 693, 47 S. W. 767, in the case of a sewer assessment.

The lien of a special assessment is made superior to a mortgage prior in time, by a statute providing that the municipal lien shall remain a lien until fully paid and satisfied. *Germania Sav. Bank v. Miller*, 31 Pittsb. L. J. N. S. 16; *Richmond v. Williams*, supra.

such mortgage contract, and denies to the owner of such mortgage contract due process of law." Appellant also insists that "laws enacted by the legislature for such public improvements as the construction of public highways or drains is not an exercise of the power of taxation."

As to the last contention, it has been held by many courts of last resort that the legislature, in enacting such laws, exercises the sovereign power of taxation. *Cooley, Taxn.* 2d ed. pp. 1181-1183; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 176-178, 41 L. ed. 369, 394, 395, 17 Sup. Ct. Rep. 56, and cases cited; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625, and cases cited; *Voris v. Pittsburgh Plate Glass Co.* 163 Ind. 599-609, 70

N. E. 249, and cases cited; *State ex rel. Hendricks v. Marion County*, 170 Ind. 595, 604, 605, 609-617, 82 N. E. 482, and cases cited; *State ex rel. Geake v. Fox*, 158 Ind. 126, 135, 136, 56 L.R.A. 893, 63 N. E. 19.

Section 3 of said act of 1891, being § 5692, *Burns's Anno. Stat.* 1901, requires that the viewers shall "make and return a schedule of all the lots and lands and private or corporate roads or railroads that will be benefited or damaged by the improvement, and the damage or benefit to each tract of land of 40 acres or less," and that they shall show the "name of the owner of each tract of land as the same appears on the tax duplicate at the time." Section 4 of said act of 1891, being § 5693, *Burns's* 1901, provides that, after the filing of the

The same thing is true of a judgment. *Pottsville v. Knecht*, 1 Leg. Rec. Rep. 45, cited in 36 *Century Dig.* col. 1622.

The lien of a special assessment takes precedence over that of a prior mortgage, under a statute providing that assessment shall be a lien from the time of confirmation until paid, notwithstanding any devise, descent, alienation, mortgage, or other encumbrances thereof. *Hand v. Startup*, 38 N. J. Eq. 115, affirmed on the opinion of the chancellor, in 41 N. J. Eq. 663, 7 Atl. 565.

The lien of a special assessment is made paramount to all pre-existing mortgages and encumbrances, by a statute providing that "all such assessments . . . shall be and become a first and paramount lien upon the land and real estate so assessed, from the date of confirmation," especially in view of a subsequent specific provision for the redemption of the land sold under the assessment, by any mortgagee or any person having an estate therein. *Shaler v. McAleese*, 73 N. J. Eq. 536, 68 Atl. 416.

The lien of a special assessment is given precedence over a prior mortgage, by a statute allowing the municipal authorities to place the unpaid assessment upon the grand duplicate to be collected as other taxes are collected. *Clifton v. Cincinnati*, 5 Ohio Dec. Reprint, 570 (purchase money mortgage); *Moerlein Brewing Co. v. Westmeier*, 4 Ohio C. C. 296. But see *Pierce v. Aetna L. Ins. Co. infra*, under subtitle, "Particular statutes held not to make assessment lien superior."

Special assessments are given precedence over prior mechanics' liens, by a statute declaring that the lien of such assessments shall have priority to, and shall be satisfied before, any recognizance, mortgage, debt, obligation, or responsibility which said real estate may become charged with or liable to. *Pennock v. Hoover*, 5 Rawle, 291; *Harvey v. South Chester*, 99 Pa. 565.

Under a statute providing that "the assessments authorized by this act shall be liens upon the properties assessed from the commencement of the improvements for which they were made, and shall . . . continue liens for five years. . . . If, on 30 L.R.A. (N.S.)

any sheriff's sale or other judicial sale, enough be not realized to pay off the lien, it shall continue to be a lien until the whole amount with the costs be paid in full," the lien of the assessment is superior to that of prior liens, and must be first satisfied; and if the amount realized on such judicial sale is not sufficient to pay off the assessment lien, then the balance shall remain a lien. *Pittsburg's Appeal*, 70 Pa. 142.

The lien of a special assessment is made superior to the lien of a prior judgment, by a statute providing that such an assessment shall be and remain first liens on the lands assessed from the commencement of the improvement, that the property may be sold on a *levari facias* on judgment recorded on the lien filed, and that the proceeding shall be deemed a proceeding *in rem*. *Haus's Estate*, 2 Pa. Dist. R. 88.

The charge for street improvements created by a statute declaring that "until recovery of such expenses and interest, the same shall be a charge on the premises," is not on the interest of the owner of the premises, but on the premises themselves; and hence premises subject to a covenant restricting the owner thereof from building thereon may, for the purpose of satisfying such charge, be ordered to be sold free from such restrictive covenant, although the owners of the dominant estate would be thereby injured. *Tendring Union v. Downton*, L. R. 45 Ch. Div. 583.

Such charge is also superior to a mortgage. *Birmingham v. Baker*, L. R. 17 Ch. Div. 782, 16 Eng. Rul. Cas. 408.

A special assessment is made a lien on the land affected superior to a mortgage prior in time both to the lien of the assessment and to the statute itself, by a statute providing that the assessment "shall constitute and be considered a first lien on the real estate assessed, in the same manner as other taxes are;" and such superiority is not taken away or qualified by a later statute providing that such lien shall relate to the time of filing the petition. *Murphy v. Beard*, 138 Ind. 560, 38 N. E. 33.

In *Morris v. Hainer*, 16 Pa. Co. Ct. 468,

report of said viewers, the auditor shall immediately fix a day for the hearing of the same, and issue summons "to be served upon the owners or the owner, or agent or tenant of such owner, of any lot or parcel of land affected by the proposed improvement." Sections 4, 5, 6, and 7 of said act of 1891, being §§ 5693-5696, Burns's 1901, make provision for notice and a hearing before the board of commissioners and an appeal to the circuit court, as to the amount of benefits and damages assessed. Under § 12 of said act, being § 5701, Burns's 1901, the benefits assessed against the real estate in the taxing district are placed upon a special tax duplicate, and are "a first and paramount lien upon the real property as-

essed in the same manner and form as other taxes."

It is within the power of the legislature to declare an assessment lien for the construction of a public drain or the improvement of a public highway shall have priority over other liens. They may be given priority over pre-existing mortgages, as does the said drainage law of 1891. *State ex rel. Ely v. Aetna L. Ins. Co.* 117 Ind. 251, 20 N. E. 144; *Bloomington v. Phelps*, 149 Ind. 596, 601, 49 N. E. 581; *Murphy v. Beard*, 138 Ind. 560, 38 N. E. 33, and cases cited; *O'Brien v. Bradley*, 28 Ind. App. 487, 493, 61 N. E. 942; *Morey v. Duluth*, 75 Minn. 221, 77 N. W. 829; *Chase v. Trout*, 146 Cal. 350, 80 Pac. 81; *German Sav. & L. Soc. v. Ramish*, 138 Cal. 120, 69 Pac. 89,

the court, construing a statute providing that "said lien [for municipal improvements] shall have priority to, and shall be fully paid and satisfied before, any other lien or encumbrance of whatsoever kind or nature, with which the land assessed may become charged, and shall not be divested by any judicial sale, except as to such portion of the proceeds of the sale as may actually be applied for the payment of such lien," held that, in case all liens filed prior to the municipal lien are paid, and the proceeds of a judicial sale being applied to the liens in their order reaches and pays part of the municipal lien, the lien is discharged to the extent of the payment, otherwise it remains a lien that cannot be divested by any judicial sale, except a sale on execution on the lien itself, and that it remains a lien on the land, and the purchaser takes it subject to said lien.

—particular statutes held not to make assessment lien superior.

A statute providing simply that the assessment shall "be a lien from the date of filing the report of the commissioners" does not make the lien of the assessment superior to that of a prior mortgage. *State ex rel. Ely v. Aetna L. Ins. Co.* 117 Ind. 251, 20 N. E. 144.

Nor does a statute providing that the assessment shall be a lien "from the time of filing the petition." *Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700.

Nor does a statute containing no provision declaring assessments liens upon the lands benefited, though providing that the assessments made should be placed upon the tax duplicate and collected as "other taxes," etc., but without declaring that they were taxes, and containing no provision for notice to lien holders or to any persons except owners. *Pierce v. Aetna L. Ins. Co.* 131 Ind. 284, 31 N. E. 68. But see, *supra*, *Clifton v. Cincinnati and Moerlein Brewing Co. v. Westmeier*, under subtitle, "Particular statutes held to make assignment lien superior."

The lien of municipal assessments is not given precedence over other prior liens at 30 L.R.A. (N.S.)

taching before its passage, by a statute providing that "all municipal claims which may hereafter be lawfully imposed or assessed on any property . . . shall be, and they are hereby declared to be, a lien on said property, . . . and said liens shall have priority to, and be fully paid and satisfied out of the proceeds of any judicial sale of said property before, any other obligation, judgment, claim, lien, or estate with which said property may become charged, or for which it may become liable," as a statute will not be held to be retroactive unless its language clearly requires such construction. *Martin v. Greenwood*, 27 Pa. Super. Ct. 245; *Bellevue v. Umstead*, 38 Pa. Super. Ct. 116; *Oil City Bldg. & L. Asso. v. Shanfelter*, 29 Pa. Super. Ct. 251.

Where street improvements are made, and the cost of paving that portion of the same occupied by street railway companies is levied as special assessments against the property of the several street railways as separate properties, and these different street railways are afterwards consolidated and merged into one property, and operated as one street railway system, the old companies losing their individuality and identity, and the new company assuming the burdens and obligations of the constituent companies, it was held, in *Lincoln Street R. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802, that, as between the consolidated company and the municipal authorities levying such special assessments, the liens arising by reason of the several assessments against the different constituent companies and properties attach to the new property owned and operated by the substituted company as one property, in its entirety, and may be enforced by the sale of the property without dismemberment and separating it into fractional properties as it existed before consolidation. But, however, it was also held that where a mortgage was placed upon a street railway property, and afterwards another company against which certain liens for taxes levied as special assessments existed was consolidated with the mortgagor company, the lien of the mortgage on the property covered thereby could not

70 Pac. 1067; *Hand v. Startup*, 38 N. J. Eq. 115; *Richmond v. Williams*, 102 Va. 733, 47 S. E. 844; *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* 134 Ill. 384, 10 L.R.A. 285, 25 N. E. 781; *Seattle v. Hill*, 35 L.R.A. 372 and note (14 Wash. 487, 45 Pac. 17); *Kirby v. Waterman*, 17 S. D. 314, 96 N. W. 129; *Doremus v. Cameron*, 49 N. J. Eq. 1, 22 Atl. 802; *Weinreich v. Hensley*, 121 Cal. 647, 54 Pac. 254; *Dressman v. Farmers' & T. Nat. Bank*, 100 Ky. 571, 36 L.R.A. 121, 38 S. W. 1052; *Dressman v. Simonin*, 104 Ky. 693, 47 S. W. 767; 2 Page & J. *Taxation by Assessment*, § 1068; *Elliott, Roads & Streets*, 2d ed. § 599; 2 *Cooley, Taxn.* 3d ed. pp. 865 et seq.; 27 *Cyc. Law & Proc.* pp. 1176, 1177, and cases cited; *Hamilton, Special Assess-*

ments, § 708; 25 *Am. & Eng. Enc. Law*, 2d ed. pp. 1236, 1237, and notes.

It is said in *Elliott on Roads & Streets*, 2d ed. § 599, p. 627: "Everyone who acquires an interest in land takes it subject to the right of the sovereign to lay general taxes upon it, and to impose upon it the burden of paying the expense of public improvements which confer upon the land a special benefit. . . . Statutes giving a lien are remedial, and therefore to be liberally construed, and so construed as to accomplish the legislative purpose. In creating liens for improvement assessments, the legislature makes secure compensation for what is in truth an industrial annexation to the land, for the road or street improved is in a sense an appurtenance of the land

without the consent of the mortgagee, be impaired by the agreements and acts of consolidation; and that the tax lien on the property consolidated and merged into the new company and with the property mortgaged could not be made prior to the mortgage lien on all the property after consolidation; that the tax and mortgage liens attached to the specific properties embraced in the levy and the mortgage, respectively; and that the respective liens and their priorities could be preserved only by separating the different properties into their constituent parts as before consolidation, and awarding to each a lien according to priority.

This case was followed in *Lincoln v. Lincoln Street R. Co.* 67 Neb. 469, 93 N. W. 766.

Under a statutory provision that "no mortgage, conveyance, pledge, transfer, or encumbrance" of the property of a street railway company, "created and suffered by any such company . . . after the time when any street, or part thereof, upon which any such street railway shall have been laid, shall have been ordered paved, repaved, macadamized, or repaired, shall be made or suffered, except subject to the actual or prospective lien of said special taxes, whether actually levied or not, if such levy be in contemplation," the lien of a mortgage attaching to a street railway property before street improvements were projected or in contemplation is prior to the lien of taxes levied thereafter, as special assessments for the costs and expenses of paving the right of way of such street railway, to conform to the improvement of the remainder of the street. *Lincoln Street R. Co. v. Lincoln*, 61 Neb. 109, 84 N. W. 802; *Lincoln v. Lincoln Street R. Co.* 67 Neb. 469, 93 N. W. 766.

The court in 61 Neb. 109, *supra*, quoted and approved also in 67 Neb. 469, *supra*, said: "By the language used it is contemplated that if the improvement has been projected and is under way, that is, if the street 'shall have been ordered paved,' no lien shall be created except subject to the prospective lien. The language of the statute 30 L.R.A. (N.S.)

ute excludes the idea that under all circumstances the lien for special assessments shall be superior to all other liens. If force and effect be given to the language of the statute, and the words used be taken in their ordinary and natural meaning, the conclusion is irresistible that an encumbrance placed on the property before street improvements are projected is prior to a lien for special assessments levied thereafter for such improvement.

Superiority as between successive special assessments.

The rule, in the absence of statutory provision to the contrary, that liens take precedence in order of time, is applicable to successive liens of assessments for local improvements; and this order of priority will not be disturbed or altered, unless expressly provided by statute. *Des Moines Brick Mfg. Co. v. Smith*, 108 Iowa, 307, 79 N. W. 77; *Parker-Washington Co. v. Corcoran* (Mo. App.) 129 S. W. 1031.

Such priority is not disturbed by a statute providing that such assessments "shall be a lien upon the property . . . from the commencement of the work, and shall remain a lien until fully paid, and shall have precedence over all other liens, excepting the ordinary taxes, and shall not be devested by any judicial sale." *Des Moines Brick Mfg. Co. v. Smith*, *supra*, disapproving *Burke v. Lukens*, *infra*.

There is no superiority as between successive assessments of the same property, under a statute providing that "assessments, as made, . . . shall be a lien upon the several lots . . . to the same extent that taxes are a lien upon such property, and shall be collectable in the same way that taxes are collected," and "that delinquent instalments shall be collected in the same manner that delinquent taxes are collected." *Brownell Improv. Co. v. Nixon* (Ind. App.) 92 N. E. 693, distinguishing *Burke v. Lukens*, 12 Ind. App. 648, 54 Am. St. Rep. 539, 40 N. E. 641, where it was held that the last assessment for street improvements takes prece-

which increases its value. Whoever holds an interest in the land profits by the apportionment, and ought, in justice, to be subjected to the lien, which secures the assessment. It is, for these reasons, often proper to deduce, from the general language of the statute giving a lien, the conclusion that it gives a paramount lien to which mortgage estates or judgment liens must yield."

As the drainage act of 1891 in controversy here provided that the assessment against the lands for the construction of the proposed drain should be "a first and paramount lien upon the real estate assessed in the same manner and form as other taxes," the cases of *State ex rel. Vawter v. Loveless*, 133 Ind. 600, 33 N. E. 622, *Pierce v. Aetna L. Ins. Co.* 131 Ind. 284, 31 N. E.

dence as a lien over those previously made, under a statute providing that assessments for street improvements" shall be a lien upon the property so assessed, and shall remain a lien until fully paid, and shall have precedence over all other liens excepting taxes."

Superiority as between special assessments and taxes.

It was held in *McCullum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 725, without referring to any statute, and apparently on general principles, that a tax lien is superior to the lien of a special assessment prior in time.

But a foreclosure of a tax lien will not cut off a lien for a prior assessment, where those interested in the lien of the assessment are not made parties, and they are entitled to enforce it subject to the paramount lien of the tax. *Ibid.*

The intent of the legislature to make the lien of special assessments subordinate to that of general taxes is shown by a statutory provision that a deed, upon the foreclosure and sale for an assessment, shall "convey the entire title to the property therein described, stripped of all prior liens or claims, excepting unpaid instalments and general taxes." *McMillan v. Tacoma*, 26 Wash. 358, 67 Pac. 68; *Keene v. Seattle*, 31 Wash. 202, 71 Pac. 769; *State ex rel. Craver v. McConnaughey*, 31 Wash. 207, 71 Pac. 770; *Ballard v. Way*, 34 Wash. 116, 101 Am. St. Rep. 993, 74 Pac. 1067; *Pennsylvania Co. v. Tacoma*, 36 Wash. 656, 79 Pac. 306; *Ballard v. Ross*, 38 Wash. 209, 80 Pac. 439.

Where the charter of a city, after making special assessments levied by the city a paramount lien on the real estate, added the proviso "that nothing in this act contained shall be construed to affect or prejudice the lien of the state for all taxes which have been or may be levied upon such property under the general laws of the state," the lien for a local improvement is subordinate to the lien of the state for taxes levied under the general laws of the state, without reference to the time when the lien

68, *State ex rel. Ely v. Aetna L. Ins. Co.* 117 Ind. 251, 20 N. E. 144, and *Cook v. State*, 101 Ind. 446, in which it is held that the prior mortgage is superior to the lien of the assessment, are not in point here, because they were decided under a statute which failed to provide that the assessment, should be a first and paramount lien. What is said in the cases named as to the necessity of a provision for notice to the mortgagee was unnecessary to the decision of said cases, and was *obiter dicta*.

It is expressly provided in the laws concerning taxation that, "in case of mortgaged real estate, the mortgagor shall for the purpose of taxation be deemed the owner, until the mortgagee shall have taken possession of the mortgaged premises, after which

accrued. *White v. Knowlton*, 84 Minn. 141, 86 N. W. 755; *White v. Thomas*, 91 Minn. 395, 98 N. W. 101.

But although, under such a charter provision, the purchaser of the lien of the state takes it with its right of priority over all the then existing liens of the city for local assessments, without reference to the time when the state lien attached, yet, after the state lien has become the subject of private ownership, the interest of the purchaser in or his lien on the land is subject to all liens of the city for local assessments thereafter attaching. *White v. Thomas*, *supra*.

Where a statute declares that the cost of a local improvement shall be a real charge on the property, and that, "it shall be considered and treated as pledged for the amount due; that it shall constitute a lien or privilege upon the abutting property," such lien is not taken away by a subsequent tax deed given for taxes which accrued before the lien of the assessment, where the statute under which the land was sold for taxes provided that "if not redeemed, such record in the conveyance or mortgage office shall operate as a cancellation of all conventional and judicial mortgages," since the lien of a special assessment is neither. *Moody v. Sewerage & Water Board*, 117 La. 360, 41 So. 649.

It was held in *Indianapolis v. City Bond Co.* 42 Ind. App. 470, 84 N. E. 20, that the lien of a special assessment is not destroyed by a tax sale and the execution of a tax deed, as the section of a statute which declares that a tax deed, "shall vest in the grantee an absolute estate in fee simple" defines the quality of the estate, and does not release it from valid encumbrances.

Superiority as between special assessments and mortgages due state.

In the absence of statute permitting it, the lien of a municipality for special assessments will not take precedence over a prior mortgage in which the funds of the state are invested. *Public Schools v. Shot-*

the mortgagee shall be deemed the owner." Burns's 1908, § 10176. The statute also requires that real property shall be assessed to the owner if known, if not, then to the occupant if any, and if there be no occupant, then as unknown. Burns's 1908, §§ 10170, 10189.

The laws of this state concerning the assessment of property for general taxation, and the levying and collection of general taxes thereon, make provision for notice to the owner thereof (Burns's 1908, §§ 10255, 10265), and gave him the right to a hearing (Burns's 1908, § 10279), but make no provision for notice to a mortgagee, or for giving him a hearing. If, however, the mortgagee has taken possession of the mortgaged premises under the provisions of the

mortgage, he "is deemed the owner," and the said law provides for notice to and a hearing for him as owner.

As lands in this state are not entered on the tax duplicate in the name of the mortgagee, or assessed or taxed in his name, but in the name of "the owner thereof if known, if not, then to the occupant if any, and if no occupant, then as unknown" (Burns's 1908, §§ 10170, 10176, 10189), it is evident from the provisions of § 5692; Burns's 1901, requiring the viewers to show in their report the name of the owner of the land benefited or damaged as the same appears on the tax duplicate at the time, that it was the legislative intent that notice should be given, not to the mere mortgagee, but to the person owning the land as shown

well, 45 N. J. Eq. 106, 16 Atl. 308; State Elizabeth, Prosecutor, v. King, 51 N. J. L. 414, 17 Atl. 942 (*dictum*).

Even though the mortgage was originally owned by a private individual, and assigned to the state, and the assignment was not recorded. Public Schools v. Shotwell, *supra*.

Precedence is not given to a special assessment levied by a city over a prior mortgage owned by the state, by a statute providing generally that special assessments shall be a first lien in all cases. *Ibid*.

See also State v. Kilburn, 81 Conn. 9, 129 Am. St. Rep. 205, 69 Atl. 1023, *supra*, under title, "Power of legislature to make special assessments superior to other prior liens.

Superiority as between special assessments and private mortgages controlled by court.

Special assessments levied by a municipality will not take precedence over prior mortgages held by the chancellor of the state in his official capacity, as security for funds in court which had been loaned on mortgages on the property by order of the court. State, Elizabeth, Prosecutor, v. King, *supra*; Jersey City v. Foster, 32 N. J. Eq. 825.

Nor is the rule changed because the mortgage is made to an officer of the court designated by the chancellor instead of to the chancellor directly. Jersey City v. Foster, *supra*.

And purchasers of the property on foreclosure of the mortgage, where the municipality is a party to such foreclosure action, take free from the lien of any special assessment existing at the time of such sale. State, Elizabeth, Prosecutor, v. King, *supra*.

The reason for the exemption of such mortgage is thus stated by the court in State Elizabeth, Prosecutor, v. King: Cases in our court have established the rule that the same considerations of public policy, founded on expediency, which protect investments of the funds of the state from the hazards of the priority of tax liens, apply 30 L.R.A. (N.S.)

with equal force to mortgages taken to secure property which the state, in virtue of its sovereignty, has drawn into its courts, and caused to be invested in the name of the chancellor, as its agent selected for that purpose. It will not permit such investments while in its custody, to be impaired or lost by the acts of other public agents, through the imposition of taxes, assessments, or other rates, for public uses. Hence, mortgages securing them are prior liens on lands and superior to municipal taxes and assessments."

Rights of transferee of assessment lien.

The assignee of a judgment recovered on a municipal lien for a special improvement, given by statute priority over other liens, acquires the same priority which the lien possessed when in the hands of the municipality. Hagemann's Appeal, 88 Pa. 21.

Land subject to the lien of a special assessment does not become exempt from such lien, so as to cut off the purchaser of assessment bonds from his right to foreclose, by a sale of such land to the municipality by the owner of the land. Indianapolis v. City Bond Co. 42 Ind. App. 470, 84 N. E. 20.

Estoppel.

The holder of a mortgage superior to the lien of a special assessment is not estopped to claim priority by merely standing silent and permitting the improvement to be made, or by anything short of a promise to pay or something calculated to deceive, for such conduct on the part of a mortgagee is entirely consistent with a reliance upon the priority of the mortgage lien. Killian v. Andrews, 130 Ind. 579, 30 N. E. 700.

The title acquired by one who purchased at a judicial sale to enforce the lien of a special assessment made against the lot of one holding the record title, and apparently the absolute owner by virtue of a warranty deed, which in reality was only a mortgage, is superior to that of one claiming under a judicial sale of such lot in a subsequent action to foreclose such mort-

by the tax duplicate at the time. In none of the laws of this state providing for the improvement of public highways or for public drains, passed by the legislature in the exercise of the sovereign power of taxation, is there any provision for notice to a mere mortgagee. It is evident that the provisions for notice and hearing as to the benefits and damages and the amounts of the assessments, in the act of 1891, are substantially the same as those customarily followed in this state in proceedings for the assessment and collection of general taxes, and in proceedings under other statutes for the construction of drains and the improvement of public highways. In case notice is necessary, the legislature may provide what notice shall be given and the manner in which it must be given. *Carr v. State*, 103 Ind. 548, 3 N. E. 375; *Killian v. Andrews*, 130 Ind. 579, 582, 30 N. E. 700; *Porter v. Stout*, 73 Ind. 3, 9; *Klein v. Tuhey*, 13 Ind. App. 74, 76, 40 N. E. 144, and cases cited; *Kizer v. Winchester*, 141 Ind. 694, 696, 40 N. E. 265; *Indianapolis & C. Gravel Road Co. v. State*, 105 Ind. 37, 4 N. E. 316; *Swain v. Fulmer*, 135 Ind. 8, 12, 34 N. E. 639; *Elliott, Roads & Streets*, § 199.

It is held in this state that when the statute requires the land to be described in the petition as belonging to the person who appears to be the owner as shown by the "tax duplicate or record of transfers," it is sufficient to serve notice of the assessment on the person named in the petition and on the last tax duplicate. *Carr v. State*, supra; *Kepler v. Wright*, 136 Ind. 77, 35 N. E. 1017; *Reed v. Kalfsbeck*, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466; *Poundstone v. Baldwin*, 145 Ind. 139, 143, 144, 44 N. E. 191. In *Bell v. Cox*, 122 Ind. 153, 23 N. E. 705, it is held that persons who have no title of record need not, under the statute, be made defendants to a drainage petition, but, if they have an interest in the land affected, they may come in and defend.

Under a statute which provides that the petition for the location, vacation, or change of a highway shall set forth the names of

the owners, occupants, or agents of the lands affected, it is not necessary to make the owner a party, if the occupant or agent is named and made a party. *Porter v. Stout*, 73 Ind. 3; *Ryder v. Horsting*, 130 Ind. 104, 16 L.R.A. 186, 29 N. E. 567. In this state the mortgagee has no title to the lands mortgaged, but has merely an encumbrance or lien thereon, and has no right to convey said real estate. *Burns's* 1908, § 1135. The mortgagee is not entitled to possession of the mortgaged premises, unless the mortgage specially provides that he shall have possession thereof. *Burns's* 1908, § 1133; *Burns's* 1901, § 1099; *Rev. Stat.* 1881, § 1086; *Jewett v. Tomlinson*, 137 Ind. 326, 36 N. E. 1106. The title remains in the mortgagor, the mortgage being a mere security for the debt. *Grable v. McCulloch*, 27 Ind. 472; *Reasoner v. Edmunson*, 5 Ind. 393; *Francis v. Porter*, 7 Ind. 213; *Morton v. Noble*, 22 Ind. 160; *Fletcher v. Holmes*, 32 Ind. 497; *Lowe v. Turpie*, 147 Ind. 652, 676, 677, 37 L.R.A. 233, 44 N. E. 25, 47 N. E. 150, and cases cited; *Aetna L. Ins. Co. v. Broeker*, 166 Ind. 576, 578, 77 N. E. 1092. See also *Norwich v. Hubbard*, 22 Conn. 587, 594; *Great Falls Co. v. Worster*, 15 N. H. 412, 434; *Glover v. United States*, 164 U. S. 294, 41 L. ed. 440, 17 Sup. Ct. Rep. 95; *State ex rel. Lewis v. Smith*, 158 Ind. 543, 552, 63 L.R.A. 116, 63 N. E. 25, 214, 64 N. E. 18, cited by appellant, approves the rule, but states exceptions thereto. The case before us, however, falls within the rule, and not within any exception.

It has been correctly held that a provision for service of notice on the owner of land to be affected by the drain does not authorize service on mortgagees; that mortgagees do not come within such description of the persons entitled to notice; that the mortgagee is not the owner of the land mortgaged any more than any other lien holder; that he has no such interest in the land as makes notice to him necessary. *Kinnie v. Bare*, 80 Mich. 345, 45 N. W. 345; *Richmond v. Williams*, 102 Va. 733, 47 S. E. 844, and cases cited; *Ahern v. Board of Im-*

age. *Wilson v. California Bank*, 121 Cal. 630, 54 Pac. 119.

In *Donohue v. Brotherton*, 7 Ohio N. P. 367, a real-estate syndicate on its own account improved a street running through its property, and then mortgaged some lots abutting on the street. In order to raise money to pay the contractors who made the improvements, the syndicate petitioned the village to make the identical improvements which had already been made. The village passed an ordinance to that effect, and assessed the cost against the lots. It was held that, though by estoppel such assessment would be valid as against the real-

estate syndicate, yet it was not valid as against the mortgagee, who did not consent to such illegal assessment.

In *Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills Co.* 58 N. J. Eq. 59, 43 Atl. 419, it was held that where a city has a lien on a paper mill for water superior to that of a mortgage, and after the mortgagor was a quarter in arrears, was notified by the mortgagee to turn off the water, but did so in such a manner that the mortgagor could easily turn it on again, the city cannot, as against the mortgagee, enforce its lien as to water thereafter furnished.

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provement, 69 Ark. 68, 74, 61 S. W. 575. See also *Norwich v. Hubbard*, 22 Conn. 587; *Schumacker v. Toberman*, 56 Cal. 508; *People v. Weber*, 164 Ill. 412, 45 N. E. 723; *Cornell v. Conine-Eaton Lumber Co.* 9 Colo. App. 225, 47 Pac. 912. In *Richmond v. Williams*, supra, appellees in 1889 took a mortgage on certain real estate. In 1892 the general assembly of Virginia passed an act (Acts 1891-92, chap. 312) by which the corporate limits of the city of Richmond were extended so as to include the property on which appellees held the above mortgage. Later the property was assessed for street improvements. The assessment was made under the act which extended the corporate limits of the city of Richmond. The decision of the case turned on the question as to whether or not appellees were owners within the meaning of the act above referred to, and as such entitled to notice and an opportunity to be heard. The court held that trust creditors are not owners within the meaning of the act, and neither the city charter nor any other law required that notice should be given them, and that the lien of the city for improvements made was paramount to their prior deed of trust.

Said drainage act of 1891 does not impair the obligation of appellant's mortgages, although enacted after said mortgages were executed, for the reason that said mortgaged real estate was subject to the taxing power as against the mortgagees and lien holders, as well as against the owner. This is true, as everyone must admit, in relation to general taxes, where the only return to the taxpayer is the protection and security which the government gives him, and *a fortiori* should it be true in the cases of special assessments, where, in theory at least, an adequate and complete return for the money assessed is received in the enhanced value of the estate or property which he owns or to which his lien attaches. *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* 134 Ill. 384, 10 L.R.A. 285, 292, 25 N. E. 781; *Seattle v. Hill*, 35 L.R.A. 372, 375, and note, page 373 (14 Wash. 487, 45 Pac. 17); *Dressman v. Farmers' & T. Nat. Bank*, 100 Ky. 571, 36 L.R.A. 121, 38 S. W. 1052; *Dressman v. Simonin*, 104 Ky. 693, 47 S. W. 767; *Lybass v. Ft. Myers*, 56 Fla. 817, 47 So. 346; *Elliott, Roads & Streets*, § 599, p. 627, and cases cited; *Elliott, Railroads*, 2d ed. § 789.

It is evident that said drainage act of 1891 is not open to the objections that it deprives appellant of his property without due process of law, or that it impairs the obligations of contracts.
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What we have said disposes of the controlling questions in the case.

The appellees insist on an affirmation of the case, although they have assigned cross errors. As appellees ask for an affirmation of the judgment, and the case can be affirmed by disposing of the errors assigned by appellant, the court will not decide the questions presented in the assignment of cross error. *Feder v. Field*, 117 Ind. 386, 20 N. E. 129; *Thomas v. Simmons*, 103 Ind. 538, 2 N. E. 203, 3 N. E. 381; *Kammerling v. Armington*, 58 Ind. 384.

Appellant having died since the submission of this cause, the judgment is affirmed as of the date of submission, as provided in § 705, Burns's 1908.

Myers, J., took no part in the decision of this cause.

NEW MEXICO SUPREME COURT.

CHICAGO, ROCK ISLAND, & EL PASO
RAILWAY COMPANY, Appt.,
v.

JACOB WERTHEIM.

(— N. M. —, 110 Pac. 573.)

Pleading — denial on information of facts within knowledge.

1. Denial upon information and belief of matters necessarily within the knowledge of the pleader is not permissible.

Same — operation of railroad.

2. In a suit against a railroad company, a denial by such company upon information and belief, that it was operating a railroad at the time and place alleged, being a matter necessarily within defendant's knowledge raises no such issue upon the pleadings as will admit testimony that it was not operating such railroad over an objection that such testimony was not admissible under the pleadings.

(August 16, 1910.)

Headnotes by POPE, Ch. J.

Note. — Denials upon information and belief, or of knowledge or information sufficient to form belief, as to matters presumptively within pleader's knowledge.

While the courts themselves seem to make no express distinction bearing on the subject, between denials upon information and belief and denials of any knowledge or information sufficient to form a belief, the form of the plea has been preserved in this note, the first form being indicated by the figure (1) and the second, by the figure (2).

Although denials in one or the other of these qualified forms are, in proper cases authorized in many states, it may be said

A PPEAL by defendant from a judgment of the District Court for Quay County in plaintiff's favor in an action brought to recover damages for destruction of certain property by fire which was alleged to have been caused by defendant's negligence. Affirmed.

Statement by Pope, Ch. J.:

The appellee, Wertheim, sued the appellant railway company for damages. The complaint alleges plaintiff's ownership in the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 22, township 11 N., range 30 E., New Mexico principal meridian. The following allegation then appeared: "That the defendant now is, and was at the time hereinafter mentioned, a corporation organized and existing under

and by virtue of the laws of the territory of New Mexico, owning, controlling, and operating a line of railway and a right of way extending across said territory near to said land." It is further alleged that the company negligently and carelessly allowed dried grass and other combustible material to accumulate along the said right of way, over which it was then operating trains, and that it carelessly and negligently allowed sparks to escape from engines operated over its railroad track located on said right of way, and, as a result, said dried grass and combustible materials were set on fire, and same was communicated to the lands of the appellee, with the result that the grass and hay thereon situated were burned and the

in general that they cannot properly be employed where the subject-matter of the denial is presumably within the pleader's knowledge.

The use of such denials under the New York Code is well stated in *Rochkind v. Perlman*, 123 App. Div. 808, 108 N. Y. Supp. 224, 1151, by Gaynor, J., as follows: "Only two forms of denial are permitted, viz.: 'A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.' (Code Civ. Proc. § 500.) The so-called denials in this case purport to be under this latter form. It is permitted only out of necessity, to meet certain rare cases where the defendant is honestly without any knowledge or information of allegations of the complaint sufficient to form a belief of them; does not know whether they are true or false, and is therefore unable to positively deny them. In such a case he is permitted to answer that he denies that he has 'any knowledge or information thereof' (i. e., of such allegations) 'sufficient to form a belief' of them, i. e., as to their truth or falsity.

"This prescribed form of denial has to be (1) permissible in the particular case, and (2) followed in all substantial particulars, in order to be good, i. e., not frivolous.

"(a) If the facts alleged in the complaint which are denied by this form of denial are presumptively within the defendant's knowledge, as would be the case of transactions with him personally, for instance, he cannot use such form of denial. It would be a mere evasion, and that the courts will not allow. It was not meant to enable defendants to deny their own personal transactions, but only things which did not come within their personal knowledge. 'The true distinction to be observed in determining when a defendant may avail himself of the privilege accorded to him of answering in the qualified form allowed by the Code, and when he must positively admit' (he is not required to make formal admission of anything under our Code) 'or deny the allegations, is to inquire whether the facts alleged 30 L.R.A. (N.S.)

are presumptively within the defendant's knowledge. If they are, he cannot avail himself of this form of denial.'

"(b) Nor may this form of denial be used in a case of intentional ignorance of the defendant when it is his duty, as here, to know or learn the facts, and they are at hand and accessible. The appellants became sureties on a bond to pay the judgment on a mechanics' lien, if the lienors should recover judgment on such lien, and this action is against the appellants on such bond. It was their duty to pay the said judgment when recovered; and when notified of its recovery and called upon to pay it, it was their duty to ascertain if it had been recovered. If a defendant's lack of knowledge or information in such a case arises from his unwillingness or refusal to know the facts, a denial in this form is not permissible. A reading of the complaint and answer would show such denial to be frivolous. Having such knowledge or information at hand, he cannot be permitted to deny that he has it, for he has it, but only shuts his eyes to it. And hence in such a case, 'a party cannot plead ignorance of a public record to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the facts.'

Pleader's own acts.

The pleader's own acts, in the absence of special circumstances, are held to be within his knowledge, so that he cannot deny them in either of their qualified forms. *Hackett v. Richards*, 11 N. Y. Leg. Obs. 315 (denial (1) of allegation with defendant, as tenant, allowed premises to remain out of repair, insufficient); *Richardson v. Wilton*, 4 Sandf. 708 (denial (2) by defendant in action for assault, of allegation that he spit in plaintiff's face, frivolous); *Pardi v. Conde*, 27 Misc. 496, 58 N. Y. Supp. 410 (denial (1) by attorney for defendant in suit for slander of allegation that defendant uttered words alleged, sham); *Lawrence v. Derby*, 15 Abb. Pr. 346 (denial (2) in action for false imprisonment, of allegation that defendant caused writ on

real estate injured, and plaintiff asked for damages in the sum of \$400. The company filed the following answer: "Comes now the defendant in the above styled and numbered cause, and, answering the complaint of the plaintiff last filed herein, says: Defendant on information and belief denies each and every allegation contained in the complaint of the plaintiff filed herein, except only the allegations therein contained to the effect that the defendant is a corporation organized as stated in the said complaint. And defendant further denies that the plaintiff is entitled to the relief, or any part thereof, by him claimed, or to any relief whatsoever." Jury was waived. From a judgment for \$100, the company prosecutes this appeal.

which plaintiff was arrested to be issued, sham); Lay Gas Mach. Co. v. Falls of Neuse Mfg. Co. 91 N. C. 74 (denial (2) by defendant as to time when he first complained about machine sold to him by plaintiff insufficient); Sherman v. Boehm, 13 Daly, 42, 15 Abb. N. C. 254 (denial (1) of averments in complaint as to personal transactions between plaintiff and defendant Code, sham); Masti v. Bartholomew, 41 Colo. 328, 92 Pac. 682 (denial (2) in replication to answer setting up fraudulent representations made by plaintiff, insufficient); Knox v. Galligan, 21 Wis. 470 (denial (2) of allegation of defendant's nonpayment of taxes, Code, insufficient); Mills's Estate, 40 Or. 424, 67 Pac. 107 (denial (1) of certain statements alleged to have been made by defendant in presence of several persons, insufficient); Kentucky Coal Min. Co. v. Mattingly, 133 Ky. 526, 118 S. W. 350 (denial (2) by corporation of issuance or delivery of metal checks to employees, not good plea); Loveland v. Garner, 74 Cal. 298, 15 Pac. 845 (denial (1) by directors of mining corporation of allegations that certain persons were officers, that a mine was developed, ore extracted, liabilities incurred, and as to other matters relative to conduct of corporate business, evasive); Raleigh & G. R. Co. v. Pullman Co. 122 Ga. 700, 50 S. E. 1008 (answer by corporation that, for want of information, they could not deny or admit whether certain party was its general manager, Code, evasive); Edwards v. Lent, 8 How. Pr. 28 (denial (2) as to whether plaintiff gave defendants notice of increase in insurance rate, and whether they gave plaintiff authority to effect insurance, Code, insufficient); Sloan v. Little, 3 Paige, 103 (denial (2) as to exaction of usurious interest on mortgage, equity, insufficient); Carpenter v. Momsen, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692 (denial (1) by assignee that he had not demanded, and statement that it was in hands of former agent of assignor, evasive); Gribble v. Columbus Brewing Co. 100 Cal. 67, 34 Pac. 527 (denial (1) by assignee of corporation as to whether certain property was attached

Messrs. Hawkins & Franklin for appellant.

Mr. Harry H. McElroy for appellee.

Pope, Ch. J., delivered the opinion of the court:

The only assignment of error relates to the rejection of the testimony to be now mentioned. Upon the trial the witness Franklin was introduced, who testified that, by reason of being the New Mexico attorney for the defendant, he passed on the lease between that company and the El Paso & Southwestern System, of which he was assistant general attorney, and that he also had charge of the settlement of claims over the portion of the railroad (from Tucuman to Santa Rosa) here involved, and had

to realty, insufficient); Kentucky River Nav. Co. v. Com., 13 Bush, 435 (denial (1) by company as to its solvency, whether it would be able to make certain repairs, and as to validity of municipal subscriptions to its stock, Code, sham).

In Hall v. Wood, 1 Paige, 404, however, a denial in equity of knowledge or information as to sums claimed to have been collected by one who had been collecting accounts for years and had filed books and papers giving all the information he had, was held sufficient.

Making agreements and contracts.

Ordinarily, a party cannot plead upon information and belief, or knowledge and information sufficient to form a belief, as to the execution and making of agreements and contracts by him. Dugan v. Harris, 6 Ky. L. Rep. 596 (denial (2) by defendant as to execution of bond in question, insufficient); Thorn v. New York Central Mills, 10 How. Pr. 19 (denial (2) by director of corporation as to execution of note in question by its authorized officer, Code, frivolous); Lloyd v. Burns, 6 Jones & S. 423 (denial (1) by trustee of corporation as to whether alleged notes were made by corporation, Code, insufficient); Shearman v. New York Central Mills, 1 Abb. Pr. 187 (denial (2) by corporation that it made note sued on by its authorized agent, Code, frivolous); Hewel v. Hugin, 3 Cal. App. 248, 84 Pac. 1002 (denial (1) by treasurer of irrigation district as to secretary's signature to bonds, insufficient); Byrne v. Benton, 3 N. Y. Month. L. Bull. 100 (denial (1) of alleged contract for board and lodging, Code, sham); Howard v. Maysville & B. S. R. Co. 24 Ky. L. Rep. 1051, 70 S. W. 631 (denial (2) as to alleged contract with plaintiff, held admission); Compton v. Beecher, 17 App. Div. 38, 44 N. Y. Supp. 887 (denial (2) by member of firm as to whether policy of insurance had been issued by firm, insufficient); Raymond v. Johnson, 17 Wash. 232, 61 Am. St. Rep. 908, 49 Pac. 492, 19 Mor. Min. Rep. 56 (denial (2) as to al-

frequent occasion to advise with reference to the operation of that section of the railroad, and that, being thus in daily touch with these matters, he knew who was operating the road between the points above named. With this preliminary proof it was sought to be shown by the witness that the defendant was not operating or in charge of the track and equipment between Tucumcari and Santa Rosa at the date of the alleged injury. This was objected to on the grounds that the witness had not shown the proper qualification to testify, that the answer involved the contents of a written lease, and that the evidence was not admissible under the defendant's answer. The objection was sustained, and we are asked to review the action of the court in declaring

this testimony inadmissible. We find it unnecessary to determine the correctness of this ruling upon the first two objections urged, for we deem the third—that the testimony was not admissible under the pleadings—well taken. The answer, as we have seen, was a denial on information and belief. While this tendered an issue upon some of the matters set up in the complaint, it did not have this effect as to the allegation that the defendant was operating the line of road at the place and time in question. This was a matter necessarily within the knowledge of the defendant, and as to such the law does not permit a denial upon information and belief. 31 Cyc. Law & Proc. p. 201; Raphael Weil & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238; Smith v.

leged mining contract between plaintiff and defendant insufficient); Lewis v. Acker, 11 How. Pr. 163 (denial (2) in reply to answer, as to contract to which plaintiff was party, Code, frivolous); Streator v. Streator, 145 N. C. 337, 59 S. E. 112 (denial (2) of allegation that defendant procured lands to be conveyed to himself in pursuance of parol agreement that he should hold them in trust for certain persons, insufficient); Avery v. Stewart, 136 N. C. 426, 68 L.R.A. 776, 48 S. E. 775 (denial of knowledge and belief as to whether defendant purchased property under agreement to hold it for certain purposes, equity, insufficient); Wesson v. Judd, 1 Abb. Pr. 254 (denial (2) as to whether undertaking executed by pleader, was correctly set out in complaint, insufficient); Fravert v. Fealer, 11 Colo. App. 387, 53 Pac. 288 (denial (2) by party to contract as to performance by other, Code, held admission); Smith v. Stubbs, 16 Colo. App. 130, 63 Pac. 955 (denial (2) as to whether indemnity bond was made by defendant, insufficient); Mott v. Burnett, 1 N. Y. Code Rep. N. S. 225 (denial (2) by joint maker of note, as to whether note was made by defendants, or either of them, Code, insufficient); Angier v. Equitable Bldg. & L. Asso. 109 Ga. 625, 35 S. E. 64; Smith v. Champion, 102 Ga. 92, 29 S. E. 160 (answer alleging that, for want of sufficient information could not deny or admit matters stated in contract executed by him, evasive).

But under certain circumstances these matters may be put in issue by a denial upon information and belief, or by a denial of knowledge or information sufficient to form a belief. Hall v. Woodward, 30 S. C. 564, 9 S. E. 684 (denial (1) of signature by one sued for contribution as cosurety on note which had been lost for twenty years, sufficient); Kosztelnik v. Bethlehem Iron Co. 91 Fed. 606 (denial (1) by plaintiff, unable to read English, as to execution of release pleaded by defendant written in English, sufficient); Wood v. Watson, 23 N. Y. Week. Dig. 85 (denial (1) in action against partners on note, and for goods sold, as to making of note as

partners, or delivery of goods to them as such, Code, sufficient).

And assignees and subsequent purchasers of instruments may use these forms of pleas. Fairbanks v. Isham, 16 Wis. 118 (avertment (1) by plaintiff, suing as assignee of mortgage, as to witnessing and acknowledgment of mortgage, sufficient); St. John v. Beers, 24 How. Pr. 377 (complaint by assignee of notes, alleging (1) that notes were executed by defendant, Code, sufficient); Pearson v. Neeves, 92 Wis. 319, 66 N. W. 357 (denial (2) by subsequent purchasers, in action to foreclose mortgage, as to payments of taxes and insurance by plaintiff, which mortgagor had agreed to pay, sufficient).

In Carey v. Jones, 8 Ga. 516, where the matters in question had occurred more than six years before, it was held that an answer in an action seeking to charge defendant as a stockholder, that according to his recollection, he promised he would subscribe to stock and give a mortgage to secure the payments, but that, according to his best recollection and belief, he did not subscribe for any shares or give a mortgage, was held sufficient in equity, the matter involved being remote.

And in Alston v. Brownell, 4 Ill. App. 17, an allegation in defendant's affidavit of defense, that to the best of his knowledge and belief he never was a stockholder and never owned stock in any certain company, was held good, the court saying that it amounted to a positive statement that he never was a stockholder, that he never himself subscribed for such stock, and so far as he knew no one else ever had done so.

In Balliett v. Metropolitan L. Ins. Co. 125 App. Div. 705, 110 N. Y. Supp. 77, the court said that it would be difficult, to say the least, for the defendant to defend its denial of knowledge or information sufficient to form a belief, as to the provisions of one of its policies. The decision, however, was put on another ground.

In Carroll County Sav. Bank v. Strother, 22 S. C. 552, an answer by defendant that he signed an instrument of writing

Stubs, 16 Colo. App. 130, 63 Pac. 955. Such a pleading raises no issue of fact. *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621; *Ord v. The Uncle Sam*, 13 Cal. 370; *Loveland v. Garner*, 74 Cal. 298, 15 Pac. 844; *Crane Bros. Mfg. Co. v. Morse*, 49 Wis. 368, 5 N. W. 815; *Carpenter v. Momsen*, 92 Wis. 449, 65 N. W. 1027, 60 N. W. 692; *Carpenter v. Rolling*, 107 Wis. 559, 83 N. W. 953; *Nashville, C. & St. L. R. Co. v. Carrico*, 95 Ky. 489, 26 S. W. 177; *Avery v. Stewart*, 136 N. C. 426, 68 L.R.A. 776, 48 S. E. 775; *Raymond v. Johnson*, 17 Wash. 232, 61 Am. St. Rep. 908, 49 Pac. 492, 19 Mor. Min. Rep. 56; *Ensley v. Page*, 13 Colo. App. 452, 59 Pac. 225; *Howard v. Maysville & B. S. R. Co.* 24 Ky. L. Rep. 1051, 70 S.

supposed to be the paper sued on, but could not be positive without an inspection of the instrument, nor as to whether the indorsement was made before or after due, or contained a guaranty, was held not such an admission as to authorize judgment without proof of the instrument.

And in *Jones v. Perot*, 19 Colo. 141, 34 Pac. 728, where an action was brought against an administrator for a breach of a contract with the deceased, denials by the administrator of knowledge or information sufficient to form a belief were held defective in that they did not state that he could not obtain sufficient knowledge or information upon which to base a belief, since from all that appeared he might, upon the slightest inquiry, have obtained information which would have enabled him to deny positively.

In *Hand v. Miller*, 58 App. Div. 126, 68 N. Y. Supp. 531, a denial of knowledge or information sufficient to form a belief, as to the execution and delivery of the contract sued on, was held not to constitute a denial of the execution of the contract, where it was followed by a statement admitting that defendant signed some paper, but denying knowledge or information sufficient to form a belief as to whether the paper sued on was the one signed.

Matters involved in agreements.

Parties must also as a rule plead positively as to matters involved in agreements made by them. *Granniss v. McLean Automobile Co.* 117 N. Y. Supp. 881 (denial (2) as to allegations in action for rent of building leased by defendant, frivolous); *Wesson v. Judd*, supra (denial (2) by one recognizing for appearance of one arrested, as to whether such person was arrested, insufficient); *Mullally v. Townsend*, 119 Cal. 47, 50 Pac. 1060 (denial (2); by sureties in redelivery bond of commencement of action, where allegations setting out bond and release of property were not denied, insufficient); *Mills v. Jefferson*, 20 Wis. 50 (denial (2) by town officers that bonds were given to satisfaction of supervisors, evasive).
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W. 631; *Gribble v. Columbus Brewing Co.* 100 Cal. 67, 34 Pac. 527.

Nor do we consider that the plaintiff waived the question by going to trial without attacking the form of the answer. While the general rule is that an objection to a pleading may be waived by failure to urge the objection at the proper time, or by any act which in legal contemplation implies an intention to overlook the defect (31 Cyc. Law & Proc. p. 717; *J. S. Keator Lumber Co. v. Thompson*, 144 U. S. 434, 36 L. ed. 495, 12 Sup. Ct. Rep. 669; *Pring v. M. B. Goldenburg Co.* [N. M.] 107 Pac. 529), we find no such failure and no such act here. Neither a motion for judgment on the pleadings nor a demurrer was available as against the answer, for it contained denials which,

In *Gallagher v. Merrill*, 13 App. Div. 182, 43 N. Y. Supp. 303, a denial by a surety on a lease of knowledge or information sufficient to form a belief, as to the contents of the lease, was held not to be sham under the Code, the court saying that the authorities seem to answer the question of whether such matter can be stricken out as sham in the negative.

In *Genesee Mut. Ins. Co. v. Moynihan*, 5 How. Pr. 321, an answer in an action on a premium note, denying knowledge or information sufficient to form a belief, as to facts alleged to render the defendant liable upon the note, was held to be sufficient under the Code.

Sales.

It is generally held that a party cannot use denials upon information and belief, or of knowledge or information sufficient to form a belief, as to the sale of goods to him. *Chapman v. Palmer*, 12 How. Pr. 37 (denial (2) by partner as to sale of goods sued for, and sums claimed, Code, evasive); *Starbuck v. Dunklee*, 10 Minn. 168, Gil. 136, 88 Am. Dec. 68 (answer admitting receipt of some of wood sued for, but denying any knowledge or information sufficient to form a belief as to quantity, insufficient); *Singer v. Effler*, 16 Misc. 334, 30 N. Y. Supp. 720 (denial (2) that, at times mentioned in complaint, plaintiff sold goods, wares, and merchandise to defendant, insufficient); *Wing v. Dugan*, 8 Bush, 583 (denial (2) to defendant's plea of set-off for goods sold and delivered, Code, evasive); *Raphael Weill & Co. v. Crittenden*, 139 Cal. 488, 73 Pac. 238 (denial (1) as to sale and delivery of goods to defendant at his request, insufficient).

In *Schroeder v. Capehart*, 49 Minn. 525, 52 N. W. 140, defendant's denial that he had knowledge or information sufficient to form a belief, as to whether plaintiffs sold or delivered the goods alleged, was held to raise an issue, while it was suffered to remain in the pleadings. The court said: "Upon a motion to strike it out, or to require the pleading to be amended, it might appear that the defendant's liability arose

although upon information and belief, were good, as for instance the denials as to the ownership of the premises and the suffering of damage. These preliminary methods of attack were therefore not open to plaintiff. Upon the trial plaintiff did not by his proof go into the question of who was operating that part of the line, or recognize that as an issue, and when the defendant, by this line of proof, sought to make it as an issue, the objection now considered, based upon the pleadings, was promptly made, thus giving defendant notice of the question raised and of the desirability of an amendment. There is nothing in this to indicate a waiver of the objection or an acquiescence in the defective pleading as sufficient. 31 Cyc. Law & Proc. p. 723; Rogers v. St. Paul, 86 Minn. 98, 90 N. W. 155. On the other hand, the form of the answer lacks much of giving the plaintiff that notice which our Code system guarantees to parties as to the issues to be insisted upon. An insistence upon this by the courts aids to economy in the preparation of cases and

to certainty and despatch in the administration of justice.

We are aware that there are one or two Minnesota cases holding, contrary to the views here expressed, that advantage of a defect in pleading such as this must be made in advance of trial, and not by an objection to evidence. *Smalley v. Isaacson*, 40 Minn. 450, 42 N. W. 352; *Schroeder v. Capehart*, 49 Minn. 525, 52 N. W. 140. The latter case, seems the more nearly in point. In that case, however, it will be noted that the court's decision proceeds, at least in part, upon the ground that the matter denied upon information was not necessarily within the knowledge of the defendant. But whatever be the basis of these contrary decisions, we deem them not in accord with the modern ideas of pleading. The face to face contest, and not the masked battery, typifies the latter.

The judgment is affirmed.

Parker, McFie, Wright, and Abbott, JJ., concur. Mechem, J., having been of counsel, did not participate.

upon an implied contract for goods furnished to an agent, or at defendant's place of business under circumstances showing that the denial in the answer in the form adopted was consistent with good faith on the defendant's part."

So, in *Nichols v. Corcoran*, 38 Misc. 671, 78 N. Y. Supp. 242, a denial in an answer by an executrix of knowledge or information sufficient to form belief, as to goods sold and delivered to a store of the estate, which had been continued by the executrix, was held under the Code not to be a sham answer, since the store might not have been conducted personally by the executrix.

And in *St. John v. Beers*, supra, it was held that there was no objection to stating an allegation as to the sale of goods on information and belief, since they might have been sold by a clerk or agent.

And in *Harvey v. Walker*, 59 Hun. 114, 13 N. Y. Supp. 170, which was an action to recover for goods alleged to have been sold to the defendants as partners, a verified answer made upon information and belief was held good and sufficient to raise an issue as to the defendant's partnership.

In *Richards v. Fuechsel*, 5 N. Y. Civ. Proc. Rep. 430, a denial in an action for goods sold and delivered, of every allegation of the complaint, on information and belief, was held sufficient, the court saying that such a denial, where the matter was presumptively within the personal knowledge of the defendant, was not formerly allowed, but that the cases now seemed to countenance it.

As to indebtedness.

A party is generally required to answer positively as to whether he is indebted to 30 L.R.A. (N.S.)

another, and denials upon information and belief, or of knowledge and information sufficient to form a belief, are held insufficient. *Brady v. Ranch Min. Co.* 7 Cal. App. 182, 94 Pac. 85 (denial (1) of indebtedness, insufficient); *Bloch v. Bloch*, 131 App. Div. 859, 116 N. Y. Supp. 339, reversed on other ground in 136 App. Div. 770, 121 N. Y. Supp. 475 (denial (2) as to allegations of loan to defendant and nonpayment, insufficient); *Thompson v. Seligman*, 90 Fed. 219 (denial (1) by plaintiff to counterclaim setting up loans and an account stated, insufficient); *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130 (denial (1) of nonpayment of note, insufficient).

But in *Morrow v. Cougan*, 3 Abb. Pr. 328, an answer to a complaint alleging in general terms that the defendant was indebted to the plaintiff, denying knowledge or information sufficient to form a belief, as to whether the defendant was indebted to him, was held not to be frivolous.

And in *Richter v. McMurray*, 15 Abb. Pr. 346, a denial of knowledge or information sufficient to form belief as to the truth or falsity of a complaint alleging that an amount was due on each note sued on, without alleging that the plaintiff holds notes drawn by the defendant, was held not to be frivolous. *

Work or services.

In the following cases denials upon information and belief, or of knowledge or information sufficient to form a belief, as to work or services rendered, were upheld: *Etchas v. Orena*, 121 Cal. 270, 53 Pac. 798 (denial (2) by executor as to services rendered testatrix and her promise to pay therefor, sufficient); *Colorado Coal & L. Co.*

v. John, 5 Colo. App. 213, 38 Pac. 390 (denial (2) as to services performed and moneys laid out by attorney employed by defendant corporation's general counsel, sufficient); Hensberry v. Clark, 23 Misc. 37, 51 N. Y. Supp. 308 (denial (1) in action to recover for services, where it was claimed defendant was not in suitable mental condition to enter into contract, sufficient); Walton v. Wild Goose Min. & Trading Co. 60 C. C. A. 155, 123 Fed. 209, 22 Mor. Min. Rep. 688, writ of certiorari denied in 194 U. S. 631, 48 L. ed. 1158, 24 Sup. Ct. Rep. 856 (denial (2) as to work performed on mining claim prior to pleader's acquisition thereof, not evasive); Humble v. McDonough, 5 Misc. 508, 25 N. Y. Supp. 965 (denial (1) as to indebtedness to plaintiff for professional services, Code, not sham).

Negligent acts.

Negligent acts must be pleaded positively, where it is clear, that the party must have some knowledge concerning the matter involved; Fallon v. Durant, 60 How. Pr. 178 (denial (1) by plaintiff of matters relative to injury sustained, where his averments showed that he had knowledge, Code, insufficient); Nashville, C. & St. L. R. Co. v. Hamilton, 16 Ky. L. Rep. 68, 26 S. W. 537; Nashville, C. & St. L. R. Co. v. Carico, 95 Ky. 489, 26 S. W. 177 (denial (2) by defendant carrier as to whether it injured stock transported, insufficient).

But in Boorman v. American Exp. Co. 21 Wis. 154, a denial by an express company of any knowledge or information sufficient to form a belief, as to the alleged negligence of its employees in transporting a violin, was held good. The court said: "An answer denying any knowledge or information sufficient to form a belief, as to facts presumed to be within the knowledge of the defendant, or of which he can easily inform himself, is bad; but such is not the nature of the facts here put in issue. The defendant, the express company, which is no more than a copartnership doing business under that name, transacts its business through a multitude of agents residing in different parts of the country, and the knowledge of such agents is not, for this purpose, the knowledge of their principals, the proprietors of the company. Neither can the proprietors readily avail themselves of, or acquire, the knowledge of their agents. This would be extremely difficult,—in the first place, on account of the great number of such agents residing in places remote from each other and from the proprietors themselves; but more especially, because the guilty or negligent agent in every such case is adversely interested. He might evade inquiry or give false answers. To hold, therefore, that the proprietors must know the facts, or obtain correct information of them, before they can answer to an action, would, in very many cases, be equivalent to an unqualified denial of justice. We are of opinion 30 L.R.A. (N.S.)

that such is not the rule of law, and that the answer in its present form is sufficient."

In Scully v. Wolf, 56 Misc. 468, 107 N. Y. Supp. 181, which was an action to recover for an injury received by being struck while passing defendant's property, with boards thrown to the ground, an answer denying knowledge or information sufficient to form a belief, as to the allegation, was held to be sufficient to warrant the admission of evidence as to the facts.

And in Comerford v. Dupuy, 17 Cal. 308, an answer on information and belief, that land on which damage was alleged to have been done by defendant's cattle was not in the plaintiff's possession, and that defendant was informed that other cattle had done some of the damage mentioned, was held sufficient.

Ownership and possession.

A party is generally bound to plead positively, and not upon information and belief, or by the use of a plea of knowledge and information sufficient to form a belief, as to the ownership of property by himself, and also as to the ownership of one to whom he has directly transferred property. McNeeley v. Welz, 20 App. Div. 566, 47 N. Y. Supp. 310, affirmed on other grounds in 166 N. Y. 124, 59 N. E. 697 (denial (2) as to whether defendant made claim to interest in certain fund, insufficient); Fales v. Hicks, 12 How. Pr. 153 (denial (2) by last indorser of note as to transfer thereof to plaintiff, frivolous); Flammer v. Kline, 9 How. Pr. 216; Fleury v. Brown, 9 How. Pr. 217; Fleury v. Roget, 5 Sandf. 646; Fleury v. Roger, 9 How. Pr. 215 (denial (2) as to whether plaintiff, to whom defendant made and delivered notes sued on, is lawful holder of them, sham); Kamlah v. Salter, 6 Abb. Pr. 226 (denial (2) by maker of note payable to his order, as to whether it was delivered or transferred to plaintiff, frivolous); de Santes v. Searle, 11 How. Pr. 477 (denial (2) as to whether plaintiff is owner of bill of exchange alleged in complaint to have been made payable to plaintiff and delivered to him, frivolous).

And such pleas cannot be used where the instrument is payable to bearer. Bronson v. Chicago, R. I. & P. R. Co. 40 How. Pr. 48 (answer denying (2) that plaintiff in suit on bond payable to bearer is owner, frivolous); Asiel v. Kansas & P. R. Co. 3 N. Y. Month. L. Bull. 28 (denial (1) as to whether plaintiff was owner of note payable to bearer, insufficient).

In Deloatch v. Vinson, 108 N. C. 147, 12 S. E. 895, where a complaint by an executor averred execution by defendant of the bond sued on, an answer that defendant was informed and believed that the plaintiff was not the owner of the bond, was held sham, being merely a legal conclusion which was not allowed by the Code.

But in Townsend v. Platt, 3 Abb. Pr. 325, a denial in an action to recover securities pledged by the plaintiff with the de-

pendant, of knowledge and information sufficient to form a belief, as to whether the securities belonged to the plaintiff, was held good under the Code.

One may generally plead as to another's ownership or right to possession of property upon information and belief, or by the use of a denial of knowledge and information sufficient to form a belief, where the pleader was not the direct transferor of the property, or, in case of instruments, where they were not made payable to bearer. *Kraemer v. Williams*, 131 App. Div. 236, 115 N. Y. Supp. 721 (allegation (1) in complaint to set aside conveyance on ground of fraud, that debtor has no other property subject to execution, sufficient); *Bartow v. Northern Assur. Co.* 10 S. D. 132, 72 N. W. 86 (denial (2) by defendant, a foreign corporation, in action on insurance policy, of allegation that plaintiff was owner of the property destroyed, sufficient); *Colby v. Spokane*, 12 Wash. 691, 42 Pac. 112 (denial (2) in action to enjoin city from proceeding with public improvements, for the purpose of which condemnation proceedings had been commenced against the plaintiff, as to allegation that plaintiff was owner of premises, sufficient); *Cunningham v. Skinner*, 65 Cal. 385, 4 Pac. 373 (denial (1) in action to recover personal property as to allegation that plaintiff was entitled to possession, sufficient); *Flood v. Reynolds*, 13 How. Pr. 112; *Snyder v. White*, 6 How. Pr. 321; *Duncan v. Lawrence*, 6 Abb. Pr. 304; *Hughes v. Wilcox*, 17 Misc. 32, 39 N. Y. Supp. 210 (denial (2) by maker of notes, as to transfer of notes to plaintiff, Code, sufficient); *Morton v. Jackson*, 2 Minn. 219, Gil. 180 (denial (2) as to indorsement of note to plaintiff, sufficient); *Hughes v. Brewer*, 7 Colo. 583, 4 Pac. 1115 (denial (2) as to whether plaintiff was bona fide assignee of judgment, sufficient); *Stacy v. Bennett*, 59 Wis. 234, 18 N. W. 26 (denial (1) of averment that tax sale certificate had been assigned to plaintiff, Code, sufficient); *Reese v. Walworth*, 61 App. Div. 64, 69 N. Y. Supp. 1115 (denial (2) as to whether bond and mortgage sued upon had been assigned to plaintiff, Code, sufficient); *Conolly v. Schroeder*, 121 App. Div. 634, 106 N. Y. Supp. 303 (denial (2) in suit by one claiming rent as purchaser of premises, as to plaintiff's ownership, sufficient).

In *Hyde v. Kitchen*, 50 N. Y. S. R. 466, 21 N. Y. Supp. 238, an answer by executors made parties to an action against a bank for money alleged to have been deposited by their testator in trust for the plaintiff, denying, beyond the book referred to in the complaint, knowledge or information sufficient to form a belief, as to whether they, as executors, had any interest in the fund, was held not sham.

And in *Caswell v. Bushnell*, 14 Barb. 393, where the maker of a note denied that he had knowledge or information sufficient to form a belief, as to whether the payee indorsed it to the plaintiff, notwithstanding affidavits making it probable that he did

have such knowledge, it was held that to hold the answer a sham would be to overturn the privilege given by the Code, which is in the alternative, to deny the allegations or to deny "any knowledge or information thereof sufficient to form a belief."

And in *Harney v. McLeran*, 68 Cal. 34, 1 Pac. 884, an answer in an action for street assessments, that the defendant had not sufficient information or belief as to his ownership of property to enable him to answer as to its ownership, and that he therefore denied it, was held sufficient, where no motion to strike it out was made.

For cases dealing further with ownership, see section on "Matters of public record," infra.

Service, demand, presentment.

In *Ensley v. Page*, 13 Colo. App. 452, 59 Pac. 225, a denial on information and belief of personal service upon defendant of a demand for possession of property was held insufficient.

In *Warner v. United States Land & Invest. Co.* 53 Hun, 312, 6 N. Y. Supp. 411, a denial by a foreign corporation in a suit on bonds, that it had no knowledge or information sufficient to form a belief, as to a demand of interest at its agency, and default after demand, was held not frivolous. The court said: "From the nature of this case, there was nothing in the allegation contained in the complaint from which the defendant was necessarily presumed to have knowledge of the fact of this demand. It was a foreign corporation, and the demand was made at its agency in the city of New York. And although individuals and corporations are presumed to be acquainted with the acts done by themselves, yet they cannot be presumed to know as to acts done by others at agencies remote from the situs of the corporation itself."

And in *Dickerson v. Kimball*, 1 N. Y. Code Rep. 49, a denial in an action on a promissory note of which defendant was indorser, that as to the presentment and nonpayment of the note he had no information sufficient to form belief, was held not evasive.

Fact of incorporation.

In *Brown v. La Crosse City Gaslight & Coke Co.* 21 Wis. 51, a denial by a corporation, through its president, of knowledge or information sufficient to form a belief, as to the allegation that the company was incorporated under a certain statute, under a given name, on a day designated, was treated as an admission.

And in *Northwestern Cordage Co. v. Galbraith*, 9 S. D. 634, 70 N. W. 1048, an answer that the defendant in a suit where it was alleged that the plaintiff was a corporation had no knowledge or information sufficient to enable him to form a belief, as to the truth of the allegation, was held not to put its corporate existence in issue.

And in *Crucible Co. v. Steel Works*, 9

Abb. Pr. N. S. 195, an answer denying knowledge or information sufficient to form a belief as to whether the plaintiff was a corporation was said to be frivolous, but the court held that they could not on appeal review the denial by the lower court of a motion to strike out the pleading as frivolous.

Matters within knowledge of public officials.

Where matters involved are connected with the duties of public officers, they cannot generally use the qualified denials considered in this note. *Appel v. State*, 9 Wyo. 188, 61 Pac. 1015 (denial (2) by chairman of county commissioners as to whether there were sufficient funds in treasury to pay warrant, insufficient); *McConoughy v. Jackson*, 101 Cal. 265, 40 Am. St. Rep. 53, 35 Pac. 863 (denial (1) of financial accountant of city as to sufficiency of funds to pay warrant, insufficient).

But in *State ex rel. Tracy v. Cooley*, 58 Minn. 514, 60 N. W. 338, an answer by a county auditor, in mandamus proceedings to compel the issuing of an order to pay school expenses, stating upon information and belief that the school district was never legally organized, and that it had been dissolved, was held sufficient.

—knowledge by municipality.

And a city is generally held to have positive knowledge as to matters clearly within the knowledge of its officers. *Borough Constr. Co. v. New York*, 131 App. Div. 278, 115 N. Y. Supp. 697 (denial (2) by city as to whether plaintiff's claim was presented to comptroller, frivolous); *Philadelphia v. Pierson*, 211 Pa. 388, 60 Atl. 999 (denial by city of information as to whether bond of indemnity given city had been approved by its solicitor, insufficient); *Carpenter v. Rolling*, 107 Wis. 559, 83 N. W. 953 (denial (2) by town as to whether road was legally laid out as highway, and as to whether it was bound to keep it in repair, insufficient).

But in *Smith v. Janesville*, 26 Wis. 291, a denial by defendant city of knowledge or information sufficient to form a belief, as to an allegation that the city assessors had knowingly and intentionally assessed certain kinds of property at less than true value, was held to be a sufficient denial.

Matters of public record.

Matters appearing of public record cannot as a rule be denied upon information and belief, or by a denial of knowledge and information sufficient to form a belief. *Peacock v. United States*, 60 C. C. A. 389, 125 Fed. 583 (denial (1) as to ownership and registry of vessel shown by registry, insufficient); *State ex rel. Kennedy v. McGarry*, 21 Wis. 406 (denial (1) by officer removed by board of county supervisors, that cause of his removal was particularly assigned in writing and entered upon books of board, insufficient); *Union Lumbering* 30 L.R.A. (N.S.)

Co. v. Chippewa County, 47 Wis. 245, 2 N. W. 281 (denial (1) in action against county supervisors to avoid taxes as illegal, that town assessors neglected to annex prescribed oath to assessment, that board of equalization was not properly sworn, and of other matters appearing of public record, insufficient); *Mendocino v. Peters*, 2 Cal. App. 24, 82 Pac. 1182 (denial (2) of matters in reports of viewers, and notice, hearings, orders, and proceedings of board of supervisors, insufficient); *People v. McCumber*, 15 How. Pr. 186 (denial (1) that bank was designated to receive canal tolls sought to be recovered, insufficient); *Gridler v. Farmers' & D. Bank*, 12 Bush, 333 (denial (2) by defendant of presentation, demand, refusal of payment of bill, where protest of notary is filed with petition, insufficient, this being official document signed by public officer).

But in *People v. Curtis*, 1 Idaho, 754, a denial of one elected probate judge, upon information and belief, as to whether the compensation of the office had been increased by a certain act, was held sufficient to raise an issue, where, to ascertain the fees paid his predecessor, he would have been obliged to have searched the records of the county commissioners, the court saying: "The facts could only have been ascertained by the examination of records, possibly within his reach, but not such as he would be presumed to know the contents of."

—deeds and mortgages.

A party, for the purpose of pleading, is generally held to have knowledge of deeds and mortgages of record, so that he cannot resort to qualified pleas as to such instruments. *Johnson v. Asher*, 32 Ky. L. Rep. 317, 105 S. W. 943 (denial (2) as to recorded conveyance to plaintiff, insufficient); *Wheaton v. Briggs*, 35 Minn. 470, 29 N. W. 170 (denial (2) to complaint brought by assignee to foreclose mortgage, as to recorded assignment of mortgage, insufficient); *Hathaway v. Baldwin*, 17 Wis. 616 (denial (2) by defendants claiming interest in property about to be foreclosed, as to execution and record of plaintiff's mortgage, evasive); *Daisy Realty Co. v. Brown*, 18 Ky. L. Rep. 155, 35 S. W. 637 (denial (2) as to matters shown on recorded plat of defendant's land, insufficient); *Goodell v. Blumer*, 41 Wis. 436 (denial (1) as to averments setting out deed made to plaintiff, and giving volume and page where recorded, insufficient); *Schwartz v. Ribaud*, 52 Misc. 102, 101 N. Y. Supp. 599, affirmed on other points in 110 N. Y. Supp. 352; *Burdick v. Sterr*, 2 W. N. C. 123 (denial (1) as to assignment of mortgage sued on, where record referred to in pleadings, insufficient).

In *Bidwell v. Sullivan*, 10 App. Div. 135, 41 N. Y. Supp. 770, however, where a defendant in an action to foreclose a mortgage answered that he had no knowledge or information sufficient to form a belief,

as to allegations in the complaint that his lien was subsequent to the mortgage sought to be foreclosed, it was held not to be frivolous. The court said: "The answer was adjusted to be frivolous apparently upon the ground that the defendant was bound to take notice of the fact of the recording of the prior mortgage, and, therefore he was not at liberty to set up a general denial upon the ground that he had no knowledge or information sufficient to form a belief. While the record of the mortgage is undoubtedly notice of its existence to any one who has occasion to examine the record, yet it clearly is not proof of the due execution and delivery of the mortgage, although it may raise a presumption of those facts, and those facts are put in issue by the denial of the defendant in the form in which the statute permits him to make it, as much as any other facts. Although a defendant may be able by inquiry to ascertain whether the allegations of the complaint are true, he is not bound to do so, and unless such allegations are necessarily within his personal knowledge, an answer in the form of this one is not frivolous."

And in *McIntosh v. Omaha*, 3 Neb. (Unof.) 408, 91 N. W. 527, an answer as to whether the plaintiff was the owner of land, stating that the defendant was not sufficiently informed as to the plaintiff's ownership, and therefore denied it, was held sufficient, where it was not alleged that the deed of conveyance was recorded, since the title might have been acquired by adverse possession or otherwise not appearing of record.

In *Smalley v. Isaacson*, 40 Minn. 450, 42 N. W. 352, a denial of knowledge or information sufficient to form a belief as to allegations respecting the title of the several parties was held to raise an issue so long as it remained in the answer, but not after a motion was made to strike out.

In *Collart v. Fisk*, 38 Wis. 242, an answer by one made defendant in an action to foreclose a recorded mortgage, in which the complaint stated that the defendant had some interest in land subsequent to plaintiff's mortgage, of knowledge or information sufficient to form a belief as to any averment of the complaint, except that the defendant had an interest in the land, was held to be a good traverse, but it was held to admit that the defendant's interest was subsequent to plaintiff's mortgage.

—recorded liens.

So, a pleader is presumed, for the purposes of pleading, to have knowledge as to recorded liens. *Oakes v. Ziemer*, 62 Neb. 603, 87 N. W. 350 (denial (1) as to regularity of tax lien, insufficient); *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144 (denial (1) as to whether plaintiff had recorded claim for mechanics' lien, insufficient).

But in *Hagman v. Williams*, 88 Cal. 146, 25 Pac. 1111, a denial on information and

belief that a recorded claim for a mechanics' lien, which was inartificially drawn, contained the necessary facts, was held sufficient.

—matters concerning taxes.

And the same rule of notice applies as to the assessment, etc., of taxes. *Austen v. Westchester Teleph. Co.* 8 Misc. 11, 28 N. Y. Supp. 77 (denials (1) in complaint to collect personal taxes as to proceedings for taxing, levying, and demand, frivolous); *Stone v. Auerbach*, 133 App. Div. 75, 117 N. Y. Supp. 734 (denial (2) by assignee of lease under which lessee undertook to pay taxes, as to assessment, etc., shown by records, frivolous); *Van Dyke v. Doherty*, 6 N. D. 263, 69 N. W. 200 (denial (2) as to whether plaintiff paid taxes sued for, where defendant was attorney located at county seat where public records kept, insufficient); *Wickersham v. Russell*, 51 Pa. 71 (denial (1) as to the assessment and payment of taxes upon land of defendant, insufficient); *Davis v. Louk*, 30 Wis. 308 (denial (2) in action by one who has paid taxes to recover part from defendant, as to who paid taxes, insufficient); *Wentzel v. Zinn*, 7 Ohio N. P. 512 (statement in action to recover from doweress proportion of taxes paid on her account, that she was not informed of amounts of taxes and assessments unpaid by her, evasive).

—judgments.

Pleaders are generally presumed to have knowledge of judgments appearing of record to which they are parties and matters involved therein cannot be denied upon information and belief, or by the use of denials of knowledge or information. *Ketcham v. Zerega*, 1 E. D. Smith, 553; *Curtis v. Richards*, 9 Cal. 34 (denial (2) as to judgment sued on which was rendered against defendant in same court, insufficient); *Gjerstadengen v. Hartzell*, 8 N. D. 424, 79 N. W. 872; *Livingston v. Hammer*, 7 Bosw. 670 (denial (2) as to whether judgment against defendant set out in complaint was entered, frivolous); *Buller v. Sidell*, 43 Fed. 116 (denial (2) regarding judgment sued on, where pleader entered appearance in the former suit, sham); *Beebe v. Marvin*, 17 Abb. Pr. 194 (denial (2) as to recovery of judgment against defendant in foreign state, Code sham); *Roblin v. Long*, 60 How. Pr. 200 (denial (2) in action on foreign judgment in which defendant appeared, Code, sham); *Lucas v. Lucas*, 18 Ky. L. Rep. 661, 37 S. W. 588 (denial (2) by defendant as to whether court of another state had jurisdiction in divorce suit against him, or whether he was properly before the court in that action, insufficient).

And the same rule applies where they are in such a position as naturally to know of such judgments. *First Nat. Bank v. Watt*, 7 Idaho, 510, 64 Pac. 223 (allegation (1) in answer of surety that note signed by principals had been reduced to

judgment, insufficient); *Hance v. Rumming*, 2 E. D. Smith, 48 (denial (2) by sureties as to judgment rendered against principal, where attorney acted for both original defendant and subsequently for sureties, sham); *Brown v. Scott*, 25 Cal. 190 (denial (1) by one to whom judgments had been assigned, of whether the execution sale at which he purchased was had under these judgments, and whether he used the judgments in payment of the sum bid by him, insufficient); *Elmore v. Hill*, 46 Wis. 618, 1 N. W. 235 (denial (2) as to validity of judgment on which execution which was handed to defendant sheriff for levy was issued, insufficient); *Zivi v. Einstein*, 1 Misc. 212, 20 N. Y. Supp. 893, 894 (denial (2) by stockholders of corporation as to recovery of judgment against corporation, insufficient).

But in *Wesson v. Judd*, 1 Abb. Pr. 254, a denial upon knowledge or information sufficient to form a belief, by one who gave an undertaking that the defendant in supplementary proceedings should attend, as to the existence of the judgment on which the supplementary proceedings were founded, was held not to be sham or evasive.

And where the pleader is not a party to the judgment, these pleas have been upheld. *Mower v. Stickney*, 5 Minn. 397, Gil. 321 (denial (2) as to judgment pleaded by plaintiff, to which defendant was not a party, sufficient); *Vassault v. Austin*, 32 Cal. 597 (denial (1) by several defendants of complaint averring judgment against one of defendants, the court where recorded, and the date and amount, Code sufficient).

And in *Dittmore v. Cable Mill Co.* 16 Idaho, 298, 133 Am. St. Rep. 98, 101 Pac. 593, a denial of information as to an adjudication of insolvency, to which the defendant was not a party, and also the appointment of the plaintiff as trustee in bankruptcy, was held sufficient.

—court records, matters other than judgments.

Matters other than judgments, which appear upon the records of the court, are also held to be within the presumptive knowledge of those connected therewith, for the purpose of pleading. *Huffaker v. National Bank*, 12 Bush, 287 (denial (2) as to whether note was duly presented and payment refused, where protest was filed with petition, insufficient); *McClure v. Bigstaff*, 18 Ky. L. Rep. 601, 37 S. W. 294, 38 S. W. 431 (denial (1) as to assignment of notes, where notes with assignments thereon were part of record, insufficient); *Douglass v. Cline*, 12 Bush, 608 (denial (2) as to whether wages were due, where pay rolls upon which claims were based were part of record, equity, insufficient); *First Nat. Bank v. Martin*, 6 Idaho, 204, 55 Pac. 302 (denial (1) of matters upon records in case in which defendant was principal party, insufficient); *Herald v. Hargis*, 21 Ky. L. Rep. 1287, 54 S. W. 958 (denial (1) as to court order of record 30 L.R.A. (N.S.)

approving sheriff's bond in action against defendant, insufficient); *Steinberg v. Saltzman*, 130 Wis. 419, 110 N. W. 198 (denial (1) that license to sell real estate in suit was granted by probate court to administrator, insufficient); *Wallace v. Bacon*, 80 Fed. 553 (denial (1) by stockholder in corporation, as to appointment of receiver of corporation, his qualification, and assessment of stock by comptroller of currency, insufficient); *Work Bros. v. Kinney*, 7 Idaho, 460, 63 Pac. 596 (denial (2) in suit against sheriff and his sureties, as to matters relative to suit upon which execution in question issued, insufficient); *Simpson v. Remington*, 6 Idaho, 681, 59 Pac. 360 (denying (1) in supplementary proceedings, allegation of issuance of execution, and return *nulla bona*, insufficient).

And where the plaintiff in an action on bills of exchange filed an amended petition, upon defendants' request, for the purpose of showing usury, stating the history of the bills, when they originated, their dates, and amount of interest, it was held that defendants could not deny that they had sufficient knowledge or information to form a belief as to whether the information given was true. *Rudd v. Deposit Bank*, 105 Ky. 443, 49 S. W. 207, 971.

—official appointments.

The appointment of officials is also held to be a matter presumptively within the knowledge of the pleader. *Re Clement*, 132 App. Div. 598, 117 N. Y. Supp. 30 (denial (2) in answer to action by state commissioner of excise, as to whether petitioner was the duly appointed and qualified commissioner, insufficient to compel introduction of affirmative proof); *Simmons v. Craig*, 137 N. Y. 550, 33 N. E. 76 (denial (2) as to appointment of person alleged by other party to have been appointed executrix, insufficient); *Thompson v. Skeen*, 14 Utah, 209, 46 Pac. 1103 (denial (1) as to appointment of personal representative, where complaint stated that will of deceased had been probated at certain place, and necessary steps taken to enable plaintiff's to sue, insufficient).

But in *Wittman v. Watry*, 37 Wis. 238, in a suit where the plaintiff stated that she sued as executrix and residuary legatee, an answer denying knowledge or information sufficient to form a belief as to the plaintiff's statements was held sufficient to put the allegation of whether she was executrix and legatee in issue.

—acts of city council.

The proceedings of city councils are held to be matters of record of which pleaders will be presumed to have knowledge. *Barret v. Godshaw*, 12 Bush. 592 (denial (2), as to whether alleged ordinances authorizing improvements in question had been passed and approved by city council, insufficient); *Milwaukee v. O'Sullivan*, 25 Wis. 666 (allegation (1) that city coun-

cil allowed claim of which defendant was assignee for certain amount, insufficient).

In *Greer v. Covington*, 83 Ky. 410, a statement that defendant "has no information sufficient to form a belief upon, that any of the ordinances mentioned in plaintiff's amended petition were ever published as required by law," was held to be but a statement of the party's want of information of the law, and not good.

Exception as to allegations.

It has been held that allegations of affirmative matter may be pleaded upon information and belief, notwithstanding it is presumptively within the knowledge of the pleader.

Thus, in *New York Marbled Iron Works v. Smith*, 4 Duer, 362, where the plaintiffs in their complaint alleged on information and belief that they were a corporation, that defendant indorsed the note sued on, and that it was duly presented, demand made, and payment refused, the court said: "The other objections to the complaint are so plainly groundless as scarcely to require a remark. Although a defendant in an answer under oath is not permitted to answer upon information as to facts within his personal knowledge, no such rule is applicable to averments in a complaint, and so applied, the rule would be arbitrary and senseless. Whether the material facts stated in a complaint are stated upon information or knowledge, it is equally the existence of the facts that is averred, and that the plaintiff is bound to prove upon the trial. Hence, the form of the averment is to the defendant a matter of entire indifference."

And this case was followed in *Risdon v. Davenport*, 4 S. D. 555, 57 N. W. 482, where an answer alleging affirmatively, upon information and belief, that the service of the summons or notice of contest in proceedings referred to in the complaint was made by publication only, and in no other way, was held valid.

Rule as to corporations.

In *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L.R.A. 193, 44 Pac. 320, the court said: "The denial of an allegation in the complaint, for want of sufficient information and belief to enable the defendant to answer the same, justifies the court in disregarding or striking out such denial, if the matter is presumptively within the knowledge of the defendant; and although a corporation does not itself have any knowledge of the matters alleged, but is compelled to act through its officers, whose information may be derived from others, yet it cannot place its denials upon its want of information and belief, if the matters alleged were presumptively within the knowledge of any of its officers, even though the officer verifying the answer was himself without any information or belief

upon the subject." The rule here laid down is the one generally adopted, as will be seen by other corporation cases appearing under the several sections of this note, where the general rule has been applied.

But in *Martin v. Erie Preserving Co.* 48 Hun, 81, it was held that the rule allowing the plaintiff to show by affidavit that defendant's answer on information and belief is false, and that the facts alleged or constituting plaintiff's cause of action are within defendant's knowledge, did not apply where the defendant was a corporation. The court said: "But if it should be conceded that the general rule is as contended for by the counsel for the plaintiff in actions against persons, it does not apply in cases where a corporation is the defendant, making a denial upon information and belief. The answer by a corporation may be verified by one of its officers, and in the form here used. It is not to be supposed that the officers of a corporation having charge of its affairs have personal knowledge of all its business transactions. If a corporation disputes the cause of action set up in the complaint, it may, by its answer, deny the same on information and belief otherwise it might not be able, in many instances, to serve a verified answer. If the officer making the verification does not have personal knowledge that the allegations in the complaint relative to the cause of action are false and untrue, he would place himself in a position of great peril in making the affidavit of verification, should the answer contain a positive denial of the cause of action. It is declared in § 524, that unless the allegations in a pleading are stated to be on information and belief of a party, they must be regarded for all purposes, including a criminal prosecution, as having been made upon the personal knowledge of the person verifying the pleading."

Miscellaneous.

In *Noyes v. Inland & S. Coasting Co. MacArth. & M. 2*, a statement on information and belief in an answer by a corporation which had taken over a foreign corporation, as to the latter's power to loan money upon certain security, was held sufficient.

And in *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642, 10 A. & E. Ann. Cas. 774, the plaintiff's reply to defendant's answer alleging that a certain statute never was a law of the state, or enacted and signed as prescribed by the Constitution, that they had not, and could not, obtain sufficient knowledge or information upon which to base a belief, was held good under the Code.

In *Straus v. American Publishers' Assn.* 96 App. Div. 315, 89 N. Y. Supp. 172, where an action was brought against various defendants to declare a combination unlawful, the court said: "One line of the plaintiffs' objections is that the answer in several places avers or denies upon informa-

tion and belief, and the plaintiffs insist that the defendants know of their own knowledge. This, we think, is not a very serious objection, and, as said by the respondents, while in some cases anyone of the defendants might perhaps allege that he himself had or had not knowledge or motive or the like, he certainly could only answer on information and belief as to those matters with respect to his codefendants; and as to the averment that an illegal combination existed, the defendants would rely upon legal advice as to the nature of their association, and hence, must answer on information and belief."

And in *Hopkins v. Meyer*, 76 App. Div. 365, 78 N. Y. Supp. 459, where the facts pleaded do not appear, the court said that it is well settled that an answer made upon information and belief cannot be stricken out as sham, even where a person is in a position to know the facts, and that such allegations cannot be disregarded as pleading.

And where the matter involved was particularly within the knowledge of the other party, pleas upon information and belief have been upheld. *McDermont v. Anaheim Union Water Co.* 124 Cal. 112, 56 Pac. 779 (material allegations (1) in complaint by stockholder against irrigation corporation, to prevent its furnishing water to new members, where truth as to matters particularly within defendant's knowledge, Code sufficient); *Campbell-Kawannanaka v. Campbell*, 152 Cal. 201, 92 Pac. 184 (allegations (1) in complaint sounding in fraud, of matters peculiarly within defendant's knowledge, sufficient).

In *Robinson v. Ferguson*, 119 Iowa, 325, 93 N. W. 350, in an action by a county treasurer under a statute providing that when property subject to taxation is withheld, overlooked, or for any other cause not listed or assessed, such treasurer shall when appraised thereof cause an action to be brought therefor it was held that the necessary allegations in the petition might be made by him upon information and belief, since he might not have actual knowledge that the property had been omitted.

So a denial on information and belief of allegations that plaintiff forwarded a warrant with a certain indorsement thereon is good, although the warrant is in defendant's possession, the material allegation going to the act of forwarding and not the indorsement. *Seattle Bank v. Meerwaldt*, 8 Wash. 630, 36 Pac. 763.

The rule in equity that matters within the presumptive knowledge of the pleader must be set out positively, and not upon information and belief, or upon knowledge or information sufficient to form a belief, was laid down in the following cases but the decisions were placed upon other grounds: *Miles v. Miles*, 27 N. H. 440; *Dinsmoor v. Hazelton*, 22 N. H. 535; *McAllister v. Clopton*, 51 Miss. 257; *Mead v. Day*, 54 Miss. 58; *Woods v. Morrell*, 1 Johns. Ch. 103. J. T. W.
30 L.R.A. (N.S.)

ARKANSAS SUPREME COURT.

STATE MEDICAL BOARD OF ARKANSAS MEDICAL SOCIETY, Appt.,

v.

A. S. McCrary.

(— Ark. —, 130 S. W. 544.)

Physician — revoking license — necessity of judicial proceeding.

1. Judicial proceedings are not necessary to the revocation of a license to practise medicine, in order to avoid conflict with the constitutional provision against depriving one of property without due process of law.

Statute — certainty — regulation of physicians.

2. A statute providing for the revocation of the license of a physician who advertises special ability to treat or cure chronic and incurable cases is not void for uncertainty.

Physician — forbidding to advertise special ability — validity.

3. Forbidding physicians to advertise special ability to treat or cure chronic or incurable diseases is within the police power.

(June 27, 1910.)

Note. — Grounds for revoking physician's license.

The early cases dealing with grounds for the revoking of physician's licenses are covered in the notes to *Macomber v. State Bd. of Health*, 8 L.R.A. (N.S.) 585, and *Munk v. Frink*, 17 L.R.A. (N.S.) 439.

The expression "gross immorality," named in a statute as a cause for the revocation of a physician's license, was held in *Rose v. Baxter*, 7 Ohio N. P. N. S. 132, not so vague, uncertain, broad, and comprehensive as to give the medical board the sole power to determine whether the license should be revoked without providing any standard as to qualification. The court said: "Gross immorality is a term which has been used and has received adjudication at the hands of a great many courts. The word 'gross' does not mean great or big or excessive, necessarily, but rather such a wilful, flagrant, and shameful quality with respect to the office involved as renders the officer unfit to hold his license and authority to act. Sometimes the expression is found, under the law, 'gross misbehaviour.' The expression 'moral turpitude' is closely akin to the expression at bar, and has received a great many interpretations, but has always been sustained by the courts so far as I have been able to ascertain, and I find no cases in which it has been held so indefinite as to preclude action against a person guilty thereof."

And this statute is violated where a physician maintains two offices under different names, intending thereby to perpetrate a fraud upon the public. *Ibid.*

APPEAL by defendant from a decree of the Pulaski Chancery Court enjoining it from interfering with plaintiff's right to practise medicine because of an alleged unlawful advertisement. Reversed.

Statement by Hart, J.:

A. S. McCrary was duly notified to appear before the State Board of the Arkansas Medical Society in the hall of the house of representatives, in the statehouse, in the city of Little Rock, Arkansas, on November 10, 1909, and show cause why his certificate to practise medicine in said state should not be revoked under subdivision d of § 8 of act 219, of the Arkansas general assembly, approved May 6, 1909. It is as follows:

So, a statute providing for the revocation of dentists' licenses for fraud, deceit, or misrepresentation in the practice of dentistry, or for gross violation of professional duties, is not unconstitutional on the ground of uncertainty, because the grounds for which it authorizes the revocation have no fixed or determined meaning, but are left to the caprice and whims of the state board of dental examiners, since they have a well-defined meaning. *State ex rel. Williams v. Purl*, 228 Mo. 1, 128 S. W. 100.

And this statute is violated where a dentist inserts false advertisements as to price, the making of teeth without bridges or plates, the re-enameling of teeth, the tightening of loose teeth, the curing of pyorrhea, and other false statements tending to deceive the public and to impose on the credulous and ignorant. *Ibid*.

So, a statute giving a medical board power to revoke a physician's certificate, where he inserts or causes to be inserted in the newspapers an advertisement relative to venereal diseases, is not unconstitutional because it does not state in advance what act or acts may be in violation of its provisions. *Kennedy v. State Bd. of Registration*, 145 Mich. 241, 108 N. W. 730, 9 A. & E. Ann. Cas. 125.

This case is distinguished from *Matthews v. Murphy*, *infra*, and like cases, on the ground that in the *Kennedy* case the legislature had declared what acts or conduct afforded a ground for revocation, while in the *Matthews* case the statute did not specifically provide what acts should be regarded as unprofessional conduct which was calculated to deceive or defraud the public.

In *Matthews v. Murphy*, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785, a statute authorizing the revocation of a physician's license for grossly unprofessional conduct likely to deceive or defraud the public, without fixing any standard by which such fact should be determined, was held void.

A statute authorizing a medical board to revoke a physician's license when the holder has been guilty of a felony or of gross immorality does not violate the provisions of the state or Federal Constitutions. *Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. 228. 30 L.R.A. (N.S.)

"Section 8. Every person residing in this state, or coming into it, of the age of twenty-one years, who has not heretofore been licensed to practise medicine under the existing laws, making application to register under the provisions of this act for the purpose of practising medicine in this state, shall first make application to the secretary of the board representing the school of medicine from which he graduated, and his application shall be accompanied by a fee of \$15, this fee being for examination and registration before the boards. The applicant shall present to the board satisfactory evidence of graduation from a reputable medical school, and a school shall be considered reputable within the meaning of this act whose entrance, requirements, and

The illegal sale of intoxicating liquors is not a misdemeanor involving moral turpitude, within the meaning of a statute providing that whenever a physician or surgeon shall be convicted of any crime and misdemeanor involving moral turpitude, in addition to the other penalties imposed, his license shall be revoked. *Fort v. Brinkley*, 87 Ark. 400, 112 S. W. 1084. The court said: "Moral turpitude is defined to be an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowmen or to society in general." 20 Am. & Eng. Enc. Law, p. 872. See also *Ex parte Mason*, 29 Or. 18, 54 Am. St. Rep. 772, 43 Pac. 651; *In Re Kirby*, 10 S. D. 322, 414, 39 L.R.A. 856, 73 N. W. 92, 907. . . . Moral turpitude implies something immoral in itself, regardless of the fact whether it is punishable by law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude. It seems clearly deducible from the above-cited authorities that the words 'moral turpitude' had a positive and fixed meaning, at common law, and that the illegal sale of intoxicating liquors, not being an offense punishable at common law, does not come within the definition of a crime involving moral turpitude."

Extensive advertising by a physician cannot of itself be said to be disgraceful conduct, but where such advertisements are studied efforts to impose upon the credulity of the public for gain they are utterly disgraceful within the meaning of a statute providing for an erasure of physicians' names from the medical register where they are guilty of disgraceful conduct. *Re Washington*, 23 Ont. Rep. 299.

And a physician is guilty of disgraceful conduct under this statute where he accepts money from those in the last stages of consumption, under the representation that they are suffering from catarrhal-bronchitis, when he must have known the truth. *Ibid*.

However, a charge merely stating that a physician has published the symptoms of catarrh does not charge disgraceful conduct in a professional aspect, within the meaning of the foregoing statute. *Ibid*.

course of instruction are as high as those adopted by the better class of medical schools of the United States. Such examinations may be written or oral, and shall be of a practical character and conducted on the scientific branches only, and shall include anatomy, physiology, medical chemistry, materia medica, therapeutics, theory and practice of medicine, pathology, bacteriology, surgery, obstetrics, gynecology, and hygiene. All questions and answers, with grades attached, shall be preserved by the secretary for one year.

"If in the opinion of the board the applicant possesses the necessary qualifications, the board shall issue to him a certificate. The boards may, at their discretion, arrange for reciprocity in license with the authorities of states and territories having requirements equal to those established by the boards, and every person desiring license under reciprocity must make application to the secretary of the board representing the school of medicine from which he graduated. License may be granted applicants for license under such reciprocity on payment of \$25.

"The boards may refuse to grant or may revoke a license for the following causes, to-wit: "(a) Chronic and persistent inebriety; (b) the practice of criminal abortion, either as principal or abettor; (c) conviction of a crime involving moral turpitude; (d) publicly advertising special ability to treat or cure chronic and incurable diseases; (e) the presentation to the board of any license, certificate, or diploma which was illegally or fraudulently obtained, or the practice of fraud or deception in passing the examina-

tion. In complaints for violating the provisions of this section, the accused person shall be furnished a copy of the complaint, and given hearing before said board in person, or by attorney; and any person after such refusing or revocation of license, who shall attempt or continue the practice of medicine, shall be subject to the penalties hereinabove described."

On November 10, 1909, Dr. McCrary filed a complaint against said board and the members thereof to enjoin them from acting in the complaint filed against him before said board. With his petition he filed the following exhibits: First. The notice served on him to appear before the State Medical Board and show cause why his license to practise medicine in the state of Arkansas should not be revoked. Second. The complaint filed against him before said board. It charged that he had violated subdivision d of the above-quoted act, "by publicly advertising special ability to treat or cure chronic and incurable diseases," in violation of the terms thereof. Third, A verbatim copy of his advertisement, stating his success and ability to cure certain ailments. It is not necessary to set out his advertisement; for it seems to be conceded that if the act in question is constitutional, and is not void for uncertainty, the advertisement falls within its prohibition.

The board demurred to the complaint. The court overruled the demurrer on the ground that subdivision d, which authorized the board to revoke the license of a physician, if he "publicly advertise special ability to treat or cure chronic and incurable diseases, is too indefinite and uncertain for en-

Under a statute providing in substance that any registered medical practitioner who shall have been convicted of any felony shall thereby forfeit his registration, or in case of a person known to have been convicted of a felony who shall present himself for registration the register shall have power to refuse such registration, the name of one who had previously been convicted of manslaughter and after the full term of his sentence had expired had made application for registration and been registered, cannot be removed from the register because of this conviction. *R. v. College of Physicians & Surgeons*, 44 U. C. Q. B. 146.

And where he was asked no questions at the time of registration, he is guilty of no false or fraudulent representations justifying the erasure of his name from the register, although the secretary did not know of the conviction at the time his name was entered. *Ibid*.

In *Re Telford*, 11 B. C. 355, a young woman who was pregnant, and who had herself made unsuccessful attempts to bring about a miscarriage, asked a physician to effect an abortion. The physician, believing

that it would be necessary to expel the contents of the uterus, owing to the patient's attempts at miscarriage, inflicted a wound on her body with the object of enabling him and the patient more effectually to deceive her parents and others with respect to her real condition, by causing them to believe that she had been operated on for the removal of the appendix. The operation was performed in a private sanatorium, without professional or other consultation, and it was shown that it could serve no purpose relative to the health of the patient. The woman died from the effects of the attempts at abortion, and the physician was acquitted on a charge of manslaughter, but it was held that the medical council were justified in erasing his name from the register, since he was guilty of unprofessional conduct.

And the cancellation of a physician's license on the ground that he had committed a criminal abortion was upheld in *Mathews v. Hedlund*, 82 Neb. 825, 119 N. W. 17, and it was held that the revocation might be made before his conviction in a criminal court.

J. T. W.

forcement." The board electing to stand on its demurrer, and refusing to further plead, a decree was entered enjoining it and the members thereof from in any way interfering with the right of the plaintiff to practise medicine, because of the advertisement charged in the complaint made against him.

To reverse that decree this appeal is prosecuted.

Messrs. Coleman & Lewis, with Mr. H. L. Norwood, Attorney General, for appellant.

Messrs. Pettard & Brickhouse and W. T. Tucker for appellee.

Hart, J., delivered the opinion of the court:

The constitutionality of the above-quoted statute is attacked by appellee. He contends that his license to practise medicine is a property right, the revocation of which is an exercise of judicial power, which cannot be vested in any administrative board, but only in the courts; and that to assume to invest this power in the board is to deprive him of his property without due process of law, in violation of § 8 of article 2 of our Constitution.

In discussing this question, the supreme court of the state of Minnesota, in a clear and well-considered opinion delivered by Mr. Justice Mitchell, said: "The radical fallacy in this chain of argument is the assumption that the revocation of such a license is the exercise of judicial power. 'Due process of law,' or 'the law of the land' (which means the same thing), is not necessarily judicial proceedings. Private rights and the enjoyment of property may be interfered with by the legislative or executive, as well as the judicial, department of the government. When it is declared that a person shall not be deprived of his property without 'due process of law' it means such an exercise of the powers of government as the settled maxims of law permit and sanction, under such safeguards as these maxims prescribe for the class of cases to which the one in question belongs. . . . It has never been held that the granting or refusing to grant such a license as this was the exercise of judicial power, . . . and there is no possible distinction in this respect between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power. The power exercised and the object of its exercise are in each case identical, viz., to exclude an incompetent or unworthy person from this employment. Therefore the same body which may be vested with the power to grant, or refuse to grant, a license may also

be vested with the power to revoke. The statutes of all the states are full of enactments giving the power to revoke licenses of dealers, innkeepers, hackman, draymen, pawnbrokers, auctioneers, pilots, engineers, and the like, to the same bodies, boards, or officers who are authorized to issue them, such as city councils, county commissioners, selectmen, boards of health, boards of excise, etc. The constitutionality of such laws, as a valid exercise of the public power, has often been sustained, and, indeed, rarely questioned. . . . The only authorities cited by relator to support his contention are cases in which it has been held that the removal of an attorney by a court from his office as an attorney of the court, like the order of his admission, is the exercise of judicial power, and is a judgment of the court. But these cases are not at all analogous to the one at bar. They rest expressly upon the ground that attorneys are officers of the court, whose duties relate almost exclusively to proceedings of a judicial nature, and that at common law it vested exclusively with a court to determine who is qualified to become one of its officers, and for what cause he ought to be removed, and hence that attorneys could only be removed from office for misconduct ascertained and declared by judgment of the court. *Ex parte Secombe*, 19 How. 9, 15 L. ed. 565; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366." *State ex rel. Chapman v. State Medical Examiners*, 34 Minn. 387, 26 N. W. 123.

This is a leading case on the subject, and has been cited with approval by nearly all the courts where the question has been under consideration. In the case of *Meffert v. State Bd. of Medical Registration* (*Meffert v. Packer*) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247, which was affirmed by the United States Supreme Court without discussion (*Meffert v. Packer*, 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790), all the authorities bearing on the question were reviewed, and the quotation we have made from the *Chapman Case* was discussed and approved in its entirety. The *Meffert Case* is also reported in 1 L.R.A.(N.S.) 811, and contains an excellent case note. To the same effect see *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Hawker v. New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *State v. Schmidt*, 138 Wis. 53, 110 N. W. 647; *State ex rel Burroughs v. Webster*, 150 Ind. 607, 41 L.R.A. 212, 50 N. E. 750, and cases cited. Our own court, in a carefully prepared opinion by Mr. Justice Riddick, has held (quoting from syllabus): "Acts 1903, p. 342, forbidding physicians and surgeons engaged in the practice of medicine to so-

licit patients by paid agents, is a valid exercise of the state's police power in regulating the practice of medicine and surgery." *Thompson v. Van Lear*, 77 Ark. 506, 5 L.R.A.(N.S.) 588, 92 S. W. 773, 7 A. & E. Ann. Cas. 154. As stated in the case of *Com. v. Porn*, 196 Mass. 326, 17 L.R.A.(N.S.) 94, 82 N. E. 31, 13 A. & E. Ann. Cas. 569, "the maintenance of a high standard of professional qualifications for physicians is of vital concern to the public health, and reasonable regulations to this end do not contravene any provision of the state or Federal Constitution."

It is also contended that section d of the section of the statute in question is too vague and indefinite to be upheld and enforced; and to our minds, this is the most difficult question in the case to determine. It has given us the gravest concern, and after due consideration we have decided to uphold it. Our attention has not been called to any case where a statute of similar import has become the subject of judicial determination. Counsel for appellee rely upon cases where statutes authorizing the Board of Medical Examiners to revoke the certificate of a physician for making "grossly improbable statements" or for "unprofessional or dishonorable conduct" have been held void, as being unreasonable, too uncertain, and indefinite. *Hewitt v. State Medical Examiners*, 148 Cal. 590, 3 L.R.A.(N.S.) 896, 113 Am. St. Rep. 315, 84 Pac. 39, 7 A. & E. Ann. Cas. 750; *Matthews v. Murphy*, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785; *Czarra v. Medical Supervisors*, 25 App. D. C. 443.

On the other hand there are cases upholding statutes empowering boards to revoke the licenses of physicians who are guilty of unprofessional and dishonorable conduct, and the licenses have been revoked or not, according to the proof made. *State ex rel. Feller v. State Medical Examiners*, 34 Minn. 391, 26 N. W. 125; *Macomber v. State Bd. of Health*, 28 R. I. 3, 8 L.R.A.(N.S.) 585, 65 Atl. 263, and the case note to *Hewitt v. State Medical Examiners*, 7 A. & E. Ann. Cas. 750, indicate that the weight of authority is to this effect. But we need not decide that question; for we hold that the language of subdivision d in question is not too uncertain and indefinite to be upheld and enforced. In the case of *Thompson v. Van Lear*, *supra*, this court held that an act forbidding physicians and surgeons to solicit patients by paid agents was a valid exercise of the police power. For like reason, a statute forbidding a physician to advertise for patients in newspapers would be upheld; and by analogy, a statute forbidding them to advertise their ability to

treat and cure certain named diseases would be a valid exercise of the police power.

While the particular disease against which the prohibition of the statute is directed is not named, as was the case of *Kennedy v. State Bd. of Registration*, 145 Mich. 241, 108 N. W. 730, 9 A. & E. Ann. Cas. 125, yet the words "chronic and incurable," when used with reference to diseases of the body, are not variable, but have a settled and generally accepted meaning. The word "chronic" is the antithesis of "acute," and a chronic and incurable disease is generally understood to be one of long standing, deep-rooted, obstinate, persistent, and unyielding to treatment. On this account those afflicted with such diseases become discouraged, and to an extent desperate, and more easily become the prey of conscienceless and unscrupulous practitioners in the medical profession. Such diseases are specifically named and discussed in standard medical works, and are known to all physicians who may possess a sufficient knowledge of their profession to practise the art of healing, as chronic and incurable diseases. For the board to consult these standard medical works would not be to use them as evidence as contended by appellee, but such act would be rather done as an aid to the memory and understanding of the members of the board. See *State v. Wilhite*, 11 A. & E. Ann. Cas. 180, and case note (132 Iowa, 226, 109 N. W. 730).

The decree will be reversed, and the complaint dismissed for want of equity.

OKLAHOMA SUPREME COURT.

AMERICAN STEEL & WIRE COMPANY,
Plff. in Err.,

v.

CARL E. COOVER et al.

(— Okla. —, 111 Pac. 217.)

Appeal — case-made — sufficiency — review of evidence.

1. Alleged errors presented for review that require an examination of all the facts cannot be considered, unless the case-made contains an averment by way of recital to the effect that the case-made contains all the evidence introduced at the trial. But

Headnotes by HAYES, J.

Note. — Adjudication of bankruptcy of member of firm as affecting rights of firm creditors against firm property.

As to effect of adjudication of bankruptcy of partnership to subject separate estates of partners to administration in

a statement in a case-made preceding the evidence, to the effect that "the following evidence was introduced, same being all the evidence introduced by both parties at the trial," whereupon the evidence follows, is a sufficient compliance with the rule to authorize a review of alleged errors requiring a consideration of all the facts.

Bankruptcy — partner — estate of unadjudicated firm — attachment — validity.

2. Where one of two members constituting a firm is adjudicated a bankrupt, but there is no adjudication against the firm, the property of the firm does not pass to the trustee of the estate of the individual bankrupt; and such adjudication does not defeat an attachment lien of a firm creditor who has caused an attachment to be levied on a portion of the firm's assets within four

months prior to the adjudication of the individual as a bankrupt, nor does it require that such attachment shall be discharged.

(September 13, 1910.)

ERROR to the District Court for Muskogee County to review a judgment dissolving an attachment in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

Statement by Hayes, J.:

This is an action brought by plaintiff in error, plaintiff below, against defendants in error, Carl E. Coover and O. E. Coover, doing business under the firm name and style of Coover Hardware Company, to recover on a promissory note for the sum of \$1,082 and

bankruptcy, see the note to Dickas v. Barnes, 5 L.R.A. (N.S.) 654.

As to whether individual partners, as well as firm, must be insolvent in order to render the firm bankrupt, or to avoid payment of a firm debt as a preference, see the note in 21 L.R.A. (N.S.) 960.

It seems to have been the rule under the various bankruptcy statutes that ordinarily the trustee of one partner could not claim the partnership assets in the absence of the bankruptcy of all the partners, or of the firm itself. Under the act of 1898 this rule seems to have been made a matter of express provision. It should be noted that no attempt has been made to treat exhaustively the question of the right of the assignee or trustee of one partner to administer firm assets. While some cases passing on this question, but not coming within the title of this note, are herein referred to merely for illustrative purposes, there are other cases of the same kind which have not been considered.

Section 14 of the bankruptcy act of 1841 provided, among other things, that upon the insolvency of two or more persons who were partners in trade, an order might be made, upon which all the joint property and also all the separate estate of each of the partners should be taken; that the net proceeds of the joint property should be appropriated to the payment of the creditors of the firm, and the net proceeds of the separate property to the payment of the separate creditors; and that in other respects proceedings against partners should be conducted in like manner as if they had been prosecuted against one person alone.

The rule under this act is indicated by the following language employed in Ayer v. Brastow, Fed. Cas. No. 682 (D. C. Me.): "On the separate bankruptcy of one partner, if the firm or if the other partners are solvent, the general rule in equity, as I understand it, is that the court will not take the joint effects out of the hands of the solvent partners, but leave the possession and distribution with them, subject, of course, to be controlled by the court when equity requires it, unless when a sale is demanded, 30 L.R.A. (N.S.)

or when some special ground is shown requiring the interposition of the court. But where the firm itself and all the partners are insolvent, the interest of the creditors and the policy of the law require that the rule should be reversed, and that the administration of the assets should be by the assignee or a receiver under the direction of the court, and the distribution be made by the law." In this case the contest was between the assignee of the partner in bankruptcy and the insolvent partner not in bankruptcy, who claimed the right to retain the assets of the firm which was also insolvent, for the purpose of settling its affairs. It does not appear that any of the firm creditors were seeking to enforce any rights against the firm assets, but the court had their rights in mind in reaching the decision, for it said: "If the effects are left in the hands of the insolvent partner, as his administration is not under the immediate control of the court, he has it in his power to defeat the policy of the bankrupt law by giving preferences. In this case, the respondent states in his answer, that he has settled, by payment or compromise, one half or more of the whole debts of the firm; that is, the effects of the firm thus far have been appropriated to the payment of one half of the creditors, while the other half have received nothing. Now one great object of the bankrupt law is to prevent this preference of favored creditors, and to give to all an equal share of the estate in proportion to the amount of their demands. Another very obvious reason for preferring the administration of the assignee is found in the fact itself that the partner is insolvent. The creditors among whom the property is to be distributed have a just claim to have the effects placed in security for the purpose of being converted into money for their benefit. As a general rule, it cannot be doubted that the administration will be more safe in the hands of an assignee than in those of an insolvent partner. Has, then, the court the power of taking the effects out of the possession of the insolvent partner and placing them in the hands of the assignee? As a general question this

interest, executed on the 31st day of January, 1907, and signed by Coover Hardware Company. Ancillary to the main action, plaintiff sued out a writ of attachment, which was levied upon certain property of the partnership. Subsequently a receiver was appointed on application of plaintiff, who took charge of the property attached, and later, by agreement of the parties, said property was sold and the money ordered to be held by the receiver subject to the order of the court on the final hearing of the cause. Defendants by their answer deny that they constitute a partnership, and allege that Carl E. Coover alone was doing business under the style and firm name of Coover Hardware Company. They admit the execution of the note sued on, but allege

that O. E. Coover had nothing to do with the indebtedness it represents, and was not a party to the execution of the note. Further answering, they allege as a defense that in the month of March, 1907, within four months of the filing of this action and the execution of the note, the defendant Carl E. Coover had filed his application in the Federal district court to be adjudged a bankrupt, and denied all the grounds of attachment alleged in plaintiff's petition. The action was originally instituted in the United States court for the western district of Muskogee before the admission of the state, it was transferred to the district court of Muskogee county, where a trial was had to the court without the intervention of a jury.

I suppose does not admit of doubt. The partnership is dissolved by the bankruptcy; and on a dissolution by bankruptcy or otherwise, any of the partners or the representatives of a partner may insist on having the whole concern wound up by a sale."

A provision in § 2 of the act of 1841, that nothing therein should be construed to annul, destroy, or impair any liens, mortgages, or other securities, was invoked in *Parker v. Muggridge*, 2 Story, 334, Fed. Cas. No. 10,743 (C. C. N. H.) where it was held that where creditors of a partnership had instituted actions at law against a partnership, and attached its property, but had continued the actions from time to time as the result of agreements with the members of the firm, until finally the actions were defaulted, the creditors had an equitable lien upon the firm property, which survived a decree in voluntary bankruptcy of several of the partners, before the entry of the default judgments. The following language indicates the basis of the decision: "The general rule in bankruptcy is that in cases of partnership, where one partner becomes bankrupt, his assignee can take only that portion of the partnership assets which would belong to the bankrupt, after payment of all the partnership debts; and that the solvent partners have a lien upon the partnership assets for all the partnership debts, and also for their own shares thereof, before the separate creditors of the bankrupt partner can come in and take anything. It is true that in such cases, it may often, from the necessity of the case, and for the purpose of ascertaining the partnership assets and debts, and adjusting and settling the same, and making a final settlement and distribution of the surplus, be indispensable that the district court, as a court of equity, should take into its own hands the exclusive management and administration of all the partnership assets, and inhibit the other partners from meddling therewith. But this it will do with caution, and solely for the purposes before stated. And so far from thereby displacing any of the rights, liens, and equities of the other partners, it studiously seeks to maintain and protect

them. Now, in the present case, under its peculiar circumstances, there is no reason whatever for the interference of the district court by way of injunction, or otherwise, to administer the property in controversy. On the contrary, by refusing or dissolving the injunction, it accomplishes the very ends designed by the contracts between all the parties, and allows the partnership property to be applied to the discharge of the partnership debts according to its just and original destination."

Recognizing the principles enunciated in the two foregoing cases, the court in *For-saith v. Merritt*, 1 Low. Dec. 336, Fed. Cas. No. 4,946, 3 Nat. Bankr. Reg. 48 (D. C. Mass.), held that the assignee of a bankrupt partner could not avoid a conveyance executed by both partners in favor of firm creditors, upon the ground that it constituted a preference, the other partner not being bankrupt.

Where the partners as well as the firm were insolvent, and had, in contemplation of insolvency, assigned all of their property in trust for creditors, it was held that the assignee in bankruptcy of one partner, who filed his petition nine days after the assignment for creditors, was entitled to have the assigned property taken into the bankruptcy court, notwithstanding that, under the assignment, the same disposition of the property would have been made as was directed by the bankruptcy act, and that the greater part of the creditors were satisfied with the conditions existing under the assignment. *McLean v. Johnson*, 3 McLean, 202, Fed. Cas. No. 8,883 (C. C. Ohio).

In *Ex parte Norcross*, 1 N. Y. Leg. Obs. 100, Fed. Cas. No. 10,293 (D. C. Me.), where the contest was between the assignee in bankruptcy of one partner, and the solvent partner, it was held that the bankruptcy of one partner worked a dissolution of the firm, and made the assignee a tenant in common with the solvent partner, but that the right of the assignee was not to the possession of the partnership effects, but to an account, and to the bankrupt's share of the surplus, after the firm debts should be paid.

Section 36 of the act of 1867 was in all

The court found that Coover Hardware Company was composed of O. E. Coover and Carl E. Coover, and found all the issues of fact in the main action in favor of plaintiff, and rendered judgment against defendants for the amount of the note. But the court found that the defendant Carl E. Coover had filed a petition in bankruptcy, and had been adjudged a bankrupt within four months from the bringing of this action, and for that reason dissolved the attachment, and ordered the receiver to pay the proceeds of the attached property over to the clerk of the court. No appeal has been taken by defendants, and plaintiff prosecutes this proceeding from only that part of the judgment of the trial court which dissolves the attachment.

Messrs. Masterson Peyton and Matthew G. Mason, for plaintiff in error:

Creditors of a partnership are subrogated to all of the rights or liens of each individual partner for the payment of the debts of the firm.

22 Am. & Eng. Enc. Law, pp. 192-194; Watson v. Gabby, 18 B. Mon. 664; Re Mercur, 10 Am. Bankr. Rep. 505, 58 C. C. A. 472, 122 Fed. 384.

A partnership and the individuals composing it are distinct legal entities, and proceedings in bankruptcy by or against one do not of necessity involve the other. The filing of a voluntary petition by Carl E. Coover as an individual does not involve the attached partnership property of the Coover Hardware Company.

essential particulars like that of § 14 of the act of 1841.

In the case of *Amsinck v. Bean*, 22 Wall. 395, 22 L. ed. 801, 11 Nat. Bankr. Reg. 495, decided while the act of 1867 was in force, it was held that an assignee of the estate of an individual partner had no such title as would enable him to call third parties to account for partnership property; that money, if it could be recovered back at all, should be claimed by the partnership in whose behalf it was paid, or by an assignee duly appointed to administer the joint estate; and that therefore the assignee of the estate of an individual partner of a debtor copartnership could not maintain a suit to recover back money previously paid to a firm creditor, upon the ground that the money was paid in fraud of other creditors of the firm, and in fraud of the provisions of the bankrupt act. The court said: "Assignees in bankruptcy of the estate of an insolvent copartnership may, perhaps, maintain such a suit for such a claim, even though the money was paid by an individual partner under such an agreement to compromise his separate debts, as the assignees in such a case are required to keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member of which the copartnership is composed; and the provision is that the net proceeds of the joint stock and property shall be appropriated to pay the creditors of the copartnership, and that the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors. None of the proceeds of the separate estate of the individual partners can be appropriated to pay the partnership debts, unless the proceeds from that source exceed what is necessary to pay the separate debts of the partner, nor can any part of the proceeds of the joint stock or property of the copartnership be appropriated to pay the separate debts of the individual partner, unless there is an excess from that source beyond what is required to pay the partnership debts. 14 Stat. at L. 535, chap. 176 [§ 35 act 1867]. These regulations show that, in cases where they apply, the assignees in 30 L.R.A. (N.S.)

bankruptcy of the joint stock and property of a copartnership are required to administer the separate estate of the individual members of the firm or company as well as the described estate of the copartnership, but the bankrupt act contains no regulations of a corresponding character applicable in a case where an individual member of a copartnership is adjudged a bankrupt, without any such decree against the copartnership or the other partner or partners of which the copartnership is composed. Instead of that, the bankrupt act provides that in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. Partners are not entitled in any case to come in competition with the joint creditors upon the partnership funds, whatever may be the rights and equities which would otherwise attach between them and the bankrupt partner or partners."

So, under this act it was held that partnership assets could not be reached in bankruptcy unless all the persons who had an interest as copartners in such property were adjudged bankrupt. *Re Shepard*, 3 Ben. 347, Fed. Cas. No. 12,754, 3 Nat. Bankr. Reg. 172 (S. D. N. Y.). In this case the partnership was, by mutual agreement, dissolved, "except so far as it may be necessary to continue the same for the final liquidation and settlement of the business thereof." One of the two partners took all of the assets for application to the payment of firm debts. Thereafter he made a voluntary assignment of firm property in trust for the payment of firm debts, and he was subsequently adjudged a bankrupt on the petition of one of his creditors. The assignee in bankruptcy brought suit to have the assignment set aside upon the ground that it was made with intent to give preferences. It was held that the suit could not be maintained, for the assignee showed no title to call the assignee for creditors, or anyone else, to account. It was pointed out that the partnership was not dissolved with respect to partnership property relinquished by the retiring partner, with re-

Re Sanderlin, 6 Am. Bankr. Rep. 384, 1 Remington, Bankr. p. 67; Re Meyer, 39 C. C. A. 368, 98 Fed. 977; 3 Am. Bankr. Rep. 559; Strause v. Hooper, 5 Am. Bankr. Rep. 228; Re Pincus, 17 Am. Bankr. Rep. 336; Re Ceballos, 20 Am. Bankr. Rep. 460.

Messrs. W. T. Hutchings, George A. Murphey, and W. P. Z. Georman for defendants in error.

Hayes, J., delivered the opinion of the court:

The question which we are asked to determine by this proceeding requires a consideration of all the evidence, and defendants object to any consideration thereof, upon the ground that the case-made does not contain an averment by way of recital

spect to partnership debts, or with respect to proceedings under the bankruptcy act.

Where a firm composed of three members transferred certain value to its creditors, and thereafter one of the partners died, it was held that the assignee in bankruptcy of the surviving partners, who were adjudged bankrupts within four months after the transfer, could not have the same set aside as a preference or fraud on the bankruptcy act, the firm itself not being in bankruptcy. Withrow v. Fowler, Fed. Cas. No. 17,919, 7 Nat. Bankr. Reg. 339 (E. D. Mo.).

From these cases it is apparent that, under the earlier bankruptcy acts, it was the policy of the courts to prevent the assignee in bankruptcy of one partner from claiming the firm assets, in the absence of the insolvency of all the partners or of the firm itself; and the courts clearly, and it would seem correctly, give the reasons for the rule. Since the individual partner, or his creditors, have no claim upon firm assets until the firm creditors are paid, there is ordinarily no reason for taking the assets from the solvent partners. Now if the rule had been to the contrary, namely, that the assignee of an insolvent partner was entitled to take the firm assets, it would by no means have necessarily followed that his taking would, in any way, have interfered with the rights of firm creditors to pursue firm property, or retain that already received. In the case of lien creditors it is certain that their rights could not be thus impaired, as is shown by Parker v. Mugridge, supra. And where the assignee cannot take the firm property, the bankruptcy of one member *a fortiori* does not affect the right of firm creditors against firm property.

Then the only room for a nice question, it would seem, is as to the right of the assignee or trustee in bankruptcy of one partner to avoid preferences secured by firm creditors. In other words the question is, May a payment made to, or a lien acquired by, firm creditors upon firm property in circumstances that would render it subject to attack as a preference if the part-

that it contains all the evidence. That, in order to authorize this court to review any alleged error which requires an examination of all the evidence, the case-made must contain an averment by way of a recital to the effect that it contains all the evidence, has been frequently held (Wagner v. Satt'oy Mfg. Co. 23 Okla. 52, 99 Pac. 643), but the objection of defendants in error to the record in this case is not well founded in fact. There is nothing in the rule which requires that case-made to contain such averment, that prescribes any definite language, to be used, or the place in the case-made at which the same shall appear. Just preceding the evidence in this case-made appears the following statement: "And thereafter, to wit, on the 9th day of

nership were in bankruptcy, be attacked by an assignee or trustee in bankruptcy, when not all of the partners are involved, as is required to render the firm assets subject to administration in bankruptcy? This has been answered in the negative in Forsaith v. Merritt; Amsinck v. Bean; and Re Shepard,—supra, and it should be kept in mind in referring to the cases hereinafter cited and also AMERICAN STEEL & WIRE Co. v. COOVER, all of which arose under the bankruptcy act or 1898.

Section 5 h of the act of 1898 provides that in the event of one or more, but not all, of the members of a partnership being adjudged a bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but that such partner or partners shall settle the partnership business, and account for the interest of the partner or partners adjudged bankrupt. As previously suggested, this section is, in effect, an enactment of the rule obtaining under the earlier statutes.

It was held in Lane v. Tanner, 156 Cal. 135, 103 Pac. 846, that under this section, the trustee in bankruptcy of a partner could not sue for partnership property taken by mortgagees of the firm a few days before the filing of the petition in bankruptcy of the partner, where the property was taken in pursuance of authority given by the mortgage, which was executed five months before the filing of the petition. The apparent ground of this decision is not that the trustee of the individual partner could not avoid a preference, but that the transaction did not constitute a voidable preference, because the taking should be regarded as of the date of the mortgage.

And it was held in Burke v. Rollinson, 23 R. I. 177, 49 Atl. 694, that under § 5 h the trustee in bankruptcy of one member of a firm could not recover back money paid by such member to a third person under a firm contract. Although, as a matter of fact, the payment was made within four months before the filing of the petition, it is not expressly made to appear that the

July, 1908, said cause comes on for hearing and the plaintiff appearing by its attorney of record, Masterson Peyton, Esq., and the defendants appearing by their attorneys, Hutchings, Murphey, & German, by agreement of parties, a jury is waived and cause submitted to the court sitting as a jury, whereupon the following proceedings were had, and the following evidence was introduced, same being all the evidence introduced by both parties at the trial." Then follows the evidence. Had the foregoing statement followed the evidence in the record, and been made to read, "the foregoing evidence was introduced, same being all the evidence introduced by both parties at the trial," there could not be any question of its sufficiency; but the meaning of such statement would not be different from the one appearing in the case-made. Each is equivalent to averring that the evidence in the case-made is all the evidence that was introduced, and complies with the requirement of the rule.

Defendant O. E. Coover is the father of defendant Carl E. Coover. They were engaged in a general hardware and implement business in the town of Haskell, in this state. The business was managed principally by the son. The father, who is a resident of the state of Missouri, furnished practically all, if not all, the capital that went into the business. The son advertised to the public the fact that his father was a member of the firm, and appears to have held him out continually as a member of the firm until the commencement of this proceeding. The evidence does not disclose whether the partnership is in an insolvent condition, but it does appear that O. E. Coover is solvent. There is no

evidence whatever relative to the bankruptcy proceedings of Carl E. Coover. Defendants allege in their answer that within four months preceding the institution of this action Carl E. Coover filed his petition to be adjudicated a bankrupt; and counsel for plaintiff at the trial admitted, without the introduction of evidence, that such petition had been filed and Carl E. Coover adjudicated a bankrupt as alleged in the answer. The foregoing constitutes all the facts in the record relative to said bankruptcy proceeding. No petition has ever been filed by or against the partnership for its adjudication as a bankrupt. The property attached in this proceeding was the property of the partnership of the individual Carl E. Coover.

Section 67 of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 565, U. S. Comp. Stat. 1901, p. 3449) provides that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee. There can be no doubt that, if the partnership had been adjudicated a bankrupt, such adjudication would have discharged the attachment; and it appears that the learned trial court entertained the view that, by reason of this section, the adjudication of Carl T. Coover individually as a bankrupt had that effect, and that the attached property passed to the trustee as part of the estate of Carl

action was based upon that ground, but it is to be inferred that such was the ground.

It was held in *Moses v. Pond*, 32 Misc. 406, 66 N. Y. Supp. 600, 4 Am. Bankr. Rep. 656, that the trustee in voluntary bankruptcy of a surviving member of a partnership could not, as against judgment creditors of the firm, take the surplus resulting from the foreclosure of a joint mortgage upon the partnership real state. Here the judgments were recovered after the filing of the petition.

A partnership mortgage upon firm property was held in *Sanderlin*, 109 Fed. 857, 6 Am. Bankr. Rep. 384 (E. D. N. C.), not to be affected by the bankruptcy of one of the partners within four months thereafter, although it appeared that, after the execution of the mortgage, the firm had been dissolved and the bankrupt had taken its assets and assumed its debts. The decision on this point was affirmed in 51 C. C. A. 89, 113 Fed. 113, 7 Am. Bankr. Rep. 638 (4th Circuit).

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See also *Re Mercur*, 58 C. C. A. 472, 122 Fed. 384, 10 Am. Bankr. Rep. 505, (3d Circuit) set out in the opinion in *AMERICAN STEEL & WIRE Co. v. COOVER*.

Section 5h has been held not to apply where the partner not in bankruptcy was excepted from the adjudication upon the ground of his infancy. *Re Dunnigan*, 95 Fed. 428, 2 Am. Bankr. Rep. 628 (D. C. Mass.); *Re Duguid*, 100 Fed. 274, 3 Am. Bankr. Rep. 794 (E. D. N. C.). In the latter case the trustee was allowed to administer the property as against judgment creditors who had levied upon firm property, and the court held that such judgments as were rendered within four months before the filing of the petition were void as against the trustee.

On discharge of partnership liability in individual proceedings, see the note to *Loomis v. Wallblom*, 69 L.R.A. 771.

See also the note to *Frank v. Michigan Paper Co.* ante, 623, on the right to a discharge as affected by acts of the applicant's partner or agent.

L. A. W.

E. Coover, bankrupt. In this view, we think the court fell into error. The better reasoned current authorities construing and applying the bankruptcy act of 1898 agree that, in contemplation of that statute, a partnership is a distinct separate entity from the individual partners who compose it, and that a partnership can be adjudicated a bankrupt only when a petition therefor has been filed by it or directed against it, alleging an act of bankruptcy in which it is involved. A proceeding in bankruptcy may be prosecuted against the partnership, and it be adjudicated a bankrupt without any proceeding prosecuted against the individual members of the partnership and without their being adjudicated bankrupts individually, and the individual partners may be adjudicated bankrupts without involving the partnership. *Re Meyer*, 39 C. C. A. 368, 98 Fed. 976; *Re L. Stein & Co.* 62 C. C. A. 272, 127 Fed. 547; *Re Bertenshaw*, 17 L.R.A. (N.S.) 887, 85 C. C. A. 61, 157 Fed. 363, 13 A. & E. Ann. Cas. 986.

In the last cited case Mr. Circuit Judge Sanborn, delivering the opinion of the court, said: "A partnership owns its own property, and owes its own debts. It, its property, and its debts are separate and distinct from the individuals who compose it, from their individual property, and from their individual debts. The partnership does not own, cannot assign or apply to the partnership debts, the individual property of its members, nor is it liable for their debts. The most that a creditor of a partner can secure from a partnership or from its property is the excess of the latter after the partnership debts have been paid. The partners and their individual property are to a limited extent, to the extent of the excess of their individual property over their individual debts, but not to the full extent of ordinary indorsers or indemnitors, sureties for the debts of the partnership. The act of 1898 recognized these patent facts, and provided for separate adjudications of the partnership and of its members. Under this act, the partnership may make an assignment or commit some other act of bankruptcy and be adjudged a bankrupt while many of its members are solvent, and cannot be so adjudged. On the other hand, some of its members may be adjudged bankrupts while the partnership is not subject to such an adjudication."

The debt this plaintiff is trying to collect in this case is a partnership debt. The property which it is endeavoring to have appropriated to the payment of that debt is partnership property, and not the property of the individual partner who was

adjudicated a bankrupt. Had the partnership been adjudicated a bankrupt, then, under the section of the act of 1898 above referred to, the attachment having been levied within four months prior to the adjudication, while the partnership was insolvent, such adjudication would have dissolved the attachment. But does the adjudication of the individual members of the partnership draw into the bankruptcy proceeding the assets of the partnership of which the bankrupt is a member, but against which no bankruptcy proceedings are pending? This question, we think, must upon reason and the authorities be answered in the negative. *Re Mercur*, 58 C. C. A. 472, 122 Fed. 384, was a case wherein both of the two persons composing a firm had been, in separate proceedings instituted against them, adjudged individually to be bankrupts, but there had been no proceeding against or adjudication of the firm. The partnership within four months prior to the adjudication of the individual partners as bankrupts had made assignment of parts of its property for the benefit of its creditors. The trustee of the individual bankrupts' estates sought to recover from the assignee of the partnership this property, but the court denied him relief, and held that the adjudication of the individual partners did not give the court jurisdiction of the firm assets, and that, in order for the court to obtain jurisdiction thereof, it was necessary that there be an adjudication of the partnership as a bankrupt. The court quoted approvingly from the opinion of the district court in that case (116 Fed. 635) the following: "There has been no adjudication against the firm, and the trustee was not appointed to represent it, but only the two members who happened to compose it in their separate and individual capacity. Under such circumstances, the trustee has no authority to demand or interfere with the firm assets. This is settled by the case of *Amsinck v. Bean*, 22 Wall. 395, 22 L. ed. 801, where it was held that, while the assignee (trustee) in bankruptcy of the joint stock and property of a partnership is required by the statute to administer the separate estate of the individual members as well as that of the firm, there is no reciprocal regulation with regard to the estate of the partnership where an individual member of it has alone been adjudged a bankrupt."

In the *Amsinck v. Bean* Case, one of the partners constituting a copartnership had furnished the greater part of the capital invested by the firm, and was a large creditor thereof. The other partner had suffered

him. after the firm had ceased paying its creditors, to take charge of the partnership assets and manage them as if they had been owned by him individually. The managing partner proposed and made settlements with creditors of the firm on a basis of 70 cents on the dollar, took the partnership stock, transacted business in his own name, bought and sold new stock and mingled funds, but the court held that such acts did not dissolve the partnership, and that a decree of bankruptcy against the managing partner individually did not pass the partnership assets to his assignee in bankruptcy. The trustee of the bankrupt estate of Carl E. Coover has no interest in the firm assets further than the bankrupt's share of the surplus of those assets that may be left over after the firm's debts are paid, if there be any. The adjudication of the partnership as a bankrupt would not pass the assets of the firm to the trustee of the firm for administration without the consent of the solvent partner; and much greater is the reason why the insolvency and adjudication of one of the individuals of the firm should not operate to transfer the assets of perhaps a solvent firm to the bankruptcy court for administration. If the attachment lien of plaintiff in error could be destroyed by such a proceeding, then the creditors of solvent firms could have no protection in the enforcement of their claims by the provisional remedies prescribed by the statute or by execution, so long as the firm contains a member who is individually insolvent; for by voluntary application of that individual partner for an adjudication as a bankrupt, such liens would all be discharged.

Re Harris (D. C.) 108 Fed. 517, is cited and relied upon by defendant in error, but that case is not in point. In that case a person was adjudged a bankrupt as the sole owner of a business conducted in the name of a company. Throughout the entire bankruptcy proceedings the assets of the bankrupt, which were composed entirely of the assets of the company, were treated by the bankrupt and by his creditors, who were composed entirely of the creditors of the company, as the property of the bankrupt. The evidence in the case disclosed a silent partner, who himself permitted the court and the bankrupt and his creditors to treat the assets of the company as the individual property of the bankrupt member; and the court held under those circumstances that the distribution of the estate would be made on the basis that the assets were the property of the individual bankrupt. What representation was made by the bankrupt in the bankruptcy proceedings in this case as to the ownership of the partnership as 30 L.R.A. (N.S.)

sets the record does not disclose, nor does it disclose whether the partnership creditors, if any such there are, have participated in that proceeding, or whether it has been participated in only by the individual creditors of the bankrupt. Prior to his adjudication, the record does disclose that the bankrupt represented that his father was an interested partner in the business, and held him out to the world as such. Plaintiff in error relied upon such fact when it extended credit to the firm, and has never consented that the property of the firm should be treated as the assets of the bankrupt, nor has it by its acts estopped itself from now asserting that such property is not the property of the bankrupt. It has at all times insisted upon its right to have the assets attached by it applied to the payment of its claim against the partnership. Its claim and contention are similar to those of the creditors in the case of *Re Mercur*, supra; the only difference being that in that case the creditors obtained a lien upon the assets of the firm within four months prior to the adjudication of the individual partners as bankrupt by virtue of an assignment by the firm for the benefit of the firm's creditors, whereas, in this case plaintiff obtained his lien by means of an attachment. The principle involved in both cases is the same. No contention is made that the grounds of attachment were not established by the evidence; and there is evidence reasonably tending to support same. The only reason presented for dissolution of the attachment was that the adjudication of the junior member of the partnership as a bankrupt operated as a discharge of the attachment and passed the property to the bankrupt's estate.

It follows from the views already expressed that the judgment of the trial court must be reversed and the cause is remanded, with instructions to enter judgment in conformity with this opinion.

Dunn, Ch. J., and Williams, Kane, and Turner, JJ., concur.

KENTUCKY COURT OF APPEALS.

OWEN TURPIN, Appt.,

v.

COMMONWEALTH OF KENTUCKY.

(— Ky. —, 130 S. W. 1086.)

Trial — argument — facts not in evidence — error.

A statement by the state's attorney when summing up a criminal case to the jury, to

the effect that to the knowledge of the presiding judge one of the number had been fixed, based not upon facts in evidence, but upon the judge's statement to him that he had seen the juror and a relative of the accused in conversation under suspicious circumstances, an objection to which the judge overrules, is reversible error.

(October 11, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Rockcastle County convicting him of voluntary manslaughter. Reversed.

The facts are stated in the opinion.

Messrs. J. W. Brown and C. C. Williams, for appellant:

The statement of the state's attorney to

the effect that one of the jurors had been fixed was prejudicial.

Bessette v. State, 101 Ind. 85; Bates v. Com. 13 Ky. L. Rep. 132, 16 S. W. 528; McHenry Coal Co. v. Sneddon, 98 Ky. 687, 34 S. W. 228; State v. Wigger, 196 Mo. 90, 93 S. W. 394; People v. Fielding, 158 N. Y. 542, 46 L.R.A. 649, 70 Am. St. Rep. 495, 53 N. E. 497, 11 Am. Crim. Rep. 88; Sasse v. State, 68 Wis. 530, 32 N. W. 849; 2 Enc. Pl. & Pr. p. 733; Nalley v. State, 28 Tex. App. 387, 13 S. W. 672; State v. Noland, 85 N. C. 576; Martin v. State, 63 Miss. 505, 56 Am. Rep. 812; People v. Montague, 71 Mich. 447, 39 N. W. 585; Scott v. State, 110 Ala. 48, 20 So. 648; State v. Hannett, 54 Vt. 83, 4 Am. Crim. Rep. 38; Heller v. People, 22 Colo. 11, 43 Pac. 124; Raggio v.

Note.—Reference by prosecuting attorney, in argument to jury, to attempts to tamper with witnesses or jurymen as ground for reversal.

Where, as in *TURPIN v. COM.*, there is no evidence upon which to predicate a reference by the prosecuting attorney in his argument to the jury, as to attempts to bribe witness or jurors, the statement is held to constitute ground for reversal, provided the prejudice created is not removed by instructions from the court to disregard the statements made.

Thus, where the only evidence justifying the assertions is the testimony of defendant's wife that a certain person who was employed by her husband had gone away, the prosecutor's statement in his closing argument that the person had been bribed to leave, that if he had not gone, the same Winchester that settled the person whom defendant was accused of killing would have settled him, and that one of defendant's horses and some money settled the question of his testimony, was held to constitute ground for reversal, the court merely having stated to the jury that the counsel's remarks were not evidence. *Butler v. State* (Tex. Crim. Rep.) 27 S. W. 128.

So, where the prosecuting attorney in his argument said: "The attorney for the defendant has tampered with the witnesses. You know it, and I know it, and he ought to be convicted for it; and, too, the attorney for the defendant has attempted to buffalo and bulldoze this court and myself, just because we were new at the business, and thought we would not know any better. The defendant is a scoundrel and a perjurer, and ought to be convicted." It was held reversible error, the court not having instructed the jury to disregard the remarks, but merely requested the attorney to keep within the record. *State v. Clapper*, 203 Mo. 549, 102 S. W. 560.

And the following words used by the prosecuting attorney in a murder trial constitute sufficient error for reversing the judgment, where the objection to the statements was opposed by the judge on the 30 L.R.A. (N.S.)

ground that it was in response to remarks by defendant's counsel, but these remarks did not in fact appear, and there was no evidence to justify them: "I tell you, gentlemen, money talks. Oliver Helm, Amanda Helm, and Ed. Short were witnesses before the grand jury and at the coroner's inquest. They were then witnesses for the state, now they are witnesses for the defendant. We have been prepared for this thing. We knew someone had been to Ottumwa and Bonaparte, and were prepared for the evidence from there." *State v. Helm*, 92 Iowa, 540, 61 N. W. 246.

And where, in a trial for breaking and entering a storehouse, there is no evidence that anything was stolen, a statement by the prosecutor that three witnesses who had testified in defendants' behalf "had gotten part of the stolen goods" is cause for reversal. *Dunmore v. State*, 115 Ala. 69, 22 So. 541.

So, in a prosecution for receiving stolen goods, where officers and agents of a company from whom property had been taken had testified for the state, a statement by the prosecuting attorney that the company in question could have received a large amount for dropping the case should have been excluded, where there was no evidence to support it; and for this and other causes the case was reversed. *Piano v. State*, 161 Ala. 88, 49 So. 803.

And it is error for the prosecuting attorney to refer to an alleged threat to injure witness and his property, made by the defendant to one of his witnesses, providing such witness did not testify in a given way, where the fact that defendant had made such a statement was not proved. *State v. Hogan*, 115 Iowa, 457, 58 N. W. 1074.

In *State v. Woolard*, 111 Mo. 248, 20 S. W. 27, the statement by one of the prosecuting attorneys in a murder trial, in answer to criticism by defendant's counsel based on the statement of a witness to the effect that the prosecutor had told him that if he would testify against the accused he would turn witness loose, that the prosecuting officer had merely told his witness that all he wanted was the truth, and that he

People, 135 Ill. 533, 26 N. E. 377; Turner v. State, 4 Lea, 206; Crawford v. State, 15 Tex. App. 501; Cavanah v. State, 56 Miss. 299; Gawn v. State, 13 Ohio C. C. 116; Vaughan v. State, 58 Ark. 353, 24 S. W. 885; House v. State, 9 Tex. App. 567; Territory v. Chamberlain, 8 N. M. 538, 45 Pac. 1118; People v. Lange, 90 Mich. 454, 51 N. W. 534; Combs v. State, 75 Ind. 221; Ferguson v. State, 49 Ind. 33, 1 Am. Crim. Rep. 582; Shular v. State, 105 Ind. 289, 55 Am. Rep. 211, 4 N. E. 870, 7 Am. Crim. Rep. 509; Brow v. State, 103 Ind. 133, 2 N. E. 296; Cross v. State, 68 Ala. 476; Dunmore v. State, 115 Ala. 69, 22 So. 541; Pruitt v. State, 92 Ala. 41, 9 So. 406; People v. Mitchell, 62 Cal. 411; Jenkins v. State, 35 Fla. 737, 48 Am. St. Rep. 267, 18 So. 182; State v. Comstock, 20 Kan. 650; People v. Aikin, 66 Mich. 460, 11 Am. St. Rep. 512, 33 N. W. 821, 7 Am. Crim. Rep. 345; State v. Hatcher, 29 Or. 309, 44 Pac. 584; Northington v. State, 14 Lea, 424; Hardy v. State (Tex. App.) 13 S. W. 1008; Bryson v. State, 20 Tex. App. 566; Brown v. Swineford, 44 Wis. 283, 28 Am. Rep. 582; Martin v. State, 63 Miss. 505, 56 Am. Rep. 812.

Messrs. James Breathitt, Attorney General, and Tom McGregor for the Commonwealth.

had made no promise to induce him to testify, was held highly improper where these facts were not in evidence; and for this and other errors the judgment was reversed.

And a ground for a new trial is shown where the prosecuting attorney, in arguing to the court for a mistrial on the ground of fraud in drawing the jury, said that two jurors "had gone into the jury box with souls blackened with perjury and bribery, and that all hell could not change their minds," the jury being present when the statement was made. State v. Noland, 85 N. C. 576.

So, it was held prejudicial error in State v. Montgomery, 56 Wash. 443, 134 Am. St. Rep. 1119, 105 Pac. 1035, for the prosecuting attorney to state in the jury's presence, after the prosecuting witness had denied the charge against the defendant in a prosecution for rape, that she had made contradictory statements to him, and had been tampered with and bought, and then temporarily excuse her, and subsequently, before recalling her, tell her that she could be imprisoned for perjury.

Where there is evidence in the record upon which to base statements as to the bribery of witnesses or jurors, or, in the absence of such evidence, where the prejudice can be removed by a direction from the court to disregard the statements, they are generally held not to constitute ground for reversal.

Thus, in Billingsley v. State, 96 Ala. 126, 11 So. 409, where the defendant was accused 30 L.R.A. (N.S.)

O'Rear, J., delivered the opinion of the court:

Appellant was convicted of the crime of voluntary manslaughter. He has had two trials, each resulting in verdict of guilty. The verdict upon the first trial was set aside, and a new trial granted by the circuit court upon the ground of newly discovered evidence. There appears to have been some difficulty in obtaining a qualified jury on the second trial. While the jury was being impaneled, one of the venire men notified the court that he had been approached by a son-in-law of appellant, who sought to influence his verdict, should he be selected. The court upon a trial of the party charged found him guilty of contempt and punished him. The jury was finally selected, and the trial begun. It lasted for several days. Toward the close of the trial and at the noon adjournment, while the jury was in charge of the sheriff under admonition to be kept together, and not suffer anyone to approach them on the subject of the trial, they were taken to the public water-closet at the courthouse by the sheriff. One of the jury necessarily, or under the pretense of necessity, went into the closet, the others and the sheriff remaining outside. A son of appellant then came up and went into the closet also. He claims that he did not

of selling liquor without a license, and no objection was made to testimony of a witness for defendant, who was a member of the grand jury which found the indictment, to the effect that he took a drink with the sheriff shortly before he went upon the stand, it was held that a statement by the prosecutor in his argument as follows: "Gentlemen, it is an outrage when the sheriff of your county and a grand juror are drinking together while court is in session,"—was not a ground for reversal, although it went to the utmost limit.

So, in McDonald v. State, 55 Tex. Crim. Rep. 508, 117 S. W. 131, in a prosecution for carrying a pistol, where the defendant and his witnesses had testified that he went to a stall in a stable to get the pistol of one who was in jail, and who had told defendant to get it in payment of a debt, and the theory of the prosecution was that he had rushed to the stall to hide the pistol when he saw the rangers, it was held that the county attorney's statement that the defendant had brought his witnesses to court to swear him out of the case, and that the witnesses had manufactured the defense, was proper under the evidence in the case.

And where there is evidence that defendant's witnesses in a murder trial had been furnished with typewritten copies of what they were to testify to, it is not reversible error for the prosecuting attorney to state this fact in his argument. Ross v. State, 8 Wyo. 351, 57 Pac. 924.

And no prejudicial error is shown where

know that it was occupied, did not know the juror, and said nothing to him, which the juror confirms. While they were in the closet, the presiding judge of the court, having occasion to use it, and not knowing it was occupied, went in there also, when he found the parties in earnest and apparently confidential conversation. When they saw him, they appeared confused and hurriedly withdrew. The jury had been put in charge of the sheriff by the court. But, without the knowledge of the court, and, as the judge certifies, to his surprise, they had been turned over to a deputy sheriff, who was related to the accused. The judge reported what he had seen to the commonwealth's attorney, and issued a rule against appellant's son and the juror to answer for contempt, but the rule was not tried or executed until after the trial of the principal case. There was no evidence introduced before the jury at the trial of this case, of the foregoing circumstances. In the concluding argument of the commonwealth's attorney, he used this language, which was objected to by the accused, but the court overruled his objections, and refused to admonish the attorney or to withdraw the remarks: "There is one man on this jury who has been 'fixed' in this case. This fact is known by the judge on the

bench. Eleven of you have not been 'fixed.' Eleven of you know who this juror is. I will expect that juror to be for an acquittal, but I expect the other eleven of you to be for a conviction. Judge Frank Finley, while circuit judge, and while presiding at the trial of a case, and knowing that one of the jurors had been 'fixed' to find for the defendant, peremptorily instructed the jury to find the defendant guilty, and afterwards set the verdict aside. I appeal to the 'fixed' juror to look at the emblem of justice here on the judge's stand,—the beautiful figure of a woman, blindfolded, with the scales of justice equally poised in her hand. She administers justice without fear and without knowing any man. She is blindfolded, as shown by this figure." The defendant then moved the court to discharge the jury, which was also overruled. Another attorney for the commonwealth, in his argument of the case to the jury, said: "A great and outraged populace is appealing to you to do your duty in this case." That remark was objected to. The court sustained the objection, and admonished the jury not to consider the statement. These arguments of counsel are the only grounds urged for a reversal.

The matter last quoted, irregular and improper as it was, was probably cured by

the prosecuting attorney, in his argument in a trial for unlawful cohabitation, said that it was in defendant's power to show all the facts in defense by his wife and children, but that it was not within the power of the prosecution to do so by them, because they had been put out of the way by the procurement of the defendant, and in another place, said that an outsider had made signals to the jury; the court having subsequently charged the jury that they should not go outside of the evidence in reaching their verdict, and it appearing that the counsel ceased such remarks immediately upon his attention being called to the impropriety by the court. *United States v. Musser*, 4 Utah, 153, 7 Pac. 389.

In *State v. Thomas*, 135 Iowa, 717, 109 N. W. 900, a murder trial, it appeared in evidence that a witness for defendant was at the time an inmate of the poorhouse, that he had gone from the office of the defendant's attorneys to a place of business where he was acquainted, and, jingling three silver dollars in his hand, stated that he was to be a witness in the case in question. The prosecuting attorney in his argument jingled several silver coins in his hands, and referred to one of the counsel for the defendant in such language as to indicate that while there might not be legal evidence that he had bribed the witness, to a moral certainty he had. The court, in holding this not irreparable error, said: "Without discussing from a professional standpoint the propriety or advisability of 30 L.R.A. (N.S.)

this kind of argument, we are only concerned now in determining whether there was such misconduct as to require a new trial. It is not claimed that the court was remiss in giving to the defendant any protection to which he was entitled, so far as redress could be given or protection afforded, by reprimanding counsel or cautioning the jury as to the effect to be given by them to the argument. The sole contention is that irreparable error was committed for which a reversal must be granted. The argument of counsel is not open to the objection that it refers to matters outside of the record. The facts as to what Noble did and said were in the record, and counsel for the prosecution did not pretend that there was any evidence of bribery of the witness by defendant's counsel, or that he had any information as to such bribery, not contained in the record itself. He simply made a charge based upon inference, and which on its face showed that it had no other basis.

In *Cook v. State*, 152 Ala. 66, 44 So. 549, a statement by the prosecuting attorney that a certain witness should not be believed in preference to another mentioned, because the predicate laid to the first put in his mouth what to testify to, was held within the limits of legitimate advocacy.

For a note on reversal of conviction because of unfair or irrelevant argument or statements of facts by prosecuting attorney, see *People v. Fielding*, 46 L.R.A. 641.

J. T. W.

the admonition of the court. Whether we would have reversed for it alone is not necessary to decide. But the other matter is more serious. It contained a statement of fact not in evidence before the jury, of a most damaging character as affecting the guilt of the accused. It charged that the fact was within the personal knowledge of the presiding judge of the court. When the accused objected to the character of the argument, and his objection was overruled by the judge, it tended to confirm the attorney's statement that the fact existed, and was within the judge's knowledge. It also indicated to the jury that the argument was not improper, which is to say not illegal, and that, therefore, it was a matter which they were at liberty to, perhaps under the duty to, consider. The statement of the attorney was evidence of a clearly incriminatory nature. If one accused of crime flees, or attempts to bribe a witness or a juror, or to fabricate evidence, all such conduct is receivable as evidence of his guilt of the main fact charged. It is in the nature of an admission; for it is not to be supposed that one who is innocent, and conscious of the fact, would flee, or would feel the necessity for fabricating evidence. *Moriarty v. London*, C. & D. R. Co. L. R. 5 Q. B. 314; *Winchell v. Edwards*, 57 Ill. 41; *Com. v. Webster*, 5 Cush. 316, 52 Am. Dec. 711; *Com. v. Brigham*, 147 Mass. 415, 18 N. E. 167. Upon the same principle, one who is innocent would not be apt to resort to bribery, either of a witness or of a juror, to insure his acquittal. Consequently, if he resort to that course, it is evidence from which the jury may infer guilt. At least, it is evidence corroborating the other evidence of guilt, and may tend strongly to remove any doubt left in the mind of the jury as to the prisoner's guilt. It would have been competent for the prosecution to have introduced evidence that the prisoner had offered a bribe to a juror to find him not guilty. The evidence is material in character, and is in chief. But, like all other evidence of admissions, it is to be received guardedly. It is a fact explainable, and, whether explained by other evidence or not, is solely for the jury to apply in the light of the surroundings and of the intelligence of the accused. But, in any event, he was entitled to have the witness who testified to such damaging facts against him sworn, and an opportunity for cross-examination, and for counter evidence. In the course pursued in this case, these rights of the accused were denied him. Even though there was no doubt of his guilt, even if it had occurred in the presence of the distinguished trial judge and commonwealth's attorney, it was 30 L.R.A. (N.S.)

nevertheless a fact to be proven, if it was to be used against him, like all other facts, by authentic documents or out of the mouths of sworn witnesses confronting him at the bar of the court. Here, his son is charged with having tampered with a juror. It was not shown, nor attempted to be, nor is it claimed, that the prisoner knew of the act, or in any wise authorized it. The young man may have done it on his volition, and out of his anxiety concerning a parent in great trouble. Under such circumstances, criminal though the act be, the prisoner here would be neither legally nor morally responsible for it, and it would not constitute evidence of any kind against him. Yet the effect of the attorney's statement was as if the prisoner had bribed a juror, or had caused it to be done. The circumstance of itself shows the wisdom of the rule requiring the evidence to be heard in court from the mouth of the witness having the knowledge, and subjected to cross-examination, to counter evidence, and to explanation. Furthermore, the trial judge did not claim to have heard what passed between the juror and young Turpin. Nor did he see any consideration pass. The circumstance and the conduct of the parties were highly suspicious. More, it was in contempt of the rule and orders of the court. Nevertheless, it may have been the result of ignorance or accident, as it was claimed (though of the latter there is doubt) but there was no conclusive evidence of either motive or consequence. It was certainly explainable, and needed explanation. But opportunity was not afforded for refuting or explanatory evidence. The commonwealth's attorney did not claim to have witnessed the transaction. His statement was pure hearsay evidence. On that score also, it was error to allow it to go to the jury.

A fair summary of the principle under discussion is found in *Wigmore on Evidence*, § 1806, as follows: "A counsel's argument is in its purpose a connected presentation of the facts supposed to have been proved by the evidence tending in favor of his client. He is not a witness. He may have testified as a witness; but in his argument he has solely the functions and rights of counsel. Any representation of fact, therefore, which is made by him in the argument, must not be an assertion made upon his own credit. It must be based solely upon those matters of fact of which evidence has already been introduced, or of which no evidence need ever be introduced because of their notoriety as judicially noticed facts. To bring forward in argument an assertion of fact not of these two sorts is to become a witness; and

to be a witness without being subjected to cross-examination is to violate the fundamental principle of the hearsay rule." Authorities are numerous and consistent in support of that announcement. This court has had frequent occasion to consider the subject. The rule announced was applied in *Cook v. Com.* 86 Ky. 663, 7 S. W. 155; *Bates v. Com.* 13 Ky. L. Rep. 132, 16 S. W. 528; *McHenry Coal Co. v. Sneddon*, 98 Ky. 687, 34 S. W. 228; *Howard v. Com.* 110 Ky. 356, 61 S. W. 756, 13 Am. Crim. Rep. 533. In *Sasse v. State*, 68 Wis. 530, 32 N. W. 849, the district attorney intimated that someone on behalf of the defendant had tampered with the witness for the state, or spirited him away, and, upon objections being made, remarked that he would prove it before he got through, after which he did not even offer to prove the charge. It was held error, and ground for reversal. In *Nalley v. State*, 28 Tex. App. 392, 13 S. W. 672, the prosecuting attorney stated to the jury that he expected to show by a witness that Sam Nalley had induced him to leave the county, so as not to testify. The court, reversing the judgment, said: "There was no statement by the district attorney to the effect, and no pretense, that he sought to inculcate the defendant in any manner directly with this attempt to suppress the testimony. Even if the prosecuting officer could have proved what he stated, such testimony would have been clearly inadmissible against defendant, unless he had been directly connected with the matter. *Favors v. State*, 20 Tex. App. 158; *Marshall v. State*, 5 Tex. App. 273. There being no proof that these overtures to the witness were made by the authority or with the knowledge of the accused, such statement by the district attorney was illegal and unjust, and was highly calculated to prejudice the accused. *Barbee v. State*, 23 Tex. App. 199, 4 S. W. 584. Anything Sam Nalley, the brother, might have done in the matter, in the absence and without the knowledge of defendant, was most clearly inadmissible against, and could not be binding upon, him, . . . and afforded no reasonable presumption or inference pertinent to the issue in the case for which defendant was on trial, and the court should have so instructed the jury."

If an effort on the part of the accused to influence witnesses in his behalf to fabricate evidence, or to have the evidence against him suppressed, would tend, and it does, to establish his guilt under the main charge, it is equally so for him to attempt to corrupt a juror trying his case. The latter act is apt to have even more force in the minds of the jury than the former; for not only is it of equal effect upon the result, if

successful, but it is contempt of the tribunal composed of the jurymen. It is an affront to their dignity and the integrity of their body. It is an attempt which would cause them all to be held up to the scorn of the public, because of a miscarriage of justice at their hands. It is therefore more likely to be visited by a harsh judgment from the men who have been so insulted. The effort to get before the minds of the jury thus illegally matter of such grave importance as conducing to the verdict was in every probability most prejudicial to the accused. If, perchance, the juror under suspicion were in fact innocent of wrong in the matter, it practically destroyed his independence as a juror, for knowing he was suspected and thus singled out, he scarcely might dare to act with that independence of judgment on the merits of the case that is essential to a fair trial. He would be more concerned about his own standing, and the effect upon himself of any verdict he might render. The other jurors, not knowing who was alluded to in the remark of the prosecuting attorney, naming the presiding judge as having knowledge of an unlawful effort on behalf of the accused to corrupt one of their number, would look with suspicion upon any one of them who, in their private deliberations, might express an opinion favorable to the accused. The legitimate influence of such a juror and the force of his reasoning in their consultation would be nullified. From whatever point the matter is viewed, we cannot escape the conclusion that the remark was prejudicial and most damaging to the accused. Whatever our opinion might be as to his guilt, and however this court may sympathize with the purpose of the learned trial judge, and applaud his zeal in endeavoring to protect the trial from improper influence from without, we cannot pass over so grave an offense against the plainest, as well as most valuable, right of a man charged with crime, a right equally valuable to the public, which is the guaranty of a fair trial, upon legal evidence only, and face to face with the witnesses who constitute his accusers.

We commend the efforts of the trial judge in endeavoring to protect the jury against outside influence. The question necessarily arose in his mind what to do in view of what he had seen, or thought he saw the evidence of, to prevent a miscarriage of justice. If he should discharge the jury, that would operate to release the defendant, he being then "in jeopardy." If he should content himself alone with punishing as for contempt those engaged in disobeying the rules of the court, that would have no effect on the trial of the principal case, and

the mischief feared might be done regardless of the penalizing of the minor culprits. We are of the opinion the trial judge, upon informing counsel in the case what he had observed, should have left it to them to introduce evidence of the fact, by competent means, before the jury. If the evidence connected the prisoner with the matter, it would have been relevant in his case. If the prisoner was not connected with it, then he was entitled to have the jury know the fact, so that they might not impute to him an act for which he was in no wise responsible. The matter thus coming into the trial as evidence, given by witnesses under oath, subject to cross-examination and contradiction, and all the means by which the truth is sifted out by a trial in court, it would be then for the jury, and be open for such argument based upon it, including such inferences deducible from it, as might fairly be warranted. If the prosecuting attorney had not seen proper to introduce the matter as evidence before the jury in the case on trial, it was at the option of the trial judge to have issued a rule against the alleged offenders, and have tried them then and there, letting it have such effect on the trial of the principal case as it might, controlling its application by appropriate instructions to the jury. That such proceeding would have injected a trial into another trial is an incident of the nature of the offense. It is not unusual, rather it is usual, for the trial court to punish witnesses, attorneys, parties, jurors, or others for contempt committed in the court's presence during the trial, and inflict the punishment generally in the presence of the jury. Whether to do so depends on the circumstances of the case, and appeals to the sound discretion of the judge.

As neither course suggested was adopted when the attorney indulged the argument complained of, it should have been withdrawn in such manner as to leave no doubt that its evil effect was removed, or the court, upon the consent of the accused, should have set aside the swearing of the jury.

We perceive no other error in the record. Judgment reversed, and remanded for a new trial under proceedings consistent herewith.

MAINE SUPREME JUDICIAL COURT.

EDWARD L'HOUX

v.

UNION CONSTRUCTION COMPANY.

(— Me. —, 77 Atl. 636.)

Servant — flying splinters — assumption of risk.

1. An experience adult assumes the risk
30 L.R.A.(N.S.)

of injury from flying splinters caused by striking a small chisel held against iron a hard blow with a heavy hammer.

Evidence — uncontradicted — right to follow.

2. The jury cannot act upon the uncontradicted testimony of an experienced laborer that he did not know that striking a hard blow with a heavy hammer upon a small chisel held against iron would cause splinters to fly, where ordinary observation and thought would have revealed that fact to him.

(September 22, 1910.)

Note. — Liability of master for injuries caused by splinters flying from hammers or chisels, punches, and other similar tools.

The "common" tool rule.

It is a general rule recognized by a great many cases, that the duty of a master to exercise reasonable care to provide reasonably safe tools and appliances for his servants has no application where the tools and appliances furnished are of a simple nature, easily understood, and in which the defects, if any, can be readily observed by such servant. As to liability of master for injury by defect in common tool, see note to *Vanderpool v. Partridge*, 13 L.R.A.(N.S.) 668.

This rule has been applied and a recovery denied where the servant has been injured by slivers of iron or steel flying from hammers or chisels, punches, etc. *Lynn v. Glucose Sugar Ref. Co.* 128 Iowa, 501, 104 N. W. 577 (hammer); *Atchison, T. & S. F. R. Co. v. Weikal*, 73 Kan. 763, 84 Pac. 720 (chisel); *Gillaspie v. United Iron-Works*, 76 Kan. 70, 90 Pac. 760 ("set" used as buffer); *Golden v. Ellis*, 104 Me. 177, 71 Atl. 649 (hammer); *Dompier v. Lewis*, 131 Mich. 144, 91 N. W. 152 (hammer); *Koschman v. Ash*, 98 Minn. 312, 116 Am. St. Rep. 373, 108 N. W. 514 (common sledge or hammer); *Rahm v. Chicago, R. I. & P. R. Co.* 129 Mo. App. 679, 108 S. W. 570 (bolt-punch hammer); *Campbell v. T. A. Gillespie Co.* 69 N. J. L. 279, 55 Atl. 276 (driftpin); *Demato v. Hudson County Gas Co.* 74 N. J. L. 793, 67 Atl. 28 (chisel); *Martin v. Highland Park Mfg. Co.* 128 N. C. 264, 83 Am. St. Rep. 671, 38 S. E. 876 (hammer); *Meyer v. Ladewig*, 130 Wis. 566, 13 L.R.A.(N.S.) 684, 110 N. W. 419 (hammer).

And, again, it has been held that a servant cannot recover for injuries due to splinters of steel flying from the head of hammers, or chisels, punches, etc., because in such an action the servant's opportunity of knowing of the defects in such tools is equal or superior to that of the master; this, of course, is merely another form of expressing the so-called common or simple tool rule. *Fordyce v. Stafford*, 57 Ark. 503, 22 S. W. 161 (chisel); *Banks v. J. S. Schofield's Sons Co.* 126 Ga. 667, 55 S. E. 939 (chisel); *Gillaspie v. United Iron-Works*

MOTION by defendant for a new trial after verdict for plaintiff on a trial before the Supreme Judicial Court for Androscoggin County, of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Sustained.

The facts are stated in the opinion.

Messrs. Bisbee & Parker and Newell & Skelton, for defendant:

Plaintiff assumed the risk.

Golden v. Ellis, 104 Me. 177, 71 Atl. 649; Jensen v. Kyer, 101 Me. 112, 63 Atl. 389; Lemoine v. Aldrich, 177 Mass. 90, 58 N. E. 178; Bryant v. Great Northern Paper Co. 100 Me. 174, 60 Atl. 797; Cunningham v. Bath Iron Works, 92 Me. 510, 43 Atl.

106; Podvin v. Pepperen Mfg. Co. 104 Me. 564, 129 Am. St. Rep. 411, 72 Atl. 618.

Messrs. McGillicuddy & Morey for plaintiff.

Emery, Ch. J., delivered the opinion of the court:

The plaintiff's version of the reception of the injury for which he seeks to recover compensation is substantially as follows: He was in the employ of the defendant company in the construction of a system of waterworks for supplying a town with water, etc., and while in such employ, a Mr. Reed, whom the plaintiff supposed to have authority, and who appeared to have authority, from the defendant to do so, came to the plaintiff at the tool house, selected

Co. supra ("snap" or "set" used as a buffer); Wachsmuth v. Shaw Electric Crane Co. 118 Mich. 275, 76 N. W. 497 (snap hammer).

It is only machinery and appliances which are recognized as in their nature dangerous to employees using them or working in proximity to them, as to which the employer owes the duty to the employee of looking out for his safety. Lynn v. Glucose Sugar Ref. Co. supra.

A master is under no obligation to a servant to inspect for defects a hammer which was reasonably safe and free from obvious defects when furnished, although it was of peculiar construction and intended for use on iron or steel. Meyer v. Ladewig, supra.

Although a hammer is made of suitable material and properly tempered, yet it is a matter of common knowledge that when it is used with great force upon other implements small chips of steel are likely to fall off and fly from one instrument or the other. Golden v. Ellis, supra.

The duty of inspection and repair of chisels, driftpins, and similar tools, so as to prevent their getting into a condition that slivers are likely to fly off, is upon the servant. Campbell v. T. A. Gillespie Co. and Demato v. Hudson County Gas Co. supra.

The danger of chips of steel flying from a chisel which is being struck with a hammer is an obvious danger concerning which the master is under no obligation to warn a servant. Atchison, T. & S. F. R. Co. v. Weikal, supra.

The ordinary rule of the nonliability of an employer for injury sustained by an adult employee of ordinary discretion, through the voluntary use of a defective tool, when the facts and the danger were within the comprehension of any ordinarily intelligent and prudent man, and were as completely within the knowledge and appreciation of the servant as of the master, is applicable to the case of a man who lost an eye by being struck by a sliver of steel from a "set" or "snap" used to receive the blows of the sledge in riveting I-beams. Gillaspie v. United Iron-Works Co. supra. 30 L.R.A.(N.S.)

The promise to repair rule does not apply to simple tools like a hammer, so as to remove the question of assumption of risk, and permit a recovery for injuries due to a splinter of metal flying from the hammer. Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936.

But in Buchanan v. Blanchard (Tex. Civ. App.) 127 S. W. 1153, the court held that the general rule that a servant assumes no risk of defective conditions unless he knows thereof, or it is so obvious as to charge him with knowledge of them and of the danger incident to their use, is not limited in its application to complex instruments, but applies to simple tools in ordinary use, so that a servant will not assume the risk of an injury from a sliver or splinter of steel flying off from the head of a steel cutter, unless he knew or ought to have known that the cutter was defective.

And the general rule that the servant has a right to rely upon the safety of the tools furnished by the master was held to apply in Drolet v. La Compagnie de Pulpe de Metabetchouan, Rap. Jud. Quebec, 26 C. S. 107, where a plaintiff was injured by a sliver of steel which flew off from a chisel with which he was at work with other servants in cutting a steel rail.

A flogging hammer used in a machine shop for striking chisels and similar instruments, when manufactured and furnished by the master, is an implement within the rule requiring the master to furnish tools and appliances reasonably safe for the purpose used, and to such tools the common tool rule does not apply. Morris v. Eastern R. Co. 88 Minn. 112, 92 N. W. 535; Vant Hul v. Great Northern R. Co. 90 Minn. 329, 96 N. W. 789.

Master's liability as determined by ordinary rules of master and servant.

In many cases the master's liability for injuries caused by splinters of steel or iron flying from the heads of hammers or chisels, punches, or other similar instruments, on being struck by a hammer, is determined by the general rules of master and servant.

Thus, if the servant knows of the defect

a small steel "cold chisel" and a 7 pound striking hammer, and directed the plaintiff to take those tools and go with him to cut off some iron pipe. The plaintiff did so without objection. On reaching the place, Mr. Reed held the chisel upon the pipe, and directed the plaintiff to strike the head of the chisel with the hammer. The plaintiff struck a first blow "not very hard," and then a second blow "pretty near" as hard as he could. As a result of the second blow a fragment broke off the point of the chisel and flew up into his eye.

There was no evidence that the chisel or the hammer was visibly imperfect, or that the chisel was improperly held for the plaintiff to strike upon it, or that the plaintiff was directed to strike so hard. The only proposition upon which the plaintiff bases his claim for compensation is that Reed was negligent in selecting so small a chisel and so heavy a hammer. In answer it is contended by the defendant that the danger of breakage in striking so heavily

with such a hammer upon such a chisel placed against an iron pipe was so obvious that the plaintiff must be charged with knowledge of it; that the plaintiff alone was responsible for striking so hard as to break the point of the chisel; and hence must be held to have assumed the risk.

It appears from the plaintiff's own testimony that he was thirty-seven years old; that he had worked for seventeen years in the construction of waterworks, railroads, etc.; that he had used a striking hammer on a steel drill every year when there was blasting to do; that he knew steel drills used on stone hammered down on top and sometimes broke off at the point; that he had this chisel made from a piece of steel he took to the blacksmith. He saw clearly the kind of hammer and the kind of chisel proposed to be used.

It would seem to be a matter of common knowledge that, when steel hammers are struck with great force upon steel chisels or drills held against iron surfaces, chips

in the hammer, chisel, or other tool, he will ordinarily be precluded from recovering for the injury, under the doctrine of assumption of risk. *Fordyce v. Stafford*, 57 Ark. 503, 22 S. W. 161 (chisel); *Baker v. Western & A. R. Co.* 68 Ga. 699 (sledge); *Banks v. J. S. Schofield's Sons Co.* 126 Ga. 667, 55 S. E. 939 (chisel); *Atchison, T. & S. F. R. Co. v. Weikal*, 73 Kan. 763, 84 Pac. 720 (chisel); *Golden v. Ellis*, 104 Me. 177, 71 Atl. 649 (hammer); *Buchanan v. Rome, W. & O. R. Co.* 10 N. Y. S. R. 326 (chisel); *Houston & T. C. R. Co. v. Conrad*, 62 Tex. 627 (cold chisel); *H. S. Hopkins Bridge Co. v. Burnett*, 85 Tex. 16, 19 S. W. 886 (hammer); *Ft. Worth & D. C. R. Co. v. Ramp*, 30 Tex. Civ. App. 483, 70 S. W. 568 (chisel); *San Antonio Sewer Pipe Co. v. Moll*, 37 Tex. Civ. App. 269, 83 S. W. 900 (chisel).

Of course, if the servant is guilty of contributory negligence, either in the manner of using the tool or because the tool itself is essentially dangerous in the condition in which it is, there can be no recovery. *Baker v. Western & A. R. Co.* 68 Ga. 699 (sledge); *San Antonio Sewer Pipe Co. v. Moll*, 37 Tex. Civ. App. 269, 83 S. W. 900 (chisel).

Where the head of a hammer or of a chisel, punch, or other such instrument has become battered and burred by use, an experienced workman must be held to have knowledge of the fact that slivers of iron or steel are likely to fly off,—that being an ordinary occurrence or incident of the use of such a tool in that condition. *Cincinnati, H. & D. R. Co. v. Phinney*, 38 Ind. App. 546, 77 N. E. 296 (punch); *Kellogg v. New York Edison Co.* 120 App. Div. 410, 105 N. Y. Supp. 398 (hand drill).

But in *Fasini v. New York C. & H. R. R. Co.* 109 App. Div. 404, 96 N. Y. Supp. 415, affirmed in 190 N. Y. 515, 83 N. E. 30 L.R.A. (N.S.)

1125, where a servant, while steadying a rail which was being cut several feet from him, by other servants by means of a hammer and chisel, was injured by a sliver of steel flying from either the hammer or the chisel or the rail, it was held that the master was not liable, since the method adopted had long been in general use upon railroads, and was deemed the most effective way to cut the rail, and there was no proof that any accident had ever occurred before by the flying off of slivers from the implements used in carrying on the work. The nonliability of the master was put squarely upon the ground that he was not negligent, since the danger was not one which could have been reasonably anticipated.

A master is not liable for injuries due to splinters of steel flying from the head of defective hammers or chisels, where the master has furnished a number of such tools and the servant or his fellow servants have voluntarily selected a defective one. *Needham v. Stone*, 186 Mass. 565, 72 N. E. 80 (cutting chisel); *Rawley v. Colliau*, 90 Mich. 31, 51 N. W. 350 (sledge hammer); *Hefferen v. Northern P. R. Co.* 45 Minn. 471, 48 N. W. 1, 526 (cold chisel).

It cannot be assumed as a matter of law that the master was negligent because a sledge hammer was lying about a blacksmith shop with its face cracked or battered, when there were others that were sound and in safe condition for use, and when neither the plaintiff nor any of his fellow employees were obliged or directed by the defendant to use this particular hammer in their work, and when they could have used a hammer not defective. *Rawley v. Colliau*, supra.

But if the driftpin at the time it was taken by the servant was unfit for use and subject to throw off splinters, and there was not a reasonable supply of safe pins

particles of steel are liable to break off in the chisel, as well as from the hammer the iron surface, and fly up and about. Especially would it seem that a man of plaintiff's age, experience, opportunities of observation, and knowledge of the liability of the steel drills to break off at the point when held against stone, would know there was such danger when such a chisel was held against iron and struck so hard with a 7-pound hammer. If this were all that appeared in the evidence, there would be no question that the plaintiff assumed the risk of the consequences resulting from a heavy blow, under the familiar rule that a servant, if he does not stipulate otherwise, assumes such risks in his employment as are known to him, or would be known to him by the exercise of ordinary observation and forethought. *Golden v. Bliss*, 104 Me. 177, 71 Atl. 640.

But the plaintiff further testified that he in fact did not know that, in striking as

hard as he did with that hammer upon that chisel held against the iron pipe, there was any danger or liability of bits of steel breaking off from the chisel and flying about. His counsel argues that that testimony warranted the jury's finding that he did not assume the risk. Despite his assertion to the contrary, however, it is so clear that he must have known the danger or liability, had he been, as it was his duty to be, ordinarily observant and thoughtful, that the jury finding, resting as it does on that assertion alone, cannot be sustained. We must assume that he was ordinarily observant and caretaking, since such was his duty. Workmen are not excused from the exercise of their senses and reasoning faculties, and, unless they stipulate otherwise, they assume the risks that such exercise would reveal to them.

Motion sustained.
Verdict set aside.

accessible to him, from which he might have selected a safe one, then the master is at fault. *Campbell v. T. A. Gillespie Co.* 69 N. J. L. 279, 55 Atl. 276.

Under the Missouri doctrine, that a servant never assumes the risk of the master's negligence, a servant, if in the exercise of due care, may recover for injuries caused by splinters flying off from hammers, chisels, punches, and other similar tools, where the master knew of the defect or was chargeable with knowledge thereof. *Johnson v. Missouri P. R. Co.* 96 Mo. 340, 9 Am. St. Rep. 351, 9 S. W. 790; *Franklin v. Missouri, K. & T. R. Co.* 97 Mo. App. 473, 71 S. W. 540; *Robbins v. Big Circle Min. Co.* 105 Mo. App. 78, 79 S. W. 480.

So, a common section hand will not be chargeable with contributory negligence in using a defective claw bar a splinter from which flew up and struck him in the eye, where, although he knew of the defect, he did not fully comprehend the danger. *Booth v. Kansas City & I. Air Line*, 76 Mo. App. 516.

And averments to the effect that a drift-pin constructed of iron or steel was defective in that it was improperly and unskillfully made, and of defective material, shape, and construction, rendering it liable to chip and splinter, are sufficiently specific, and adequately advise the defendant of the facts constituting a right of action. *Rickaly v. O'Brien Boiler Works Co.* 108 Mo. App. 130, 82 S. W. 963.

—where servant is inexperienced or ignorant of the defects.

As in all other cases, a servant is not chargeable with the assumption of the risk of splinters or chips flying from hammers, or chisels, punches, etc., where he has neither actual nor constructive knowledge of the danger.

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Thus, a servant may recover for injuries received from the splintering of a brass punch furnished by the master, where he had previously used an iron punch, and did not know that a brass one would splinter. *Galveston, H. & S. A. R. Co. v. Whisenhunt*, 36 Tex. Civ. App. 135, 81 S. W. 332.

And it is error to grant a nonsuit in an action by a servant for an injury caused by a splinter flying from a chisel which he was using, where it was made of coarse-grained steel, and not fine-grained steel as chisels for his work were ordinarily made, and the foreman had assured the plaintiff that it was all right, and it so appeared to the plaintiff upon an examination of it before using it. *Crilley v. New Amsterdam Gas Co.* 106 App. Div. 127, 94 N. Y. Supp. 102.

So, where the character of the work is such and the tools are of such delicate material that the splinters are so small as not to be noticeable, the servant will not be chargeable with assumption of risk, in the absence of warning of the danger on the part of the master. *Standard Oil Co. v. Fordeck*, 34 Ind. App. 181, 71 N. E. 163.

A recovery was allowed in *Famous Mfg. Co. v. Harmon*, 28 Ind. App. 117, 62 N. E. 306, for injuries caused by the flying off of a splinter of steel from a punch with which the plaintiff was engaged in punching holes in a piece of iron with a punching machine, where he had no means of knowing of the defects in the punch.

An inexperienced workman who complained to his foreman that a hammer being used by him was defective, and was assured by the foreman that it was all right, may recover for injuries caused by a splinter flying therefrom and striking him in the eye, as he had the right to rely upon the superior knowledge of the foreman. *Duerst v. St. Louis Stamping Co.* 163 Mo. 607, 63 S. W. 827.

Where a servant upon a railroad, engaged in driving spikes, is furnished by the section boss with an iron maul known by the boss to be defective, and is injured in consequence of such defect, the company is liable, although the defect was patent, and would have been known to the servant had he inspected it. *Guthrie v. Louisville & N. R. Co.* 11 Lea, 373, 47 Am. Rep. 286.

Where the plaintiff was inexperienced, and did not know that the new tool which had been furnished him to work with was more brittle and more likely to splinter than the tool with which he was more familiar, he cannot be held to have assumed the risk of the danger of the tool so splintering. *Littlefield v. Edward P. Allis Co.* 177 Mass. 151, 58 N. E. 692.

That a sliver of steel was likely to fly from a rod which was being hammered to cause it to swell ought to have been anticipated and guarded against by the master, and an inexperienced workman may recover for injuries caused thereby. *Republic Iron & Steel Co. v. Ohler*, 161 Ind. 393, 68 N. E. 901.

Master's liability as affected by fact that defective tool was furnished to and used by another servant.

If the plaintiff is injured by a splinter flying off a hammer or chisel, punch, or other such tool, which had been furnished by the master to another servant and was being used by him, then the master is generally held liable.

Thus, the master's liability for injuries to a servant caused by a splinter of steel flying from a "soft-head" or buffer furnished for his use is not defeated by the fact that the defective condition was known to a fellow servant who procured the tool for use by himself and the injured servant, and who was therefore negligent in regard to such use. *Noble v. Bessemer S. S. Co.* 127 Mich. 103, 54 L.R.A. 456, 89 Am. St. Rep. 461, 86 N. W. 520.

So, a machinist engaged in the work of chipping a casting by means of a chisel which he himself held while it was being struck by a sledge hammer supplied by the master is under no obligation to inspect the helper's sledge or to observe its defective condition, and he has a right to assume that the master had performed its duty and furnished the helper with a proper tool. *Missouri, K. & T. R. Co. v. Quinlan*, 77 Kan. 126, 93 Pac. 632.

And a servant can recover where he is injured by a sliver flying off a spike maul being used by a fellow servant, where he did not have actual knowledge of the defective maul, and never had occasion to use it so as to be chargeable with constructive knowledge. *Louisville & N. R. Co. v. Roberts*, 24 Ky. L. Rep. 1160, 70 S. W. 833.

A servant injured by splinters flying from the head of a defective chisel used by a fellow servant, and which he himself had never seen, may recover for such injury, since the act of the foreman in se-

lecting the chisel was that of the master. *Baltimore & O. S. W. R. Co. v. Walker*, 41 Ind. App. 588, 84 N. E. 730.

If the defective tool is furnished to another servant, and the injured servant has no occasion to examine the same, nor an opportunity of observing it, then the master will be liable for injuries resulting therefrom. *De la Vergne Refrigerating Mach. Co. v. Stahl*, 24 Tex. Civ. App. 471, 60 S. W. 319; *Texas Mexican R. C. v. Trijerina*, 51 Tex. Civ. App. 100, 111 S. W. 239.

Where tool is not shown to be dangerous.

If the tool is not shown to be defective or dangerous, then the master cannot be held liable, even if the common tool rule would not apply.

Thus a servant is properly nonsuited in an action for injuries caused by a splinter flying from a pin which he was driving into a rivet hole for the purpose of making the hole larger, if he fails to show that the pin was defective. *Goransson v. Riter-Conley Mfg. Co.* 186 Mo. 300, 85 S. W. 338.

And the master is not liable where there was no proof that the condition of the chisel before the blow was struck was dangerous, nor that an examination would have disclosed the danger. *Mulligan v. Crimmins*, 75 Hun, 578, 27 N. Y. Supp. 819, affirmed without opinion in 149 N. Y. 594, 44 N. E. 1126. **W. M. G.**

NORTH CAROLINA SUPREME COURT.

GEORGE C. TUDOR
v.

R. J. BOWEN, Appt

(152 N. C. 441, 67 S. E. 1015.)

Negligence — cranking automobile — frightening horse — liability.

1. One attempting to crank an automobile in close proximity to horses, without paying any attention to whether or not they are frightened by the resulting noise, and continuing to turn the crank until the machine starts notwithstanding the horses manifest fright, as the result of which they run away, is responsible for the resulting injury to them.

Same — notice to driver.

2. It is negligence *per se* to attempt to crank a defective automobile which makes a terrible noise when starting, in close proximity to horses, without giving their driver notice to remove them to a safe place.

(May 4, 1910.)

Note.—Various questions affecting the liability for injuries caused by the frightening of horses by automobiles will be found in earlier notes in this series indexed under the topic "Automobiles."

APPPEAL by defendant from a judgment of the Superior Court for Forsyth County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The second and third paragraphs of the charge referred to in the opinion are as follows:

"(2) Although the jury may find that there was nothing unusual about the defendant's automobile, and that it did not make any unusual noise, still, if they further find that the defendant knew, or could by the exercise of that care required of him under the circumstances—that is, by the use of ordinary care—have known, that the horses were restless and had been frightened by his automobile, if the jury find as a fact that they were restless and frightened thereby, then it was a wrongful and negligent act for him to have done anything in reference to his automobile which would have been considered by an ordinarily prudent man to have a tendency to increase their fright and cause them to run away; and, if the jury find that the defendant, under the circumstances just stated, cranked his machine and started it off, and by the noise made thereby the team was caused to run away, they will answer the first issue, 'Yes.'"

"(3) If the jury should find from the evidence that, in attempting to start the defendant's machine, it made an unusually loud and alarming noise, one calculated to startle or frighten horses of ordinary temper and training, and this condition of the machine was known to the defendant, it was his duty in operating said machine to use reasonable prudence in seeing that no horses or animals were about, and so situated as,

under reasonable circumstances, would be frightened by the starting of the said machine; and if the defendant, knowing that he had a machine which made such an unusual and alarming noise, failed to look around or to regard horses that were frightened in his immediate vicinity, and went on cranking his machine, making such a noise as would reasonably scare horses of ordinary temper and training, and if thereby as a proximate result plaintiff's horses were scared and the injury brought about, he would be guilty of negligence, and you will answer the first issue, 'Yes.'"

Further facts sufficiently appear in the opinion.

Messrs. Watson, Buxton & Watson for appellant.

Messrs. Manly & Hendren, for appellee:

The degree of care required in the use and operation of a vehicle upon the streets of a city depends upon the dangerous character of the vehicle and its liability to do injury to others lawfully upon such streets, as well as its liability to frighten animals. The more dangerous its character, and the greater its liability to do injury to others or to frighten animals, the greater the degree of care and caution required in its use and operation.

Bennett v. Lovell, 12 R. I. 166, 34 Am. Rep. 628; Knight v. Lanier, 69 App. Div. 454, 74 N. Y. Supp. 999; Miller v. Addison, 96 Md. 731, 54 Atl. 967; Hannigan v. Wright, 5 Penn. (Del.) 537, 63 Atl. 237; Indiana Springs Co. v. Brown, 165 Ind. 465, 1 L.R.A.(N.S.) 238, 74 N. E. 615, 6 A. & E. Ann. Cas. 650; Ingraham v. Stockamore, 63 Misc. 114, 118 N. Y. Supp. 399; Towle v. Morse, 103 Me. 250, 68 Atl. 1044; Mason v. West, 61 App. Div. 40, 70

There is, however, but little specific authority upon the question involved in *TUDOR v. BOWEN*, as to the liability for frightening horses by the noise peculiar to the starting of an automobile. The question, like most others relating to liability for frightening horses, is generally one of fact for the jury upon the evidence.

It was so held in *Fisher v. McGrath* (Minn.) 128 N. W. 579, where a young woman, twenty-four years of age, accustomed to driving horses and meeting automobiles, when at a distance of about 80 rods, saw the defendant on his knees looking at his automobile, which was stationary on the highway, and having no reason to anticipate trouble in passing kept on her way until she had reached a point 25 feet from the machine, at which time the defendant and two ladies were standing near its front end, and continued to drive along without giving any indication that she wished to pass, when the defendant, without giving any warning, suddenly started
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his motor causing the usual nerve-wrecking noise made by a machine when cranked, frightening the horse, which whirled and threw the plaintiff into a ditch. The court said in effect that the mere fact of starting the machine was not evidence of negligence, but that the failure to warn the plaintiff of the intent to start the motor was the gist of the cause of action.

Whether the owner of an automobile having stopped at the request of a driver whose horse was frightened by the approach of the machine was guilty of negligence in starting up his machine again while the driver was holding the horse by the head, and while the horse was still frightened, is a question for the jury. *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 999. In this case it appeared to be the moving vehicle itself, rather than any noise incident to its starting, that caused the horse to become frightened.

N. Y. Supp. 478; *McCann v. Consolidated Traction Co.* 59 N. J. L. 481, 38 L.R.A. 236, 36 Atl. 888; *Ayars v. Camden & Suburban R. Co.* 63 N. J. L. 416, 43 Atl. 680; *Feeney v. Wabash R. Co.* 123 Mo. App. 420, 99 S. W. 477; *Richmond R. & Electric Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736; *Joyce v. Exeter, H. & A. Street R. Co.* 190 Mass. 304, 76 N. E. 1054; *Indianapolis & G. Rapid Transit Co. v. Haines*, 33 Ind. App. 63, 69 N. E. 187; *Lott v. Frankford & S. Pass. R. Co.* 159 Pa. 471, 28 Atl. 299; *Jones v. Snow*, 56 Minn. 214, 57 N. W. 478; *McFern v. Gardner*, 121 Mo. App. 1, 97 S. W. 974.

If the defendant knew, or could by the exercise of that care required of him under the circumstances have known, of the restless and frightened condition of the horses, it was his duty to refrain from doing anything, even though under other circumstances he might have had a right to do it, about his automobile, which would, by an ordinarily prudent man, have been considered to increase their fright and cause them to run away, such as cranking his machine and starting it off.

Oates v. Metropolitan Street R. Co. 108 Mo. 535, 58 L.R.A. 449, 68 S. W. 906; *Olney v. Omaha & C. B. Street R. Co.* 78 Neb. 767, 111 N. W. 784; *Knoxville Traction Co. v. Mullins*, 111 Tenn. 329, 76 S. W. 890; *Doran v. Cedar Rapids & M. C. R. Co.* 117 Iowa, 442, 90 N. W. 815; *Danville R. & Electric Co. v. Hodnett*, 101 Va. 361, 43 S. E. 606; *Moore v. Charlotte Electric Street R. Co.* 128 N. C. 458, 39 S. E. 57; *Weil v. Kreutzer*, 134 Ky. 563, 24 L.R.A. (N.S.) 557, 121 S. W. 471; *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196; *Christy v. Elliott*, 216 Ill. 31, 1 L.R.A. (N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 A. & E. Ann. Cas. 487; *Ellis v. Lynn & B. R. Co.* 160 Mass. 341, 35 N. E. 1127; *Feeney v. Wabash R. Co.* supra; *Missouri, K. & T. R. Co. v. Traub*, 19 Tex. Civ. App. 125, 47 S. W. 282.

Brown, J., delivered the opinion of the court:

No motion to nonsuit was made, and no assignment of error challenges the sufficiency of the evidence upon the issue of negligence. So we have to consider only the correctness of the portions of the charge excepted to in view of the evidence adduced on the trial. In the brief the defendant abandons the first assignment of error, and confines his criticisms to the second and third paragraphs of the charge.

The evidence introduced by the plaintiff tends to prove that the defendant was driving his automobile on the streets of Win-

ston-Salem, and stopped it for purposes of examination within a few feet of where plaintiff's team of horses were standing harnessed to a surrey and in charge of a competent driver; that the machine could not be seen by the horses, but could be heard by them; that when the machine was being cranked for the purpose of starting, one horse began to prance and show symptoms of fright; that the cranking kept on and did not stop, causing the horses to run away and injure themselves and the vehicle; that the driver, when the cranking commenced, called to defendant to "wait a minute," but whether the call was heard or not does not appear. This evidence also tends to prove that the defendant's automobile made a most unusual and loud noise while being cranked up; that "the gear wheels were loose, and made a terrible noise;" that no other machine makes such a fearful noise; that it could have been avoided by using rawhide gearing, but defendant said the price was too high. Upon this phase of the evidence we think his Honor's charge is supported by generally recognized principles of law. Negligence is essentially relative and comparative. The legal duty we owe to others is the accepted standard, and that duty is measured by the exigencies of the occasion. A want of caution to avoid injury, where the duty to exercise caution is incumbent, and a reckless or heedless use of a dangerous agency in a locality where the peril from its use is obvious, constitute breaches of duty which may become, when causing injury, actionable negligence. As has been said, "The term covers all those shades of inadvertence which range between deliberate intention on the one hand and total absence of responsible consciousness on the other." *Cooke v. Baltimore Traction Co.* 80 Md. 554, 31 Atl. 327; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506. The existence of negligence is therefore to be sought for in the facts and surroundings of each particular case.

Although the use of automobiles began in recent years, it seems to have caused much litigation, though not in this state. It is the consensus of judicial opinion that it is the duty of the operator of an automobile upon highways and public streets to use every reasonable precaution to avoid causing injury, and this duty requires him to take into consideration "the character of his machine and its tendency to frighten horses." *Hannigan v. Wright*, 5 Penn. (Del.) 537, 63 Atl. 234; *House v. Cramer*, 12 A. & E. Ann. Cas. p. 463, note, and cases cited. The possession of a powerful

or dangerous vehicle imposes upon the chauffeur the duty of employing a degree of care commensurate with the risk of danger to others, engendered by the use of such a machine on a public thoroughfare.

Upon the case as made out by plaintiff we think the defendant is liable for the damage done, upon two phases of the evidence:

1. The proximity of the auto to plaintiff's team when it stopped was such that defendant must have seen the horses and vehicle, unless he was either blind or guilty of gross carelessness. There is evidence sufficient to go to the jury that when the defendant began to "crank up," the animals manifested fright, and that defendant, if at all observant, must have seen it, but, instead of stopping his cranking, he continued until his machine started. It is well settled that it is the duty of an autoist to stop his machine, or to do whatever is reasonably required to relieve persons of peril, when he sees a horse is becoming frightened by his machine. *Indiana Springs Co. v. Brown*, 165 Ind. 465, 1 L.R.A. (N.S.) 238, 74 N. E. 615, 6 A. & E. Ann. Cas. 666; *Shinkle v. McCullough*, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 186; *House v. Cramer*, supra, and cases cited in notes. This duty is imposed by statutes in many states regulating the use of automobiles, but we think it is easily deducible from elementary principles of the common law. *Long v. Warlick*, 148 N. C. 32, 61 S. E. 617. It was the duty of this defendant, assuming that his machine was a normal one, when he began to "crank up" to keep a watchful eye on the horses standing so close by. It was his duty, when he saw that they were manifesting symptoms of fright, to stop at once, until the horses could be removed. There is evidence that in this respect the defendant failed in his duty.

2. The plaintiff shows by evidence that defendant's machine was not a normal, but a most abnormal, one; that the noise it made when cranking up was something "terrible," to use the expression of one witness. That defendant was fully aware of this, and refused to correct it because of the incidental expense, is testified to by the machinist Hamlin. His Honor might well have told the jury that to crank up such a defective and abnormal machine in close proximity to a pair of horses, without giving the driver notice to remove them, is *per se* negligence. This imposes no great burden upon those who use the public highways, even with the best-equipped and safest machines. To require less would render the

highways of the country dangerous to the lives and property of those who daily use them.

We are of the opinion that his Honor correctly and fairly submitted the case to the jury, in a charge free from error.

No error.

OKLAHOMA SUPREME COURT.

P. E. BROOKS et al., Pliffs. in Err.,
v.

HINTON STATE BANK.

(— Okla. —, 110 Pac. 46.)

Assumpsit — money not rightfully retained.

1. An action will lie to recover a sum certain whenever one has the money of another which he in equity and good conscience has no right to retain.

Same — money held by second assignee.

2. Plaintiffs' evidence disclosed that P., having a claim against a county for building a bridge, assigned, in writing, a part thereof to them, as partners, in payment of a debt due the firm; that said assignment when made was pinned to said claim; that subsequently, while in this condition, said claim was, in writing on the back thereof,

Headnotes by TURNER, J.

Note. — Right of first assignee of claim to recover from the second assignee the amount collected by latter on the claim.

Although there are many cases in which one person sought, in an action for money had and received, to recover money which for some reason had been paid to another, the cases are but few where, as in *Brooks v. Hinton State Bank*, the money in question had been assigned to two different assignees.

In *Carnegie Trust Co. v. Battery Place Realty Co.* 67 Misc. 452, 122 N. Y. Supp. 697, where a creditor after assigning a part of the amount due him from his debtor, assigned to a second assignee an amount greater than still remained, and the debtor, with notice of both assignments, paid the second assignee the whole amount assigned, it was said: "The relation between the assignor and the state was that of debtor and creditor. The assignment to the plaintiff was a valid assignment. The assignment to the defendant was subject to the plaintiff's prior rights by virtue of his earlier assignment. Under these circumstances the plaintiff might have repudiated the payment by the debtor and recovered the amount thereof from him; but he had also the right to adopt and ratify the act of the debtor in making the payment, and bring this action for money had and received."

G. V.

assigned by P. to defendant, and by it lodged in the office of the county clerk, where the same was filed, and by the chairman of the board of county commissioners approved, audited, allowed, and by said board paid in full to defendant. Held, in a suit by plaintiffs against defendant for the amount due them under their assignment, that the court erred in sustaining a demurrer to the evidence.

(March 8, 1910.)

ERROR to the District Court for Caddo County to review a judgment dismissing an action brought to recover certain moneys which defendant had received upon an assigned claim but to which plaintiffs alleged title under a prior assignment. Reversed.

The facts are stated in the opinion.

Mr. A. J. Morris for plaintiffs in error.

Messrs. H. W. Morgan and F. E. Gillette, for defendant in error:

Where there are two claimants for the same money, and one of them is recognized as being entitled to it by the person from whom it is due, and is paid, the other cannot sue him to recover the money, for the reason that having received the money under a claim of right in himself, the law will not imply any contract or promise by him to hold the money for the use of the other claimant, or to pay it over to him, and therefore there is not, under the circumstances, any privity of contract on which to found the action.

27 Cyc. Law & Proc. p. 859 & cases cited.

Turner, J., delivered the opinion of the court:

On December 22, 1904, P. E. Brooks and H. Flanagan, partners as Brooks & Flanagan, plaintiffs in error, sued the Hinton State Bank, defendant in error, in the district court of Caddo county as in assumption for money had and received. After answer and reply filed there was trial to a jury. At the close of plaintiffs' testimony defendant demurred to the evidence, which was sustained, the suit dismissed, and plaintiffs taxed with the costs. After motion for a new trial filed and overruled, plaintiffs bring the case here, and assign that the court erred in sustaining said motion. There is no conflict in the testimony. It discloses that on April 18, 1904, Caddo county being indebted to C. H. Patterson for the construction of the Henley bridge, he, on that date, made out a claim against the county for the amount due him therefor, and swore thereto before S. B. Gorman, township trustee; that on the same day, being indebted to plaintiffs for material fur-

nished him in the construction of the bridge, he made out an order, which read:

Bridgeport, O. T., 4-18-1904.

To the Honorable Board of County Commissioners of Caddo County, O. T.

Gentlemen:—

Pay to Brooks & Flanagan out of contract for what is known as Henley Bridge, sections 10 and 15, amount of it to be paid Brooks & Flanagan is \$165.00.

C. H. Patterson.

—and pinned it to said claim. In this shape it was then turned over to said township trustees, who turned it over to defendant in error, which procured an assignment written upon the body of the claim, which reads:

Bridgeport, O. T., April 20-1904.

I hereby assign the within claim to the Hinton State Bank. C. H. Patterson.

With both assignments on the claim it was, by the bank, then forwarded to the county clerk, filed, approved, audited, and allowed, and the following indorsements made thereon:

No. 2953. Claim of C. H. Patterson against Caddo county, Oklahoma, for bridge material. Filed 22d day of April, 1904.

Fremont Boyle, County Clerk.

Amount claimed \$258 82
Amount approved 22d day of April,

1904, for building bridge \$258 82

Audited and allowed on R. & B. fund this 22d day of April, 1904.

C. W. Ludwick, Chairman.

While in the office of the county clerk the assignment by Patterson to Brooks & Flanagan of their part of the claim became detached and lost, and a controversy arose as to whom and in what amounts the claim should be paid. In passing on the matter the board of county commissioners made the following order: "There seeming to be a controversy over claim 2953 allowed to C. H. Patterson, different parties claiming to have an assignment of said claim, the clerk is hereby directed to draw one warrant for \$194.12, and one warrant for \$64.70, the two warrants to cover claim 2953; and he is further directed to hold said warrant awaiting the further direction of the board."

Later, the attorney for defendant called for and received the warrant for \$194.12, the amount of plaintiff's claim, concerning which there appears this entry:

Paid by warrant No. 193, claim 2953,

\$194.12, issued July 29, 1904, Series C, in favor of C. H. Patterson. For what purpose: Building bridge. Received this order the 6th day of August, 1904.

Carl Glitsch, Attorney.

Plaintiffs sue to recover the \$194.12 paid by the treasurer to defendant on the warrant. We think they are entitled to recover, and that the court erred in sustaining the demurrer to the evidence.

We gather from the briefs that the trial court predicated its action on the ground that the evidence failed to disclose any privity of contract on which to found the action. We think there is sufficient privity. This is established when the evidence discloses that one person has another's money which he in equity and good conscience has no right to keep. In such a case there arises an implication of law that he will pay it over. This was so held by this court in *Allsman v. Oklahoma City*, 21 Okla. 142, 16 L.R.A. (N.S.) 511, 95 Pac. 468, 17 A. & E. Ann. Cas. 184, where the second section of the syllabus reads: "An action will lie to recover a sum certain whenever one has the money of another which he in equity and good conscience has no right to retain." The doctrine is thus broadly stated by the Supreme Court of the United States in *Gaines v. Miller*, 111 U. S. 395, 28 L. ed. 466, 4 Sup. Ct. Rep. 426, where the court said: "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. *Pickard v. Bankes*, 13 East, 20; *Spratt v. Hobhouse*, 4 Bing. 173; *Israel v. Douglas*, 1 H. Bl. 239; *Beardsley v. Root*, 11 Johns. 406; *Hall v. Marston*, 17 Mass. 575; *Clafin v. Godfrey*, 21 Pick. 1."

Brand v. Williams, 29 Minn. 238, 13 N. W. 42, was a suit in assumpsit for money had and received. The facts set forth in the complaint in substance were that the sheriff of Lyon county held in his possession a stock of goods belonging to Robinson & Mass under certain levies of executions against them, in favor of certain creditors, including plaintiffs; three of said executions, amounting to some \$2,000, were prior to plaintiffs', which was next, and amounted to over \$1,000; that under these executions the sheriff sold the goods for \$4,000 in cash, sufficient to cover costs and fees, and to satisfy all said executions; that defendant, knowing plaintiff to be entitled to satisfaction out of said sum, induced the sheriff to turn over to him all of the proceeds of said sale left after payment of the first execution, and refused to pay plaintiff his share thereof on demand. The court gave judgment for defendant on the plea—30 L.R.A. (N.S.)

ings. Held error, and the case reversed. The supreme court in passing, in effect, held, and declared the proposition elementary, that an action in assumpsit for money had and received would lie whenever one man has received or obtained the possession of the money of another, which he ought in equity and good conscience to pay over; that there need be no privity between the parties or any promise to pay other than that which results or may be implied from one man's having another's money which he has no right in conscience to retain; that when the fact is proved that he has the money, if he can show no legal or equitable ground for retaining it, the law implies the privity and the promise.

Ph. Zang Brewing Co. v. Bernheim, 7 Colo. App. 528, 44 Pac. 380, was a suit by Bernheim Brothers against the brewing company to compel them to pay over money had and received for plaintiff's use. They and Uri were judgment creditors of Herman Eli, as were also Oppenheimer Brothers and Rabb Brothers; executions issued on all said judgments and money collected sufficient to satisfy the Oppenheimer judgment in full and the Rabb judgment in part, leaving a balance which was, according to appellee's contention, properly applicable to the payment of their judgment. This money was in the hands of the sheriff, who failed to apply it to appellee's claim, but turned it over to a constable who held an execution in favor of the Zwang Brewing Company, and said company applied it in satisfaction of their claim. Appellee contended that the brewing company was not entitled to hold it, and sued for its recovery. There was judgment for appellee. The brewing company appealed. The judgment of the lower court was affirmed. The supreme court in passing recognized the well-established doctrine above set forth and said: "The rule in these cases is very broad, and is ample to include an action by the Bernheim Brothers against the brewing company to compel them to pay over this fund which they had wrongfully received and applied to the discharge of their debt,"—citing *Brand v. Williams*, supra; *Haebler v. Myers*, 132 N. Y. 363, 15 I.R.A. 588, 28 Am. St. Rep. 589, 30 N. E. 963; *Clark v. Pinney*, 6 Cow. 297.

In *Bates-Farley Sav. Bank v. Dismukes*, 107 Ga. 212, 33 S. E. 175, the petition alleged Dismukes and certain other persons therein named to be the respective owners of certain certificates issued by a certain loan association, representing their stock therein. On each of said stock certificates was printed the contract between the association and its stockholders, in substance, that the certificate might at any time after one year and before two years be returned

and the member entitled to receive for each share the money paid into the loan fund; that at any time after two years and before maturity the member would be entitled to withdraw his stock and receive the amount paid into the loan fund and not less than 6 per cent interest for the average time,—withdrawal of shares to be on sixty days' notice to the association; that each of said stockholders desiring to receive the withdrawal value of his stock indorsed or transferred the certificate representing the same to the said association "for withdrawal." Subsequently, plaintiff in error bank obtained possession of said certificates from said association, some of them being transferred to it in writing. Upon each said bank collected from said association the withdrawal value of said stock, which the certificate represented, returning the certificate with its own indorsement in blank thereon to the association, which thereupon marked the certificate "withdrawn." Subsequently Dismukes became the owner by proper assignment of the separate rights of the other stockholders under their respective certificates and their respective rights against the bank, and brought suit against it for money had and received. A demurrer to the petition was overruled, and the bank appealed. The supreme court affirmed the judgment of the trial court, and on the subject of privacy quoted approvingly from Nisbit, J., in *Culbreath v. Culbreath*, 7 Ga. 68, 50 Am. Dec. 375, wherein he said: "It is not founded upon the idea of a contract." And from Lord Mansfield in *Moses v. Macferlan*, 2 Burr. 1005, where he said: "If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt and gives this action, founded in the equity of the plaintiff's case, as if it were upon contract." See also *Dorsey v. Williams*, 48 Ill. App. 386; *Calais v. Whidden*, 64 Me. 249; *Richardson v. Moffitt-West Drug Co.* 92 Mo. App. 515, 69 S. W. 398; *Tamm v. Kellogg*, 49 Mo. 118; 27 Cyc. Law & Proc. p. 857. The great weight of authority supports this doctrine, although there are some cases which seem to hold that where of two claimants for the same money, one of them is recognized as being entitled to receive it by the person from whom it is due, and is paid, the other cannot sue him to recover the money. The cases so holding fail to recognize any privacy on which to found the action. In so far as they conflict with our holding in this case, we refuse to follow them.

For the error complained of, the judgment of the lower court is reversed, and the cause is remanded for a new trial.

All the Justices concur.
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WISCONSIN SUPREME COURT.

BARRON COUNTY, Respt.,

v.

J. C. BECKWITH, Appt.

(142 Wis. 519, 124 N. W. 1030.)

Officer — fees — accounting — naturalization.

The fees or compensation to be turned over to the county treasurer by a county clerk who is by statute upon a salary in lieu of all fees or compensation for services rendered by him, which shall be so turned over, include fees collected under the naturalization laws of the United States, which authorize and permit him to retain a portion of the fee received, although the Federal law is passed subsequently to the state law, so that they were not directly in contemplation when the state law was passed.

(February 22, 1910.)

Note. — Right of clerk on salary basis to retain fee for naturalization.

It is generally held that a clerk under a fixed salary is not entitled to retain as his own the fees received in naturalization cases by virtue of his office.

Thus, in *Cowan v. New York*, 3 Hun, 632, 6 Thomp. & C. 151, a salaried clerk and assistant in the marine court in the city of New York is not entitled to recover compensation for extra work performed by him, in furnishing naturalization papers and indexing naturalization books in that court, such services being imposed upon him by law as part of the duties pertaining to his office.

So, in *People ex rel. Whittemore v. Seabury*, 23 How. Pr. 121, a clerk of the city court of Brooklyn has no authority to retain as his own, fees received by him for the naturalization of aliens, where statute expressly declares that he shall be paid for his services, not by the fees he may receive, but by a fixed annual salary.

And in *Eder v. Kreiter*, 40 Ind. App. 542, 82 N. E. 552, it is held that the fee of \$1 charged by the circuit court clerk under statute, and specifically designated therein as an item to be taxed and charged on behalf of the county, is the property of the county, and does not belong to the clerk.

But in *United States v. Hill*, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510, affirming 25 Fed. 375, which was an action on the official bond of the clerk of a district court, for failure to account for fees charged by him in naturalization cases, it was held that such fees are not within § 833, Rev. Stat. U. S. Comp. Stat. 1901, p. 642, requiring such clerks to account for all fees and emoluments of their offices of every name and nature, where it appears that for many years it had been the custom of the clerks of the United States for that district to collect the fees incident to naturalization proceedings, without including them

A PPEAL by defendant from a judgment of the Circuit Court for Barron County in plaintiff's favor in an action brought to recover certain fees which had been allowed defendant under Federal statutes for services in naturalization proceedings, to which plaintiff alleged that it was entitled under a state statute placing the clerks of circuit courts of the state upon a salary basis of compensation. Affirmed

Statement by Kerwin, J.:

This is an appeal by the defendant from a judgment against him rendered in the circuit court for Barron county for the sum of \$165.50. The question involved is the right of the clerks of the circuit courts of

this state, who, pursuant to the state statute, have been placed upon a salary basis of compensation, to retain fees allowed to them by the Federal statutes for services in naturalization proceedings. It is alleged in the complaint that the defendant was clerk of the circuit court for Barron county; that the county board of said county, pursuant to chapter 411, Laws of 1901, which provides for a change from the fee to the salary system, adopted in 1901 the following resolution: "Whereas, chapter 411, Laws of 1901, provides for a change from fees to salary system of officers therein named, therefore be it resolved in accordance therewith, that the method of compensating the clerk of circuit court for his

in returns of fees and emoluments, which fact was known and approved of by the judge and accounting officers. In the opinion of the circuit court it is stated: "It is for services rendered under these rules and as a special officer of the court, and not as clerk, that these fees have been permitted. They were not duties pertaining to the office of clerk. They could as well have been performed by any other person designated by the court for the purpose, as by the district attorney or a commissioner of the circuit court or an attorney, or any suitable person not an officer of the court."

• Following the above case, United States v. McMillan, 165 U. S. 504, 41 L. ed. 805, 17 Sup. Ct. Rep. 395, holds that the clerk of a district court of a territory is not obliged to return to the United States, as a part of the emoluments of his office, sums received for his services in naturalization proceedings.

In Eldredge v. Salt Lake County, 27 Utah 106 Pac. 939, it is held that a clerk of the district court who performs services in naturalization proceedings under an act of Congress is not accountable to his county for fees retained as provided by that act, although he is paid a salary fixed by law. It seems from the opinion in this case that, prior to the passage of the naturalization act of June 29, 1906, Congress had left it to the several states to determine and fix the fees that the state or county officers should be permitted to collect for the services rendered by them in hearing and passing upon applications for and in making a record of the proceedings by which aliens were admitted to citizenship. By this act of Congress, however, the states were deprived of this power. In view of this the court said: "From the foregoing it seems clear to us that the duties which appellant discharged, and the services rendered by him, by virtue of the act of Congress aforesaid, are not duties which are imposed on, nor services which are rendered as a part of, the county office to which he was elected, and of which he was the incumbent during the time in which the fees in question were earned and received by him. If this be so, then the salary which he received as com-

pensation for discharging the duties of such office was not intended to, and did not, constitute compensation for the extra official services he rendered as an agent of the general government in discharging the powers conferred on him by the act of Congress aforesaid, and for which services the fees in question were allowed him by the national, and not by the state, government." In distinguishing People ex rel. Whittemore v. Seabury, supra, the court said: "That case was decided in 1862, and by the decision the clerk of the city court of Brooklyn was required to account for fees collected by him in naturalization cases. At that time, however, as we have pointed out, Congress permitted the states to fix and collect the fees in naturalization cases which were conducted in the state courts. The whole question of what the fees should be, and how collected and accounted for, was thus left to the states. The whole matter being thus within the power of the states, they, no doubt, could determine what should be done with the fees they had the power to and did impose. We have seen, however, that Congress has deprived the states of the power to impose fees in naturalization cases, and with it went the power to dispose of them. In view, therefore, of the changed conditions, and for the reasons hereinbefore stated, the case last referred to is in our judgment not an authority."

So, in Hampden County v. Morris (Mass.) 207 Mass. 93 N. E. 579, it is held that the state statute requiring that all fees received by the clerk in naturalization cases, except sums expended for additional clerical assistance, shall be paid over to the county treasurer, conflicts with the statute of United States in regard to the naturalization of aliens, requiring clerks of courts to account to the Bureau of Immigration and Naturalization for one half of the fees collected by them, and permitting the clerks to retain the other half for themselves, first paying from these fees all additional clerical force that may be required in performing the duties imposed by the act: and that consequently a clerk of the state court need not pay over to the county treasurer fees received in naturalization cases.

J. D. C.

services shall be a salary fixed by the county board, which shall be in lieu of all fees, *per diem*, and compensation for services rendered by him or his deputy, and that all such fees, *per diem*, and compensation for services rendered shall be turned over to the county treasurer according to law." It is further alleged in the complaint that between January 1, 1907, and January 1, 1909, the defendant as a clerk collected as fees under the naturalization laws of the United States the sum of \$165.50, which sum has been retained by him, and which he has failed to turn over to the treasurer of said county. The defendant answered admitting certain allegations of the complaint, and alleged that the fees received by him under the naturalization laws of the United States were not included in such fees as he was required to account for and turn over to the treasurer of the county under the resolution referred to, and denied any indebtedness to the county. The case was tried by the court. The court held that the defendant was liable to the county for the fees, and rendered judgment accordingly. From this judgment, the defendant appealed.

Messrs. Olin & Butler, for appellant:

The act of 1906 clearly contemplates that one half of the fees collected by clerks shall belong to them, and to require the surrender thereof would defeat the intention of Congress.

24 Am. & Eng. Enc. Law, p. 876; Richardson v. Seevers, 84 Va. 269, 4 S. E. 712; Swann v. Josselyn, 14 Smedes & M. 115; United States v. Hill, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510; United States v. McMillan, 165 U. S. 504, 41 L. ed. 805, 17 Sup. Ct. Rep. 395.

An officer is not, in consequence of holding an office, rendered incompetent to the discharge of services which are extra-official, and for such services he is entitled to compensation.

Mechem, Pub. Off. § 863; Tiedeman, Mun. Corp. § 79; Eagle River v. Oneida County, 80 Wis. 266, 56 N. W. 644; Kollock v. Dodge, 105 Wis. 187, 80 N. W. 608; Massing v. State, 14 Wis. 502; Evans v. Trenton, 24 N. J. L. 764; State ex rel. Seattle v. Carson, 6 Wash. 250, 33 Pac. 428; Klemm v. Newark, 61 N. J. L. 112, 38 Atl. 692; United States v. Brindle, 110 U. S. 688, 28 L. ed. 286, 4 Sup. Ct. Rep. 180; United States v. Ripley, 7 Pet. 18, 8 L. ed. 593; Leavenworth County v. Brewer, 9 Kan. 308; Huffman v. Greenwood County, 23 Kan. 281; Niles v. Muzzy, 33 Mich. 61, 20 Am. Rep. 670.

The exercise of naturalization jurisdiction is not the exercise of judicial power by 30 L.R.A. (N.S.)

a court as such, but rather the exercise of that character of judicial power which has been well described as quasi judicial.

Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19; State ex rel. Ellis v. Thorne, 112 Wis. 81, 55 L.R.A. 956, 87 N. W. 797; Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326.

A sure test of whether the services of the officer were official or not is, Could the officer have been compelled to perform them by virtue of his office, or held liable for official misconduct?

Kollock v. Dodge, 105 Wis. 210, 80 N. W. 608.

Courts or their clerks could not be compelled to perform naturalization duties by virtue of their offices, or be held liable for official misconduct if they failed to do so.

Re Stephens, 4 Gray, 561.

The clerks of the state courts are entitled to retain the fees in naturalization proceedings, and are not compelled to account therefor to their counties, notwithstanding constitutional or statutory provisions requiring clerks to pay over to their counties all fees collected by them.

Eldredge v. Salt Lake County (Utah) 106 Pac. 939.

Mr. J. W. Soderberg for respondent.

Kerwin, J., delivered the opinion of the court:

The defendant was clerk of the circuit court for Barron county upon a salary basis, under the provisions of chapter 411, Laws 1901, and a resolution of the county board passed in pursuance thereto by which he was to receive for his services as such clerk a fixed salary in lieu of all fees, *per diem*, and compensation for services rendered by him or his deputy. The resolution provided that all such fees, *per diem*, and compensation for services rendered, should be turned over to the county treasurer according to law. The amount in dispute was collected by the defendant as fees under the naturalization laws of the United States, and which he claims the right to retain. The manifest purpose of the legislature, as indicated in chapter 411, Laws 1901, was to make the salary fixed full compensation to the clerk for all services performed by him as such clerk, and therefore provided that he should pay to the county treasurer "all fees, *per diem*, and other emoluments of whatever kind, received by him," and that the salary of clerks and deputies should be in "lieu of all fees, *per diem*, and compensation for services rendered." The language of this statute is about as broad and sweeping as it could well be, and would seem to leave no doubt that it was the purpose of the legislature to make the salary full compensa-

tion for all services performed by the clerk as clerk, and vest the county with all moneys earned by the clerk in his capacity of clerk of the circuit court. But it is argued with much ability by counsel for appellant, that the statute only contemplates the fee system under state laws, and was not designed to cover, and does not cover, fees earned under the act of Congress relating to naturalization. The question is not free from difficulty. The act of Congress was passed in 1906, being an act to establish a uniform rule for the naturalization of aliens throughout the United States, and providing fees to be charged by clerks of courts exercising jurisdiction in naturalization cases, and further providing that such clerks are authorized to retain a certain portion of the fees received, and pay over the balance to the Bureau of Immigration and Naturalization. United States Act 59th Congress, June 29, 1906, chap. 3592, § 13, 34 Stat. at L. 600, U. S. Comp. Stat. Supp. 1909, p. 483. Before the passage of the above act of Congress, the state courts, under power conferred by Congress, naturalized aliens, and the clerks were by state statute allowed certain fees for their services. Section 747, Stat. 1898. Much stress is placed by counsel for appellant upon the act of 1906 as a uniform rule of naturalization as affecting the fees of clerks of circuit courts in naturalization proceedings, and removing them from the fee system of state courts. And it is argued that since the passage of said act of Congress, chapter 411, Laws 1901, does not include fees in naturalization proceedings. This argument is based upon the exclusive power of Congress on the subject of naturalization, and the particular language of the act, and further, that the resolution and law upon which the plaintiff rests apply only to fees provided for at the time of the adoption of the resolution, hence do not cover fees provided by the act of Congress passed in 1906, and subsequent to the passage of the resolution. The argument is ingenious, but it seems to us that the statute was intended to cover all fees and emoluments coming to the clerk in his official capacity while holding the office upon the salary basis. We think it cannot be successfully maintained that if, during the salary term, the legislature of the state should increase the fee bill under the fee system as to clerks of courts, that the clerks, though on a salary, could retain, in addition to the salary, the extra fees provided for by legislative enactment after the salary had been fixed. No reason appears why the same rule should not apply to the change in fees by Congress after the adoption of the resolution. The fees and emoluments to be

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turned over under the statute (chapter 411, Laws 1901) are such as have been received by such clerk, and he is required to make a sworn statement at the end of each quarter of all fees, *per diem*, and emoluments collected by him, and file it with the county clerk. The clerk, therefore, takes the office upon the salary fixed, and must account to the county treasurer for all fees and emoluments received by him in his official capacity during his term. The question then arises whether the act of Congress, passed after defendant was put on the salary basis, alters the situation. It is urged that because prior to 1906 there was no Federal law providing fees for clerks in naturalization proceedings, the fees in question could not have been contemplated by the legislature. But fees were then prescribed by the state statute (§ 747, Stat. 1898), hence some fees for such services must have been in contemplation. The fact that Congress had exclusive power when it assumed to act, and that the fees prescribed are at variance with the fees fixed by state statute, we do not regard significant so long as the acts performed by the clerk were official in the discharge of his duty as clerk. The courts of the state designated in the act have power to naturalize aliens, and the clerks perform services as clerks in such proceedings, and receive fees as clerks for such services, and whether such fees are fixed by act of Congress or by state law, they are fees or emoluments of the office, within the meaning of chapter 411, Laws 1901. Even if it be true, as contended by counsel for appellant, that the power of Congress is exclusive, *State ex rel. Newman v. Libby*, 47 Wash. 481, 92 Pac. 350, and that the state law is superseded as to amount of fees, the fees are nevertheless emoluments of the office of clerk, within the meaning of the state law.

It is further argued that the words of the act of Congress that the clerks are "authorized" and "permitted to retain one half of the fees" involve the granting of a privilege to hold the fees as their own. We think the words used in this connection have reference solely to the adjustment under the act of Congress between the clerks and the bureau. Clearly they cannot be held to authorize or permit the clerks on salary basis to hold them as against the counties, if they are fees or emoluments which belong to the counties. So we come back to the proposition whether they are or not.

It is insisted that such services are performed in a nonofficial capacity, therefore belong to the clerks exclusively, and are not covered by the state law or the resolution requiring fees and emoluments received by clerks in their official capacity to be turned

over to the county. And it is argued that clerks would not be obliged to turn over money earned in work purely nonofficial, as, for example, time not required in discharge of official duty spent in bookkeeping. This might be admitted, but it does not reach the question, because in the case before us the services were strictly official. The naturalization proceedings are proceedings in court, and the clerk, in the performance of services therein, acts in his official capacity as clerk of the court. The act of Congress purports to confer jurisdiction to naturalize aliens on "all courts of record in any state." And the courts of record in this state have uniformly from an early day assumed such jurisdiction, and the clerks of the circuit courts have acted in their official capacity in such proceedings before and since the act of Congress. That the circuit courts of the state have jurisdiction to naturalize aliens is beyond question. This is not denied by counsel for appellant, but it is argued that the jurisdiction is limited or quasi judicial in its nature, and that Congress might designate the board of aldermen of cities to determine the requisite facts to entitle to citizenship under the conditions prescribed by law. Whether Congress could have conferred the power on other bodies than courts of record we need not determine. It is sufficient that it has authorized courts to perform the function, and provided the fees to be received by clerks for the performance of their duties as clerks of courts in that regard. The courts having assumed to act have the right to do so in the absence of any law of the state prohibiting such action. *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060; *Re Stephens*, 4 Gray, 559; *Levin v. United States*, 63 C. C. A. 476, 128 Fed 826.

We shall briefly refer to some of the principal authorities relied upon by appellant's counsel. In *United States v. Hill*, 120 U. S. 169, 30 L. ed. 627, 7 Sup. Ct. Rep. 510, under an act of Congress providing, in effect, that the clerk shall not be allowed to retain of the fees and emoluments of his office for his personal compensation, over expenses including clerk hire to be audited and allowed by the proper officer, a sum exceeding \$3,500, and that the accounts should be examined and certified by the judge, and be subject to revision by the accounting officers, it appeared in the case that, for a great number of years, naturalization fees had not been included in such fees in the clerk's return. All the facts were known to the judge who passed on the accounts, and the general custom was acquiesced in for a long period of time. Under the act of Congress, there was no fee provided for in naturalization proceedings, but a fee of 30 L.R.A. (N.S.)

\$3 was by custom charged by the clerks, and the court made rules respecting naturalization proceedings and the services. At page 179 of 120 U. S., the court said: "It is for services rendered under these rules, and as a special officer of the court, and not as clerk, that these fees have been permitted. They were not duties pertaining to the office of clerk. They could as well have been performed by any other person designated by the court for the purpose, as by the district attorney or a commissioner of the circuit court or an attorney, or any suitable person not an officer of the court."

In *United States v. McMillan*, 165 U. S. 504, 41 L. ed. 805, 17 Sup. Ct. Rep. 395, the court followed the decision in *United States v. Hill*, supra. In *United States v. Brindle*, 110 U. S. 688, 28 L. ed. 286, 4 Sup. Ct. Rep. 180, *Brindle* held a public office upon a salary, and the act of Congress prohibited receiving compensation for discharging the duties of any other office. He was appointed to perform a service in no way connected with the office he held, and which was not an office known to the law, and it was held that the service had "no affinity or connection, either in its character or by law or usage, with the line of his official duty." *Mechem on Public Officers*, § 863, lays down the general rule that one holding an office is not rendered legally incompetent to discharge duties clearly extra-official, outside of the scope of his official duty. In *Evans v. Trenton*, 24 N. J. L. 764, the treasurer of the city of Trenton performed services not part of the duties of his office, and it was held that he was entitled to compensation therefor, in addition to his salary as treasurer. In *Leavenworth County v. Brewer*, 9 Kan. 307, it was held that a county attorney is not bound to go beyond his county to do business for the county, and if he does he is entitled to reasonable compensation therefor in addition to his salary. This was substantially ruled by this court in *Eagle River v. Oneida County*, 86 Wis. 266, 56 N. W. 644, relied upon by appellant. In *Niles v. Muzzy*, 33 Mich. 61, 20 Am. Rep. 670, it was held that one who was mayor and councilman of a city, and an attorney at law, could act for the city and defend a suit against it and recover the value of his services. In *Kollock v. Dodge*, 105 Wis. 187, 80 N. W. 608, the points involved mainly were the scope of legislative power delegated to the city council, and that, under the delegated power, the council determined that the services of the officer in question were not official, and that this was not an unwarranted exercise of power.

We have found this case by no means easy of solution. Some cogent reasons have been

presented by counsel for appellant in support of their contentions. However, after a careful examination of the case, the court have reached the conclusion that the judgment below should be affirmed.

The judgment below is affirmed.

Petition for rehearing denied April 26, 1910.

MICHIGAN SUPREME COURT.

MARSHALL L. STRINGER, Admr., etc.,
of Fannie Stephens, Deceased, Appt.,
v.

JOHN GAMBLE, Admr., etc., of Thomas
Stephens, Deceased, et al.

(155 Mich. 295, 118 N. W. 979.)

Will — charge on property — lien — enforcement.

1. A provision in a will requiring the devisee to make certain payments to testator's wife, that they shall be and remain a lien upon the property devised so long as the wife shall live, will permit a recovery after her death of sums accruing during her lifetime.

Election of remedies — decedent's estate — presentation of claim.

2. The presentation in administration proceedings upon the estate of one to whom property was devised upon condition that he make certain annual payments to testator's wife, which are made a lien on the

property, of a claim for arrears not paid, and the acceptance of payment of such instalments with interest as were not barred by limitation, is not an election of remedies which will prevent enforcement of the lien against the property for the residue of the arrears.

Limitation of action — mortgage — testamentary lien.

3. The statute governing the limitation period for enforcement of mortgage liens applies to a suit to enforce a lien imposed by the will on property devised, to secure payment of annuities to testator's widow.

(January 4, 1909.)

APPEAL by complainant from a decree of the Circuit Court for Oakland County, in Chancery, in defendants' favor in a suit brought to enforce a lien on certain real estate to secure payment of arrearages of annuities. Reversed.

The facts are stated in the opinion and in that in the case of Stringer v. Stephens, 8 L.R.A.(N.S.) 393.

Mr. Thomas A. Conlon for appellant.

Mr. James H. Lynch for appellees.

Ostrander, J., delivered the opinion of the court:

The position of appellees is stated in the following language taken from the brief: "In the former trial I claimed, and I again claim, that, when Thomas Stephens accepted the property under the will, he took it charged with the conditions imposed by the

Note. — Remedies for enforcement of legacy when charged upon devise.

Cases involving enforcement of legacies for sums of money, annuities, or the support of another, where charged upon a devise of real estate, are included herein. Cases involving the enforcement of debts of the decedent charged upon his real estate are excluded, although perhaps in a general way the questions are similar. The fact, however, that the creditors of a decedent are entitled to look to the entire estate, including the personal, real, and mixed property, and have a right of priority of payment over bequests and devises, and the further fact that the court will conclusively presume that the testator intended his debts to be paid at all hazards, that he intended to be honest before he was generous, and, to effectuate this presumption, will enforce the payment of the testator's debts to the exclusion of bequests and devises,—justify the distinction.

Personal liability of devisee.

By imposing upon a devise of real estate the payment of a legacy, a charge is created against the devised land, which is thereby made primarily liable for the payment of such legacy. In general, a devisee, by accepting a devise subject to, or charged

with, a legacy, also becomes personally liable for the payment thereof. Ruston v. Ruston, 2 Dall. 243, 1 L. ed. 365, 1 Am. Dec. 283; Mason v. Smith, 49 Ala. 71; Burch v. Burch, 52 Ind. 136; Duncan v. Prentice, 4 Met. (Ky.) 216; Doolittle v. Hilton, 63 Me. 537; Mitchell v. Mitchell, 3 Md. Ch. 71; Cumberland v. Codrington, 3 Johns. Ch. 229, 8 Am. Dec. 492; Glen v. Fisher, 6 Johns. Ch. 33, 10 Am. Dec. 310; Birdsall v. Hewlett, 1 Paige, 32, 19 Am. Dec. 392; Cook v. Grant, 1 Paige 407; Johnson v. Cornwall, 26 Hun, 499, affirmed without opinion in 91 N. Y. 660; Hoover v. Hoover, 5 Pa. 351; Miltenberger v. Schlegel, 7 Pa. 241; Snyder's Appeal, 75 Pa. 191; Jordan v. Donahue, 12 R. I. 199; Preston v. Preston, 2 Jur. N. S. 1040.

Compare with Jillard v. Edgar, 3 De G. & S. 502, which holds that, in order to charge the devisee personally, the devised land must not only be charged, but the devisee also. His mere acceptance of land devised subject to a legacy is not sufficient. In Preston v. Preston the devisee was directed by the testator to pay the legacy charged upon the land. And see to same effect Jillard v. Edgar.

A devisee of real estate, upon recovering same in ejectment proceedings, his title being based upon the devise, becomes personally liable for the payment of an annuity

will, but his position was not the same as if he had entered into a written agreement with his father or his mother by which he agreed to pay a certain sum of money and furnish certain products of the farm, but, so far as the performance of the conditions is concerned, he was personally liable upon a contract, either express or implied, and the land was charged with the performance thereof so long as Fannie Stephens lived. At the death of Fannie Stephens, if there were any portions of the annual payments unpaid, the estate of Thomas Stephens would be liable for the same unless barred by limitation or other defense. If the lien continued beyond the life of Fannie Stephens, in case of unpaid instalments, her representative might proceed in equity to

enforce the lien." This statement is in accord with the rules of law generally adopted in cases involving facts like those presented in the case at bar, and with the opinion of this court in *Stringer v. Stevens*, 146 Mich. 181, 8 L.R.A. (N.S.) 393, 117 Am. St. Rep. 620, 109 N. W. 269, 10 A. & E. Ann. Cas. 337. The brief proceeds: "So far it would be analogous to the case of a promissory note secured by real-estate mortgage. But when suit is brought upon a promissory note secured by mortgage, and judgment is taken in such suit, and the same paid and satisfied, then the mortgage lien in any event is thereby terminated." The legal representative of Fannie Stephens is seeking in this suit to enforce the lien. It would appear that the questions presented

charged thereon, although the land is also primarily liable for payment thereof. *Snyder's Appeal*, supra.

A legacy charged upon an estate devised becomes a personal liability of the devisee upon his acceptance of the devise. It, however, still remains an equitable lien upon the land, and may be enforced in equity by a sale thereof. *Birdsall v. Hewlett*, supra.

From the fact of acceptance of a devise charged with the payment of a legacy, the devisee thereby becomes personally liable therefor, although the land is worth less than the amount of the legacy. *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625.

In some jurisdictions, however, it is held that where the will does not expressly make the devisee personally liable for the payment of a legacy charged on the devised real estate, personal liability does not arise from the mere acceptance of the devise. *Hayes v. Sykes*, 120 Ind. 180, 21 N. E. 1080; *Brown v. Furer*, 4 Serg. & R. 213, 8 Am. Dec. 693; *Lockwood v. Stockholm*, 11 Paige, 87. (But see *New York cases*, supra, and *Redfield v. Redfield*, infra.)

And in *Brown v. Furer*, supra, it was held that devisees did not, by accepting the devise, become personally liable for payment of the legacy, in the absence of an express promise to pay. The court said that the land was the fund to be looked to in whatever hands it might be. This case is not in accord with the later Pennsylvania decisions. See such cases, supra.

A devise of real estate subject to the payment of a certain legacy, unexplained and unqualified by anything else in the will, constitutes a charge upon the land, and not a personal charge upon the devisee. *Den ex dem. Wilson v. Small*, 20 N. J. L. 151.

—extent of liability.

By the weight of authority, the acceptance of a devise of real estate charged with, or subject to, a legacy, in the absence of language in the will indicating a contrary intention on the part of the testator, renders the devisee personally liable for the

amount of the legacy charged upon the devised property, even though such property is of less value than the legacy.

In *Redfield v. Redfield*, 126 N. Y. 466, 27 N. E. 1032, it was said that an annuity charged upon land is a lien thereon, which will be enforced by a sale of the premises if necessary, that devisees, by accepting a devise charged with an annuity, render themselves personally liable therefor in the first instance, as well as liable for any deficiency arising from the sale of the devised property to pay the annuity.

If a devisee accepts a devise upon which a testator has charged a legacy, he becomes personally bound to pay the legacy, and is thus bound even though the land devised to him proves to be less in value than the legacy; he can only escape such personal liability by refusing to accept the devise. *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243.

A devisee upon accepting a devise of real estate of greater value than a charge imposed thereon by the testator becomes personally liable therefor, and upon a refusal or failure to pay same, such charge, with interest thereon, may be enforced by a personal decree against him, which will also be made a lien upon the estate devised. *Dunne v. Dunne*, 66 Cal. 157, 4 Pac. 441, 1152.

Where there is a mandatory direction that the executor, who is also a devisee of real estate, and the testator, shall pay a sum of money to another, and the devise is subject to such direction, the real estate is charged therewith equally with the personal estate, and the devisee, by accepting the devised property, is personally liable for such money in case of a deficiency of the assets. *Preston v. Preston*, supra.

Where the question as to the personal liability of a devisee for the payment of a legacy charged upon the devised property, and the extent of such liability, is determined from the intent of the testator as evidenced by the language of his will, if it evidences the intent of the testator personally to charge the devisee, his acceptance of the devise renders him personally liable to such an extent as the language of the will

for our determination are, first, whether the lien was discharged by the death of the person in whose interest it was created; if it was not, then, second, whether the fact that the claim for unpaid portions of the charge was presented as a demand against the estate of Thomas Stephens, and a portion of it allowed and paid, operated to discharge the lien.

First. The words employed by the testator, after reciting the charge in favor of his wife imposed upon his devisee, are: "All the above to be and remain: a lien upon said above-described farm as long as my said wife shall live;" and the devise is made "upon this express condition, that he furnish to my beloved wife," etc. No other provision for the wife is made in the will.

indicates the testator intended he should be personally charged. On the other hand, where the language used negatives an intention personally to charge the devisee, he incurs no personal liability by the acceptance of the devise. *Spencer v. Spencer*, 4 Md. Ch. 456; *Hunkypillar v. Harrison*, 59 Ark. 453, 27 S. W. 1004; *Eskridge v. Farrar*, 34 La. Ann. 721; *Nudd v. Powers*, 136 Mass. 273; *Commons v. Commons*, 115 Ind. 162, 16 N. E. 820, 17 N. E. 271; *Hancock v. Fleming*, 103 Ind. 533, 3 N. E. 254.

The general rule as to personal liability of the devisee upon accepting a devise charged with a legacy is subject to the exception that, if the intention of the testator as gathered from the language of the will is that he does not wish the devisee to pay the legacy at all events, but only so far as the devised property will enable him to, his acceptance of the devise does not create a personal liability beyond the value of the real estate received thereunder. *Hunkypillar v. Harrison*, *supra*.

Thus, where the testator requires the devisee to pay a legacy out of the proceeds of the devised real estate, this language will be considered as limiting the devisee's personal liability to the sum received from the sale of the real estate. *Hancock v. Fleming*, *supra*.

Where a legacy is to be paid by a devisee out of the estate devised him, he is not personally liable therefor, except to the extent of the rents and profits received by him; if these are not sufficient to satisfy the legacy, the balance may be raised by a sale. *Wallington v. Taylor*, 1 N. J. Eq. 314.

So, a devisee of real estate devised subject to a legacy to be paid out of the proceeds when the real estate is sold does not, by accepting the devise, become personally liable to pay the legacy. He cannot be required to pay anything until after selling the real estate, and then not to exceed the amount received therefor. *Haskett v. Alexander*, 134 Ind. 543, 34 N. E. 325.

To the same effect, as to the charge of a legacy on real estate to be payable out of

It is clear from the nature of the charge imposed that it was intended by the testator to secure to the wife subsistence during her life. There may be doubt whether, strictly speaking, the provision made for the wife should be called an annuity, a question which is sometimes of considerable importance; but it is in essence an annuity, expressly charged upon the corpus of the particular land devised to the son, payable annually, and measured by the duration of her life. See 2 Am. & Eng. Enc. Law, p. 390. I think the express provision for a lien should be held not either to limit the duration of a lien which, in the absence of the express provision, would be raised by law, or to expire at the death of the annuitant. It is more reasonable to say that

the rents and profits thereof, is *Eskridge v. Farrar*, 34 La. Ann. 709.

Where charges are made upon the rents from property devised to another, and not upon the corpus or upon the devisee personally, by accepting the devise he does not become personally liable, except to the amount of the rent and profit actually received or chargeable to him by reason of his possession and occupancy of the premises. To this extent, however, the charge will be enforced in equity, and a receiver appointed to take charge of the rents if that course is necessary. *Nudd v. Powers*, *supra*.

Where an annuity is made a charge upon the rents and profits of real estate devised, it can be enforced against the devisee personally only so far as he has received the rents and profits. *Irwin v. Wollpert*, 128 Ill. 527, 21 N. E. 501.

A devisee of a life estate subject to an annuity payable annually does not, by taking possession of the devised real estate, render himself or his estate personally liable for any part of the legacy not due and payable during his life. *Decker v. Decker*, 3 Ohio, 157.

Where an annuity is made a charge upon two different lots, each to pay a ratable portion thereof, it must be enforced in that manner, and will not be enforced entirely out of one of the lots. *Irwin v. Wollpert*, *supra*.

Right as against several devisees.

A legatee whose legacy is made a charge upon different devises of real estate is entitled to maintain a bill in equity against all of such devisees jointly, and in such action is entitled to a decree requiring that each devisee pay his equal share of the legacy, and, in default thereof, that the real estate of the defaulting devisee be sold to pay such share. *Larkin v. Mann*, 53 Barb. 267.

Where land is devised to different persons charged equally with the support of other persons, upon accepting their devises each devisee is bound for the faithful perform-

it was given to secure payment of the sums accruing during her life, and for that purpose may be enforced after her death.

Second. The whole demand for unpaid money (for nine years) was presented as a claim against the estate of the devisee. A judgment for the entire amount, with interest, was rendered. The case coming to this court on error, it was held, first, that although the demand grew out of a specialty,—a will,—it was nevertheless one properly recoverable in that action as upon an implied promise of the devisee to pay the annuity. It was held, second, that the statute of limitations had application as in the case of an ordinary action upon an implied contract. It was found that the statute barred recovery for the most of the de-

mand, and the claimant was given an option to permit judgment to stand for the sum not barred, or to take a judgment of reversal and a new trial. He exercised the option by permitting the judgment for the smaller sum to stand, and by accepting the amount of that judgment. In the entire proceeding the demand was for the several annual money charges, and interest was allowed as upon sums falling due annually. I am not prepared to hold that this operated as a performance of the condition. I think the decision was not *res judicata* to the extent of the condition unperformed and of the sum actually secured by the lien, and, if the lien survived this action, it might be enforced notwithstanding the judgment and its payment. The question is, it seems to

ance of the charge, and, for breach of it, is jointly and severally accountable to the parties for whose benefit the charge was imposed. *Shillito v. Shillito*, 160 Pa. 167, 28 Atl. 637.

So, where land is devised to several persons, charged with payment of a gross sum of money, each devisee is liable for his proportionate share. *Newman's Appeal*, 35 Pa. 339; *Field's Appeal*, 36 Pa. 11.

Compare with *Dewart's Appeal*, 70 Pa. 403, which holds that where different devisees of real estate are charged with payment of a legacy, it is error for the orphans' court to decree payment by each devisee of his proportionate share of the legacy; the court said that the decree should have decreed the sale of the lands charged with the payment of the legacy.

The court will apportion a legacy made a charge upon different parcels of real estate devised to different parties, some of whom have disposed of their portions to third persons, among all the parties whose real estate is bound, and will establish, as between the respective owners of the different properties, a ratable proportion which each must pay. *Sinking Fund Comrs. v. Woodward*, 40 N. J. Eq. 23.

Heirs or personal representatives of devisee.

A devise of land charged with a legacy renders the devisee personally liable upon acceptance, and those claiming through or under him are also liable in proportion to their respective estates, and in aid of such liability the devised land is also liable in the same manner and proportion. *Shobe v. Carr*, 3 Munf. 10.

The heirs of a devisee of land charged with a legacy take subject thereto, and must pay the same proportionately. *Harper v. Vaughan*, 87 Va. 426, 12 S. E. 785.

Real estate devised subject to a life estate, also to a legacy to be paid at a designated time after the termination of the life estate, is not released from the charge by the death of the devisee prior to the termination of the life estate, but the legacy

remains a charge upon the lands in the hands of his next of kin, and may be enforced against them. *Miles v. Leigh*, 1 Atk. 573. To the same effect, as to heir of a devisee whose devise was conditioned upon payment of certain legacies, is *Wigg v. Wigg*, 1 Atk. 382.

A legatee whose legacy is made a charge upon real estate devised to another may enforce such legacy against the devisee personally, or, upon his death without having paid same, against the distributees of his property. *Methodist Episcopal Church v. Reeve*, 79 App. Div. 65, 70 N. Y. Supp. 1102.

Subsequent purchaser from devisee.

Where a will constitutes a link in the chain of title of a purchaser or mortgagee of real estate, and by the terms of such will a charge is imposed thereon in favor of a legatee, such purchaser or mortgagee is chargeable with notice of this lien upon the property, and he, no more than the devisee, can hold it without conforming to the requirements of the will in respect of payment thereof, and, for failure to make payment, the lien will be enforced against the lands in his hands to the same extent as though title remained in the devisee. *Wilson v. Piper*, 77 Ind. 437; *Nash v. Taylor*, 83 Ind. 347; *Henry v. Griffiths*, 89 Iowa, 543, 58 N. W. 670; *Proctor Coal Co. v. Beams*, 20 Ky. L. Rep. 1913, 50 S. W. 533; *Kemp v. M'Pherson*, 7 Harr. & J. 320; *Meakin v. Duvall*, 43 Md. 372; *Re Moores*, 84 Mich. 474, 48 N. W. 39; *Peebles v. Acker*, 70 Miss. 356, 12 So. 248; *Jenkins v. Freyer*, 4 Paige, 47; *Briggs v. Carroll*, 117 N. Y. 288, 22 N. E. 1054; *Mallery v. Facer*, 181 N. Y. 567, 74 N. E. 487; *Shanley v. Shanley*, 34 App. Div. 172, 54 N. Y. Supp. 652; *Sherrer v. Bartlett*, 45 App. Div. 135, 60 N. Y. Supp. 1067; *Phillips v. Humphrey*, 42 N. C. (7 Ired. Eq.) 206; *Patterson v. Patterson*, 63 N. C. 322; *Clyde v. Simpson*, 4 Ohio St. 445; *Nellons v. Truax*, 6 Ohio St. 97; *Gumaer's Estate*, 19 Pa. Super. Ct. 621; *Newman v. Kent*, 1 Meriv. 240, followed in *Jillard v. Edgar*, 3 De G. & S. 502.

me, whether by adopting the remedy the lien was waived. Neither the charge upon the land nor the lien was created by the devisee. There is no undertaking of the devisee to pay the annuity, although he became liable to do so by accepting the devise. The lien did not exist to secure the liability thus arising, but it did exist to secure, out of the land itself, the benefit intended for the wife. In this state a mortgage is a security merely, transferring no interest in the property mortgaged, and is not released because an action at law is brought to recover the sum secured. Ordinarily the rule is no different where the note is given by one person and the mortgage by another. I think there is no ground for a distinction in the fact that the

liability of the devisee to pay the secured charge rested upon legal implication, instead of express stipulation. The annuitant had two remedies, not inconsistent with each other, for obtaining the benefit secured to her in the will of her husband. It was established in the probate proceedings, the remedy first adopted, that, because of the operation of the statute of limitations applicable to the form of action, no recovery could be had for sums falling due in certain years. For these years she has not received the benefit. She has not waived or forgiven it. The land is not relieved of this charge unless by operation of the statute of limitations. I know of no rule which denies her the right to pursue the remedy afforded by the terms of the will. I am of

Of course, the general rule that a subsequent purchaser takes subject to equities against his vendor also applies where the former has actual knowledge of the terms of the will. *Siron v. Ruleman*, 32 Gratt. 215; *Brooks v. Eskins*, 24 Mo. App. 296.

Compare with *Colyer v. Finch*, 5 H. L. Cas. 905, which holds that if the devisee takes an estate devised in fee, but charged with payment of the debts and legacies, and thereafter sells the same, it is as if an executor sells property at executor's sale, unless it can be shown that the purchaser knew the purchase money was not going to be employed in paying the debts and legacies.

To the same effect is *Re Henson* [1908] 2 Ch. 356, which holds that a mortgage by a devisee of real estate devised subject, in common with other realty and personalty, to the payment of certain legacies, takes priority over such legacies. The will contained a direction to the devisee to pay such legacies, and the stated object of the devisee in making the loan in question was to obtain money for this purpose, the court saying that under such circumstances the duty did not devolve upon the mortgagee to see to the proper application of the money.

Compare *Bank of Bombay v. Suleman Somji*, 24 Times L. R. 840, which holds that a bank, in loaning money to a devisee of real estate devised subject to certain legacies, takes subject thereto, where an investigation on its part would have revealed the will which created the charge, and the mortgagor practised no concealment in this respect.

Where the intention as expressed in the will is that the land and particularly the proceeds are to be the primary fund for the discharge of an obligation to support another imposed thereon, it is a continued charge which can only be strictly performed during the tenure of occupancy of the land upon which it is imposed by the devisee, and where he is no longer in possession and an alienee is in possession, equity, at the instance of the executor of such legatee, will hold the subsequent purchaser to the performance of the obligation, since the 30 L.R.A. (N.S.)

means to perform—the funds specifically charged—are in his exclusive control. And this is true, although such support was actually furnished by the devisee, he being the son of the legatee, and it not appearing that the support was not furnished in fulfilment of his moral obligation arising from this relationship, rather than because of any liability from accepting the devise *Wingett v. Bell*, 14 Pa. Super. Ct. 558.

And where a devisee conveys the devised land subject to the charge of a legacy, his vendee stands, in respect of personal liability, charged like a purchaser of mortgaged premises subject to a mortgage, he not becoming personally liable for the mortgage debt without a contract of assumption evidenced in some way; but no particular form of words is necessary to create such a liability. Any words which fairly import the assumption of such liability are sufficient to impose it, and the intention will be sought from the whole instrument, when the promise is to be gathered from a writing. *Hodges v. Phelps*, 65 Vt. 303, 26 Atl. 625.

A court of equity will enforce a legacy charged upon real estate devised to another, by declaring it a lien upon such real estate, with a provision for foreclosure by sale of the property, unless same is discharged by payment. The fact that the land has been conveyed to others with notice of such legacy is of no consequence as affecting the right of the legatee to such relief. *Wilson v. Piper*, supra.

A devise of real estate charged with the support of the testator's unmarried daughter out of the proceeds of the devised land remains a charge thereon in the hands of a subsequent purchaser, and a decree will be entered against him for the proceeds of the land received by him. *Bakert v. Bakert*, 86 Mo. App. 83.

The lessee of a testator who bequeaths rents thereafter to accrue to a certain person, and devises the land to another subject to the lease, cannot, by purchasing from the devisee and surrendering the lease, defeat the right of the legatee to the rental, and this is true although, by the terms of

opinion that in this case the court should adopt the rule of the statute affecting the foreclosure of mortgage liens, and that a decree should pass for such sums only as were not fifteen years past due at the time of filing the bill. No trust relation existed between the wife and the devisee of the land. The wife died February 28, 1897. As to each annual instalment unpaid, the statute began to run during her life. Thomas Stephens died April 9, 1903. The bill was filed on or about February 26, 1907. All payments falling due prior to February 26 1892, are barred.

The decree of the court below should be

reversed, with costs of both courts, and a decree entered in this court requiring payment within four months from the date of the decree of the instalments which came due June 7, 1892, June 7, 1893, and June 7, 1894, each instalment being \$100, with interest at the rate of 6 per cent per annum from the dates when they respectively became due. In default of payment, the decree should provide for a sale of the premises after the manner of foreclosure sales under decrees of a court of chancery.

Blair, Ch. J., and Montgomery, Hooker, and Moore, JJ., concurred.

the lease, he was entitled to surrender the premises and terminate the lease at any time. *Graham v. Woodson*, 2 Call (Va.) 249.

A devisee of an estate in remainder, subject to a legacy, takes only an equity of redemption, which may be foreclosed in equity in satisfaction of the legacy, and his subsequent grantee acquires no better right to the devised land. *Warner v. Bronson*, 81 Vt. 121, 69 Atl. 655.

Where an estate is devised in tail, a charge thereon will not affect the remainder, and a sale of the land to pay the charge gives the purchaser no greater right than the holder of the estate in tail. *Den ex dem. Wilson v. Small*, 20 N. J. L. 151.

But a legatee whose legacy is charged upon both the real estate and personal property of the testator, before being entitled to the aid of equity to enforce payment thereof as a lien upon the real estate, where the same has been sold by the devisee, must show that the personal estate has been exhausted in the payment of the debts of the estate, or not collectable, it appearing that there was sufficient personalty originally to pay the legacy. *Dodge v. Manning*, 1 N. Y. 298.

—different purchasers of distinct parcels.

Where different parcels of real estate charged with the payment of a legacy or legacies are disposed of by the devisee at different times, and to different persons, such real estate in the hands of the subsequent purchasers is liable for the payment of the legacy, and payment of the same will be enforced thereon in inverse order of alienation. *Jenkins v. Freyer*, supra; *Rogers v. Smith*, 177 N. Y. 588, 70 N. E. 1108, affirming without opinion 75 App. Div. 141, 77 N. Y. Supp. 392; *Mallery v. Facer*, supra; *Wieting v. Bellinger*, 50 Hun, 324, 3 N. Y. Supp. 361; *Fessenden's Estate*, 170 Pa. 631, 33 Atl. 135; *Nellons v. Truax*, supra; *Cowden's Estate*, 1 Pa. St. 267. And see *Pickering v. Pickering*, infra, under heading "Charge for support, education, etc."

But where the devisee of different parcels of real estate charged with a legacy sells the same at different times, and to different

persons purchasing without knowledge of the charge, except the last purchaser, who is informed thereof by the devisee, and who purchases subject thereto, the legacy will be decreed to be paid out of the latter property exclusively, if the same is sufficient for that purpose. *James v. Bremar*, 2 Desauss, Eq. 560.

Third person in possession.

Third persons who go into possession of real property devised subject to the payment of legacies, without the consent of the devisee or any other authorized person, must account for the rents and profits to satisfy the legacies. *Morgan v. Titus*, 3 N. J. Eq. 201.

Purchaser at mortgage foreclosure sale.

The doctrine that the lien of a legacy where charged upon land devised to another continues upon the lands although in the hands of subsequent purchasers, and may be enforced thereout, also applies to purchasers of the property at mortgage foreclosure sale, foreclosing a mortgage executed by the devisee. *Conkling v. Weatherwax*, 173 N. Y. 43, 65 N. E. 855; *Hutchins v. Hutchins*, 18 Misc. 633, 42 N. Y. Supp. 601; *Ogle v. Tayloe*, 49 Md. 158; *Reynolds v. Bond*, 83 Ind. 36; *Rogers v. Smith*, supra; *Walm v. Emley*, 26 N. J. Eq. 243.

In *Reynolds v. Bond*, it was said a mortgagee whose mortgagor based his title upon a will in which he was devised land subject to a legacy took his mortgage chargeable with notice of the contents of the will, and the lien of the legacy would be declared a lien upon the land, and it would be sold for the payment thereof, as against the claims of the mortgagee.

Lands devised upon condition that the devisee pay a legacy charged thereon may be applied in satisfaction thereof, and the same ordered sold, the devisee having the right to the aid of equity to redeem the property upon paying such charge with interest and costs. A mortgagee of the lands holding under a mortgage executed by the devisee is entitled to the same, but no greater, right; so, also is a purchaser at an execution sale of another portion of the devised land. In order to enable them to re-

tain their interests, they must pay the amount charged against the lands. If they elect to redeem, they ought to pay according to the interest they respectively have in the property, and if they refuse to redeem, and a sale is ordered or a partition made, it ought to be upon the same principle. *Bissell v. Bissell*, 24 Conn. 241.

The mortgagee in a proceeding to foreclose a mortgage which is subject to a legacy may make the legatee a party thereto, and such legatee will be entitled to priority of payment over the mortgagee out of the proceeds of the sale. *Farra v. Adams*, 12 Bush, 515. To the same effect is *Conkling v. Weatherwax*, supra.

The support of testator's widow when charged upon a farm is a lien thereon as against the original devisee, and a purchaser from him takes subject to the charge, and where the widow is justified in leaving the farm because of ill treatment, the value of such support may be filed by a court of equity as an annuity, and enforced out of the farm in the hands of the subsequent purchaser, purchasing at a sale on the foreclosure of a mortgage executed by the devisee. *Gardenville Permanent Loan Asso. v. Walker*, 52 Md. 452.

Purchaser at execution sale.

A purchaser at execution sale stands in no better position than the owner of the real estate sold, who had been devised the property charged with a legacy in favor of another. The latter's right is enforceable against the devised land in the hands of such purchaser to the same extent as when the title was in the devisee, the sale not having the effect of divesting the lien of the legacy. *Donnelly v. Edelen*, 40 Md. 117 (support); *Harris v. Fly*, 7 Paige, 421; *Dewart's Appeal*, 43 Pa. 325; *Newman's Appeal*, 35 Pa. 339; *Cowden's Estate and Wingett v. Bell*, supra.

Legacies charged upon land devised to another are a fixed lien thereon, and a purchaser thereof at sheriff's sale has constructive notice of the charge, and is bound to know that the lien is not divested by such sale upon execution against the devisee, and that, in order to protect his interests in the land, he will have to pay the legacy when it becomes due. *Lake's Estate*, 2 Del. Co. Rep. 12.

In Pennsylvania it is held that a sale of devised land by a sheriff, by order of the orphans' court, discharges the lien of legacies existing against it, but the proceeds of the sale must in the first instance be applied to payment of the liens against the real estate according to their respective priority. *M'Lanahan v. Wyant*, 1 Penr. & W. 96, 21 Am. Dec. 363; *Pryer v. Mark*, 129 Pa. 529, 19 Atl. 895.

But this rule applies only where the legacy is determinate (*Barnet v. Washebaugh*, 16 Serg. & R. 410); hence it does not apply to a charge of support which is not determinate, and the lien of such a charge is not divested by a sheriff's sale of the 30 L.R.A.(N.S.)

land on an execution against the devisee, but the land remains bound thereby, and the lien may be enforced against it in the hands of the purchaser (*Walter's Estate*, 197 Pa. 555, 47 Atl. 862).

Purchaser from administrator or executor of devisee.

Where the support of a person is made a charge upon real estate devised to another, a subsequent purchaser thereof, from the administrator of the devisee, will be deemed to have purchased subject to the charge; hence he has no standing in equity to require enforcement of the charge in the first instance, against the legal representatives of the devisee, but the legatee may proceed in equity to enforce the charge against the devised lands in his hands. *Bourne v. Hall*, 10 R. I. 139.

But where the real estate charged with payment of legacies is sold at administrator's sale for the payment of debts and the maintenance of children, the purchaser obtains a title divested of the lien of the legacies. the legatees' relief being to reach the fund arising from the sale in the hands of the administrator. *Randolph's Appeal*, 5 Pa. 242.

Executors of a devisee of land charged with certain legacies and annuities cannot, by a sale thereof under a power given in the devisee's will, discharge the lien of the legacies, and payment by the purchaser of the purchase price into court does not have that effect. *McCredy's Appeal*, 47 Pa. 442.

Purchaser from executor or administrator of testator's estate.

The administrator of an estate may be authorized to sell devised land charged with a legacy, in order to obtain the funds to pay the same, and in the event of such a sale, the land becomes freed from the charge of the legacy. *Root's Will*, 81 Wis. 263, 51 N. W. 435.

Where land is charged with payment of legacies, but express power is given in the will to the executor to sell the same to obtain money to pay such legacies, or for any other purpose he may think advantageous, such land, upon sale under this power, is discharged from the liability of the legacies. *Turner v. Turner*, 57 Miss. 775.

A purchaser from an executor of real estate charged with the payment generally of the debts and legacies is not bound to see to the proper application of the purchase price, and if he turns the same over to the trustee, the estate in his hands stands discharged from the trust. *Andrews v. Sparhawk*, 13 Pick. 393.

But legatees whose legacies are made a charge upon real estate which its executors are authorized to sell to pay the legacies may enforce in equity their lien upon the devised premises against the purchaser at administrator's sale, who has not paid the purchase price. *Elstner v. Fife*, 32 Ohio St. 358.

Where a devisee of land charged with

legacies is also an executor of the will, and as such executor he gives a bond to pay such legacies, a charge of support upon the real estate, being one of the legacies, is released as to the real estate conveyed away by the executor. *Currier v. Earl*, 13 Me. 213.

A devisee of real estate devised subject to certain legacies holds the same free from the lien of such legacies, where he is also the executor of the estate, and charges himself as such with the amount of the legacies. *Manifold v. Jones*, 117 Ind. 212, 20 N. E. 124.

Compare with *State use of Hewlett v. Hewlett*, 48 Md. 138, which holds that where a legal and beneficial interest in the residuary estate is vested in a person as devisee, subject only to a charge in favor of another, the devisee as to such charge holds as devisee in trust, and for the enforcement of this trust his testamentary bond given as executor of the estate is not answerable.

Where a testator in his lifetime contracts to dispose of real estate charged in his will with the payment of a legacy, the real estate is free from the lien of the legacy, although contract to sell is not carried out until after the death of the testator. *Guelich v. Clark*, 3 Thomp. & C. 315.

Assignee for creditors of devisee.

An assignee for creditors of a devisee of land charged with a legacy takes the same subject to the lien thereon in favor of the legatee, and the lien is enforceable upon the lands in his hands to the same extent as against the devisee. *Swoyer's Appeal*, 5 Pa. 377.

Real estate devised charged with the keep of certain live stock belonging to third persons, so long as they shall remain unmarried, remains charged therewith in the hands of the assignee for creditors of the devisee, and may be enforced against him by an action in favor of the legatees, for the expense of caring for the stock, where neither the devisee nor his assignee has complied with the provisions of the will in that respect. *Veazey v. Whitehouse*, 10 N. H. 409.

Right of subrogation to remedies of legatee.

Where real estate is devised to several devisees jointly, subject to certain legacies which are a charge thereon, any of the devisees may pay such legacies, and thereby relieve the common estate of the burden, and in equity may enforce contributions from the other devisees. *Cook v. Cook*, 92 Ind. 398; *Cook v. Cook*, 92 Ind. 602.

Where different devisees of real estate are each equally charged with a legacy, one of the devisees, who is compelled to discharge the entire legacy in consequence of the inability or refusal of the others to bear their share, is in equity entitled to contribution from the other devisees. *Shillito v. Shillito*, 160 Pa. 167, 28 Atl. 637.

A devise of real estate subject to the pay-

ment by the devisee of an annual sum to whoever has control of an infant during his minority, and a certain amount upon his reaching his majority, is a proper claim against the estate of the deceased devisee, in behalf of a person furnishing such support, and the same may also be enforced by declaring such sums to be a lien upon the devised lands with the usual remedies for enforcing the same. *Bailey v. Bailey*, 115 Ill. 551, 4 N. E. 394.

Devisees accepting real estate devised subject to a legacy are personally liable to pay the same, and this liability may be enforced against them in an action of debt instituted by the legatees, or by a subsequent purchaser of the devised land, who has been subrogated to the rights of legatees by paying them the amount of their legacies, in order to protect his interest in the land. *Lake's Estate*, 2 Del. Co. Rep. 12.

But one loaning money to a devisee to be used to pay legacies charged upon devised real estate has no right to be subrogated to remedies of the legatees. *Sommers v. Schrader*, 59 App. Div. 340, 69 N. Y. Supp. 866.

A person furnishing support to another whose support is made a charge upon real estate devised to a third person is entitled to enforce the charge against such real estate, to the extent of the support furnished. *Warburton v. Williams*, 116 Wis. 557, 93 N. W. 438; *Clark v. Marlow*, 149 Ind. 41, 48 N. E. 359.

The arrears due for the support of a person, where charged upon real estate devised to another, may be recovered by an action at law from the devisee of the land, where he accepts the same; and where the support has been furnished by a guardian of the legatee, he may recover therefor. *Pinkerton v. Sargent*, 112 Mass. 110.

Where third parties furnished support to another, relying for their compensation on a charge made upon certain real estate for the support of such person, equity will enforce in their behalf an equitable lien of the legatee upon the devised real estate, to the extent of the value of the support furnished. *Thurber v. Chambers*, 66 N. Y. 42.

But see *McQuerry v. Wilson*, 21 Ky. L. Rep. 112, 50 S. W. 1099, which holds that a person supporting the widow of a testator who has devised land subject to her support is a mere volunteer, and cannot assert a lien upon the land devised, or hold the devisee personally liable for the value thereof.

Although a legatee might maintain a bill to enforce a charge for support against real estate charged therewith, yet a mere volunteer who furnished such support cannot do so; neither is he entitled to have a judgment previously rendered in his favor against a devisee for the value of the support declared a lien on the land. *Halstead v. Westervelt*, 41 N. J. Eq. 100, 3 Atl. 270.

And a person furnishing support to another under a will making the latter's sup-

port a charge upon land devised to a third person is not subrogated to the rights of such legatee to the extent of being entitled to proceed in the same manner to enforce the charge as is given the legatee by statute. Luckenbach's Estate, 170 Pa. 586, 33 Atl. 121.

Whether remedy is at law or in equity.

Where it is sought to enforce merely the personal liability of a devisee for a legacy to which his devise was subject, and payment is not sought out of the devised real estate, the legatee has an adequate remedy at law, and is entitled to plant his action in a court of law thus to charge the devisee. *Burch v. Burch*, 52 Ind. 136; *Lofton v. Moore*, 83 Ind. 112; *Davidson v. Coon*, 125 Ind. 497, 9 L.R.A. 584, 25 N. E. 601; *Red v. Powers*, 69 Miss. 242, 13 So. 586; *Dudgeon v. Dudgeon*, 87 Mo. 218; *Brown v. Knapp*, 79 N. Y. 136; *Montgomery v. Cook*, 6 Watts, 238.

An action at law on a legacy may be maintained by the legatee against the devisee, who has accepted his devise subject to the legacy; such action is based upon an implied assumpsit, and is transitory in its nature. *Willis v. Roberts*, 48 Me. 257; *Brown v. Knapp*, supra; *Van Orden v. Van Orden*, 10 Johns. 30, 6 Am. Dec. 314; *Wiggin v. Wiggin*, 43 N. H. 561, 80 Am. Dec. 192.

Assumpsit is a proper action by a legatee bequeathed her support out of devised real estate, against the devisee or his grantee to enforce the same, and in such action she is entitled to recover the value of such support. *Sheldon v. Purple*, 15 Pick. 532.

Compare with *Pelletreau v. Rathbone*, 18 Johns. 428, which holds that an action at law cannot be maintained by a legatee to recover his legacy from a devisee of real estate accepting a devise charged with the legacy, unless he has expressly promised to pay the same.

An action on the case to recover a legacy charged upon different parcels of land devised in severalty may be maintained by a legatee jointly against the devisees. *Montgomery v. Cook*, supra.

Ejectment may be maintained against a grantee of a devise of land charged with the support of two mentally incompetent persons. *Ripple v. Ripple*, 1 Rawle, 386.

Where a legacy is made a charge upon real estate devised to another subject thereto, an equitable lien is thereby created on such real estate, and it becomes primarily liable for the payment thereof. As already seen, the devisee may be, and generally is, by accepting the devise, also personally liable for the payment of the legacy to which the devise is subject. A status or condition is therefore created very similar to that arising from a real-estate mortgage securing a note or bond in those jurisdictions where a mortgage is held not to transfer the legal title to the mortgagee. The manner of enforcing a legacy so charged upon real estate after acceptance by the 30 L.R.A. (N.S.)

devisee, where it is sought to hold both the real estate and the devisee, is very similar to a procedure for the foreclosure of such a mortgage. A personal decree may be rendered against the devisee, to secure the payment of which the legacy will be declared a lien upon the devised land, and the sale thereof ordered in foreclosure of the lien. *Harland v. Person*, 93 Ala. 273, 9 So. 379; *Dodge v. Dodge*, 1 Root, 233, 1 Am. Dec. 40; *George v. McMullin*, 3 Del. Ch. 269; *Mahar v. O'Hara*, 9 Ill. 424; *Raher v. Raher*, 130 Iowa, 743, 107 N. W. 810; *Merritt v. Bucknam*, 78 Me. 504, 7 Atl. 383; *Sherman v. Sherman*, 4 Allen, 302; *Smith v. Jackman*, 115 Mich. 192, 73 N. W. 228; *Horning v. Wiederspale*, 28 N. J. Eq. 387; *Fox v. Phelps*, 20 Wend. 437, affirming 17 Wend. 303; *Hoyt v. Hoyt*, 85 N. Y. 142; *Redfield v. Redfield*, 126 N. Y. 466, 27 N. E. 1032; *Dunning v. Dunning*, 147 N. Y. 686, 42 N. E. 722, affirming 82 Hun, 462, 31 N. Y. Supp. 719; *Dunham v. Deraismes*, 165 N. Y. 65, 58 N. E. 789; *Carter v. Worrell*, 96 N. C. 358, 60 Am. Rep. 420, 2 S. E. 528; *Bird v. Stout*, 40 W. Va. 43, 20 S. E. 852; *Powers v. Powers*, 28 Wis. 659.

On this point, in *Merritt v. Bucknam*, supra, the court reasoned that such a legacy was not a mortgage according to the Maine doctrine of mortgages, which is that the mortgagee has a legal estate, but that it was analogous to a mortgage according to the doctrine of mortgages which obtains in some states, that the legal estate is in the mortgagor; it was said that in these jurisdictions the usual procedure to enforce a mortgage was by process in equity, and decree for the sale of the land, and the payment of the debt out of the proceeds, the residue to be paid to the mortgagor. The court added that such a procedure and decree were applicable in that state to a legacy charged upon real estate devised to another.

A legacy charged upon real estate devised to another may be enforced as a prior lien in a proceeding to foreclose a mortgage given by the devisee. *Coleman v. Howell* (N. J. Eq.) 16 Atl. 202.

Generally, it is optional with the legatee whether to proceed at law or in equity, to enforce payment of the legacy against a devisee whose devise was subject thereto. *Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243.

The liability of a devisee of real estate charged with the payment of a legacy may be enforced by a suit in equity against the real estate devised, or by a common-law action directed against the devisee upon his implied promise to pay it, the promise being implied from his acceptance of the devise. *Ibid*.

Where a legatee is given a lien or charge upon devised land, to secure payment of the legacy, he has a right to invoke the power of the court, whether of law or of equity, to exert its proper machinery to render that lien effective in producing the amount of the legacy. Courts of equity have many methods within their power,

prominent among which is judicial sale, for the enforcement of such a legacy, and a transfer of the whole or a portion of the devised property, as may be necessary, to a purchaser who will pay the amount of money requisite to satisfy the charge. *Korn v. Friz*, 128 Wis. 428, 107 N. W. 659.

The fact that a legatee has a remedy at law for the enforcement of his legacy is not a bar to his proceeding in equity to enforce the same against the real estate charged with payment thereof, and also against the devisee accepting the same. *Cady v. Cady*, 67 Miss. 425, 7 So. 216; *Cray v. Johnson* (N. J. Eq.) 20 Atl. 212.

And equity will take jurisdiction of a proceeding to enforce a legacy charged upon real estate, where such remedy is adequate and just to all the parties, including a purchaser of the devised land, although by the terms of the will the legatee is given the right to enforce the legacy by entry and distress. *Duncombe v. Greenacre*, 6 Jur. N. S. 987.

—as affected by nature of the legacy.

Under some circumstances, however, equity has exclusive jurisdiction over proceedings by a legatee to enforce payment of his legacy from a devisee taking subject thereto. Indeed, it has been asserted that, in general, equity has exclusive jurisdiction over such proceedings. *Cornish v. Willson*, 6 Gill, 299; *Nash v. Clarke*, 4 Dana, 69.

But this is not the general rule, at least where the devisee is personally liable, unless the terms of the legacy or the manner of payment or other circumstances connected therewith are such that a remedy at law is not adequate. In such cases equity has exclusive jurisdiction. Thus, where a devise of real estate requires the devisees to pay debts of the testator sufficient to equalize their portion with that of another charge on such real estate, a court of equity alone has jurisdiction to adjust the rights of the parties, and enforce the charge. *Harland v. Person*, *supra*.

A court of law has no jurisdiction in an action to enforce the personal liability of a devisee of real estate upon a legacy charged thereon, where it does not expressly appear that the testator had not intended also to charge his personal estate with payment thereof. Where both are chargeable therewith, equity has exclusive jurisdiction to adjust the rights of the parties, and to enforce the charge. *Tole v. Hardy*, 6 Cow. 333.

Where a devisee of real estate charged with a legacy payable in the future upon the happening of a contingency, interest payable yearly, became so embarrassed in his pecuniary affairs that he failed to pay the interest, and lost possession of the farm against which the legacy was charged, and the rest of the property devised to him subject to the charge had either been conveyed away or encumbered to such an extent that a sale of it was necessary, thereby im-

pairing the security for the payment of the legacy with the interest, the legatee is entitled to the aid of equity to raise the amount of the legacy out of the property upon which it is charged, the proceeds thereof to be invested to carry out the requirements of the will with reference to the legacy. *Woodward v. Woodward*, 28 N. J. Eq. 119.

—charge for support, education, etc.

Where a charge of support or other charge of a similar character is made upon real estate devised to another, it constitutes an equitable lien upon the property, and generally a personal liability of the devisee upon his acceptance of the devise. Such a charge is enforceable in equity, and will be enforced by fixing the value of the support, and declaring it a lien upon the devised property, with a provision for the sale of the property in satisfaction thereof unless payment is made by those holding through or under the devisee, in accordance with the terms of the decree. *Ellis v. Ellis*, 64 N. J. Eq. 375, 55 Atl. 103 (support and education of minor child); *Borst v. Crommie*, 19 Hun, 209.

A person whose support is made a charge upon devised real estate, upon failure of the devisees to support her, may enforce her lien by recovering the reasonable value of such support, and have the same declared a lien upon the devised real estate, although the same is in the hands of a subsequent purchaser from the devisee; and she is entitled to a foreclosure of such lien upon the real estate unless the same is discharged by the payment thereof. *Borst v. Crommie*, *supra*.

Where the widow of a testator, whose support is charged upon land devised to others, is not limited or restricted to any particular place to receive the maintenance provided by the will, it is the duty of those charged with furnishing it to furnish it, or tender performance to her, where she may choose; and where this is not done, she is entitled to a decree in her favor to enforce the charge against the devisees or their subsequent grantees of the real estate charged. *Steele's Appeal*, 47 Pa. 437.

A charge upon devised real estate for the support of another person entitles such person to board and clothing, and a reasonable sum must be allowed for these purposes or a gross amount in commutation thereof out of the proceeds of the sale of the real estate. This annual allowance is not to be made out of the profits of the estate in common with the devisee and his family; neither is it to be limited to a proportion of the interest on the proceeds of the sale, where the devised real estate has been disposed of to different persons ratably apportioned, and charged upon the different portions of the real estate. *Hutchins v. Hutchins*, 3 Md. Ch. 356.

The bequest of a specific number of horses and cows, with a proviso that the same are to be kept upon certain land de-

vised to another during the natural life of the legatees, is a charge upon the land which will be enforced in equity, by requiring the devisee to pay for the hay and pasturage for the animals mentioned, and making that amount a standing charge upon the land. *Kingsland v. Kingsland*, 60 N. J. Eq. 65, 47 Atl. 69.

The proper way to enforce a charge for support charged upon a devise of real estate is for equity to treat the devisee as a trustee of the person to be supported, and to make the amount fixed upon as the value of the support a charge on the land. *Tolson v. Tolson*, 10 Gill & J. 150.

In equity a devisee of real estate charged with the support of the widow of the testator is considered a trustee for the purpose of executing the provisions in her favor, and by accepting the devise he assumes the trust, and the estate devised is not only chargeable in equity therewith, but the devisee becomes personally responsible for its payment according to the provisions of the will. *Mahar v. O'Hara*, 9 Ill. 424.

A charge of support upon the real estate devised will in equity be charged as an annuity upon the devised real estate, and enforced as such. *Willett v. Carroll*, 13 Md. 459.

Where real estate devised to one person is charged with the support and education of an infant, such charge will be declared to be an equitable lien upon, and enforced out of, real estate thereafter purchased by the devisee from the proceeds of the devised land. *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. 786.

A person whose support has been charged against real estate devised to another cannot maintain assumpsit against several different purchasers of different portions of such real estate, to recover from them the value of such support, the remedy being in equity, where the charge can be enforced, and the amount thereof apportioned against different parcels of the land. *Pickering v. Pickering*, 15 N. H. 281.

Compare with *Swasey v. Little*, 7 Pick, 296, which holds that an action of assumpsit may be maintained to recover an annuity made a charge upon real estate devised, and subsequent purchasers of different portions of such real estate may be joined in the action.

Where the support and education of an infant is made a charge upon real estate devised, the legatee may recover damages from the devisee accepting the devise for his failure to provide the support and education charged thereon. *Watt v. Pittman*, 125 Ind. 168, 25 N. E. 191.

—annuity.

Where certain devised real estate is charged with, and made subject to, the payment of an annuity a court of equity may appoint a receiver for the purpose of collecting and applying rents from such real estate to the satisfaction of a decree in favor of the annuitant. *Gee v. Gee*, 204 30 L.R.A. (N.S.)

Ill. 588; 68 N. E. 515; *Watt v. Pittman*, supra; *Willis v. Roberts*, 48 Me. 257; *Wiggin v. Wiggin*, 43 N. H. 561, 80 Am. Dec. 192; *Kelsey v. Deyo*, 3 Cow. 133; *Beecker v. Beecker*, 7 Johns. 99, 5 Am. Dec. 246; *Van Orden v. Van Orden*, 10 Johns. 30, 6 Am. Dec. 314.

A court of equity has discretionary power to order a sale or mortgage of real estate charged with the payment of an annuity, in order to realize a sum sufficient to satisfy the annuity. *Tucker v. Tucker* [1893] 2 Ch. 323.

When action may be brought.

An action against a devisee of an estate in remainder charged with the legacy cannot be maintained at law prior to the expiration of the intervening life estate, although he has accepted the devise, and paid a portion of the legacy. *Duncan v. Prentice*, 4 Met. (Ky.) 216.

A legacy charged upon land devised to another creates an equitable lien thereon, which equity will enforce even after the final settlement of the estate. *Davidson v. Coon*, 125 Ind. 497, 9 L.R.A. 584, 25 N. E. 601.

A devisee accepting a devise charged with a legacy to be paid out of the proceeds of the real estate cannot be required to pay anything on the legacy until after a sale of the real estate. *Haskett v. Alexander*, 134 Ind. 543, 34 N. E. 325.

Enforcement of legacy in orphans', surrogate, or probate court.

In Pennsylvania, by statutory enactment of 1834, the orphans' court has exclusive jurisdiction of proceedings by a legatee to enforce his lien against real estate devised to another subject thereto. *Strickler v. Sheaffer*, 5 Pa. 240; *Reed v. Reed*, 5 Pa. 241, note; *Downer v. Downer*, 9 Pa. 302; *Hamilton v. Whitely Twp.* 12 Pa. 147; *Swoope's Appeal*, 27 Pa. 58; *Marcy's Estate*, 22 Pa. 140; *Wertz's Appeal*, 69 Pa. 173; *Pierce v. Livingston*, 80 Pa. 99; *Eyre's Appeal*, 106 Pa. 184.

Where the support of one person is charged upon the real estate devised to another, such support cannot be enforced by ejectment proceedings against the devisee to recover possession of the devised land, but proceedings should be had in the orphans' court to enforce against the land the lien created thereon for such support. *Craven v. Bleakney*, 9 Watts, 19.

But jurisdiction in the orphans' court to enforce the payment of a legacy charged upon real estate devised to another is exclusive only where relief is sought against the land; where the devisee accepts the devise, and thereby becomes personally responsible for its payment, an action by the legatee to enforce this personal liability may be maintained in a court of common pleas. *Headley v. Renner*, 129 Pa. 542, 18 Atl. 549.

To the same effect is *Etter v. Greenawalt*, 98 Pa. 422; *Eyre's Appeal*, supra; *Dinsmore v. Ramsay*, 2 Pa. Dist. R. 657.

Where a devisee dies before a testator, legatees whose legacies are made a charge upon the devised land may enforce the same by a sale of the land under a decree of the orphans' court. *Solliday v. Gruver*, 7 Pa. 452.

Where a devisee of real estate subject to a legacy or annuity in favor of the widow of the testator becomes the administrator of such legatee, her heirs, upon petition to the orphans' court having jurisdiction of the legatee's estate, may have the amount of such legacy charged against the administrator, he having failed to pay it during the lifetime of the legatee. *Smith v. Smith*, 7 Md. 55.

And where land is devised with direction to the devisee to pay certain legacies as each legatee arrives at his majority, and the devisee dies before all of such legatees attain the requisite age, his estate remains liable to such legatees upon the maturity of their legacy, and it is the duty of the administrator to pay the same; and this is true although such legatees are heirs of the devisee, and, as such heirs, take the devised land by inheritance. *Case v. Hall*, 52 Ohio St. 24, 25 L.R.A. 766, 38 N. E. 618.

The personal liability of a devisee of real estate charged with a legacy arises from his acceptance thereof, and is a valid claim against his estate where he dies after acceptance, but before paying the legacy; and the same may be enforced as any other claim against his estate. *Glen v. Fisher*, 6 Johns. Ch. 33, 10 Am. Dec. 310.

Compare with *Mitchell v. Mitchell*, 3 Md. Ch. 71, which holds that while a devisee of real estate charged with a legacy, upon accepting the devise, becomes personally bound for the payment of the legacy, yet, where he dies without having paid it, the devised real estate is primarily liable for the payment thereof, rather than the estate of the devisee.

Election of remedies.

The fact that a legatee has a lien upon real estate for the payment of his legacy, and that the devisee of such real estate is also personally liable for the payment thereof, does not make his remedy against the land or the devisee personally inconsistent in the sense that an election to pursue one remedy will thereafter preclude recourse to the other. On the contrary, such remedies are cumulative merely, and either or both may be pursued until the legacy has been satisfied. (See *STRINGER v. GAMBLE*.) In this connection, however, it will be noted that, as a matter of procedure, if the legatee seeks the aid of equity to enforce his legacy as a charge upon real estate devised to another, in those jurisdictions where, in such proceeding, he is entitled also to a personal decree against a devisee, if he fails to ask for this relief in his prayer for relief, but merely seeks a sale of the property, he cannot thereafter obtain a personal judgment against the dev- 30 L.R.A. (N.S.)

isee. For a case where this rule was applied, see *Cook v. Grant*, 1 Paige, 407.

The fact that a legatee obtained a judgment against a devisee for the amount of a note given to cover a legacy, and also presented her claim to the auditors in an attachment proceeding issued in her behalf, did not bar her from thereafter asserting and enforcing her lien upon the real estate charged with the legacy, although in the hands of third persons. *Schanck v. Arrow-smith*, 9 N. J. Eq. 314. The court reasoned that the fact of the legatee obtaining judgment against the devisee did not affect her lien under the will, since she had two remedies within her reach. She could prosecute the devisee on his personal liability, or enforce her lien against the land. She might pursue both her remedies simultaneously without affecting either, or one of them at her pleasure, and until the debt was discharged by actual payment, no objection could be made to either prosecution.

The acceptance of a devise of real estate imposes a personal obligation upon the devisee where such devise is charged with the support of the widow of the testator, the payment of which is made a condition of the devise; and this obligation may be enforced by a suit to recover a personal judgment against the devisee to an amount exceeding the value of the real estate devised, and such judgment may be enforced either against the devisee personally, or by resort to the land devised, or against the devisee personally to the extent of his available assets and against the land for the balance. *Porter v. Jackson*, 95 Ind. 210, 48 Am. Rep. 707.

A legatee, by accepting a bond from the devisees whose real estate is devised to them subject to such legacy, does not thereby waive or release the devisees from their personal obligation to her, and such bond does not operate to discharge the devised land from the legacy. *Kelsey v. Western*, 2 N. Y. 500.

Where an executor takes an estate charged with the support of a third person, and gives a bond for the payment of the debts and legacies, upon his death without payment the claim can be enforced against his estate, and the legatee may also charge the land, as that remains charged until the actual payment of the legacy. *Copp v. Hersey*, 31 N. H. 317.

The fact that a legatee had a right of action upon a bond given by a devisee to pay debts and legacies does not preclude action against the purchasers of the real estate from the devisee, as that is merely a cumulative remedy. *Sheldon v. Purple*, 15 Pick. 532.

A subsequent purchaser of real estate devised subject to a legacy cannot maintain a bill in equity to require the legatee to look to a bond filed by the devisee to pay the debts and legacies, since the bond is at most only a supplementary obligation. *Amherst College v. Smith*, 134 Mass. 543.

A subsequent purchaser of land from a devisee who was devised the same subject

to an annuity cannot require a legatee to resort to the personal obligation of the devisee on a bond given by him, before attempting to enforce a lien on the land. *Evans v. Sowles*, 51 Vt. 177.

Compare with *Dodge v. Manning*, 1 N. Y. 298, which holds that a devisee, by accepting a devise of real estate charged with a legacy, becomes personally liable for the payment of the legacy, and the remedy against him should be first exhausted, before a subsequent purchaser on a mortgage foreclosure sale of a mortgage given by the devisee of the real estate should be charged in respect of such real estate.

A devise of land merely accompanied by a direction to the devisee to pay certain sums to other persons does not constitute such sums a charge upon the land; they, however, become a personal charge against the devisee upon his accepting the devise, and this liability is not merged in a bond executed by him to the legatees for the payment of the legacies. *Miltenerger v. Schlegel*, 7 Pa. 241.

See, further, as to election of remedies, *STRINGER v. GAMBLE*.

Right of legatee to possession of real estate charged with the legacy.

Where a devise of real estate is subject to a charge for the support of the widow of a testator, upon the failure of the devisee or his grantees to provide such support, the widow is entitled to enter upon the estate, and hold possession until her support is furnished; or she may maintain a petition in chancery, and such petition is not subject to abatement upon the ground that she has an adequate remedy at law. *Dodge v. Dodge*, 1 Root, 233, 1 Am. Dec. 40.

Compare with *Thomas v. Boyd*, 13 Ind. 333, which holds that a devise of real estate subject to the support of the widow of the testator does not give the primary right to the widow to control the land devised, but, on failure or refusal of the devisees to provide for her as provided in the will, gives her the right to subject the land to that purpose.

A person whose support is charged on devised real estate is not ordinarily entitled to the possession thereof, but if such possession is necessary to provide the support, it will not be interfered with. *Harris v. Ross*, 57 N. C. (4 Jones, Eq.) 413.

See *Dinan v. Coneys*, 143 N. Y. 544, 38 N. E. 715, which holds that the existence of a legacy charged upon real estate devised to another gives the legatee no right of possession as against the devisee, whether the legacy is paid or not, and in an action of ejectment by the devisee against the legatee, to obtain possession of the devised real estate, the legatee cannot set up his legacy as a counterclaim. A. G. S. 30 L.R.A. (N.S.)

PENNSYLVANIA SUPREME COURT.

NORRIS E. HENDERSON

v.

JOHN W. JENNINGS, Appt.

(228 Pa. 188, 77 Atl. 453.)

Sale — mortgage — passing title.

1. The title to the mortgage passes at the time of making the contract, where one interested in a building operation agrees with a materialman that if he will furnish certain materials for the project, and take in part payment a specifically described mortgage on the property, "to purchase from you within sixty days after its delivery" the mortgage, the contractor stating "I purchase simply what you get."

Damages — failure to pay for mortgage.

2. The measure of damages for breach of a contract to purchase a specifically designated mortgage within sixty days after its delivery by the mortgagor to the mortgagee is the price, and not the difference between the price and the market value of the mortgage, since the title passes when the contract is made.

(May 2, 1910.)

APPEAL by defendant from a judgment of the Court of Common Pleas No. 2 for Philadelphia County in plaintiff's favor in an action brought to recover damages for breach of a contract to purchase a certain mortgage. Affirmed.

The facts are stated in the opinion.

Messrs. Francis J. Maneely and Morris Dos Passos for appellant.

Messrs. Alfred D. Wiler and William H. Peace, for appellee:

As the bond and mortgage had been executed, was duly recorded, and was in the possession of the Union Trust Company to deliver to the plaintiff, and was later duly assigned to plaintiff, and defendant agreed to pay for it in sixty days after its delivery to plaintiff, the title to it passed to defendant under his contract, and plaintiff should recover the full price of the mortgage.

Reynolds v. Callender, 19 Pa. Super. Ct.

Note. — Although there are many cases passing on the general question as to the remedies of the seller under an executed contract when the buyer refuses to accept the goods sold, the rules applicable to those cases do not seem heretofore to have been applied in a case where the purchaser refused to accept a mortgage which at the time of the sale was not in existence.

610; *Unexcelled Fire-Works Co. v. Polites*, 130 Pa. 536, 17 Am. St. Rep. 788, 18 Atl. 1058; *Guillon v. Earnshaw*, 169 Pa. 471, 32 Atl. 545; *Ballentine v. Robinson*, 46 Pa. 179; *Field v. Schuster*, 26 Pa. Super. Ct. 82; *Sedgw. Damages*, 8th ed. § 753; *Gross v. Ajello*, 132 App. Div. 25, 116 N. Y. Supp. 380; *Heilbrunn v. Weislow*, 129 App. Div. 532, 114 N. Y. Supp. 50; *Pearson v. Mason*, 120 Mass. 53.

Stewart, J., delivered the opinion of the court:

The defendant was interested—to what extent we do not know, nor is it material—with one Sharp in a building operation in Philadelphia. The plaintiff proposed to supply them with the hardware required in the construction of certain buildings, for the sum of \$3,072. The terms of payment offered him were 50 per cent cash and 50 per cent in a second mortgage or mortgages upon the buildings. He at first declined these terms. Thereupon it was proposed that, if he would accept the terms offered, Jennings would purchase from him the mortgage or mortgages within sixty days after they were delivered to him at the face value, less 10 per cent. This was satisfactory to the plaintiff, and the contract was accordingly entered into, Jennings on a separate paper obligating himself to purchase from the plaintiff the particular mortgage for \$1,550, which plaintiff had finally agreed to accept. Plaintiff, having received the mortgage, at the expiration of, not within, the sixty days, requested Jennings to redeem his promise by purchasing the mortgage. Jennings refused, and plaintiff then brought this action to recover the price Jennings had agreed to pay. The trial resulted in a verdict for plaintiff for the amount claimed.

There is but one assignment of error that calls for consideration. The recovery was permitted for the full contract price for the mortgage. It is insisted that the true and only measure of damage in such case is the difference between the contract price and the market value at the time and place of delivery, and that, inasmuch as plaintiff had not shown any loss, he was not entitled to recover anything. The question turns on the construction of the contract. Jennings's written offer was in these words, addressed to the plaintiff: "In consideration of your entering into an agreement with Richard H. Sharp, and your paying me a commission of 10 per cent on the face amount thereof, I hereby agree to purchase from you within sixty days after its delivery to you a certain mortgage of \$1,550, described in schedule C of your contract with Mr. Sharp, and in connection with the ninety-six buildings

about to be erected in the Forty-Second ward of Philadelphia, without regard to title, completion, street improvements, liability for mechanics' or municipal claims, as I purchase simply what you get." The jury found as a fact that plaintiff accepted this offer, and, relying upon it, contracted with Sharp to supply the required hardware for the buildings, and accept in part consideration the mortgage described in the offer. This states the whole contract. As between the plaintiff and Jennings, touching the mortgage, was it an actual sale or merely a contract to purchase? In other words, was it an executed or executory contract? If the former, then title to the mortgage at once passed to Jennings, subject to the plaintiff's right of lien until the conditions were complied with, or until full delivery (*Winslow v. Leonard*, 24 Pa. 14, 62 Am. Dec. 354); and in such case the measure of damage would be the contract price (*Ballentine v. Robinson*, 46 Pa. 177). In the case last cited we have this very satisfactory exposition of the law. "Where a sale of goods has been made and they have been delivered, it is plain the measure of damages for nonpayment is the stipulated price. About that there is no difficulty. Doubts, however, have been entertained where goods have been sold, and not delivered in consequence of the refusal of the buyer to complete the contract. It has sometimes been said the standard for measurement is the excess of the contract price over the market value. Yet where the subject of the same is a specific article, where the contract has been so far completed as to pass the property in the article to the vendee, the possession being retained only because the price is not paid, there seems to be no good reason why the vendor should not be permitted to recover the agreed value. He has fully complied with all that he was under obligation to do. He has parted with his property, and given the full equivalent for the stipulated price. His right to the property having passed to the vendee, his right to the price would appear to be consummate." This marks the distinction as to the measure of damages in case where the default is in connection with an executed contract, and where it is in connection with a simple contract to sell. In the latter, the measure of damage is determined by the general rule of difference between contract price and market value; in the former, the contract price is the measure.

Did the right of property in the mortgage, as between vendor and vendee, pass to the latter upon the plaintiff's acceptance of the defendant's offer? This depends upon the intention of the parties as it is to be

derived from the contract and its circumstances. We are of opinion that it did pass. The subject of the sale was a specific thing, distinctly designated in the contract, and unassociated with anything else. The language of the offer following a description of the mortgage is: "I purchase simply what you get." "Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods are not ascertained. But where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee." 1 Benjamin, Sales, § 315. The above quotation from the text of the authority cited is adopted from the opinion of Baron Parke in *Dixon v. Yates*, 5 Barn. & A. 313, 23 Eng. Rul. Cas. 385. The rule as there expressed has been very generally accepted and enforced, confining it, of course, to the controversies between vendor and vendee, with no intervening rights to be disturbed. Our own state authorities give most unqualified recognition to the rule.

The case of *Winslow v. Leonard*, supra, is directly in point. Equally so is *Ballentine v. Robinson*, supra. No less explicit are *Gonser v. Smith*, 115 Pa. 452, 8 Atl. 770, and *Com. v. Hess*, 148 Pa. 98, 17 L.R.A. 176, 33 Am. St. Rep. 810, 23 Atl. 977. The opinion of Paxson, Ch. J., in the case last cited, contains a very full and careful review of all the authorities on the subject. We see nothing in the facts of the case to take it out of the operation of this general rule. That the mortgage was not in actual existence at the time the contract was entered into is unimportant. "In relation to things not yet in existence, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be sold, while the other can only be the subject of an agreement to sell, of an executory contract. Things not yet existing which may be sold are those which are said to have a potential existence; that is, things which are the natural product or expected increase of something already belonging to the vendor." 1 Benjamin, Sales, § 78. The rule is thus stated by 2 Story on Contracts, § 75. "So, also, although the thing to be sold have no actual and present

existence, yet, if it be the anticipated product or increase of something to which the seller has a vested right, the sale will be good." Under this general rule, it has been decided that the earnings of an engagement of service already entered into may be the subject of a present sale. One may assign earnings arising out of a contract of service already entered into, but not those of a prospective service. In the one case the earnings have a potential existence, though there is a possibility that they may never materialize. In the other there is nothing more than a mere possibility of existence. *Hartley v. Tapley*, 2 Gray, 505; *Augur v. New York Belting & Packing Co.* 39 Conn. 536, and *Farnsworth v. Jackson*, 32 Me. 419, further illustrate the rule. In the present case the obligation on part of the defendant became binding at once upon the plaintiff's entering into the contract with Sharp, and defendant at once acquired a present right to the mortgage under his contract, which would ripen into a perfect title by lapse of time. It was not the case of a mere possibility coupled with no interest; nor was it a case of one selling something which he did not have, but which he expected to buy in the general market. This one particular mortgage was the thing sold, and at the time of the sale nobody had any right to it except the plaintiff.

The assignments of error are overruled, and the judgment is affirmed.

TENNESSEE SUPREME COURT.

STATE OF TENNESSEE, Appt.,

v.

SAM WATKINS et al.

SAME, Appt.,

v.

GEORGE BURNS et al.

(— Tenn. —, 130 S. W. 839.)

Criminal law — misdemeanor — disturbing meeting.

It is a misdemeanor at common law wantonly to disturb an assembly of persons met together for any lawful purpose, such as the enjoyment of a Christmas tree, and this law is not changed by a statute pro-

Note. — Character of meeting essential to the offense of disturbing a meeting.

This note is confined to the single question as to the kinds of meetings within the purview of the common-law or statutory offense of disturbing meetings. It is not concerned with the question whether the offense may be committed by acts done before the

viding for the punishment of anyone who shall disturb a meeting for religious, educational, or literary purposes, or for the promotion of temperance.

(October 1, 1910.)

A PPEALS by the State from orders of the Circuit Court for Loudon County quashing indictments for disturbing a public assemblage in violation of law. Reversed.

The facts are stated in the opinion.

Mr. Walter W. Faw, for the State:

It is a misdemeanor at common law wantonly to disturb an assemblage of persons met together for any specific and lawful purpose, particularly meetings of a distinctly moral or benevolent character.

assembling, or after the dispersal, of such a meeting with the question what amounts to a disturbance of such a meeting, or any other questions affecting other ingredients of the offense. The question whether the statutory provisions on the subject of disturbing meetings preclude a prosecution at common law is also beyond the scope of this note, unless the contention was that the enumeration of meetings in the statute is exclusive, and for that reason prevents a prosecution at common law for disturbing a meeting within the purview of the common-law offense, but not named in the statute.

Religious meetings.

—in general.

There is no doubt that meetings for public worship are in general within the purview of the statutory or the common-law offense. This is assumed by a multitude of cases dealing with questions not within the scope of this note. The question here considered is merely, What are meetings for public religious worship within the purview of the offense.

It is stated in *State v. Jasper*, 15 N. C. (4 Dev. L.) 323, holding that the disturbance of a public religious meeting was a misdemeanor and indictable at common law, that while that was also the rule in England with respect to the Established Church, it was not the case with respect to Dissenters, for whose protection it was necessary to pass specific statutes.

The point is, of course, only of historical interest, but it may be noted that as early as *R. v. Hube*, 5 T. R. 542, it was held that a dissenting congregation was protected from disturbance.

And so, according to a *dictum* of Lord Mansfield in *R. v. Wroughton*, 3 Burr. 1683, Methodists and Dissenters had a right to the protection of the court if interrupted in their decent and quiet devotions.

So, the statute protecting from riotous, violent, or indecent behavior, any cathedral, church, chapel, or churchyard, applies as well to persons in Holy Orders as to laymen. *Vallancey v. Fletcher* [1897] 1 Q. B. 265. 30 L.R.A. (N.S.)

2 Wharton, Crim. Law, 10th ed. § 1556; 1 Bishop, New Crim. Law, § 542; 2 Bishop, New Crim. Law, § 301; *People v. Crowley*, 23 Hun, 412.

As the statute does not include and cover the present case, it leaves the law as it was before its enactment.

State v. Cooper, 120 Tenn. 553, 113 S. W. 1048, 15 A. & E. Ann. Cas. 1116.

Messrs. Frank R. Harrison and John J. Blair for appellees.

Beard, J., delivered the opinion of the court:

The indictment in this case charges that "Sam Watkins, Henry Jackson (and?), Charles Dobson, heretofore, on the 25th day of December, 1909, in the county aforesaid,

In this country it is clear that if the meeting can be properly regarded as one for public worship, the fact that it may not conform to the modes and forms of worship observed in more conventional organizations will not deprive it of the protection of the law.

Thus, the nature and form of worship is immaterial. *Kinney v. State*, 38 Ala. 224.

So, the protection of the law extends to all, irrespective of creed, opinion, or mode of worship, if it is not indecent or unlawful. *Hull v. State*, 120 Ind. 153, 22 N. E. 117.

But the fact that a religious congregation may have been trespassers in using a church on a day set apart for its use by another denomination will not justify a sexton in disturbing such gathering, on the ground that, as trespassers, they were conducting themselves in an unlawful manner, and consequently were not within the purview of the statute protecting "any congregation assembled for religious worship, and conducting themselves in a lawful manner." *Dorn v. State*, 4 Tex. App. 67.

The Salvation Army, though not incorporated, is a religious society within the statute denouncing this offense. *State v. Stuth*, 11 Wash. 423, 39 Pac. 665.

—Sunday school.

See also *infra*: "Meetings for social, entertainment, or educational purposes."

Sunday schools are within the purview of the common-law offense. *State v. Branner*, 140 N. C. 559, 63 S. E. 169.

And are within the North Carolina statute on the subject. *Ibid*.

And are within a statute making the unlawful disturbance of "public worship" indictable. *Martin v. State*, 6 Baxt. 234.

But it was held in *Hubbard v. State*, 32 Tex. Crim. Rep. 389, 24 S. W. 30, that a conviction for disturbing a Sunday school could not be sustained under an information charging a disturbance of religious worship, for the reason that the local statute makes a clear distinction between a disturbance of religious worship and a disturbance of a Sunday school.

did unlawfully, wilfully, and knowingly disturb an assemblage of persons met for the purpose of a 'Christmas tree,' by loud talking, profane discourse, and other rude and improper conduct, to the common nuisance, against the peace and dignity of the state." Upon motion the trial judge quashed the indictment, upon the ground, as stated in his order, that "it did not charge an indictable offense." From his action the case has been brought to this court by the state, and error assigned upon it.

It will be observed that this indictment is found under the common law, and, as such, we are satisfied was maintainable. It is a misdemeanor at common law wantonly to disturb an assemblage of persons met together for any lawful purpose, par-

ticularly meetings of a distinctly moral or benevolent character. In 2 Wharton's Criminal Law, 10th ed. § 1556, it is said: "For three or more persons to attempt to break up a meeting, religious or secular, is indictable either as a riot or as an attempt at riot. There may be cases, however, in which the number joining in the disturbance is not large enough to constitute a riot, or there may be cases in which it is desirable, for statutory or other reasons, to prosecute for the distinctive offense of improperly interfering with the right belonging to all citizens to meet together for religious or secular conference. There can be no question that the violent interference with this right is indictable at common law, and that any conduct which

—business meeting of religious society.

The statute protecting from disturbance people assembled "for divine worship" does not extend to a religious society which has concluded its religious services, and entered upon secular business. *State v. Fisher*, 25 N. C. (3 Ired. L.) 111.

Nor does the statute protecting from disturbance a congregation assembled for religious worship apply to a congregation assembled exclusively for business purposes, even though the proceedings were opened with religious exercises. *Wood v. State*, 11 Tex. App. 318. The statute governing this case protects, and is only intended to protect, "any congregation or part of a congregation assembled for religious worship."

But in *Hollingsworth v. State*, 5 Sneed, 519, the statute providing for the punishment of any person disturbing any congregation met "for the purpose of worshipping Almighty God, or aid or assist in the same," is extended to a religious congregation assembled to transact business connected with their interests as a church.

—as affected by place where meeting is held.

In *State v. Smith*, 5 Harr. (Del.) 490, it is held an indictable offense to disturb a religious society, regardless of the place if within the county. The court said: "Even without an act of assembly, this would be an indictable offense, as the Christian religion is protected by the common law."

And a congregation engaged in public worship, though it be not in a church, chapel, or meetinghouse specially set apart for the purpose, is within the statute protecting from disturbance a congregation met "for the purpose of divine service, and engaged in the worship of Almighty God." *State v. Swink*, 20 N. C. 492 (4 Dev. & B. L. 358).

Under statute making it a misdemeanor to "disturb any camp meeting, congregation, or other assembly met for religious worship," a congregation met for religious worship at a designated school and church house is protected, although the place had not been set apart for that purpose. *State v. Alford*, 142 Mo. App. 412, 127 S. W. 109. 30 L.R.A. (N.S.)

But where the members of a certain family were accustomed to gather annually for a family reunion, the residence at which a religious service was held on one of those occasions is not within the purview of the statute making it a misdemeanor to disturb religious worship at a place where people are accustomed to meet for divine worship. The court said that the statute was intended to protect known and regularly established places of public worship, within the reasonable knowledge of the general public, and when it is fair to presume that they were put upon notice that divine service was likely to be going on whenever numbers of people were then assembled, and does not include an exceptional meeting of this kind, which assembles first at one house and then at another of the members. *State v. Starnes*, 151 N. C. 724, 66 S. E. 347.

In *Stratton v. State*, 13 Ark. 688, which held an indictment for disturbing a religious congregation assembled in a certain church unsustainable by proof that defendant disturbed a congregation assembled in the open air, the court said: "It is the body of people or worshippers associated together for religious purposes, that constitutes a church, and that are equally protected by the statute against disturbance, though assembled at a camp ground or in the open air or in a private house."

But in *State v. Schieneman*, 64 Mo. 386, it is held that the statute prohibiting any person disturbing "any camp meeting, congregation, or other assembly of people met for religious worship," was intended to protect camp meetings held on a piece of ground set apart for that purpose, and congregations of persons gathered together within their place or house of worship, and did not extend to assemblages conducting religious services in public squares and streets.

Temperance meeting.

In *Com. v. Porter*, 1 Gray, 476, it is held that the statute inhibiting disturbances of schools and public meetings includes temperance meetings and, it seems, political gatherings, meetings for amusements, and

wantonly disturbs persons so meeting is in like manner indictable."

In 1 Bishop's New Criminal Law, § 542, dealing with the same subject-matter, the author says: "When people assemble for worship or in their town, or other like meetings, or probably always when they come together in an orderly way for a purpose not unlawful, the common law makes it a crime to disturb their meeting. . . . What amounts to disturbance varies with the nature and objects of the meeting."

This holding in no way trenches upon the authority of *Layne v. State*, 4 Lea, 199.

all public meetings held for lawful purposes. The court said: "If the public meeting of citizens for lawful purposes is an essential and valuable right, and this law goes no further than to give practical efficacy and security to it by a moderate punishment for its disturbance, we can perceive no good reason why the law should not be made to be coextensive with the right to be secured, and applied, according to its plain terms, to the wilful disturbance of all public meetings held for lawful purposes."

Cases like *State v. Norris*, 59 N. H. 530, upon the question whether a temperance camp meeting is within the purview of a statute prohibiting the sale of liquor within a given distance of a place of religious worship, are not within the scope of the note.

Also such cases as *Com. v. Jennings*, 3 Gratt. 624, and *State v. Edwards*, 32 Mo. 550, which turn on the question whether the offense may be committed after the assemblage has retired or dispersed, are excluded.

Meetings for social, entertainment, or educational purposes.

An assemblage of people met to celebrate the birth of Christ with a Sunday school Christmas tree, and also with prayer, song, and scriptural talk from the minister, is within the statute prohibiting disturbance of assemblages for divine worship. *Staford v. State*, 154 Ala. 71, 45 So. 673.

But a Sunday school celebration and Christmas tree at which no religious services had been appointed, but speeches were made upon the subject of Sunday schools and public morality, is not within the statute protecting against disturbance "assemblies met for religious worship." *Layne v. State*, 4 Lea. 201.

In *Brock v. State* (Tex. Crim. Rep.) 44 S. W. 516, an assemblage of people in a public schoolhouse, to rehearse for a public entertainment, is protected by a statute making it an offense to disturb the peace. The court said that the assembly, though in a sense for private purposes to rehearse, was in a public place, and the fact that it was a private rehearsal would not strip the place of its public character.

An assemblage met solely for instruction in the art of singing, although confined to the singing of sacred songs, is not an as-

In that the presentment was framed under § 4853 of the old Code (Shannon's Code, § 6776), which section is as follows: "If any person wilfully disturb or disquiet any assemblage of persons meeting for religious worship, or for educational or literary purposes, or as a lodge of or for the purpose of engaging in or promoting the cause of temperance, by noise, profane discourse, rude or indecent behavior, or any other act at or near the place of meeting, he shall be fined not less than twenty nor more than two hundred dollars, and may also be imprisoned not exceeding six months in the

assemblage met for religious worship, within the meaning of a statute prohibiting the disturbing of "religious worship." *Adair v. State*, 134 Ala. 183, 32 So. 326.

Disturbing a singing school is an indictable offense by an act providing a penalty for disturbing "any meeting of inhabitants of the state met together for any lawful purpose." *State v. Oskins*, 28 Ind. 364.

But persons assembled at a schoolhouse, to train their voices for singing, are not within the statute protecting from disturbance a congregation met for religious worship. *Green v. State* (Tex. Crim. Rep.) 56 S. W. 915.

In *Von Rueden v. State*, 96 Wis. 671, 71 N. W. 1048, it is held that the statute providing against the disturbance of any assembly or meeting of people "for religious worship or for other purposes" includes a gathering of people in a public highway to listen to a lecture.

—school session.

The statute providing a penalty for disturbing any teacher or pupils in any school kept in "any schoolhouse or other place of instruction" applies to a private school for instruction in writing. *State v. Leighton*, 35 Me. 195.

And it is an indictable offense to disturb a school assemblage, although at the time it was not in the school, but was at a bush arbor near thereto. *McCright v. State*, 110 Ga. 261, 34 S. E. 368.

Political or official meeting.

Where disturbing a town meeting constitutes an offense at common law, an indictment concluding against the form of a statute may be maintained, if the facts charged amount to such an offense, and are not within the purview of any statute. *Com. v. Hoxey*, 16 Mass. 385.

A meeting of electors is not protected by a statute making it an offense to disturb an assemblage of persons met for religious worship. *R. v. Lavoie*, 6 Can. Crim. Cas. 39, Rap. Jud. Quebec, 21 C. S. 128.

Maliciously disturbing a meeting of school directors is indictable at common law, although not punishable by any act of assembly. *Campbell v. Com.* 59 Pa. 266.

J. D. C.

county jail." The plaintiff in error in that case was presented for disturbing "an assembly of persons met for religious worship," and was convicted. It appeared from the proof that it was not such an assembly, but a meeting held at a schoolhouse as a "Sunday school celebration and Christmas tree," at which no religious services had been appointed, but where speeches were made on the subject of Sunday school and public morality. Upon appeal, it was held by this court that there was a variance between the proof and the charge in the indictment, and that, therefore, the conviction could not be sustained. This was the full extent of the court's holding. There is no intimation in the opinion that it is not a misdemeanor in Tennessee to unlawfully and wilfully disturb an assemblage of persons met for the purpose described in the indictment in this case.

The section of the Code does not pretend to cover the whole ground of nuisance as defined and made punishable at common law. It does not abrogate the common law relating to the disturbance of meetings other than those specifically mentioned therein, and it is held in *Layne v. State*, supra, that a meeting for the purpose of Christmas tree celebrations is not included either in its letter or spirit. It is well settled that "if the statute does not include and cover such a case, it leaves the law as it was before its enactment. . . . A statute will not be construed to alter the common law further than the act expressly declares, or than is necessarily implied from the fact that it covers the whole subject-matter." *State v. Cooper*, 120 Tenn. 553, 113 S. W. 1049, 15 A. & E. Ann. Cas. 1116.

It is a matter of common knowledge, as is well remarked by the attorney general in the brief submitted by him in this case, that the "custom of having Christmas trees for the benefit and enjoyment of the children and youths of Sunday schools is long established in Tennessee." This custom not only prevails in the cities and towns of the state, but in the rural districts, where there is but little police protection. In such places, if rowdies, by violent and obscene conduct and speech, can interfere with and break up such gatherings without being subject to criminal indictment and punishment, the people have no remedy. As is said for the state: "It will not suffice to say that an indictment for public profanity or obscenity will lie, for in many cases there may be serious disturbances without the guilty parties indulging in either of these offenses."

The judgment in this cause is reversed, and the case is remanded for a trial.

This opinion disposes also of the case of *State v. George Burns et al.*, involving an offense of a similar character.

FLORIDA SUPREME COURT.

MARTIN V. B. VAN NESS, Plff. in Err.,
v.

ROYAL PHOSPHATE COMPANY.

(— Fla. —, 53 So. 381.)

Covenant — breach — railroad on land.

The legal existence of a railroad right of way and of the roadbed and track upon real estate at the time it is conveyed by a deed in which the grantors bind "themselves and their heirs, executors, and administrators, to warrant and forever defend the title to said premises unto the said party of the second part, its heirs, successors, and assigns, against the said parties of the first part and their heirs, executors, and administrators, and against all persons whomsoever lawfully or equitably claiming, or to claim, the same," does not give the grantee in the deed a right of action for damages against the grantor, because of the existence of the said right of way, roadbed, and track.

(June, 1910.)

Headnotes by HOCKER, J.

Note. — Existence of public highway, private way, or railroad right of way across land at time of conveyance as breach of covenants.

This note is confined strictly to a discussion of those cases involving public highways, private pass ways, and railroads; and while similar questions involving other encumbrances affecting the physical condition of the land, such as water rights, ponds, party walls, wharves, etc., may to a certain extent depend upon similar principles, they form a distinctive class sufficient to warrant an independent treatment.

The cases are taken up in the order noted in the title, and as far as possible have been treated with respect to each specific covenant or covenants involved. Those cases involving covenants of seisin and of good right to convey are treated together, as one is practically the equivalent of the other. Also covenants for quiet enjoyment and of warranty are practically identical in operation, since whatever constitutes a breach of the one is a breach of the other, and they will be considered together. On the other hand, a covenant of seisin is not a covenant against encumbrances, but is sometimes embraced in a general warranty, which, where a statutory form is provided, as in *VAN NESS v. ROYAL PHOSPHATE Co.*, generally includes all the common-law covenants. Therefore, for cases involving any particular covenant, an examination should be made of the cases, as

ERROR to the Circuit Court for Citrus County to review a judgment in plaintiff's favor in an action brought to recover damages for alleged breach of covenants in a deed to certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. H. M. Hampton and H. L. Anderson for plaintiff in error.

Mr. W. W. Hampton, for defendant in error:

The railroad right of way does, under the law, constitute an encumbrance.

Rawle, Covenants, 5th ed. § 82; Herrick v. Moore, 19 Me. 313; Haynes v. Young, 38 Me. 557; Prichard v. Atkinson, 3 N. H. 335; Butler v. Gale, 27 Vt. 742; Parish v. Whitney, 3 Gray, 516; Hubbard v. Norton, 10 Conn. 422; Desvergers v. Willis, 56 Ga.

515, 21 Am. Rep. 289; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Jordan v. Eve, 31 Gratt. 1; 2 Devlin, Deeds, 2d ed. §§ 910, 911; Barlow v. McKinley, 24 Iowa, 69; Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290; Van Wagner v. Van Nostrand, 19 Iowa, 422; Williamson v. Hall, 62 Mo. 405; Harlow v. Thomas, 15 Pick. 66; Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426, 11 Cyc. Law & Proc. p. 1067.

Knowledge of the grantee of the existence of the easement makes no difference.

8 Am. & Eng. Enc. Law, 2d ed. pp. 86, 87; Miller v. Desverges, 75 Ga. 407; Cope-land v. McAdory, 100 Ala. 553, 13 So. 546; 2 Devlin, Deeds, 2d ed. § 911; Rawle, Covenants, 5th ed. pp. 111-115; Barlow v. De-

set out under the various divisions, which necessarily conflict.

The principal conflict of authority arises among the public highway and railroad cases, in which the encumbrances are open, visible, and notorious, it being held in many such cases that the parties are supposed to have contracted with reference to them, and that such encumbrances do not breach covenants of general warranty or those against encumbrances. A highway which conferred a benefit has also been held not to constitute an encumbrance. These rules, however, do not seem to have been extended to private rights of way, and in a few jurisdictions an express distinction has been made. Some courts, too, seem reluctant to extend the rule to existing railroads, but to the writer it seems difficult, if not impossible, to find a basis for such distinction.

Also, many cases are not based, either directly or inferentially, upon the existence of notice, either actual or constructive, in the covenantee.

Further discussions of the rules drawn and their application will be found accompanying the cases.

The division of the note into separate subdivisions, treating respectively public highways, private ways, and railroads, has some justification in essential distinctions made by the courts between these different classes of cases; but these subdivisions ought not to be regarded as mutually exclusive, to such an extent that the cases included in one have no bearing upon the principles applicable to those included in the others.

Public highways.

—covenants of seisin and of right to convey.

The question whether an existing public highway breaches covenants of seisin or of good right to convey in general depends upon the extent of the right vested in the public, a mere easement for passage being held not to breach such covenants, and this may be considered the logical rule, since 30 L.R.A. (N.S.)

the covenant of seisin is merely an assurance to the purchaser that the grantor has the estate, at least the possession thereof, in quantity and quality which he purports to convey. Therefore, in attempting to convey a fee, there will be no breach unless the fee to a highway on the lands had vested in the public.

Thus, the following cases held that the existence of a public easement for a highway over land conveyed is not a breach of a covenant of seisin, since the public easement does not affect the technical seisin of the purchaser: Moore v. Johnston, 87 Ala. 220, 6 So. 50 (cited in VAN NESS v. ROYAL PHOSPHATE Co.); Vaughn v. Stuzaker, 16 Ind. 338 (quoted with approval in Shelbyville & B. Turnp. Co. v. Green, 99 Ind. 205); Jordan v. Eve, 31 Gratt. 1.

And see also Moore v. Boulton, 10 U. C. Q. B. 140, infra, "Covenants of warranty and for quiet enjoyment."

And Vt. Rev. Laws 1880, page 586, § 3042, provide that "where real estate is conveyed by deed, the existence of a public highway over or upon any part of such estate shall not be treated as a breach of the covenant of seisin or warranty, or any covenant against encumbrances contained in such deed, unless the parties to such deed expressly refer to and covenant against such highway."

In Whitebeck v. Cook, 15 Johns. 483, 8 Am. Dec. 272, set out and quoted from in VAN NESS v. ROYAL PHOSPHATE Co., the covenants involved were those of seisin, of right to convey, and for quiet enjoyment, but the first two only are involved in the decision as set out in the VAN NESS CASE. A strong dissenting opinion was rendered by Justice Van Ness (reported at page 544 of 15 Johns.), in which, after declaring his inability to distinguish between the covenants involved and a covenant against encumbrances, in the sense that breach of the latter would not constitute a breach of the former, he said: "It has been argued that where conveyances include highways, the grantee takes the land subject to the easement; and knowing of its existence, it

laney, 40 Fed. 97; Long v. Moler, 5 Ohio St. 272.

What are usually termed "full covenants," in the United States, are those for seisin, for right to convey, against encumbrances, for quiet enjoyment, for further assurance, and of warranty.

Boone, Real Prop. § 310; 4 Kent, Com. 471; Rawle, Covenants, 27.

Generally, the interpretation of a covenant should be in accordance with the reasonable sense of the words implied.

Boone, Real Prop. § 309; Pavey v. Burch, 3 Mo. 447, 26 Am. Dec. 682; Clark v. Devoe, 124 N. Y. 120, 21 Am. St. Rep. 652, 26 N. E. 275; Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; Jenks v. Pawlowski, 39 Am. St. Rep. 522, and note;

98 Mich. 110, 22 L.R.A. 863, 56 N. W. 1105; West Virginia Transp. Co. v. Ohio River Pipe Line Co. 22 W. Va. 600, 46 Am. Rep. 527.

The other covenants for title are included in the general covenant of warranty for title against all claims.

Leary v. Durham, 4 Ga. 601; Green v. Irving, 54 Miss. 454, 28 Am. Rep. 360; 11 Cyc. Law & Proc. p. 1075 and note.

All the covenants are implied by the language contained in the deed in suit.

11 Cyc. Law & Proc. p. 1046; 8 Am. & Eng. Enc. Law, p. 119; Scriver v. Smith, 100 N. Y. 471, 53 Am. Rep. 226, 3 N. E. 675.

The statute is not in derogation of the common law.

2 Sutherland, Stat. Constr. 583.

would, therefore, be unjust and inequitable that he should maintain an action on any of the usual covenants in the deed. But, in a court of law, these considerations can have no influence. The question here is not whether the grantee did or did not know of that existence of the road. Whether the covenant is broken or not cannot depend upon that fact, nor can it at all be the subject of inquiry. A court of law must judge from what appears in the deed itself, and is not permitted to travel out of it to determine its legal effect. Let us suppose, however, the grantee to have been an entire stranger to the land; that he had never seen it; that he purchased it by the acre, and that all the land described in the deed had been covered by a highway; how would the equity of the case then stand? If, in this case, the grantee did not know of the existence of the road, and the deed had been executed under mistake or misapprehension, the grantee might, perhaps, have relief elsewhere; but in this court he is bound by the terms of his covenants. I am, accordingly, of opinion that the plaintiff has shown a right to recover." As to the covenant for quiet enjoyment, there was no decision upon the merits, as a demurrer to the averment of a breach thereof was held well taken, because the declaration contained no averment of an eviction, which was held essential, since the covenant for quiet enjoyment goes to the possession, and not the title.

And in Burbach v. Schweinler, 56 Wis. 386, 14 N. W. 449, where lands were conveyed with reference to a recorded plat, a street or alley over such lands, shown by the plat, was held not to breach covenants of seisin, of right to convey, and against encumbrances in the conveyance, irrespective of the grantee's actual knowledge, and of whether the street was a mere public easement or whether the fee vested in the public, the court saying that if the former were the case, the lands were conveyed subject to the easements, and if the latter, the land occupied by the highway was wholly excluded from the conveyance, the ground 30 L.R.A. (N.S.)

being that the grantee was chargeable with notice of any streets and alleys shown on the referred-to plat.

But in Haynie v. American Trust Invest. Co. (Tenn.) 39 S. W. 860, a public road fenced up, and not in actual use as such, yet still legally existent, the existence of which was unknown to the purchaser, was held to breach a covenant of seisin, the ground being that the grantee had the right to treat the loss of the land covered by the public road as an entire failure of title to that portion of the land purported to be conveyed.

And in Daisy Realty Co. v. Brown, 18 Ky. L. Rep. 155, 35 S. W. 637, it was held that covenants in a deed that the grantor was lawfully "seised in fee simple" of the property conveyed, that he had "good right and full power to convey the same," and that it is "free from all encumbrances," were broken by the existence of a street thereon which had been dedicated to the public use.

Of course, if the deed containing the covenant of seisin only purports to convey to the edge of the street, the existence of the highway constitutes no breach of that covenant. Tuskegee Land & Secur. Co. v. Birmingham Realty Co. 161 Ala. 542, 23 L.R.A. (N.S.) 992, 49 So. 378, though it is otherwise as to covenants against encumbrances. Ibid.

—covenants against encumbrances.

The greatest conflict among the authorities as to whether the existence of a public highway over land conveyed breaches a covenant against encumbrances in a deed arises, as before stated, around the effect of knowledge on the part of the covenantee of the existence of the way. The weight of authority, although, perhaps, not based on the sounder legal reason, releases the grantor from liability where the grantee has either actual or constructive notice, and in at least two states the question is settled by statute.

Some cases, without discussing the effect of knowledge, hold that the existence of a

law for damages in the circuit court of Citrus county against the plaintiff in error, and recovered upon the trial a large judgment, which the plaintiff in error has brought here for review. There is a perfect mass of pleas, motions to strike, demurrers, etc., in the record, but out of this labyrinth there emerges the question whether, on the facts stated, the defendant in error was entitled to recover damages from the plaintiff in error under the alleged warranties in the deed, because, when the deed was executed to the defendant in error, there existed upon the land the easement of a railroad right of way under the deed from the plaintiff in error herein referred to. The deed from the plaintiff in error to defendant in error does not follow

the language or the form of a warranty deed, prescribed in § 2449, Gen. Stat. 1906. The language of the warranty, thereby given the effect of the "full common-law covenants" by § 2450, Id., is as follows: "And the said party of the first part does hereby fully warrant the title to said land, and will defend the same against the lawful claims of all persons whomsoever." In the deed the plaintiff in error does not follow the language of the statute, and "fully warrant and defend the title," but simply binds himself and his heirs, etc., "to warrant and defend the title." Statutes such as this one are always strictly construed, because they are in derogation of the common law, and "consequently, in order to constitute the statutory covenants, the words of the stat-

against all encumbrances, he is not liable to refund the money paid upon the mortgage by the grantee. That is, he is so liable at law. This is the written contract of the parties, and it cannot be set right in a court of law, where the writing is the exclusive evidence of the contract. But in such a case, the party must resort to a court of equity, to restrain the other party from claiming indemnity against an encumbrance, which was intended to be excepted from the covenant. And the same is no doubt true of a covenant against encumbrances, so far as highways are concerned. Ordinarily, a court of equity would readily suppose the encumbrance of an existing highway or railway, or any other known and notorious right of a similar character, as a right to draw water from a spring, exercised by another at the time of the conveyance, could not have been intended to be indemnified against, and therefore should have been excepted from the operation of the covenant, and would, no doubt, so require the parties to treat the deed. But a court of law could not do this, without confounding all distinctions between the equity and law jurisdiction upon the subject." Continuing, the court characterized the attempt made in *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272, to show that a highway is not an encumbrance, as "more plausible than sound." See *Vt. Rev. Laws*, 1880, p. 586, as quoted *supra*.

In *Hubbard v. Norton*, 10 Conn. 422, evidence that certain highways which were alleged to constitute a breach of covenant against encumbrances were open and notorious, and known to the covenantee at the time of the purchase, was held inadmissible on the ground that the covenantee's knowledge could not destroy the effect of the defendant's covenant, the court saying: Will it not excite "surprise that the grantor should convey these lands with the knowledge he must have of these encumbrances, without making an exception of them, unless he was willing to sustain the damages that might arise from them? When it is recollected that this is the deed of the grantor, and these his covenants, it seems

more correct to say that he must abide by them, than to permit him to unnerve or destroy them by proof of this kind, which is only calculated to induce a belief that the party grantor could not have intended what he has actually covenanted for."

But in the following cases, it was held that a covenant against encumbrances in a deed of land is not broken by the existence of a public road over the land, known to the purchaser at the time of the purchase: *Desvergers v. Willis*, 56 Ga. 515, 21 Am. Rep. 289 (set out at length in *VAN NESS v. ROYAL PHOSPHATE CO.*); *Weller v. Fidelity Trust & S. V. Co.* 23 Ky. L. Rep. 1136, 64 S. W. 843; *Haldane v. Sweet*, 55 Mich. 198, 20 N. W. 902; *Patterson v. Arthurs*, 9 Watts, 152 (also set out in the *VAN NESS CASE*); *Jordan v. Eve*, 31 Gratt. 1, approved in *Deacon v. Doyle*, 75 Va. 258, and in *Trice v. Kayton*, 84 Va. 217, 10 Am. St. Rep. 836, 4 S. E. 377.

And a legal highway which is open and in actual use at the time of the conveyance is not embraced in a general covenant against encumbrances. *Scribner v. Holmes*, 16 Ind. 142, disapproved in *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Perry v. Williamson* (Tenn.) 47 S. W. 189 (*dictum*); *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85 (*dictum* set out in *VAN NESS v. ROYAL PHOSPHATE CO.*).

And in Vermont it is so provided by statute. See *Vt. Rev. Laws* 1880, page 586, as quoted *supra*. See also Ill. Rev. Stat. 1883, page 286, as quoted *infra*.

In *Ashburner v. Sewell* (1891) 3 Ch. 405, Justice Chitty said, *obiter*: "The general rule of law in regard to rights of way may be stated as follows: Where it is obvious that there is a right of way enjoyed by some third person or by the public in general, the existence of such right of way cannot give rise to any objection to the title; as, for example, if the estate sold is a large one with a public highway running through it, then it is obvious that it is not intended to sell the property free from such right of way; but the purchaser would take subject to the right of way."

And that a street or alley indicated on a

Hocker, J., delivered the opinion of the court:

On the 27th day of February, A. D. 1900, the plaintiff in error, joined by his wife, executed a deed to the defendant in error, in which he granted, bargained, sold, and conveyed to the defendant in error 145 acres of land, more or less, lying in Citrus county, Florida, together with the tenements, hereditaments, and appurtenances thereunto belonging. In this deed the plaintiff in error and his wife, the parties of the first part, "do hereby bind themselves and their heirs, executors, and administrators, to warrant and forever defend the title to said premises unto the said party of the second part, its heirs, successors, and assigns, against the said parties

of the first part and their heirs, executors, and administrators, and against all persons whomsoever lawfully or equitably claiming, or to claim, the same." There was no other covenant in the deed.

On the 26th of May, 1891, the plaintiff in error and his wife executed and delivered a deed to the Silver Springs, Ocala, & Gulf Railroad Company conveying a right of way over the above-mentioned land for said railroad 100 feet wide, on which the said road at once constructed, built, and operated its said railroad, and has done so ever since, and is now in possession of said right of way. Because of the existence of this right of way as an alleged breach of the warranties of its deed from plaintiff in error, the defendant in error brought a suit at

public highway over land conveyed by a deed covenanting against encumbrances is a burden and a breach of the covenant. *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545; *Kellogg v. Ingersoll*, 2 Mass. 97 (a much-cited case); *Prichard v. Atkinson*, 3 N. H. 335; *Haynes v. Stevens*, 11 N. H. 28.

The decision in *People's Sav. Bank v. Alexander*, 2 Sadler (Pa.) 287, 3 Atl. 821, is merely to the effect that the existence of a street legally laid out across a lot, but not open for use, and not known to the grantee of the lot, is an encumbrance sufficient to excuse the purchaser from performing, and entitling him to recover the purchase money paid.

And in *DeLong v. Spring Lake Beach Improv. Co.* 72 N. J. L. 135, 59 Atl. 1034, a declaration on a covenant against encumbrances, which averred as an encumbrance that a part of the land conveyed had been dedicated as a public park and as a way of access to a lake, was held not subject to a plea that the dedication was known to the grantee at the date of the sale. See also *Daisy Realty Co. v. Brown*, supra.

And in *Butler v. Gale*, 27 Vt. 739, a leading and much-cited case, it was expressly held that an open, public, and long-established highway was an encumbrance on land which it crossed, and that where not excepted in a deed of such land containing a covenant against encumbrances, it constituted a breach thereof. In arriving at this conclusion, Chief Justice Redfield made a very clear statement of the arguments advanced against the rule as laid down in *New York, Pennsylvania*, and other states announcing similar conclusions, as follows: "The question in regard to the highway being a breach of the covenants against all encumbrances, to a mere lawyer, would not seem to be one of much difficulty. But if one chose to confound the powers of the court of chancery, in restraining the party from claiming damages for such a mere technical breach, which the parties must have understood, and could not really have intended to indemnify against, with the dry law of the case, and to appeal to the merely popular opinion, as to the extent of such a 30 L.R.A. (N.S.)

covenant, he might very readily convince some persons of no great perspicuity in their views, and very likely the great majority of men, of the very great absurdity of the law, without, at the same time, really showing very clearly how a highway or a railway or a private right of way was not, after all, an encumbrance upon the land. In this country, where our tenures are strictly allodial, we are very much accustomed to consider that, if another really possesses any rights in our land, it is so far forth an encumbrance upon our title. Whether it be small or large in amount, whether it be a mortgage, or a right to flow a portion or all of the land, for a shorter or longer period during the year, or to draw water from a well or spring, or to water cattle at a brook, or to pass across the land on foot or with teams, or to draw wood in winter only across the land, or to build and maintain a railway perpetually, or a highway, is certainly of no importance in determining the mere technical question of encumbrance or no encumbrance. And it can make no difference whether this right is notorious or not. If the question of an encumbrance were to be determined by its notoriety, or what is the same thing, by its being known to the purchaser, it must, to preserve consistency, be extended to all encumbrances. And in that view the grantee could not recover upon this covenant, for paying a mortgage which he knew existed at the time of his purchase. But the contrary is perfectly well established. And in regard to these rights of way, if they existed only in a prior grant, and were not known to the grantee at the time of purchase, no one could claim that they did not constitute a breach of the covenant against encumbrances. And if the question whether a highway is an encumbrance upon land is to be determined by the fact of its being open and notorious, it resolves itself into this, whether it was the intention of the parties to treat it as an encumbrance or not. And the same rule should equally apply to a mortgage which the purchaser agreed to pay. But no lawyer will contend that, in such a case, if the grantor covenants

law for damages in the circuit court of Citrus county against the plaintiff in error, and recovered upon the trial a large judgment, which the plaintiff in error has brought here for review. There is a perfect mass of pleas, motions to strike, demurrers, etc., in the record, but out of this labyrinth there emerges the question whether, on the facts stated, the defendant in error was entitled to recover damages from the plaintiff in error under the alleged warranties in the deed, because, when the deed was executed to the defendant in error, there existed upon the land the easement of a railroad right of way under the deed from the plaintiff in error herein referred to. The deed from the plaintiff in error to defendant in error does not follow

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ute must be strictly followed. The use of less words than all of the words implying the covenants is insufficient." 11 Cyc. Law & Proc. pp. 1047, 1048, and cases cited in notes 32 and 33, p. 1048. If there be any authority to the contrary, it has not been discovered. We do not think, therefore, that the statute affords any light upon the proper construction of this deed. The covenant in the deed under which the defendant in error claims can only be regarded as one of general warranty, independent of the statute. But whether the covenant in this case is to be regarded as one of general warranty, and equivalent to the covenant for quiet enjoyment (11 Cyc. Law & Proc. pp. 1072-1076), or whether it be regarded as embracing, under the statute, full cove-

nants of seisin, of right to convey, against encumbrances, for quiet enjoyment, and for further assurance (11 Cyc. Law & Proc. pp. 1063, 1064), we do not think the plaintiff below was entitled to recover. It seems to us, although there is a conflict in the decisions on the question, that a sound view of the law and a proper application of the principles of justice will deny to the defendant in error a right of action in the instant case. 11 Cyc. Law & Proc. p. 1067.

It is held in many respectable jurisdictions that the existence of a public highway or a railroad right of way, in no wise interfering with the technical seisin of the grantee in the deed, and which was a visible notorious easement when the deed was executed, is not a breach of the covenant

recorded plat referred to in the deed does not constitute a breach of a covenant against encumbrances, see *Burbach v. Schweinler*, as set out supra.

In *Cincinnati v. Brachman*, 35 Ohio St. 289, where the deed described the land conveyed as extending to the center of a certain street "as to be extended," and referred to a plat on which the street was traced, the subsequent use of the street as a public highway was held not to constitute a breach of covenant against encumbrances or of general warranty in the deed.

And where land conveyed is described as bounded on a certain public road, such public road is not an encumbrance on the estate within a covenant against encumbrances, since, as the description in the deed made the road a monument, the grantee took under it, only to the road as it legally existed when his deed was made. *Frost v. Angier*, 127 Mass. 212.

And in *Patten v. Fitz*, 138 Mass. 456, where land was described in a deed containing a covenant against encumbrances as bounded on A street, which street had been used as a private way until accepted by the city previous to the conveyance to covenantee, and by it ordered laid out as a public way, it was held that the street itself was not such an encumbrance as would give the grantee a right of action for damages caused by changing the grade thereof in laying it out after the grantee took possession, since the parties must be presumed to have contemplated the street as it was laid out and established by the city.

And in *Patten v. Fitz*, supra, it was held that a release by the grantor of all claim for damages on account of the laying out as a public street of a strip of land that had heretofore been used as a private way is not a breach of a covenant against encumbrances contained in a deed executed subsequent to the acceptance by the city of the way as a public street, and prior to the actual laying out thereof as such on land abutting on such street, where it describes the land as bounded on such street, since in such case the parties must be presumed to have contemplated the street as a bound-

ary as it was laid out, although in doing so the grade was changed to the damage of such abutting property.

In *Holmes v. Danforth*, 83 Me. 139, 21 Atl. 845, in holding that a covenant against encumbrances in a deed conveying land described as bounded by the center of a public road was not breached by the existence of that part of the highway on the land conveyed, said: "The principle on which these and many other similar decisions rest is that, when the estate conveyed is so described that the parties must have understood that it was subject to a servitude, the grantee takes it *cum onere*, and will not be allowed to complain of that servitude as a breach of the covenants in his deed. In all such cases the conclusion is irresistible that, if the encumbrance was a damage to the estate, that fact was taken into account in fixing the price; and that the grantee has obtained all that he bargained for and all that he paid for."

In *Harrison v. Des Moines & Ft. D. R. Co.* 91 Iowa, 114, 58 N. W. 1081, in holding that an existing easement of a public highway which was not shown to be depreciative of the value of the lands on which it constituted an easement was not a breach of the ordinary covenant against encumbrances, the court expressly distinguished highways from railroads on the ground that highways through agricultural lands were not in legal contemplation encumbrances, in the absence of proof that they depreciated the value of the fee, since it is presumed that such ways are not only essential to enjoyment of the servient estate, but that they enhance the value thereof.

—covenants of warranty and for quiet enjoyment.

A conflict based upon the grounds specified in the last-mentioned subdivision of this note also arises in the decisions involving covenants of general warranty and for quiet enjoyment, and the statement there made applies as well to the question here discussed.

against encumbrances or of the general warranty; for, it being open and visible, the purchaser must be presumed to have seen it, and to have fixed his price with reference to the actual condition of the land at the time of purchase. 11 Cyc. Law. & Proc. p. 1067. Why should the technical rules of conveyancing be converted into a trap to catch an unwary grantor, unskilled in them, when it is perfectly obvious that he never intended to bind himself to do that which he could not do, viz., remove a railroad right of way and track from the land he is selling, the existence of which was perfectly obvious to the purchaser? The allegation in the declaration that the purpose of buying the land was to utilize the phosphate on it affords no foundation for a suit for

damages. No such purpose is mentioned in the deed. If the purposes of a grantee in buying property, not expressed in the deed, are to be grounds of such suits, then a grantor who sells a lot with an old building on it which does not suit the purposes of the grantee when it was conveyed to him may be sued by the grantee for a breach of his warranty because of the existence of the old building. If there happens to be a mound of earth on the property conveyed, thrown up in a previous mining for minerals, which covers minerals underneath it, this also might afford a basis for a suit for breach of the covenant of warranty; for undoubtedly it will interfere to some extent with the purposes of the grantee, if he bought the land for the minerals on it.

A public road is an easement, the existence of which over a part of land conveyed by deed with covenant of general warranty is a breach of such a covenant. *Haynes v. Young*, 36 Me. 557.

And in *Alling v. Burlock*, 46 Conn. 504, a covenant of general warranty was held broken by the existence of a public highway across the land conveyed. In this case the land for the highway was conveyed in fee by quitclaim deed, and the deed recorded, but the strip remained unappropriated for highway purposes until after the conveyance by warranty deed. Subsequent to such purchase, but before the opening of the highway to the public, the public, by proper court proceedings, asserted its paramount title. The decision turned upon the point that such action, together with the fact that the fee to the highway was in the grantees thereof, amounted to an eviction, thereby breaching the covenant of general warranty.

And in *Louisville Public Warehouse Co. v. James*, 21 Ky. L. Rep. 1726, 56 S. W. 19 (see same case in 23 Ky. L. Rep. 1216, 64 S. W. 966, and in 24 Ky. L. Rep. 1266, 70 S. W. 1046), where, under facts similar to the preceding case, with the exception that the right of way had been dedicated instead of conveyed in fee, the same conclusion was reached.

And in *Southern Wood Mfg. & Creosoting Co. v. Davenport*, 50 La. Ann. 505, 23 So. 448, an existing easement for a public highway, although not known to either the grantor or grantee at the time of the conveyance by warranty deed of the land across which it extended, was held to constitute a breach of the covenant of warranty, notwithstanding the opening of the street worked a benefit to the covenantee.

In *Copeland v. McAdory*, 100 Ala. 553, 13 So. 545, in holding that the existence of a public highway over land conveyed by a deed containing a general covenant to warrant and defend constituted a breach of the covenant, notwithstanding the covenantee had full knowledge of the existence of the encumbrance, the court said: "But knowledge or notice, however full, of an

encumbrance or of a paramount title, does not impair the right of recovery upon covenants of warranty. The covenants are taken for protection and indemnity against known and unknown encumbrances or defects of title." The following case is to the same effect: *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731, disapproving *Scribner v. Holmes*, 16 Ind. 142.

But in *Hymes v. Estey*, 116 N. Y. 501, 15 Am. St. Rep. 421, 22 N. E. 1087, the court said: "It must be deemed the settled doctrine in this state, that the fact that part of land conveyed with covenant of warranty was at the time of conveyance a highway, and used as such, is not a breach of the covenant. This is so, for the reason that the grantee must be presumed to have known of the existence of the public easement, and purchased upon a consideration in reference to the situation in that respect," citing among other cases *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272.

And in *Butt v. Riffe*, 78 Ky. 352, it was said that when a public highway is on land at the date of purchase thereof, the grantee must be held to know of its existence, and to have made his bargain with a knowledge of the inconvenience resulting from it, and that therefore such a highway would not constitute a breach of warranty of title.

In *Bowles v. Round*, 5 Ves. Jr. 508, it was held that a purchaser could not be relieved of his purchase of certain meadow lands merely because there was a road going through them, the ground being that the road was not a latent defect, which would excuse the purchaser's carelessness.

In Illinois it is provided by statute that "no covenant of warranty shall be considered as broken by the existence of a highway upon the land conveyed, unless otherwise particularly stated in the deed." Ill. Rev. Stat. 1883, page 286 (act in effect July 1, 1874). See also *Vt. Rev. Laws* 1880, page 586, as quoted supra.

In *Ake v. Mason*, 101 Pa. 17, it was held that a purchaser having constructive notice from the public records, of the construc-

To require such a technical exactness and nicety of knowledge on the part of grantors of real estate of the various kinds, of possible encumbrances for which they may lay themselves liable to suits for damages, about which the courts themselves are divided in opinion, is carrying technical nicety further than we are willing to go. A sane grantor will not intentionally make a conveyance of land which will authorize the grantee to immediately sue him for damages, and an honest grantee cannot be presumed to intentionally exact such a conveyance for such a purpose.

In the case of *Desvergers v. Willis*, 56 Ga. 515, 21 Am. Rep. 289, it was held that "a covenant against encumbrances in a deed of land is not broken by the existence of a

public road over the land, known to the purchasers at the time of the purchase." In the opinion delivered by Chief Justice Warner it is said: "A general warranty of title to land against the claims of all persons includes in itself covenant of a right to sell and of quiet enjoyment and of freedom from encumbrances. Code, § 2603. The question made by the record in this case is whether a public road on the land, which fact was known to the purchaser at the time of his purchase, is in this state a breach of a covenant of warranty against encumbrances. The decisions of the courts of this country are not uniform upon this question, but the weight of authority we think is that the existence of a public road on the land, known to the purchaser, is not

tion of a public street across the lands bought, was not, upon the actual opening thereof, thereby afforded an action for breach of a covenant against encumbrances or for quiet enjoyment implied from the words "grant, bargain, and sell" contained in the deed.

And as to a street "as to be extended" as traced on a referred-to plat, which street formed one of the boundaries of the lands conveyed, see *Cincinnati v. Brachman*, 35 Ohio St. 289.

But if, when the land was conveyed, there was nothing to indicate that it was part of a street, and it does not appear that the grantee had knowledge that a part thereof had previously been dedicated as such, the rule does not apply; and there is a breach of a covenant for quiet enjoyment where it is subsequently established that a portion of the land had been so dedicated. *Hymes v. Esty*, supra, approved on subsequent appeal in 133 N. Y. 342, 31 N. E. 105.

In *Trice v. Kayton*, 84 Va. 217, 10 Am. St. Rep. 836, 4 S. E. 377, the court, while expressly approving the doctrine of *Jordan v. Eve*, 31 Gratt. 1, refused to extend it so as to include an encumbrance which was a hidden fact, and held that the grantee of a house and lot was disturbed in violation of his covenant for quiet enjoyment, by being compelled to remove a part of the house, which, unknown to the parties to the deed, encroached upon an adjoining street, saying: "The street was obvious and observable, of course, but the hidden fact, which afterwards transpired, that, according to the true measurements of the street, the house stood upon a part of the highway, was not observable, in no wise apparent, and could not have been in contemplation of the parties contracting together."

Regarding the result above, in *Moore v. Boulton*, 10 U. C. Q. B. 140, that case might be taken as sustaining the view that the existence of a public highway known to the covenantee will not constitute a breach of a covenant of warranty or its equivalent, quiet enjoyment, as the decision in the case was that a covenant de-

nominated as a covenant for quiet enjoyment was not breached. As a matter of fact, however, the case, so far as it is authority on this point, bears the other way, taking the view of the covenant for quiet enjoyment that generally obtains in this country, since the court expressly stated that no principles can be founded on variety of circumstances, such as whether the injury is trifling, or whether the highway is an actual advantage to the grantee, and that a court of law cannot allow any effect to the circumstance that the covenantee had notice of the existence of the highway. The decision is accounted for by the court's assumption that the covenant for quiet enjoyment is the equivalent of a covenant of seisin, and not, as generally held in this country, the equivalent of a covenant of warranty. In this view of the nature of a covenant for quiet enjoyment, the decision is in accord with the weight of authority shown in the first subdivision, with respect to covenants of seisin, and wholly independent of the question as to the effect of knowledge of the condition.

Private rights of way.

The few cases in which the existence of a private way has been set up as a breach of a covenant of seisin are unanimous in sustaining such contention, but, as has before been said, even in those jurisdictions where the knowledge of the grantee of the existence of a public right of way has been held to except such a way from a covenant of general warranty, or from the more specific covenant against encumbrances, the courts do not apply a similar rule to private rights of way, but rule, without exception, that knowledge is immaterial in such cases. The result is that there is little, if any, conflict in the law as to whether the existence of private rights of way across land at the time of its conveyance will operate as a breach of covenant.

—covenants of seisin and of right to convey.

In *Perry v. Williamson* (Tenn.) 47 S. W.

such an encumbrance as would constitute a breach of the covenant of warranty. This view of the question is sustained by the better reason, especially as applicable to the condition of the people of this state. To hold that a public road running through a tract of land, which was known to the purchaser at the time of his purchase thereof, is such an encumbrance on the land as would constitute a breach of a covenant of warranty against encumbrances, would produce a crop of litigation in this state that would be almost interminable."

In *Moore v. Johnston*, 87 Ala. 220, 6 So. 50, in an opinion by Justice Somerville, the existence of a public easement as a street or right of way, which does not affect the

189, it was held that a private right of way across a farm constituted a breach of a covenant of seisin in the deed to the farm.

And in *Turner v. Moon* [1901] 2 Ch. 825, a private right of way not known to the purchaser of land which it crossed was held to constitute a breach of a covenant of title, for which damages could be recovered.

And in *Ashburner v. Sewell* [1891] 3 Ch. 405, it was held that a right of way unknown to both the grantor and grantee constituted a latent defect which was an objection to title, within the meaning of the contract of sale, which permitted the vendor to rescind if the purchaser should insist on an objection in respect of the title which the vendor would be unable or unwilling to remove.

In *Dykes v. Blake*, 4 Bing. (N. R.) 463, it was held that a private right of way, the existence of which was so concealed that a purchaser, in the exercise of ordinary care, would not have discovered it, constituted such a defect in title as justified the purchaser in rescinding the contract, for, as the way was one that might materially interfere with the intended use of the property, the purchaser could say that the lots which the seller was ready to convey were not the lots which he purchased.

—covenants against encumbrances.

The existence of an easement consisting of a right to pass over and use for the purpose of a private way a certain portion of land conveyed by deed containing a covenant against encumbrances is a breach of that covenant. *Young v. Gower*, 88 Ill. App. 70; *Vonderhite v. Walton*, 7 Ky. L. Rep. 766; *Blake v. Everett*, 1 Allen, 248; *Wetherbee v. Bennett*, 2 Allen, 428; *Bailey v. Agawam Nat. Bank*, 190 Mass. 20, 2 L.R.A. (N.S.) 98, 112 Am. St. Rep. 296, 76 N. E. 449; *Russ v. Steele*, 40 Vt. 310.

It is immaterial that the covenantee knew of a private cartway across premises, the title to which was covenanted to be free from encumbrances, if the cartway was

technical seisin of the purchaser, is not a breach of the covenant of seisin.

In the case of *Brown v. Young*, 69 Iowa, 625, 29 N. W. 941, it is held that "a right of way for a railroad is only an easement, though it be conveyed by deed, and the existence of such easement is not a breach of the covenant as to title in a warranty deed subsequently made conveying the land."

In the case of *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272, it is held: "It is not a breach of the covenants that the grantor was lawful owner of the land, was well seised, and had full power to convey, that part of the land was a public highway and was used as such, a public highway being a mere easement, and the seisin and right to convey still continuing

not excepted from the covenant. *Sherwood v. Johnson*, 28 Ind. App. 277, 62 N. E. 645.

In *Perry v. Williamson*, supra, it was held that a purchaser's knowledge of a farm pass way across land at the time of purchase did not estop him from objecting to it as an encumbrance, where he did not know that it was a right of way of a third person.

In Illinois, where § 9, chap. 30, Starr & C. Anno. Stat. (Ill.) 374, provides that deeds substantially in the prescribed form shall be deemed a conveyance in fee simple, with covenant against encumbrances, it was held in *Schmisseur v. Penn*, 47 Ill. App. 278 (see same case 77 Ill. App. 526) that a private way was not within the meaning of the term "highways" as used in § 10, chap. 30, Ill. Rev. Stat., providing that "no covenant of warranty shall be considered as broken by the existence of a highway upon the land conveyed, unless otherwise particularly specified in the deed," which act went into effect in 1874, and that therefore it constituted a breach of the implied covenant against encumbrances. In connection with this case it should be noted that previous to 1874 it had been held in Illinois that knowledge at the time of the conveyance of the existence of a then existing easement afforded no defense to a suit on the covenant. See *Beach v. Miller*, 51 Ill. 209, 2 Am. Rep. 290, and *Wadhams v. Swan*, 109 Ill. 46.

In *Harlow v. Thomas*, 15 Pick. 66, the court, in holding that a private right of passageway over land to a spring constituted a breach of a covenant against encumbrances, and that the covenantee's knowledge of the existence of the encumbrance at the time of the purchase was immaterial, because proof thereof could not be made under the parol evidence rule, said: "Uncertain would be the titles of real estate, and useless the registration of deeds, if their contents and effects were to be determined by the testimony of witnesses. They would mislead, rather than guide us in a safe course."

in the owner of the land over which it was laid out." Justice Spencer in delivering the opinion of the court says: "It must strike the mind with surprise that a person who purchases a farm through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn round on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say that such an attempt is unjust and inequitable, and contrary to the universal understanding of both vendors and purchasers. If it

could succeed, a flood gate of litigation would be opened, and for many years to come this kind of action would abound."

In the case of *Wilson v. Cochran*, 46 Pa. 229, it was, among other things, held that "a purchaser who sees such a road that has been used thirty years upon the land he is buying has no right to consider it an encumbrance, within the meaning of a covenant against encumbrances. If it is not a positive benefit to the premises, he is presumed to have estimated its disadvantages in adjusting the price he has agreed to pay."

In the case of *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85, it is held that the "existence of easement obviously and notoriously affecting physical condition of land

—covenants of warranty and for quiet enjoyment.

In *Rea v. Minkler*, 5 Lans. 196, the court, in holding the purchaser's knowledge of a previous conveyance of a strip of land in the rear of the granted premises, from which there was no access to the highway except over the subsequently granted premises, together with a right of way thereover, no defense to an action for breach of a covenant to warrant and forever defend the premises and every part and parcel thereof against every person claiming them or any part thereof, in that the use of a way to the rear strip constituted a breach of the covenant, distinguished between private and public rights of way as follows: "There is, I think, a broad distinction between a public highway and a private right of way. The latter is secured by a conveyance to an adjoining proprietor for his private use, while the former is for the benefit of the public, as well as the owner of the land through which it passes, and a positive advantage. While the latter might be unknown to a purchaser, the former, running through a farm, would be seen when purchased, and could not but be considered as an enhancement of its value," and, continuing, said that the rule as to public highways should not be enlarged so as to embrace private rights of way.

In *Wilson v. Cochran*, 46 Pa. 229, from which an *obiter* statement made in distinguishing between public and private rights of way is quoted as the law of the case in *VAN NESS v. ROYAL PHOSPHATE CO.*, the court, in holding an asserted private right of way over land conveyed to be a breach of covenant of general warranty, where the purchaser had no actual notice of the existence of such way, but only constructive notice through the public registry, said, in speaking of *Patterson v. Arthurs*, 9 Watts, 152: "It is broadly distinguishable from the case before us. Public roads are laid out in Pennsylvania by authority of law, in pursuance of the policy of Penn., who established the custom of allowing to

every grantee of land 6 acres in the hundred, as a compensation for the roads that should thereafter be opened; and they confer on the public merely a right of passage, whilst the title to the soil is left undisturbed in the owner of the land through which they pass. A purchaser who sees such a road, that has been used thirty years, upon the land he is buying, has no right to consider it an encumbrance, within the meaning of a covenant against encumbrances. If it is not a positive benefit to the premises, he is presumed to have estimated its disadvantages in adjusting the price he has agreed to pay. But *Schultz's* private way in this case had no public policy or public law to support it; it rested wholly in a private grant, and it was a grant of an interest in the land,—a vested estate that would pass by deed and would descend to heirs,—and of its existence the purchaser had no actual notice, but only that constructive notice with which an unsearched registry affects him."

The successful assertion by a stranger of a pass way over land, the title and full use and enjoyment of which has been conveyed to the grantee, amounts to a breach of a covenant of warranty. *Ware v. Owens*, 7 Ky. L. Rep. 308; *Lamb v. Danforth*, 59 Me. 322, 8 Am. Rep. 426; *Russ v. Steele*, 40 Vt. 310.

In *Bridger v. Pierson*, 1 Lans. 481, where the grantee of land conveyed by deed containing a general covenant of warranty was mulcted in damages for obstructing a prescriptive right of way thereover, held by a stranger, it was held that the covenantee could recover over from the grantor on the ground that the established private right of way constituted a breach of the covenant. On appeal (45 N. Y. 601) the judgment in this case was reversed, but upon the ground that the right of way which was alleged to breach the covenant of warranty was excepted in the conveyance, it being conceded, however, that, were it not so excepted it would have constituted a breach.

In *Butt v. Riffe*, 78 Ky. 352, it was held that the existing easement of a private

at the time of its sale, such as a right of flowing the land by a mill pond in actual existence upon it, does not constitute a breach of a general covenant against encumbrances." The opinion in this case is strong and well reasoned.

In the case of *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653, it is held that "where there are railways or other highways in use as such, over land, at the time of its sale, the purchaser is presumed to have taken with knowledge of them, and they constitute no breach of the usual covenants in his deed."

In the case of *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542, Mr. Justice Paxson, in delivering the opinion of the court, says: "Encumbrances are of two kinds, viz.: (1)

pass way of which the grantee had no knowledge was inconsistent with, if not hostile to, a title conveyed by deed containing a warrant of title, the court saying that the fact that the grantee may appropriate his land to such purposes as he may see proper, not inconsistent with the right of private passage, is no response to the claim for damages, as the right to the use of a portion of the land for a private pass way is to that extent a depreciation of the free use and enjoyment of the premises by the covenantee. Continuing, the court said: "A covenant of warranty in a deed embraces the covenant for quiet enjoyment, and also protects the grantee against encumbrances that affect the title, or that the grantee may be compelled to remove in order to have the possession and enjoyment of the estate purchased."

And the existence and use of a right of way for a private road across conveyed premises to which they were subject at the time of the conveyance, breaches a covenant for quiet enjoyment, although the grantee knew of the existence of the private way at the time of the purchase, but did not know of its extent. *Eller v. Moore*, 48 App. Div. 403, 63 N. Y. Supp. 88.

In *Ladue v. Cooper*, 32 Misc. 544, 67 N. Y. Supp. 319, it was held that a private lane partly on premises conveyed by a deed containing a covenant of warranty broad enough to cover the easement was a breach of the covenant, irrespective of the grantee's knowledge of the lane.

In *Helton v. Asher*, 135 Ky. 751, 123 S. W. 285, it was held that the rule that a purchaser must be held to know of the existence of a public highway or railroad easement, and to have purchased with knowledge of the inconvenience resulting therefrom, does not apply to a private pass way, so as to prevent recovery of damages caused by the existence of a private tramway across land conveyed by deed of general warranty, even though the covenantee knew of the existence thereof at the time of his purchase. This decision was based upon the ground that *Butt v. Riffe*, supra, made the distinction herein asserted, but a 30 J.R.A. (N.S.)

Such as affect the title; and (2) those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or a right of way, of the latter. Where encumbrances of the former class exist, the covenant referred to [against encumbrances], under all the authorities, is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title. *Cathcart v. Bowman*, 5 Pa. 317; *Funk v. Voneida*, 11 Serg. & R. 109, 14 Am. Dec. 617. Such encumbrances are usually of a temporary character and capable of removal. The very object of the covenant is to protect the vendee against them. Hence, knowledge, actual or constructive, of their existence, is no

careful study of that case shows that the premise taken therein was that the grantee had no knowledge of the existence of the private easement involved.

Railroad rights of way.

—covenants of seisin and of right to convey.

The discussion under the subdivision of this note relating to public highways as breaches of covenant of seisin or of right to convey is here applicable, the cases generally turning upon the question whether or not the fee is considered as vested in the railroad.

Thus, the following cases hold that the existence of a mere easement of a railroad right of way does not breach a covenant of seisin in a deed by which the servient estate was conveyed: *Douglass v. Thomas*, 103 Ind. 187, 2 N. E. 562, quoted with approval in *Quick v. Taylor*, 113 Ind. 540, 16 N. E. 588; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

In *Messer v. Oestreich*, 52 Wis. 684, 10 N. W. 6, a right of way for a railroad, which had been conveyed by deed which vested at least a conditional fee in the railroad company, was held to breach a covenant of seisin in a subsequent deed of land crossed by the railroad right of way. The court based the decision on the ground that the deed by conveying at least a conditional fee affected the technical seisin of the grantor, and distinguished the case from that of *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85 (set out in *VAN NESS v. ROYAL PHOSPHATE CO.*), on the ground that in the *Kutz* Case merely an easement was involved, and also distinguished it from *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653 (also set out in the *VAN NESS CASE*), on the ground that the railroad right of way involved therein was taken by eminent domain.

And in *Foster v. Byrd*, 119 Mo. App. 169, 96 S. W. 224, where an attempt was made to convey an entire quarter section of land by deed containing a covenant of seisin,

answer to an action for breach of such covenant. Where, however, there is a servitude imposed upon the land, which is visible to the eye, and which affects not title, but the physical condition of the property, a different rule prevails. Thus, it was held in *Patterson v. Arthurs*, 9 Watts, 152, that where the owner had covenanted to convey certain lots free from all encumbrances, a public road which occupied a portion of such lots was not an encumbrance, within the meaning of the covenant. This is not because of any right acquired by the public, but by reason of the fact that the road, al-

though admittedly an encumbrance, and possibly an injury to the property, was there when the purchaser bought, and he is presumed to have had knowledge of it. In such and similar cases there is the further presumption that if the encumbrance is really an injury, such injury was in the contemplation of the parties, and that the price was regulated accordingly. It was said by Justice Kennedy in the case cited: 'Although a public highway no doubt is in many instances an injury instead of a benefit to the holder or owner of the land upon which it is located, and therefore tends to

it was held that the covenant of seisin was broken at the delivery of the deed, where the grantor had previously deeded a portion of the quarter section to a railroad company for a right of way; and this on the ground that the possession of such strip was not and could not be delivered by the grantor.

But in *Jerald v. Elly*, 51 Iowa, 321, 1 N. W. 639, it was said that proof of prior use of a portion of land conveyed by deed containing a covenant of seisin, by a railroad company as a right of way under valid right, would establish a breach of the covenant of seisin. The covenantee failed to recover, however, because he did not establish the fact that the railroad company was using a portion of the land under valid right.

—covenants against encumbrances.

The decided weight of authority is to the effect that a railroad right of way constitutes a breach of a covenant against encumbrances, irrespective of the question of the knowledge of the grantee as to the existence of such a right of way. A few courts, however, place a railroad on the same basis as a public highway, and consider it as not constituting an encumbrance.

An existing right of way for a railroad, independently of any consideration of the question of knowledge, was held to be an encumbrance for which a grantee might recover under a covenant against encumbrances, in the following cases: *Barlow v. McKinley*, 24 Iowa, 69; *Kostendader v. Pierce*, 37 Iowa, 645; *Jerald v. Elly*, supra; *Pierce v. Houghton*, 122 Iowa, 477, 98 N. W. 306.

And the existence of an easement, consisting of a railroad right of way across land conveyed by deed containing a covenant against encumbrances was held in *Beach v. Miller*, 51 Ill. 209, 2 Am. Rep. 290, to breach the covenant, although both parties knew of the existence of the railroad easement at the time of the conveyance, the court saying: "When a purchaser obtains title by deed without covenants, he, of course, takes it subject to all defects and encumbrances it may be under at the time of the conveyance. But where a person insists upon and obtains covenants for title, he has the right, when ob-

tained, to rely upon them and enforce their performance, or recover damages for their breach. The vendor is under no compulsion to make covenants when he sells land, but, having done so, he must keep them, or respond in damages for injury sustained by their breach. Nor is it a release or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed, when it was made. A person may warrant an article to be sound, when both buyer and seller know it is unsound; so the seller may warrant the quantity or quality of an article he sells, when both parties know that it is not of the quality or does not contain the quantity warranted. In fact, the reason the purchaser insists upon covenants for title, or a warranty of quality or quantity, is because he either knows or fears that the title is not good, or that the article lacks in quantity or quality. If he were perfectly assured on those questions, he would seldom be tenacious in obtaining a covenant of warranty."

And the following cases are to the same effect as respects the effect of knowledge of the covenantee as to the existence of the railroad: *Wadhams v. Swan*, 109 Ill. 46; *Barlow v. McKinley*, supra; *Gerald v. Elly*, 45 Iowa, 322; *Flynn v. White Breast Coal & Min. Co.* 72 Iowa, 738, 32 N. W. 471; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Quick v. Taylor*, 113 Ind. 540, 16 N. E. 588; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Williamson v. Hall*, 62 Mo. 405; *Whiteside v. Magruder*, 75 Mo. App. 364; *Farrington v. Tourtelott*, 39 Fed. 738.

And in *Wadhams v. Swan*, supra, it was held that a covenant against encumbrances was technically broken by the existence of a railroad right of way across the land conveyed, notwithstanding the fact that the railroad, when considered with reference to the contract as an entirety, enhanced rather than diminished its value; but the court said that in such case nominal damages only could be recovered.

And in *Tuskegee Land & Secur. Co. v. Birmingham Realty Co.* 161 Ala. 542, 23 L.R.A. (N.S.) 992, 49 So. 378, it was held that the existence of a railroad in a street, damages for the construction of which to the property conveyed have been released by the grantor, is a breach of covenant against encumbrances in a grant of prop-

lessor its value in the estimation of a purchaser, yet it is fair to presume that every purchaser, before he closes his contract for his purchase of land, has seen it and made himself acquainted with its locality and the state and condition of it, and consequently, if there be a public road or highway open or in use upon it, he must be taken to have seen it, and to have fixed in his own mind the price that he was willing to give for the land with a reference to the road, either making the price less or more, as he conceived the road to be injurious or advan-

tageous to the occupation and enjoyment of the land."

In the case of *Janes v. Jenkins*, 34 Md. 1, text 10, 6 Am. Rep. 300, the question was whether a servitude which had been created upon land by the owner made him liable to an action for breach of the covenants in a subsequent deed by the grantee in the former deed, the court says: "Then, as to the second question, whether the existence of this servitude or burden upon the property sold to the appellant, and the enjoyment thereof by the owner of the eastern lot,

erty abutting on the street, although the deed purports to convey only to the line of the street.

But no breach of covenant of seisin or right to convey is shown by the existence of a railroad in the abutting street, where the deed conveys only to the edge of the street. *Ibid*.

And in *Bacharach v. Von Eiff*, 74 Hun, 533, 26 N. Y. Supp. 842, it was held that the existence, in front of premises conveyed with covenants against encumbrances, of an elevated railroad as to which the grantor had executed a release of easements, did not constitute a breach of the covenant against encumbrances in the grant of the property adjoining that on which the railroad was constructed, where the grantee knew at the time of making his contract and taking his deed that the easement was in the actual use and occupation of a railroad company, since this was notice to him that the railroad company had some claim to the easement, and that it was partially extinguished, and that therefore he must be considered as having purchased with reference thereto.

—covenants of warranty and for quiet enjoyment.

With respect to general covenants of warranty, the cases are in unison in holding that an existing railroad across land at the time of a conveyance does not work a breach of the covenant.

Thus, as is held in *VAN NESS v. ROYAL PHOSPHATE CO.*, the existence of a railroad across land at the time of its conveyance by a deed binding the grantor to warrant and forever defend the title against all persons lawfully claiming the same does not constitute a breach of the covenant irrespective of whether it be considered as one of general warranty and equivalent to one for quiet enjoyment, or whether it be regarded as embracing all the common-law covenants, the ground being that since, as the railroad was perfectly obvious, it must have been in the minds of the parties at the time of the conveyance.

In *Bird v. Bank of Williamstown*, 11 Ky. L. Rep. 868, 13 S. W. 430, a purchaser, by warranty deed, of a tract of land, with full knowledge of the existence therein of an easement of a railroad right of way, 30 L.R.A. (N.S.)

was held not entitled to an abatement of the purchase price for the number of acres included in the right of way, on the ground that he must have purchased with reference to the easement, since it was known to him.

And the fact that land was purchased for mineral purposes does not of itself render the existence of a railroad across the land at the time of its conveyance a breach of warranty against encumbrances, where the purposes of the grantee were not expressed in the deed, although the railroad easement interfered with the carrying out of the proposed mineral purposes. *VAN NESS v. ROYAL PHOSPHATE CO.* This seems to be the only case in which the contention that the purpose for which the land was purchased would govern has been raised.

In *Brown v. Young*, 69 Iowa, 625, 29 N. W. 941, cited in *VAN NESS v. ROYAL PHOSPHATE CO.*, it was held that a right of way, since it is only an easement, although conveyed by deed, does not constitute a breach of the covenant as to title in a general warranty deed subsequently made, conveying the land across which the easement exists. This decision seems to be in direct conflict with both the earlier and later Iowa cases, and, in fact, is not mentioned in later cases holding to the contrary. (See *Flynn v. White Breast Coal & Min. Co.* and *Pierce v. Houghton*, *supra*.) However, if the general warranty deed be considered as one against encumbrances created by the covenantor himself, the decision may be reconciled with the other Iowa cases, as the encumbrance was created by previous owners.

In *Milwaukee & N. R. Co. v. Strange*, 63 Wis. 178, 23 N. W. 432, it was held that a grantee of land crossed by a railroad right of way took subject to such easement, so as to prevent the grantee from recovering compensation and damages assessed because of the location and construction of the railroad on such lands, which had not been paid to the grantor at the time of the conveyance, the ground of the decision being that he must be considered as having purchased the land subject to such burden, and to have deducted from the purchase price an amount equal to the depreciation in value by reason of such easement. G. J. C.

constitute a breach of the covenant of special warranty. [The warranty was to the effect that the grantor shall forever warrant and defend the property against the claims of grantor and all persons.] This depends upon the apparent and ostensible condition of the property at the time of sale. And as the wall had been erected, and the lights therein were plainly to be seen when the appellant purchased the property overlooked by them, it is but rational to conclude that he contracted with reference to that condition of the property, and that the price was regulated accordingly. The parties, in the absence of anything to the contrary, are presumed to have contracted with reference to the then state and condition of the property; and if an easement to which it is subject be open and visible, and of a continuous character, the purchaser is supposed to have been willing to take the property as it was at the time, subject to such a burden. That being so, the covenants in the deed must likewise be construed with reference to the condition of the property at the time of the conveyance. The grantor by his covenant warranted the premises as they were, and by no means intended to warrant against an existing easement which was open and visible to the appellant, and over which the former had no power or control whatever. To construe the covenant to embrace such subject would most likely defeat the understanding and intention of the parties; certainly of the grantor."

In the case of *Pomeroy v. Chicago & M. R. Co.* 25 Wis. 641, 643, Justice Paine says: "Where there is a sale of a tract of land upon which there is an obvious existing easement or burden of any kind, like an ordinary highway, a railroad, or mill pond, the fair presumption, in the absence of any express provision in the contract upon the subject, is that both parties act with direct reference to the apparent existing burden, and that the vendor demands, and the purchaser pays, only the value of the land subject to it."

In an order made by the circuit judge, it appears that both parties relied in the court below upon the decision of this court in the case of *Silver Springs, O. & G. R. Co. v. Van Ness*, 45 Fla. 559, 34 So. 884. That case certainly determines that the deed which is before us only conveyed an easement to the railroad company, and that the technical right to the phosphate underneath the railroad was still in the grantor. That is the true condition now. Should the railroad track be removed or abandoned, the right of the defendant in error to the phosphate would be unrestricted.

There is nothing in the declaration in the 30 L.R.A. (N.S.)

instant case which squints at the notion that it is brought to recover of Van Ness the money which he recovered from the railroad company in the suit to which reference has been made. There is not the slightest indication in the deed to the defendant in error from Van Ness that he was covenanting to pay over to the defendant in error any such moneys. Without such an allegation in the declaration, and such an agreement on the part of Van Ness, it is impossible to conceive how the fact that Van Ness did recover damages from the railroad company can have anything to do with this case.

For the reasons given, the judgment below is reversed.

Taylor and Parkhill, JJ., concur.

Whitfield, Ch. J., and Shackelford and Cockrell, JJ., concur in the opinion.

Petition for rehearing denied October 18, 1910.

INDIANA SUPREME COURT.

JACOB DOTTERER, Appt.,

v.

STATE OF INDIANA.

(172 Ind. 357, 88 N. E. 689.)

Witness — impeachment — record.

1. A witness who has denied being present when an assault was committed for which another person is being tried may, for the purpose of impeachment, be asked on cross-examination if he had not been convicted for an assault on the same person at the same time as that involved in the case on trial, and it is not necessary to prove that fact by the record of conviction.

Appeal — improper evidence — immateriality.

2. One who is shown to be guilty of assaulting an officer in the discharge of his duty, upon his own evidence, cannot secure a reversal of the conviction because improper evidence was admitted for the impeachment of one of his witnesses.

(June 2, 1909.)

Note. — Cross-examination as proper mode of proving conviction of crime for purposes of impeachment.

As suggested by the title, this note presupposes the competency for impeaching purposes of the particular fact in respect of conviction which is sought to be elicited by the cross-examination, and deals only with the question whether cross-examination is a proper mode of establishing that fact, conceding or assuming its competency when properly established, or whether, on the other hand, it must be proved by the production of the record. In other words, the

APPPEAL by defendant from a judgment of the Circuit Court for Howard County convicting him of assault and battery. Affirmed.

The facts are stated in the opinion.

Messrs. **Harness, Moon, & Voorhis**, for appellant:

The conviction of the witness for assault and battery upon an officer is not proper evidence to introduce on cross-examination as affecting the credibility of the witness.

Glenn v. Clore, 42 Ind. 60.

If a person has been convicted of assault and battery, the only proper evidence to be introduced, if it is competent at all, would be the record of his conviction.

Farley v. State, 57 Ind. 331; *Com. v. Walsh*, 196 Mass. 369, 124 Am. St. Rep. 559,

82 N. E. 19, 13 A. & E. Ann. Cas. 642; *Bise v. United States*, 74 C. C. A. 1, 144 Fed. 374, 7 A. & E. Ann. Cas. 165; *James v. United States*, 7 Ind. Terr. 250, 104 S. W. 607; *Putnam v. New Albany*, 4 Biss. 365, Fed. Cas. No. 11,481; *Smith v. Western U. Teleg. Co.* 79 Fed. 132.

Messrs. **James Bingham**, Attorney General, **Alexander G. Cavins**, **William H. Thompson**, **Edward M. White**, and **J. Fenimore Cooper** for appellee.

Myers, J., delivered the opinion of the court:

Appellant was convicted upon a charge of assault and battery, and the only error assigned arises upon the motion for a new trial.

note is confined to cases in which the objection to the cross-examination is essentially that the record is the best evidence. Hence, cases in which the objection goes merely to the form of the question, the extent to which the cross-examination may be permitted, or the particular kind of conviction that may be inquired into, and not to the point whether cross-examination is a proper mode of establishing a conviction: concededly competent for impeaching purposes, if properly established, are not within the scope of the note.

Illustrations of the class of cases thus excluded are those involving the question whether the witness may be asked on cross-examination if he has even been in jail or has ever been indicted, where it is obvious that the real ground of the objections is that the fact itself is not competent, and not that cross-examination would not be a proper method of proving it, if it were competent. For the same reason cases involving forms of question permissible on cross-examination under a statute expressly permitting a conviction to be shown by cross-examination for impeaching purposes, as well as those involving the question whether under such a statute it is proper to ask a witness if he has been convicted of an offense which is a misdemeanor only, and not a felony, are excluded. That the latter question relates essentially to the competency of the conviction for impeaching purposes, rather than to the propriety of cross-examination as a method of establishing it, is well illustrated by the case of *Burke v. Stewart*, 81 Ill. App. 506, where the decision that felonies only, and not misdemeanors, are within the purview of a statute providing that the conviction of "any crime" may be shown in a civil action, for the purpose of affecting the credibility of the witness, and that the fact of such conviction may be shown like any other fact not of record by the witness himself, was based upon a similar decision in *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97, with respect to the provision of the Criminal Code that the conviction of

a person for a crime may be shown for the purpose of affecting his credibility, although the section of the Criminal Code referred to makes no provision for oral proof, so that in criminal cases the fact of conviction, even when competent, must, as the court expressly declared, be shown by the record, and cannot be proved by cross-examination. It is thus apparent that the distinction between misdemeanors and felonies bears essentially on the competency of the particular conviction, and not upon the mode of establishing a competent conviction, even when the objection is formally made to a question asked upon cross-examination.

It is true that in *People v. Schenick*, 65 Cal. 625, 4 Pac. 675, holding that a conviction for a misdemeanor could not be shown upon cross-examination, under a statute permitting a conviction of a felony to be shown in that manner, the court suggested that a conviction for a misdemeanor might be shown by the record, but that suggestion was repudiated by later cases. See *People v. Carolan*, 71 Cal. 195, 12 Pac. 52; *Jones v. Duchow*, 87 Cal. 109, 23 Pac. 371, 25 Pac. 256; *Clements v. McGinn* (Cal.) 33 Pac. 920.

It would seem in general that all objections that relate essentially to the mode of proof, as distinguished from the competency of the conviction itself, are obviated by a statute expressly recognizing cross-examination as a proper mode of establishing a conviction for impeaching purposes, and that any question arising under the statute in respect of the form of the question, the extent of the examination, or the particular character of the conviction inquired about, must go essentially to the competency of the particular fact sought to be shown in this manner, and not to the point, which is alone considered in this note, as to the propriety of cross-examination as a means of showing it.

The question whether a witness may refuse to answer the question, on the ground that it will tend to incriminate or degrade him, is also excluded, as are the questions

The prosecuting witness testified that on Sunday, July 19, 1908, at about 2:30 o'clock P. M., while on duty as a patrolman, dressed in full uniform, and having his star and mace, he saw one Moynahan go to the back door of appellant's saloon, and knock on the door two or three times, and work the door latch; that the door opened, and Moynahan entered the saloon; that he (witness) went directly to the same door, imitated the knocking on the door and working of the latch as nearly as he could and the door was partially opened by appellant; that he stated to appellant that he wanted to see who was in there, and was informed by appellant with an oath that it was none of his business who was there; that he got his hand inside the door, and

was then assaulted both by Moynahan and appellant, his face scratched by appellant, who also struck him in the face, Moynahan hit him with a beer bottle, and appellant threw him out; that, as he went out, he got hold of appellant's suspender and pulled it partly off; that he remained at the back door two or three minutes, then went to the front door, and found Moynahan there, and soon after procured a warrant for the arrest of appellant. The statement of witness that his face was scratched is corroborated by others. Appellant testified that he started out of the back door, and there met the officer; that the latter put his foot inside the door, and said, "I want in;" that appellant said, "You have not got any business in here;" and that he shoved the officer

whether the objection has been waived, or the error, if any, of the trial court, has been cured.

It is to be noted that where the purpose of the evidence is to disqualify the witness, it is generally, though not universally, held that the proof must be made by the record only. Cases of disqualification, however, are to be distinguished from those of mere impeachment, with which alone this note is concerned. In many jurisdictions the cases decided on general principles are no longer authoritative on account of the later enactment of statutes controlling the subject; and these cases are cited not as representing the existing rule of law in the particular jurisdiction, but as precedents upon the point in question when not governed by an express statute.

View that cross-examination is a proper mode.

Even in the absence of controlling statutes, it has been held in many cases that proof of a witness's conviction of crime, as affecting his credibility, may be made by cross-examination of the witness. *Lang v. United States*, 66 C. C. A. 255, 133 Fed. 201; *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406; *State v. Probasco*, 46 Kan. 310, 26 Pac. 749; *State v. Alexis*, 45 La. Ann. 973, 13 So. 394 (compare *State v. McCoy*, 109 La. 682, 33 So. 730, where the court seemed to think the question would not have been free from doubt if properly raised); *State v. Knowles*, 98 Me. 429, 57 Atl. 588; *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603; *Clemens v. Conrad*, 19 Mich. 170; *Wilbur v. Flood*, 16 Mich. 40, 93 Am. Dec. 203; *People v. Higgins*, 127 Mich. 291, 86 N. W. 812; *People v. Hoffman*, 154 Mich. 145, 117 N. W. 568; *People v. Conley*, 106 Mich. 424, 64 N. W. 325; *Coleman v. Southern R. Co.* 138 N. C. 351, 50 S. E. 690; *State v. Lawhorn*, 88 N. C. 634 (*dictum*); *Schnase v. Goetz* (N. D.) 120 N. W. 553; *Hyde v. Territory*, 8 Okla. 69, 56 Pac. 851; *Com. v. Racco*, 225 Pa. 113, 133 Am. St. Rep. 872, 73 Atl. 1007 (overruling the cases of *Buck v. Com.* 107 Pa. 486; *Com. v. Pioso*, 19 30 L.R.A.(N.S.)

Lanc. L. Rev. 145, and in effect the *dictum* in *Com. v. Barry*, 8 Pa. Co. Ct. 216); *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782; *State v. Babcock*, 25 R. I. 224, 55 Atl. 685; *State v. Benjamin* (R. I.) 71 Atl. 65; *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, rehearing in 34 S. C. 576, 13 S. E. 328; *State v. Mitchell*, 56 S. C. 524, 35 S. E. 210; *Lights v. State*, 21 Tex. App. 308, 17 S. W. 428, overruling *State v. Ezell*, 41 Tex. 35; *Bratton v. State*, 34 Tex. Crim. Rep. 477, 31 S. W. 379; *Batson v. State*, 36 Tex. Crim. Rep. 606, 38 S. W. 48; *Curtis v. State*, 46 Tex. Crim. Rep. 480, 81 S. W. 29; *Keaton v. State*, 41 Tex. Crim. Rep. 621, 57 S. W. 1125; *Williams v. State*, 51 Tex. Crim. Rep. 361, 123 Am. St. Rep. 884, 102 S. W. 1134; *McNeal v. State* (Tex. Crim. Rep.) 43 S. W. 792; *Gass v. State* (Tex. Crim. Rep.) 56 S. W. 73; *Chavarria v. State* (Tex. Crim. Rep.) 63 S. W. 312; *White v. State*, 33 Tex. Crim. Rep. 177, 26 S. W. 72 (*dictum*); *Clemmons v. State*, 39 Tex. Crim. Rep. 279, 73 Am. St. Rep. 923, 45 S. W. 911 (where the question was not answered by the witness); *McGovern v. Hays*, 75 Vt. 104, 53 Atl. 326; *State v. Champoux*, 33 Wash. 339, 74 Pac. 557, distinguishing *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036 (*dictum*).

There are many other cases in which this has been assumed, but which are not here cited for the reason that the objections to the cross-examination went to the competency of the particular facts sought to be shown, and not to the mode of showing them.

In *Slater v. United States*, 1 Okla. Crim. Rep. 275, 98 Pac. 110, the court referred to the Indian Territory Stats. of 1899, § 2017, providing that "it may be shown by the examination of a witness, or the record of a judgment, that he has been convicted of a felony," and seemed in some doubt whether this statute applied to the state of Oklahoma, but based its decision both on the statute and general law, holding that a witness's conviction of a felony or of any crime involving a want of moral character might be shown on his cross-examination as affecting his credibility. This

back, and as he shoved him back the officer grabbed appellant's suspender; that Moynahan was not there; that when he asked the officer to step back, he would not do it, and he shoved him away; that he did not strike the officer or scratch him in the face; and that a crowd collected there.

Moynahan testified that about 12:30 o'clock on July 19th he had knocked at appellant's side door, and failed to get an answer or to get in; and that he was not at the back door when the officer was, that he did not strike the officer, and did not see him until about half an hour after he (Moynahan) had tried to get into the saloon; that he had gone to appellant's place to get beer; but that he was not in or about the saloon after 2 o'clock. It was in this connection

that Moynahan was asked: "I will ask if you was ever convicted of assault and battery upon any person at a saloon,—at the door of a saloon. The person upon whom the assault and battery was committed was Edward Meeker [the prosecuting witness in this case], an officer, and at the back door of Dotterer's saloon, and on Sunday, when it was illegal to allow persons in a saloon; and you were convicted on that charge?" Objection was made that "the conviction of the witness for assault and battery upon an officer is not proper evidence to be introduced on cross-examination, as affecting the credibility of the witness. If he has been convicted of assault and battery, the only proper evidence to be introduced, if it is competent at all, would be the record of his

case was approved in *Price v. United States*, 1 Okla. Crim. Rep. 291, 97 Pac. 1056, and was followed in *Nelson v. State*, 3 Okla. Crim. Rep. 468, 106 Pac. 647, in *Keys v. United States*, 2 Okla. Crim. Rep. 647, 103 Pac. 874, and in *Hendrix v. State* (Okla. Crim. Rep.) 111 Pac. 688.

In Indiana it will be seen by *DOTTERER v. STATE*, that the supreme court inclines to the view that the evidence of a witness's conviction of crime may be shown upon his cross-examination as affecting his credibility, but that this view is by no means necessary to the decision. In *Farley v. State*, 57 Ind. 331 (to which the court refers in *DOTTERER v. STATE*), one of the grounds of the decision was that the conviction of a witness was improperly shown on his cross-examination, as this was not the best evidence.

In *Vanceleave v. State*, 150 Ind. 273, 49 N. E. 1060, it was held that where the defendant in a criminal case was asked on his cross-examination whether he had been convicted of a crime, such question was proper as affecting his credibility, in the absence of an objection that the record was the best evidence. What would have been the effect of such objection, the court does not state.

In Missouri, prior to the statute of 1895, the cases were contradictory, some holding that the proof of a witness's conviction should be shown by the record. *State v. Rugan*, 68 Mo. 214; *State v. McGraw*, 74 Mo. 573; *State v. Brent*, 100 Mo. 531, 13 S. W. 874; *State v. Douglass*, 81 Mo. 231; *Berman v. Hoke*, 61 Mo. App. 376. And others permitting a witness to be questioned touching his confinements for crimes. *State v. Miller*, 100 Mo. 606, 13 S. W. 832, 1051; *State v. Taylor*, 118 Mo. 153, 24 S. W. 449, 11 Am. Crim. Rep. 51; *State v. Pratt*, 121 Mo. 566, 26 S. W. 556; see also to similar effect *State v. Martin*, 124 Mo. 514, 28 S. W. 12.

In *State v. Knowles*, supra, the court said: "Whether, to impeach his credibility the conviction of a witness may be proved by questioning him on cross-examination, 30 L.R.A. (N.S.)

has been variously decided by different judicial tribunals. Formerly, when conviction of an infamous crime rendered a witness incompetent, it was universally held that for that purpose the conviction could be proved by the record alone. In many of those jurisdictions, however, where the conviction of crime no longer affects the competency, but simply goes to the credibility, of the witness, there has been a tendency, sometimes by legislative enactment and sometimes by judicial decision, to broaden the sources of evidence, and permit the conviction to be shown by cross-examination of the witness himself. In a technical sense, the record may be the best evidence and the rule of primariness may require its production. This general rule, however, is of no great value unless, in its application to the subject under consideration, it is necessary for the interests of justice, to avoid error, exclude falsehood, and promote the truth. It can hardly be claimed that a record of conviction is any more convincing to the mind, or less liable to error, than is the witness's own admission of the fact under oath."

When a government witness in a criminal case testified on cross-examination that he had been in jail, and on the redirect, that he was confined for "getting tight," it was held that an objection to the latter question, that the record was the only proper evidence, was not a good objection, as, for aught that appeared, the witness might have been confined by a police officer without any trial or sentence. *State v. Pike*, 65 Me. 111.

In *Fisher v. Crescent Ins. Co.* 33 Fed. 544, the conviction of a witness was shown on his cross-examination, without comment upon its propriety, the court charging the jury that they might consider such evidence as affecting the credibility of the witness.

In *State v. Hill*, 52 W. Va. 296, 43 S. E. 160, it was stated to be the proper practice to ask a witness whether he had been in the penitentiary, but in that case no objection was made to the question; the court seemed to be in some doubt whether, if the

conviction." The objection was overruled, and exception reserved, and the witness answered, "Yes, sir, I paid a fine." Reliance is here placed on the cases of *Farley v. State* (1877), 57 Ind. 331, 334; *Glenn v. Clore* (1873), 42 Ind. 60. See also *Burns's Anno. Stat.* 1908, §§ 530, 2110, *Rev. Stat.* 1881, § 506; *Acts* 1905, p. 584, § 234; *Com. v. Walsh* (1907), 196 Mass. 369, 124 Am. St. Rep. 559, 82 N. E. 19, 13 A. & E. Ann. Cas. 642; *Bise v. United States* (1906), 74 C. C. A. 1, 144 Fed. 374, 376, 7 A. & E. Ann. Cas. 165; *James v. United States* (1907), 7 Ind. Terr. 250, 104 S. W. 607.

question had been as to a conviction, it could have been shown without the record, if objected to.

In some cases the allowance of such cross-examination has been sustained as within the discretion of the trial court. *State v. Pfeifferle*, 36 Kan. 90, 12 Pac. 406; *State v. Probasco*, 46 Kan. 310, 26 Pac. 749.

Thus, it has been held that a statute providing that "the conviction of a crime involving moral turpitude may be given in evidence to affect the credibility of a witness" does not prevent the court, in its discretion, from permitting a witness to be cross-examined as to his conviction of an offense not involving moral turpitude, and that the record is not necessary. *McGovern v. Hays*, supra.

In *State v. Slack*, 69 Vt. 486, 38 Atl. 311, it was said that while it was probably improper to cross-examine a witness as to a conviction, instead of producing the record, the modern tendency was to greater liberality in that respect, and the error was not considered material.

View that cross-examination is not a proper method.

In other cases it is held that the conviction of a witness, as affecting his credibility, must be shown by the record. *Murphy v. State*, 108 Ala. 10, 18 So. 557; *Thompson v. State*, 100 Ala. 70, 14 So. 878 (*dictum*); *People v. McDonald*, 39 Cal. 697; *People v. Reinhart*, 39 Cal. 449; *People v. Buckner* (Cal.) 4 Pac. 489; *Hall v. Brown*, 30 Conn. 551; *State v. Fisher*, 1 Penn. (Del.) 303, 41 Atl. 208 (where the court seemed to place some weight on the fact that the record was of easy access, as it was in the same court); *Johnson v. State*, 48 Ga. 116 (holding it to be no error to refuse to compel a witness to answer, for the purpose of discrediting him, that he had pleaded guilty to various crimes, as the record of his plea was the best evidence); *Com. v. Quin*, 5 Gray, 478; *Com. v. Sullivan*, 161 Mass. 59, 36 N. E. 583; *Com. v. Walsh*, 196 Mass. 369, 124 Am. St. Rep. 559, 82 N. E. 19, 13 A. & E. Ann. Cas. 642; *Clement v. Brooks*, 13 N. H. 92; *Kirschner v. State*, 9 Wis. 140. The principle of the last case was approved in *Ingalls v. State*, 48 Wis. 647, 4 N. W. 785, the court in the latter case having overlooked the Wisconsin 30 L.R.A. (N.S.)

There is a diversity of holdings in the different courts upon the questions presented, and it will be useless to attempt to do more than to keep the line of cases in our own state upon a consistent course. Section 530, supra, is as follows: "Any fact which might heretofore be shown to render a witness incompetent may be hereafter shown to affect his credibility." Section 2110, supra, is as follows: "The rules of evidence prescribed in civil cases, and concerning the competency of witnesses, shall govern in criminal cases, except as otherwise provided in this act." Section 2116, *Burns's Anno.*

statute on the subject until after the argument.

But in *Childs v. State*, 58 Ala. 349, it was held that there was no error in permitting the question to be put to a witness on cross-examination as affecting his credibility, whether he had not pleaded guilty of stealing from a store in a certain place, it appearing that the trial in which the plea was made was before a justice of the peace, and it not appearing that any record was made of it.

Where a witness for the prosecution in a criminal case was asked on his cross-examination whether he had not been in the house of correction, the court said the witness might answer or not as he pleased, and he declined to answer; the trial court ruled that the question need not be answered on account of the witness's privilege, and because the prison record was the proper mode of proof; and the appellate court held that the questions were improperly put, as prior convictions could only be proved by the record. *Com. v. Quin*, supra.

In Illinois it is asserted in a number of cases that in a criminal case the proof of a witness's conviction of crime, as affecting his credibility, must be made by the record, but the decisions seem generally to have been grounded in whole or in part on other considerations; thus in *Bartholomew v. People*, 104 Ill. 601, 44 Am. Rep. 97, the defendant having denied that he had been in the penitentiary, it was held that it was error to admit any further evidence of his conviction other than the record, and also that, to discredit the witness, a conviction must be of an infamous crime.

Similarly, in *Kirby v. People*, 123 Ill. 436, 15 N. E. 33, where a defendant in a criminal case declined to answer whether he had been convicted of a certain crime, it was held to be error to admit in evidence an incomplete part of the record of conviction.

In *Simons v. People*, 150 Ill. 66, 36 N. E. 1019, where the defendant was asked on cross-examination whether he had been convicted of a crime, and admitted the fact, it was held that while this was error, it would not require the reversal of the case, as the objection to the question was general, and not on the ground that the fact could not be proved by parol, particularly where the court later excluded the evidence.

Stat. 1908, Acts 1905, p. 584, § 240, is as follows: "In all questions affecting the credibility of a witness, his general moral character may be given in evidence." A like provision is contained in Burns's Ann. Stat. 1908, § 529, Rev. Stat. 1881, § 505. Section 530, supra, was evidently enacted in view of, and to remove, the ban of the provisions of § 79, p. 999, Rev. Stat. 1843, defining infamous crimes, and rendering those convicted of the defined crimes incompetent to testify even in civil causes. Assault and battery was not among the offenses. Section 2116,

supra, applies to the cross-examination of a witness, for it is well recognized in the practice that, both as to parties and witnesses, the state may show on cross-examination, as affecting the credibility of a party or witness, that he had been arrested, prosecuted, or convicted of similar offenses. *Parker v. State* (1894) 136 Ind. 284, 35 N. E. 1105; *Vancleave v. State* (1898) 150 Ind. 275, 49 N. E. 1060; *Shears v. State* (1897) 147 Ind. 55, 46 N. E. 331; *Crum v. State* (1897) 148 Ind. 401, 411, 47 N. E. 833. This section is declaratory of a general rule, and was enacted in 1881, doubt-

This case was followed in *O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639, 8 A. & E. Ann. Cas. 123, as to the absence of a specific objection to proving a witness's conviction by parol.

In *McKevitt v. People*, 208 Ill. 460, 70 N. E. 693, it was held to be error to show by a witness for the defendant in a criminal case, on cross-examination, that he had been in the penitentiary for robbery, but that the error was harmless, as the other testimony of the witness did not tend to show that the defendant was innocent of the crime for which he was being tried.

Where a defendant jointly indicted with others refused counsel, and voluntarily took the stand and testified, and counsel for other defendants asked him on cross-examination whether he had been convicted of larceny (an infamous crime), it was held to be error for the court to disallow the question, as this amounted to the technical objection that the record was the best evidence, and, as the witness had refused counsel, such a technical objection ought not to have been taken unless he took it personally, in view of his testimony against the other defendants. *Looney v. People*, 81 Ill. App. 370.

In *Daxanbeklar v. People*, 93 Ill. App. 553, it was held that a question to a witness in a criminal case, "Were you ever in the Reform School of the State of Iowa?" was properly excluded, as the only conviction which could be shown to affect credibility was of an infamous crime, and that in a criminal case that could only be shown by the record.

Defendant in criminal case as a witness.

The detailed discussion of the question whether defendant in a criminal case, who has taken the stand in his own behalf, may be cross-examined with reference to prior convictions, for the purpose of impeaching him, is not within the scope of this note, as the essential point is the competency of the particular conviction sought to be shown, rather than the proper method of showing it. It is sufficient for the purposes of this note, to point out that in general it is held that such a defendant is subject, the same as other witnesses, to provisions of the statute permitting cross-examination of witnesses in regard to former convictions 30 L.R.A. (N.S.)

for purposes of impeachment, without discussing the particular applications, limitations, or exceptions to the rule, which go essentially to the competency of the fact rather than the mode of proving it. *Ball v. United States* (Alaska) 78 C. C. A. 126, 147 Fed. 32; *Wells v. State*, 131 Ala. 48, 31 So. 572; *Holder v. State*, 58 Ark. 473, 25 S. W. 279; *Baker v. State*, 58 Ark. 513, 25 S. W. 603, 9 Am. Crim. Rep. 455; *People v. Chin Mook Sow*, 51 Cal. 597; *People v. Johnson*, 57 Cal. 571; *People v. Crowley*, 100 Cal. 478, 35 Pac. 84; *People v. Arnold*, 116 Cal. 682, 48 Pac. 803; *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172; *People v. Meyer*, 75 Cal. 383, 17 Pac. 431; *People v. Sears*, 119 Cal. 269, 51 Pac. 325; *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016; *People v. Abbott* (Cal.) 4 Pac. 769; *People v. Carson*, 155 Cal. 164, 99 Pac. 970; *Squires v. State*, 42 Fla. 251, 27 So. 864; *State v. O'Brien*, 81 Iowa, 93, 46 N. W. 861 (this case is obscure, but the decision was probably intended to refer to the statute); *Farmer v. Com.* 28 Ky. L. Rep. 1168, 91 S. W. 682; *Henderson v. Com.* 122 Ky. 296, 91 S. W. 1141; *Wilson v. Com.* 23 Ky. L. Rep. 1044, 64 S. W. 457; *Williams v. Com.* 21 Ky. L. Rep. 612, 52 S. W. 843; *State v. Curtis*, 39 Minn. 357, 40 N. W. 263; *State v. Sauer*, 42 Minn. 258, 44 N. W. 115; *State v. Gordon*, 105 Minn. 217, 117 N. W. 483, 15 A. & E. Ann. Cas. 897; *State v. Knight*, 106 Minn. 371, 119 N. W. 56; *Williams v. State*, 87 Miss. 373, 39 So. 1006; *State v. Thornhill*, 174 Mo. 364, 74 S. W. 832; *State v. Shanks* (Mo.) 130 S. W. 451; *State v. Heusack*, 189 Mo. 295, 88 S. W. 21; *State v. Spivey*, 191 Mo. 87, 90 S. W. 81, followed in *State v. Barrington*, 198 Mo. 23, 95 S. W. 235; *State v. Oliphant*, 128 Mo. App. 252, 107 S. W. 32; *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811; *State v. Henson*, 66 N. J. L. 601, 50 Atl. 468, 616; *Roop v. State*, 58 N. J. L. 479, 34 Atl. 749; *State v. Mount*, 73 N. J. L. 582, 64 Atl. 124, reversing 72 N. J. L. 365, 61 Atl. 259, on another ground; *People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 128; *People v. Hovey*, 20 Hun, 382, affirmed in 92 N. Y. 554; *State v. Deal*, 52 Or. 568, 98 Pac. 165; *Thornton v. State*, 117 Wis. 338, 98 Am. St. Rep. 924, 93 N. W. 1107; *R. v. D'Aoust*, 3 Ont. L. Rep. 653, 5 Can. Crim. Cas. 407.

B. B. B.

less in view of the rule in *Farley v. State* (1877) *supra*.

In *People v. Cascone* (1906) 185 N. Y. 317, 78 N. E. 287, it is said: "The defendant in an action, either civil or criminal, cannot be asked on cross-examination whether he has been indicted, for an indictment is merely an accusation, and no evidence of guilt. . . . He cannot be asked if he was tried for a crime, unless it appears that he was convicted, because a trial followed by acquittal is but an accusation successfully met. A conviction for crime may be proved, or on cross-examination actual guilt without a conviction, for either implies moral obliquity, and hence affects credibility,"—citing cases. And if he was convicted, he cannot prove that he was not in fact guilty. *Com. v. Galligan* (1891) 155 Mass. 54, 28 N. E. 1129. "The cross examination may go far enough not only to overthrow the direct evidence of the witness, but also to rebut inferences. *Gillett, Indirect & Collateral Ev. § 90*. And when the fact goes to the weight of the testimony, it is admissible. *Gillett, Indirect & Collat. Ev. § 91*. "A series of mutually dependent crimes may be shown where they tend to prove that they were committed under a system which becomes relevant to the inquiry." *Gillett, Crim. Law, (2d ed.) p. 653*. It is always proper to introduce evidence of identity, though it may involve a collateral crime. *Abbott, Trial Brief, p. 349*; *Roscoe, Crim. Ev. 7th ed. 90*; *Frazier v. State* (1893) 135 Ind. 38, 41, 34 N. E. 817. Also evidence of other similar crimes, or conviction thereof, may be shown. *Crum v. State*; *Shears v. State*; and *Vancleave v. State*,—*supra*. If the evidence tends to prove a material fact, it is admissible. 3 *Rice, Ev. § 155*; 1 *Elliott, Ev. §§ 174, 175*; *Higgins v. State* (1901) 157 Ind. 58, 60 N. E. 685. It is a well-recognized rule that any fact tending to impair the credibility of the witness by showing his interest, bias, ignorance, motives, or that he is depraved in character, may be shown on cross-examination; but the extent to which such cross-examination may be carried is within the sound discretion of the court. 1 *Wharton Ev. (3d ed.) § 567*; *South Bend v. Hardy* (1884) 98 Ind. 577, 49 Am. Rep. 792; *Parker v. State* (1894) 136 Ind. 284, 286, 35 N. E. 1105; *Spencer v. Robins* (1886) 106 Ind. 586, 5 N. E. 726. In *People v. Molineux* (1901) 108 N. Y. 264, 62 L.R.A. 193, 61 N. E. 286, 302, it is said with regard to the rule as to showing the guilt or conviction of a party of a crime: "Another exception to the general rule is that, when the evidence of an extraneous crime tends to identify the person who committed it as the same

person who committed the crime charged in the indictment, it is admissible."

Within this rule, it was clearly competent, for the purpose of impeaching and discrediting the witness, to connect him with the transaction by showing his conviction for the same offense, at the same time, and as a part of the same assault, when he had denied being present. The prosecuting witness had testified that Moynahan was present on the occasion mentioned, and struck him with a beer bottle. Appellant and Moynahan had both testified that Moynahan was not present. It is not made directly to appear that the occasion referred to in the question was the same as the one on which the assault is charged to have been committed, or that it was on the same person, though the name of the officer was given as "Edward Meeker," the name of the prosecuting witness; but no objection was made on either of those grounds, but on the ground that the question was not proper on cross-examination. It is quite clear to us that if it was on the same occasion and on the same person, the fact of conviction not only had a direct tendency, but was conclusive as to Moynahan, upon that question, both as to a material fact and as showing the witness's bias and prejudice, or grounds for them. The credibility of the witness was a matter to be considered and tested by his cross-examination within proper limits. In view of his testimony that he was not present when the prosecuting witness said he was, and when appellant says he was not, the fact went directly to affect his credibility. The fact of his conviction was material, and concluded him as to the one fact, and was admissible, if the occasion was the same. It was competent to show the identity of the transaction by his cross-examination, and that he had been concluded on that question by a conviction on trial, or by a plea of guilty. It established the fact of his presence, in direct contravention of his testimony.

The cases of *Farley v. State, supra*; *Fletcher v. State* (1874) 49 Ind. 124, 19 Am. Rep. 673, and *Glenn v. Clore* (1873) 42 Ind. 60, were decided prior to the enactment of § 2116, *supra*, and held that, as a witness could not be impeached or sustained by proof of general moral character, much less could this be so by proof of isolated acts of good or bad conduct. In *Farley v. State, supra*, the defendant, on trial for the larceny of a horse, not having put his character in issue, was asked upon cross-examination, "Have you not been convicted of stealing horses before, and sent to the penitentiary?" Over objection of irrelevancy and immateriality, and that the question

was not proper cross-examination, he answered in the negative. He was then asked, "Have you not been convicted of some other crime, and sent to the penitentiary?" Over objection of irrelevancy, immateriality, and that the evidence was improper in any event, and was not proper on cross-examination, he answered: "Yes, sir; for complicity in forgery." The admission of this evidence was held improper, as not relevant to the issue. The case is based upon *Fletcher v. State*, supra, in which it is said: "It is conceded by counsel for appellant that the state had the right to impeach the appellant as a witness, by proving that his general character for truth and veracity was bad in the neighborhood of his residence; but it is very strenuously contended that the state had no right to prove what his general moral character was, to impeach him as a witness." The charge there was forgery, and it was held that proof of the defendant's general moral character was improper, on the ground that the provisions of the Civil Code did not apply, and the effect was to put defendant's general moral character in issue without his consent, and without a statute authorizing it. Both reasons are removed by the present statute.

In *Glenn v. Clore*, supra, a civil action, it was held error, on a trial for seduction, to introduce against a witness, for the purpose of affecting his credibility, the record on a charge of assault and battery with intent to commit rape, when the conviction was for assault only. This evidence was held irrelevant and improper on the ground that, as he was not incompetent as a witness prior to the adoption of the Code, the offense of which he was convicted could not be admitted to affect his credibility, under § 529, supra.

We are unable to perceive that these cases are controlling in this case, except on the ground of the lack of identity of the time and place to connect the incident with the material fact in issue at the trial. If the witness was convicted it was clearly competent; but, no objection having been interposed upon that ground, and the matter being apparently treated as the same incident, the objection made is unavailing. Besides, with the view we take of the evidence, even if not properly connected with the same transaction, appellant was not harmed by it.

Upon the question of the record being the only method of discrediting the witness by reason of a former conviction, we do not think that the apparent rule in *Farley v. State*, supra, is controlling here. There the offense was grand larceny, an infamous crime at the common law and under our statute of 1843, supra, which ren-

dered the witness wholly incompetent, though such evidence was admissible under the statute then in force, to affect his credibility. The record could not have been introduced in evidence by the state in chief, because it was collateral,—the test being: Would the cross-examining party be entitled to go into such matter in chief? If not, it is collateral. *Welch v. State* (1885) 104 Ind. 347, 3 N. E. 850, 5 Am. Crim. Rep. 450; *Staser v. Hogan* (1889) 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *George v. State* (1884) 16 Neb. 318, 20 N. W. 311. The rule for requiring a record of a conviction grew out of a state of the law which rendered those convicted of infamous crimes incompetent as witnesses, and the rule requiring the record was for the twofold purpose of certainty as to what the offense was, and in order that witnesses might not be deterred by imputation upon their character and integrity. Before a witness should be disqualified, it should certainly and definitely be shown that he was thus disqualified, and this is the reason and basis for the rule as shown in *Bise v. United States* (1906) 74 C. C. A. 1, 144 Fed. 374, 7 A. & E. Ann. Cas. 165, and *James v. United States* (1907) 7 Ind. Terr. 250, 104 S. W. 607. *Com. v. Walsh*, supra, is based on *Com. v. Quinn* (1855) 5 Gray, 478, and *Com. v. Sullivan* (1894) 161 Mass. 59, 36 N. E. 583.

There is some support for the holding in the former case, which together with *Farley v. State*, supra, is broadly grounded on the doctrine declared in 1 *Greenleaf Evidence* (14th ed.), § 457, that, "where the question involves the fact of a previous conviction, it ought not to be asked, because there is higher and better evidence which ought to be offered;" but in *Com. v. Sullivan*, supra, the rule is entirely relaxed, a fact which seems to be entirely overlooked in *Com. v. Walsh*, supra, for in the *Sullivan Case*, supra, upon the question being put to the witness on cross-examination, "Were you ever in jail in Essex county?" the court refused to allow the question to be answered, unless the record of a conviction of the witness should be produced, and the cross-examiner stated that he had no such record to produce. It clearly appears from that case that it would have been held a proper question in case of a negative answer if followed by a record of conviction; but, if answered affirmatively, what good ground could there be for demanding the record? To do so is to do more than has been done; but if there is a negative answer, the record of conviction is an effectual impeachment, and is admissible, if material. In the earlier cases questions which not only tended to criminate, but those tending to disgrace, witnesses, were excluded. The rule before

quoted from 1 Greenleaf Evidence (15th ed.) § 457, has been much modified, we think with reason. It is a familiar rule that a witness may be impeached by statements made out of court contrary to those made in court, or by testimony given on a former trial, or by testimony in other cases involving the same question or transaction, different from that given in a second trial, and while such testimony might, in the modern preservation of evidence by stenographic notes, or by a bill of exceptions, be shown by them, we apprehend that there can be no good reason urged by a witness who heard the testimony may not, upon the laying of proper ground for the impeachment, testify to the fact. That is precisely what was attempted here, as we view it, and whilst, perhaps, the ground was not definitely enough laid as to time and the individual assaulted, no objection was made on that score.

The rule as stated by Professor Greenleaf is based upon the doctrine that the best evidence of which a case in its nature is susceptible must be produced, but the rule has been attacked as not being a sound one and as uninformative and unnecessary, and not applicable as a hard and fast one. Thayer, Preliminary Treatise Ev. chap. 11. It rests upon the presumption that where better evidence is withheld, there may be some sinister motive in withholding it. *United States v. Reyburn* (1832) 6 Pet. 352, 8 L. ed. 424; *Taylor v. Riggs* (1828) 1 Pet. 591, 7 L. ed. 275. The rule is said to rest upon the quality or grade, rather than upon the strength of the evidence. *Minor v. Tillotson* (1833) 7 Pet. 99, 8 L. ed. 621; *Richardson v. Milburn* (1860) 17 Md. 67; *Robinson v. Mulder* (1890) 81 Mich. 75, 45 N. W. 505; *Western U. Teleg. Co. v. Stevenson* (1889) 128 Pa. 442, 5 L.R.A. 515, 15 Am. St. Rep. 687, 18 Atl. 441; *United States Sugar Refinery v. E. P. Allis Co.* (1893) 6 C. C. A. 121, 9 U. S. App. 550, 56 Fed. 786; *Patton v. Rambo* (1852) 20 Ala. 485; *Holmes v. Coryell* (1883) 58 Tex. 680.

In 1 Elliott on Evidence, § 216, it is said: "It is sometimes said that there is an exception to the rule requiring the best evidence, in the case of collateral writing and independent facts in issue; but these are cases in which the rule does not apply, rather than exceptions to the rule. There is a clear distinction between proving the existence of a fact which has been put in writing, and proving the writing or contents of the writing itself. If the essential fact to be proved is not the contents of a written instrument, but an independent fact, to which the writing is merely collateral, or of which it is merely an incident, there is no reason for the application of the rule. 30 L.R.A. (N.S.)

In such cases the contents of the document are no part of the issue, and there is no understanding that the writing shall be the sole repository of the fact. When the parol evidence is as near to the fact testified to as the writing itself, then each is primary." In *Gillett, Indirect & Collateral Ev.* § 91, it is said: "While there may be some reason for requiring that the record of conviction should be produced, where it is sought to disqualify a person as a witness on the ground that he is infamous, because the question as to whether he was convicted of an offense which renders him infamous is, to some extent, a technical one, yet, where the only use that is sought to be made of the fact of conviction is to affect the weight of the testimony of a person as a witness, no good reason can be suggested why he should not be interrogated upon cross-examination as to that point." "The reasons for requiring record evidence of conviction have very little application to a case where the party convicted is himself upon the stand, and is questioned concerning it, with a view to sifting his character, upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight that it may almost be looked upon as purely imaginary, while the danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent." *Clemens v. Conrad* (1869) 19 Mich. 170.

In the case at bar the issuable fact was whether appellant had assaulted the officer. Whether the witness Moynahan was present was only a collateral and incidental fact, introduced by appellant by his testimony, and that of Moynahan. The material collateral fact was that he had been convicted of an assault, presumably at the same time, on the same officer, and the facts of that assault, and his conviction of it, were as well known to him, and his confession of it was of as high quality and probative force, as the record itself, and the reason for the rule requiring the record in this case we think entirely fails. The admission by parol was as near the fact as the record could be. Rules of evidence are adopted for practical purposes.

But there is another branch of the case as to which there can be no doubt from the evidence. Appellant admits that the officer put his foot into the doorway, and he shoved the officer out, and by the testimony of both appellant and the officer it is clear that there was a struggle, and that the officer grabbed appellant's suspender, and it is undisputed that the officer's face was

scratched. Whether the witness Moynahan was present was wholly immaterial. Appellant admits that he was in the saloon on Sunday. He was conducting a license business, but one subject to police surveillance, and he cannot object that the officer, finding him there at a time when business was forbidden, demanded admittance. This, appellant denied him, and admits that he forcibly ejected him, which he clearly had no right to do. It is made the express duty of policemen to "detect and arrest offenders," and to arrest on view, and to "carefully observe and to inspect all places of business under license or required to have the same," and to "suppress and restrain all unlawful and disorderly conduct or practices, and enforce and prevent the violation of all ordinances and laws in force in such city," Burns 1908, §§ 8782, 8785, Acts 1905, p. 219, §§ 161, 164. The statute forbids all persons except the proprietor of a saloon and members of his family from going into such room on Sunday, and makes the fact of a person's going into such room prima facie evidence of the violation of the statute as to sales, and policemen are required to enforce the provisions of the act. Burns 1908, §§ 8328, 8330, Acts 1895, p. 248, §§ 3, 7. The act could only be enforced by inspection, and, being himself present, appellant was required to permit it, so that it is clear that his guilt is shown upon his own statement, and no error of which he can complain, or prejudice of his substantial right, is shown. *Sibbery v. State* (1897) 149 Ind. 684, 39 N. E. 936, 47 N. E. 458; *Shears v. State* (1897) 147 Ind. 51, 56, 46 N. E. 331, and cases cited; *Reed v. State* (1895) 141 Ind. 116, 40 N. E. 525; *Com. v. Ducey* (1879) 126 Mass. 269.

The judgment is affirmed.

MISSISSIPPI SUPREME COURT.

WIRT ADAMS, State Revenue Agent, for Use of Board of Levee Commissioners for Yazoo-Mississippi Delta, Appt.,
v.

F. I. WILLIAMS et al.

(— Miss. —, 52 So. 865.)

Courts — jurisdiction — public officer — failure to account.

1. The secretary and treasurer of a board of levee commissioners is a public officer within the meaning of a constitutional provision giving the chancery court jurisdiction of suits on bonds of public officers for failure to account for public money received by them.

Action — party plaintiff — state revenue agent.

2. The state revenue agent may maintain 30 L.R.A. (N.S.)

an action on behalf of the board of levee commissioners to hold the bond of its secretary and treasurer liable for public money received by him, under a statute making it his duty to investigate the accounts of levee board officers and to maintain suits against them.

Bond — official — failure of principal to sign — effect.

3. Failure of the principal to sign his official bond does not render it void in favor of the surety, where the statute provides that no irregularity shall render such bond void, if it is delivered as the official bond of the officer and serves as such, and it is joint and several in form.

Same — unnecessary requirements — effect.

4. The official bond of the treasurer of a levee board which has the conditions prescribed by law is not rendered void by the insertion of an additional condition relieving the surety from liability for loss of money deposited in the bank, such condition being merely surplusage and void.

Same — liability for interest earned.

5. The bond of a custodian of public money is liable to account for the interest which he receives upon it, where the statute makes him liable to safe-keep, account for, and pay over all money that may come into his custody in his official capacity, and all other money for which he is properly accountable as such officer, although the statute makes it unlawful for him to use such money for his own benefit.

(June 6, 1910.)

Note. — Liability of public officer or his bond for interest received on public money.

As to right of public to fees unlawfully collected by officer for his own benefit, see note to *State ex rel. Dunbar v. Dunbar*, 20 L.R.A. (N.S.) 1015.

The question whether an officer having custody of public funds who receives interest from the use or loaning of such funds may retain the interest as his own seems to have depended in many cases upon the further question, as to the nature of the liability of the officer who has charge of the public funds. In several jurisdictions the liability of the officer for the public funds is held to be absolute, and it seems he has even been considered the absolute owner thereof. In these jurisdictions the relations between the officer and the state or municipal corporation whose funds he has charge of is said to be that of debtor and creditor, and not that of trustee and *cestui que trust*, or that arising from a mere bailment from which it follows, as they hold, that, in the absence of a statute to the contrary, the interest accruing on such public funds belongs to the one who has charge thereof.

State v. Walsen, 17 Colo. 170, 15 L.R.A. 456, 28 Pac. 1119, is perhaps the leading case supporting that view. It was there

APPEAL by complainant from a decree of the Chancery Court for Coahoma County sustaining demurrers to a bill filed to compel defendant Williams to account to the Board of Levee Commissioners for Yazoo-Mississippi Delta for certain moneys alleged to have been received by him as interest on public moneys held by him as treasurer of such board. Reversed.

The fact are stated in the Chancellor's opinion.

Mr. O. G. Johnston, for appellant:

The revenue agent is the proper party to maintain this action.

State Revenue Agent v. Hill, 70 Miss. 106, 11 So. 789.

The bond was binding on all who signed it, without regard to its approval, and with-

out regard to whether or not it was signed by the principal.

Gloster v. Harrell, 77 Miss. 793, 23 So. 520, 941, 27 So. 609; Hall v. State, 69 Miss. 529, 13 So. 38; State use of The Treasurer v. Bowman, 10 Ohio, 445; Williams v. Marshall, 42 Barb. 524; Kneeland v. Rogers, 2 Hall, 584; Pima County v. Snyder, 5 Ariz. 45, 44 Pac. 297; Cockrill v. Davie, 14 Mont. 131, 35 Pac. 958.

It makes no difference what conditions were written in the face of the bond.

State ex rel. Mitchell v. Smith, 87 Miss. 551, 40 So. 22; 16 Cyc. Law & Proc. p. 787; Cox v. Ross, 56 Miss. 481; 5 Cyc. Law & Proc. pp. 748-751.

A bond taken in pursuance of a public statute is an official bond.

held that although the Constitution made him criminally liable for putting money out at interest or making a profit from it, a state treasurer cannot be compelled to account for interest or profits made by him from the public funds, in the absence of a statute charging him therewith, his liability for such funds being absolute, under the provisions of the Constitution.

In *Com. v. Godshaw*, 92 Ky. 435, 17 S. W. 737, it is held that a public official, in this case a trustee of a jury fund, being bound for the money at all hazards, unless he was required by law to place it in some safe depository as the money of the state, is in consequence not chargeable with interest collected on such fund. The court took occasion to say: "The whole theory of the public official being bound for the money at all hazards is that by the terms of his bond he agrees to pay the money over when collected, without any condition annexed to his liability, and that, as between the state and the official, in determining this liability, it must be treated as his money, and not that of the state. In what particular has Godshaw been guilty of a breach of his bond? He has paid over all the money and settled as the law requires. He could have mingled the money with his own, and perhaps did so, or could have deposited it in any other place than the bank. He and his sureties were liable for it, and when paid at the times required, there can be no breach of their obligation." It appeared in this case that afterwards, by a change in the law, the clerk was required to pay the money into the treasury after paying to the trustee of the jury fund a sum sufficient to pay the jurors. In the trial court this law was held not to repeal the former law under which the trustee derived his power, but the supreme court thought otherwise, and held that whatever interest the trustee had received on his deposits upon money received from the clerk or paid over to him under the order of the court since that law went into effect should be accounted for.

In *Maloy v. Bernalillo County*, 10 N. M. 638, 52 L.R.A. 126, 62 Pac. 1106, the court, 30 L.R.A. (N.S.)

after coming to the conclusion that a county treasurer was not a mere agent, trustee, or bailee, and yet not an absolute insurer of the funds without relief under any circumstances, but was rather a special bailee subject to special obligations, held that interest received by him after he has gone out of office, on account of money deposited by him in a bank while in office, without any agreement for interest, cannot be recovered from him by the county, there being no statutory provision requiring him to account for such interest, and he being expressly prohibited by law from loaning the money, either with or without interest. The court said: "The legislation prohibiting county officers from using funds so as to accumulate profits thereon indicates an intention on the part of the legislature to provide against loss of the original fund, and also to prevent counties from assuming any responsibility for loss occasioned by the default and misconduct of its officers. If the law authorized county treasurers and collectors to loan the public funds that profits might accrue thereon, the public would be required to assume more or less responsibility for any loss which might occur, and the officer would then become a bailee or trustee, required to use only ordinary care and diligence of the public funds in his hands. The legislature has seen fit to provide against this divided responsibility, and therefore has provided for holding officers to a strict accountability for the original fund, and has made no provision whereby profits shall inure to the benefit of the county. This is substantially the construction given to similar laws in other states and by the courts of the United States. The basis of this rigid rule of accountability may be found in the evident purpose of the legislature to prevent the dissipation of the original fund; and enactment of the statute prohibiting the appropriation or use of the funds by custodian was deemed sufficient guaranty of the funds. It is true that the custodian may loan the funds in his hands, and receive interest therefor; but if he does so, he does it at his peril, and is subject to

Faurote v. State, 110 Ind. 463, 11 N. E. 472; United States Fidelity & G. Co. v. Union Trust & Sav. Co. 142 Ala. 532, 38 So. 177; Dixon v. United States, 1 Brock. 177, Fed. Cas. No. 3,934; United States v. —, 1 Brock. 195, Fed. Cas. No. 14,413; Faurote v. State, 110 Ind. 463, 11 N. E. 472; State ex rel. Mitchell v. Smith, supra.

A bond is binding on the sureties as to all of the conditions prescribed by the statute, whether those conditions be written in the face of the bond or not.

5 Cyc. Law & Proc. p. 748; Cox v. Ross, supra; State v. Chadwick, 10 Or. 465; Harris v. Hanson, 11 Me. 241; Lewis v. State, 65 Miss. 468, 4 So. 429; Brandt, Suretyship, § 452; Murfree, Official Bonds, § 211; People v. Treadway, 17 Mich. 480;

the criminal penalties provided by law, where the same is done by contract or by arrangement. It is no part of the legitimate funds of the county, however, and the sureties so on the official bond of the officer are not responsible for it to the county." The court in the above case evidently also found it necessary to distinguish United States v. Mosby, 133 U. S. 273, 33 L. ed. 625, 10 Sup. Ct. Rep. 327, and Richmond County v. Wandel, 6 Lans. 33 (infra), and in its attempt to do so said: "In the last two cases the interest was paid over to the treasury, and thus treated by the officer himself as public money; and in all such cases the courts hold that the officer cannot recover back the money. Even if there was a statute prohibiting an officer from loaning the public money, or using it in any way that profits might accrue, if the officer did loan or use the money, and did receive profits thereon, and pay the same into the treasury, the courts would refuse to give it back to the officer, because, in paying the same over he admitted it to be public money that he did not claim to be his own; and, also, as a voluntary payment, he could not recover it back. Therefore, these cases are not in point in this case, where the officer did not pay over the money, but claimed the same as his own, and where the statute prohibited the officer from so using the money that interest would accrue thereon."

In Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197, it was held that a county treasurer, with respect to public funds in his hands, is not like a trustee or an agent, the mere bailee or custodian of such money, but the money becomes his own, and when he has accounted as required by law and by the terms of his bond, nothing further can be required of him, and therefore he cannot be required to pay over interest collected on such money when loaned to or deposited with a bank.

The weight of authority, however, supports what seems to be the better view, that the interest which attaches to the principal belongs to the state or municipal corporation, for failure to account for which 30 L.R.A. (N.S.)

Armington v. State, 45 Ind. 10; Mahaska County v. Ruan, 45 Iowa, 328; Kane v. Union P. R. Co. 5 Neb. 105; Fox v. Mecham, 6 Neb. 530; Throop, Pub. Off. § 255; Adams v. Saunders, 89 Miss. 784, 119 Am. St. Rep. 720, 42 So. 602, 11 A. & E. Ann. Cas. 327.

The custodian of a public fund has no right to invest that fund and retain the profits resulting from such an investment.

Gillenwaters v. Miller, 49 Miss. 150; Hughes v. People, 82 Ill. 78; Richmond County v. Wandel, 6 Lans. 33; United States v. Mosby, 133 U. S. 273, 33 L. ed. 625, 10 Sup. Ct. Rep. 327; Eshelby v. Cincinnati Bd. of Edu. 66 Ohio St. 71, 63 N. E. 586; Thompson v. Territory, 10 Okla. 409, 62 Pac. 355; State v. McFetridge, 84 Wis.

the officer or his sureties may be held liable.

This rule has been applied in several cases, notwithstanding the fact that the officer's liability was held or assumed to be absolute; these cases holding with ADAMS v. WILLIAMS, that it is a complete *non sequitur* to say that because a public officer who has charge of public funds is an absolute insurer, he therefore is entitled to the interest accruing thereon. This view, of course, makes them directly opposed to the Walsen Case, and, so far as they are concerned at least, effectually disposes of the suggestion made in that case that the difference in the various jurisdiction in the nature of the liability of the officer was the distinction upon which all or nearly all adjudicated cases might be harmonized.

A case very similar to the ADAMS CASE, and upon which that case depended much for its holding, is State v. McFetridge, 84 Wis. 473, 20 L.R.A. 223, 54 N. W. 1, 908. In that case a state treasurer was sought to be held liable on his bond for interest collected on public funds. The defense rested on three propositions: First, it was contended that the legal title to the public moneys which came into the hands of the treasurer was in him, and not in the state; that the relation between him and the state was that of creditor and debtor only, and hence that it was no concern of the state what the treasurer did with the public money, or how much profit he made out of it, provided he accounted properly for what he received; that his obligations to the state were fully performed when he paid or delivered to the persons entitled thereto the amount of money which he received in the first instance; and hence that the sums received by him from the banks in which he deposited the public funds, as interest on such deposits, whether paid to him as a gratuity or pursuant to a previous agreement or understanding, belonged to him individually, as incident to the legal ownership of the money. Second, the deposit of the public funds in banks by the treasurer was without authority of law, and it was not in contemplation of the state or the

473, 20 L.R.A. 223, 54 N. W. 1, 998; *Fogg v. Bank of Friar's Point*, 80 Miss. 750, 32 So. 285.

Mr. D. A. Scott, for appellee Williams:

The failure of Williams to sign the bond in question *ipso facto* rendered the same null and void and nonenforceable, either as against him or his codefendant.

State v. Martin, 56 Miss. 108; *Sacramento v. Dunlap*, 14 Cal. 421; *Bean v. Parker*, 17 Mass. 591; *Wood v. Washburn*, 2 Pick. 24; *Sharp v. United States*, 4 Watts, 21, 28 Am. Dec. 676; *Fletcher v. Austin*, 11 Vt. 447, 34 Am. Dec. 698; *Johnson v. Erskine*, 9 Tex. 1; *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758; *State ex rel. Mitchell v. Smith*, 87 Miss. 551, 40 So. 22; *Andrews v. State*, 69 Miss. 740, 13 So. 853.

suresties in his official bond, that he would make such deposits and receive interest thereon, and that hence liability for such interest, even though the state might recover it of the treasurer, was not within the true meaning of the condition of his bond. Third, conceding that the state was the owner of the public funds, the treasurer was still liable on his bond to account for and pay over to the persons entitled thereto, or to deliver to his successor in office, all such funds, and that, because he was thus absolutely liable therefor, the ordinary liability of a trustee to account to his *cestui que trust* for all profits made by him out of the trust money or property did not exist, and the money claimed by the state was not recoverable by it, but belonged to the treasurer individually. The court considered these three points in the order named. In regard to the first, after reviewing several statutes in regard to the duties, etc., of the state treasurer, it held that the legislature could never have intended to divest the state of its title to the public funds and the consequent control over those funds which results from ownership thereof; as to the second, it was held that the treasurer violated no law when he deposited such funds in banks, and stipulated for and received interest thereon; and as to the third, it was held that the absolute liability of the treasurer for the public moneys which come to his hands did not entitle him to the interest received from deposits thereof in banks. This case is freely quoted in the *ADAMS CASE*, and attention is called to that case for a further review thereof.

State v. Harshaw, 84 Wis. 532, 54 N. W. 17, a case similar to the *McPetridge Case*, depended upon the latter for its decision.

In *Eshelby v. Cincinnati Bd. of Edu.* 66 Ohio St. 71, 63 N. E. 586, the court, not thinking it expedient to establish a policy which would give to a treasurer any personal motive in selecting a place of deposit, held that a treasurer of a school district who, under favor of a statute permitting the deposit of "public funds," deposits such funds in a bank which allows interest on

The court of chancery had no power or authority to retain the case after having determined that the alleged bond upon which the suit is based was void.

16 Cyc. Law & Proc. pp. 109-111 and note 80; *Dowell v. Mitchell*, 105 U. S. 430, 26 L. ed. 1142; *Kearny v. Jeffries*, 48 Miss. 358; *Learned v. Holmes*, 49 Miss. 290; *Bowdre v. Carter*, 64 Miss. 221, 1 So. 162.

A statutory bond, to be good as such, must be conditioned and executed according to all the requirements of the statute.

Howard v. Brown, 21 Me. 385; *Mays v. Lewis*, 4 Tex. 1; *Dixon v. United States*, 1 Brock. 177, Fed. Cas. No. 3,934; *United States v. —*, 1 Brock. 195, Fed. Cas. No. 14,413; *Lawton v. State*, 5 Tex. 270; *Boyd v. State*, 50 Miss. 375.

the average balance of the deposits, is required to account to the school district for such interest. The court in this case also said that it did not necessarily follow from the fact that the liability of the treasurer was absolute, and that it differed in that respect from that of the ordinary trustee or bailee, who may be exempt from liability on account of funds lost without his negligence or connivance, that the funds coming into the hands of the treasurer were his, or that, upon the receipt of money in his official capacity, the relation of debtor and creditor was established between him and the district. Said the court: "To the contrary it is quite clear that instead of being the debtor of the district he is its treasurer; the custodian of its funds; and that he acquires custody of the funds without acquiring title to them." In this case it was also said that whether such treasurer should be regarded as a bailee with express and extraordinary liabilities, or as a special trustee, was not material, since in either view he was the custodian of funds belonging to another.

Rhea v. Brewster, 130 Iowa, 729, 107 N. W. 940, 8 A. & E. Ann. Cas. 389, is another case where a public officer, in this case a clerk of the court, was held not to become the owner of public funds in his hands, but a mere custodian thereof, and therefore accountable for interest which he received from a bank on public funds deposited therein. The court in this case also said: "The true test, as it seems to us, is not whether he is absolutely liable to account, but whether he is the owner of the funds in his hands. If he is not such owner, and the moneys coming into his hands belong to the county or someone else, any increment thereto is and should be treated as a part of the principal. This is the view approved in the better considered cases, and the only one consonant with sound public policy."

A similar case, and holding to the same effect, is *Vansant v. State*, 96 Md. 110, 53 Atl. 711. In this case there were many statutes which indirectly tended to show that the clerk of the court was not the

Money received by an officer, by virtue of his office is money which such officer receives under the law of his office, not in violation of the law of the office; in right of his office, not in wrong; and does not include interest received by him on deposits of public money. For the former the bondsmen are liable, but not for the latter.

Renfroe v. Colquitt, 74 Ga. 618; *Brown v. Phipps*, 6 Smedes & M. 51; *Com. v. Swope*, 45 Pa. 535, 84 Am. Dec. 518; *Furlong v. State*, 58 Miss. 717; *People v. Penlock*, 60 N. Y. 421; *Schuster v. Weissman*, 63 Mo. 562; *Gerber v. Ackley*, 37 Wis. 43; *Taylor v. Parker*, 43 Wis. 78; *Jenkins v. Lemonds*, 29 Ind. 294; *Morris v. Van Voast*, 19 Wend. 283; *Montgomery v. The Governor*, 7 How. (Miss.) 68; *State, Allen, Prose-*

cutor, v. Conover, 28 N. J. L. 224, 78 Am. Dec. 54; *Alcock v. Andrews*, 2 Esp. 542, note; *Jennings v. Bobe*, 51 Fla. 229, 120 Am. St. Rep. 156, 40 So. 194; 29 Cyc. Law & Proc. p. 1455; *People ex rel. Kellogg v. Schuyler*, 4 N. Y. 180; *Brooks Oil Co. v. Weatherford*, 91 Miss. 501, 44 So. 928; *Wood v. Robinson*, 3 Smedes & M. 271; *McFarland v. Wilson*, 2 Smedes & M. 209; *Crane v. Bedwell*, 25 Miss. 507.

The legal title to public money is vested in the officer having it in his possession, and the relationship of debtor and creditor immediately arises between the officer and the public, and the officer is not liable to account for an amount in excess of the exact amount received by him in his official capacity.

absolute owner of the public moneys in his hands, but rather that he occupied a position of trust with reference thereto. There were also other statutes in regard to the salaries and fees of a clerk of the court, which, as the court said, if there were any doubt about the responsibility of the clerk for interest on other grounds, would seem conclusively to settle it.

In *Thompson v. Territory*, 10 Okla. 409, 62 Pac. 355 (an action against the treasurer, the bondsmen not being parties), the court, after coming to the conclusion that territorial funds received by the treasurer of the territory remained the money of the territory until paid out according to law, and could not be treated as the money of the treasurer, held that although the treasurer might deposit such funds in a bank in his official capacity, and accept the interest thereon for daily balances, so long as the money remained absolutely under his control and subject to payment on his demand, since he could not appropriate the interest to his own use, it was earned by the funds of the territory. In this case it was contended by the treasurer that even if the moneys belonged to the territory, he was entitled to the interest, inasmuch as there was no provision of the statute for the treasurer to loan the funds, and that it would not follow that he was civilly liable for the interest merely because he might be amenable to the criminal law for an appropriation of the principal; and that if the funds were produced or accumulated by a criminal act by the treasurer, the territory could not accept the fruits of such crime. The court, however, said: "One might be criminally liable for a certain act, and still not be liable in damages civilly, but that is not the general rule; and, at any rate, in a case of this kind, even if the treasurer had committed a crime by accepting interest on the funds, he is estopped from saying that he had no authority to accept such interest. He used the moneys in such a way as to make them earn interest. For their use he admits he received a certain sum of money. The moneys of the territory earned these prof-

its, and even if the transaction were an unlawful one, the treasurer will not be permitted to take advantage of his own wrong and reap the benefits thereof."

United States v. Mosby, 133 U. S. 273, 33 L. ed. 625, 10 Sup. Ct. Rep. 327, which was quoted in the *ADAMS CASE*, is in harmony with the above cases. In that case a United States consul, after paying into the treasury interest which he had collected on public money, thinking that he was entitled to it, sought unsuccessfully to recover it back.

A case also upholding the above doctrine, and seemingly of much stronger authority than many of the courts favoring the contrary doctrine have been willing to attribute to it, is *Richmond County v. Wandel*, 6 Lans. 33, affirmed on opinion below in 59 N. Y. 645. In that case an action was brought on a bond of a county treasurer binding him to pay, according to law, all moneys which should come to his hands as county treasurer. The language of the court, making the case one of importance, is sufficiently set out in the *ADAMS CASE*.

But see *Maloy v. Bernalillo County*, 10 N. M. 638, 52 L.R.A. 126, 62 Pac. 1106, supra, where the last two cases were sought to be distinguished.

In *State ex rel. Atty. Gen. v. McCarty, Wilson Super. Ct. (Ind.)* 205, by virtue of a statute a state auditor was authorized to deposit temporarily at interest, while awaiting investment, certain public funds in his hands. Evidently, notwithstanding this statute, he used the money for his own individual purposes and received a large amount of interest thereon. In an action to hold him accountable for the interest collected, it was said: "The people of the state, by virtue of the Constitution and of the statute, had a right to claim that the money in the auditor's hands, if placed at interest temporarily while awaiting investment, should be so placed as to secure to the school fund the interest that might be realized, and if the auditor did, as charged in the complaint, otherwise use it, and receive interest from such use, when he could have deposited it in bank at interest, to the

State v. Walsen, 17 Colo. 170, 15 L.R.A. 456, 28 Pac. 1119; Renfroe v. Colquitt, 74 Ga. 618; Rock v. Stinger, 36 Ind. 346; Shelton v. State, 53 Ind. 331, 21 Am. Rep. 197; Com. v. Godshaw, 92 Ky. 435, 17 S. W. 735; Bocard v. State, 79 Ind. 270; Maloy v. Bernalillo County, 10 N. M. 660, 52 L.R.A. 126, 62 Pac. 1106; New Providence v. McEachron, 33 N. J. L. 339; Gerber v. Ackley, 37 Wis. 43, 19 Am. Rep. 751; Wilson v. Wichita County, 67 Tex. 647, 4 S. W. 67; Gartley v. People, 24 Colo. 155, 49 Pac. 272; District Twp. v. Morton, 37 Iowa, 550; District Twp. v. Smith, 39 Iowa, 9, 18 Am. Rep. 39; Jefferson County v. Lineberger, 3 Mont. 231, 35 Am. Rep. 462; Thompson v. Township Sixteen, 30 Ill. 99; Perley v. Muskegon County, 32 Mich. 132, 20 Am. Rep.

637; Wheeling v. Black, 25 W. Va. 266; Solano County v. Neville, 27 Cal. 465; Lumpkin County v. Williams, 89 Ga. 388, 15 S. E. 487; Taylor County v. Standley, 79 Iowa, 666, 44 N. W. 911; Cole County v. Dallmeyer, 101 Mo. 57, 13 S. W. 687; Valley County v. Robinson, 32 Neb. 254, 49 N. W. 350; Belknap v. Clark, 58 N. H. 150; Stebbins v. Crawford County, 92 Pa. 289, 37 Am. Rep. 687; Lycoming County v. Lycoming County, 46 Pa. 400; Hughes v. People, 82 Ill. 78; Cooper v. People, 85 Ill. 417; State v. Houston, 78 Ala. 576, 56 Am. Rep. 64; Alston v. State, 92 Ala. 124, 13 L.R.A. 659, 9 So. 733; Clisby v. Mastin, 150 Ala. 132, 124 Am. St. Rep. 64, 43 So. 742; Muzzy v. Shattuck, 1 Denio, 233; Lane v. Cotton, 1 Ld. Raym. 646; Whit-

credit of the fund, he is accountable for interest so received. And we are of opinion, further, that the Constitution, § 3, art. 8, by its own inherent force, makes all interest received from the sinking fund a part of the school fund; that, by virtue of that section itself, it was made the duty of McCarty to account for all interest he received; that as soon as it came to his hands, it became a part of the school fund, and if he has failed to pay the same to his successor, he and his sureties are liable in this suit on his official bond. If he used the money of the sinking fund in his own business or in speculative operations, the defendants should be held liable on their bond for such interest as would have accrued in case the money had been deposited according to law, but not for the profits of any business in which McCarty may have employed the funds, for no such liability could have been in the contemplation of the sureties when they signed the bond, nor does it seem to be contemplated in the law under which the bond was executed." In this case it was also urged by the auditor that, inasmuch as he was liable absolutely for the safety of the fund committed to his charge, he had the right to determine how it should be kept or employed while under his control, and that the money received by him was, while in his official charge, his money, and all that the state could demand of him was the return of an equal amount on the expiration of his term of office. The court, however, did not favor this view, but said that the embezzlement act placed the stamp of individuality on all public or trust funds received by the auditor and other officers therein named, and expressly prohibited them from using such funds "as their own," or in any manner not authorized by law.

That a public officer cannot retain interest made on public funds which, by act of Parliament, were intended to be paid over immediately upon their collection, was held in Craufurd v. Atty. Gen. 7 Price, 2.

In Baker v. Williams Bkg. Co. 42 Or. 213, 70 Pac. 711, it appeared that public funds had been deposited in a bank which after-

wards became insolvent. Upon the claims made by the officers who made the deposits being allowed against the receiver, the question arose whether they were entitled to interest, under a statute providing that interest should be payable on all moneys after due, and on moneys received to the use of another and retained beyond a reasonable time without the owner's consent. It was contended by the objectors that such claims represented public funds deposited with the insolvent bank by the custodian thereof, and not the private funds of individual claimants, and for this reason no interest should be paid them thereon. The court in this regard said: "It is made a felony by statute for any person having in his possession any money belonging to the state, county, town, or other municipality, to convert to his own use or loan the same, with or without interest (Hill's Anno. Laws § 1772); and while a mere deposit in a bank for safe-keeping is not inhibited by this provision, it is manifest that, in case of the failure of the bank, the officer is not entitled to interest in his own right on the fund so deposited, whatever the right of the state or municipality might be in the premises. If, therefore, the claims are in fact for public money, as the objectors allege, no interest should be allowed thereon." The court then went on to hold that since some of the officers had accounted for the full amount of the public funds due, out of their own individual funds, and the claim against the bank thereupon assigned to them, there was no reason why they should not stand on exactly the same footing as other claimants against the bank. In regard to those, however, who had never made up the loss to the state, it was held that since the funds had never ceased to be public funds, no interest could be collected thereon by the officers.

In Hunt v. State, 124 Ind. 306, 24 N. E. 887, it was held that, conceding that a city treasurer could make a loan of funds in his hands upon his own individual responsibility, taking notes therefor payable to himself, and that he would then have been entitled to the usufruct, he could not loan

field v. Le Despencer, 2 Cowp. 754; Story, Bailm. § 463; Dunlop v. Munroe, 7 Cranch, 242, 3 L. ed. 329; Farrar v. United States, 5 Pet. 373, 8 L. ed. 159.

Mr. J. W. Cutrer, also for appellee Williams:

The court had no jurisdiction.

Cazeneuve v. Curell, 70 Miss. 525, 13 So. 32; Carbolineum Wood Preserving & Mfg. Co. v. Meyer, 76 Miss. 589, 25 So. 297; Hancock v. Dodge, 85 Miss. 228, 37 So. 711; Bowdre v. Carter, 64 Miss. 221, 1 So. 162.

The alleged bond set out and described in the bill is invalid and noneffective.

State v. Martin 56 Miss. 108; McLeod v. State, 69 Miss. 221, 13 So. 288; Andrews v. State, 69 Miss. 740, 13 So. 853; Hall v. State, 69 Miss. 529, 13 So. 38; Gloster v.

Harrell, 77 Miss. 793, 23 So. 520, 941, 27 So. 609.

Defendant is not estopped to allege that he did not execute and deliver the bond sued upon, and that the bond was not approved and acted upon, and was not conditioned as required by law, 16 Cyc. Law & Proc. pp. 734-747; Tobin v. Allen, 53 Miss. 583; Sulphine v. Dunbar, 5 Miss. 255; Staton v. Bryant, 55 Miss. 261; Davis v. Bowmar, 55 Miss. 671; Evans v. Forstall, 58 Miss. 30; Murphy v. Jackson, 69 Miss. 403, 13 So. 728; Stockner v. Wilczinski, 71 Miss. 340, 14 So. 460; Hart v. Livermore Foundry & Mach. Co. 72 Miss. 809, 17 So. 769; Millsaps v. Shotwell, 76 Miss. 923, 25 So. 359.

Williams cannot be held for the alleged interest charged to have been received by

the money under the direction of the city council, and take notes therefor payable to the "treasurer of the city of Anderson," without making himself and his bond liable for the interest thereon.

Under a statute requiring "all fees, perquisites, and emoluments" to be paid into the county treasury, a sheriff cannot retain a certain sum of money received by him from a banking institution as compensation for the deposits he made therein of moneys which came into his hands as sheriff. Hughes v. People, 82 Ill. 78.

In Baltimore & O. R. Co. v. Gault, 165 Ill. 233, 46 N. E. 256, it was held that a clerk of the court who retains a fund in his custody, for the use of which a bank paid him 2 per cent interest, when in fact, by an order of the court relieving him of the office of depository, he should have put it in a bank at 2½ per cent, cannot invoke the doctrine that if the fund was received by him by virtue of his office, he, as guarantor of its safety, was entitled to the interest. The court said: "The rule, if it exists as contended for, cannot apply, because the order designated another depository, and if complied with, the clerk would not have remained liable as guarantor or otherwise. It is plain that if Best had taken the certificate of deposit, he would not have been liable for the safe-keeping of the fund which the parties had stipulated, and the court had ordered, should be removed from his custody, and deposit for such safe-keeping elsewhere. He remained custodian by his own wrong, and should not be permitted to gain a benefit by disobedience." At the end of the clerk's term of office, it appeared that his successor received the money without any knowledge or information of the order of the court designating a certain bank as depository. Upon the question arising whether he also was liable for the interest received by him, the court said: "Still, the fund was in his hands in violation of the order of the court. The parties had agreed, and the court had ordered, that it should be deposited elsewhere. The Illinois Trust and Savings Bank had been designated as depository, and if the order

had been obeyed, the fund would have produced interest. While it was in his hands it did actually produce interest at 2 per cent, and whatever his right to retain interest in other cases might be, we think that he could not be permitted to retain the interest so actually received, to the injury of appellant. He should be required to account for interest received by him."

In State v. McFetridge, supra, it was held that the omission of the term "perquisites" in the revision of a statute providing for the paying into the state treasury by the treasurer of all fees and perquisites does not entitle such treasurer to interest on the public funds as perquisites, where it is expressly provided by statute that his salary shall be "in full for all services rendered by him in his official capacity."

There are a few cases in which the decisions in actions upon the official bond turn upon the question whether the use of the money or the receipt of interest was *colore officii* or *virtute officii*, so as to fall within the condition of the bond.

A case of this nature, but generally cited as supporting the Walsen Case, supra, and other similar cases, is Renfro v. Colquitt, 74 Ga. 618, where it was held, Chief Justice Jackson dissenting, that, under a statute providing that the treasurer might, with the approval of the governor, deposit certain funds in any chartered bank of the state, subject to his draft as treasurer, and, with the governor, make such contract with the bank for the use of such funds as may be beneficial to the state, and another statute providing that the treasurer should not, under any circumstances, use himself, or allow others to use, the funds of the state in his hands, without incurring a penalty therefor,—interest received by him and others for the use of public funds in violation of such statute could not be regarded as received "by virtue of his office," and therefore a recovery would not be sustained for the benefit of the state on his official bond which bound him to pay over all money received by him "by virtue of his office." The court said: "Can the money made or received by the treas-

him from the funds of the levee board which came into his hands while he was the secretary and treasurer thereof.

Marine Bank v. Fulton County Bank, 2 Wall. 256, 17 L. ed. 787; *Griffin v. Mississippi Levee Comrs.* 71 Miss. 771, 15 So. 107; *Tillinghast v. Merrill*, 151 N. Y. 135, 34 L.R.A. 678, 56 Am. St. Rep. 612, 45 N. E. 375.

Mr. W. A. Alcorn also for appellees.

Whitfield, C., delivered the following opinion:

The facts in this case are as follows: F. I. Williams was duly elected secretary and treasury of the board of levee commissioners for the Yazoo-Mississippi Delta levee district, on the 13th day of March 1906, and thereafter, on the 17th day of May, 1906, the said Williams qualified to act as such treasurer in the following manner, to wit: The said F. I. Williams applied to the *Ætna Indemnity Company* of Hartford, Connecticut, to become surety for him on his official bond, which the indemnity company did. The condition of said bond, amongst other things, provided for the

faithful performance and discharge of the duties pertaining to the office of the treasurer. The said indemnity company became surety on the said bond, at the instance of said Williams, and was paid a valuable consideration by the board of levee commissioners, to wit, the sum of \$300 per annum, for which sum the said surety company presented its bill, which bill was duly approved and allowed, and regularly paid from the funds belonging to said board of levee commissioners, and the receipt warrant duly filed, and the payment of said sum audited and approved by the said levee commissioners. Said bond was delivered to said Williams, who was both the secretary and the treasurer of the said board, by the *Ætna Indemnity Company*. The said F. I. Williams failed to sign the bond, but he accepted the same as his official bond, and, in compliance with an act of the state legislature, entitled "An Act to Amend an Act to Incorporate the Board of Levee Commissioners for the Yazoo-Mississippi Delta and for Other Purposes," approved February 28, 1884, and "An Act to Change the Domicil of Said Board and for

urer, or allowed to be made by others, by the use of the money of the state, be said to have come into his hands by virtue of his office? Money received by an officer by virtue of his office is money which that officer receives under the law of his office, not in violation of the law of his office, right of his office, not in wrong. In this case, the money received or made was by a wrongful use of the funds of the state; there was no virtue in it; it was wrongful, and a penalty was imposed for such wrong. There is no allegation that the treasurer had failed to perform the duties of his office; that he had misapplied or used the funds of the state; and that he had failed to account for and pay over any money that he had received by virtue of his office, whereby he became liable to the state; but the breach assigned is that the treasurer received himself, and permitted others to receive, from certain banks certain sums of money for and on account of the deposit of the funds of the state in those banks, it not being alleged that these deposits had been made under a contract between the banks and the treasurer, with the governor; so that this assignment is equivalent to alleging that the treasurer had received this money, and allowed others to receive money, by the use of the funds of the state himself and allowing others to use such funds. For such money so received by the treasurer, there can be no recovery on his official bond against him and his securities." It will be noted that in *ADAMS v. WILLIAMS* the receiving of the interest by the treasurer was held to be *virtute officii*, and attention is called to that case for the distinction made between it and the *Renfro* Case.

30 L.R.A. (N.E.),

In *Vansant v. State*, 96 Md. 110, 53 Atl. 711, the court, after having decided that the clerk was responsible, turned to the question whether the surety on the bond was liable for the interest thus received, and in regard thereto it was said: "There was no law in this state prohibiting the clerk from depositing the public moneys received by him in the banks. On the contrary, as we said above, it might be assumed that it was contemplated that he would do so. When he thus deposited them, he did not only what he had the right to do, but what was clearly his duty to do, to put them in some safe place until he remitted to the treasurer, and there could perhaps be no safer place than banks of proper financial standing. He therefore not only received them, but deposited them in bank *virtute officii*, and, being of opinion that he was not the owner of them, such gains as attached to them by way of accretion or increment became a part of them, and must be accounted for to the state. It is true the law did not require him to place the money on interest, but it did not prohibit him from doing so, and, as he did, the interest should go with and become a part of the principal.

"This case does not present such questions as might arise if the clerk had used the money in speculation and earned profits in that way. That might be such a diversion of the public funds as would amount to embezzlement; but the receipt of this money was legal, and its deposit in bank was certainly not illegal, and everything up to that point, it must be admitted, was done *virtute officii*, and not merely *colore officii*. The deposits were not made in his individual capacity, but as

Other Purposes," approved January 19, 1886, said Williams filed said bond for record with the clerk of the chancery court of Coahoma county, and after the said bond had been regularly recorded, he, as secretary of the said board, received said bond and kept the same in its possession, among other records and papers belonging to said board, until the expiration of his term of office.

The original bill further alleged that, by virtue of said bond, which was ratified, accepted, and adopted by himself, he entered upon the discharge of the duties of the treasurer, and received the salary and compensation provided by law, and did not disclose to the board of levee commissioners the fact that his said bond had not been signed by himself; that said bond served as his official bond during his entire term of office, and was recognized and treated as such, by both Williams and the Aetna Indemnity Company, and the board of levee commissioners. The original bill further alleged that the said F. I. Williams deposited the money or funds belonging to said board of levee commissioners with various banking

institutions; that the money was placed to his credit as treasurer of said board; that said banking institutions, with whom the said money was deposited or to whom it was loaned, paid to the said F. I. Williams interest on the public money so deposited; but, while the said Williams accounted to the said board for all moneys paid to him as treasurer by order of the board, he failed, neglected, and refused to account to the levee board for the money paid him as interest or commissions on the public funds. This interest he appropriated to his individual personal use, making no entry of the receipt thereof on the books of account, making no report thereof to the board of levee commissioners, and concealing from the said board the fact that he had received said interest. He never accounted to the board for the money so received by him, and now fails, neglects, and refuses to pay the sum over to the said board, or in any way to account for the same. These are the allegations of the bill which was demurred to; the demurrer, of course, admitting all the allegations of fact. The object of this suit was, of course, to compel Wil-

a clerk, and the interest was paid on those deposits. He was required to do nothing more to earn it,—indeed, he claims he did not even have any agreement with the banks that interest should be paid, but they simply followed the custom with former clerks. Upon what principle then can it be said that it was not received by virtue of his office? It being so received, and the bond being comprehensive enough to include it, the surety is liable."

In *State ex rel. Hanna v. Kimball*, Wilson, Super. Ct. (Ind.) 174, it was held that where the loaning and depositing of public money by a state treasurer is made a felony, neither he nor his sureties is liable on the official bond for the failure to pay over interest acquired in violation of such law. The court said: "When all the funds which, by the terms of the law, are properly in the hands of the treasurer, have been fully accounted for and paid over, to hold the parties liable for other funds that have been acquired in violation of law, and in acquiring which the treasurer may be prosecuted in criminal actions, is extending the terms of the bond beyond anything that the parties could reasonably be held to contemplate at the time of its execution."

In *Wilkes-Barre v. Rockafellow*, 171 Pa. 177, 30 L.R.A. 393, 50 Am. St. Rep. 795, 33 Atl. 269, it was held that interest paid by a banker to himself as city treasurer, on money which he, in accordance with an agreement with the sinking fund commissioners, had borrowed from a fund in his custody, is held by him as "treasurer," and his failure to pay it over to his successor is a breach of his official bond.

In *Simons v. Jackson County*, 63 Tex. 428, it was held that a bond of a county 30 L.R.A. (N.S.)

treasurer conditioned, according to statute, that he would safely keep and faithfully disburse the school fund according to law, and pay such warrants as might be drawn on said fund by competent authority, would make the sureties upon such bond liable for any misappropriation of the school fund of any description, without reference to the source from which it might be derived, and therefore make them liable for the misappropriation by the treasurer of interest on bonds procured through the sale of school lands, or interest upon notes received for the purchase money of such lands.

The receiving by a state treasurer, for his private advantage, of interest upon state funds from banks with which the funds were deposited, was not an offense at common law. *Re Breene*, 14 Colo. 401, 24 Pac. 3.

A case of interest in this note, but not strictly in point, is *New Haven v. Fresenius*, 75 Conn. 145, 52 Atl. 823, where it was held that a city treasurer who, in contravention of a statute providing that all city funds shall be deposited in such bank or banks as shall be designated by the board of finance, deposits city funds in a bank which does not pay interest, when in fact the board of finance had designated as the depository an interest paying bank, is liable for the resulting damages to the city.

Another case equally interesting, but also not strictly in point, is *Hamilton County v. Cunningham* (Neb.) 127 N. W. 1060, holding that a county treasurer is not liable on his bond for interest which, because of his inability to find banks to take the public funds, he has been unable to collect.

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liams to pay the board the moneys received by him as interest. To this original bill, Williams and the Aetna Indemnity Company filed separate and distinct demurrers. These demurrers were both submitted to the court below on one hearing, and are to be so considered by this court.

The questions presented for decision by these demurrers are as follows: First, are the matters involved in this allegation properly cognizable by a court of equity? Second, has the said revenue agent a right to maintain this suit, suing for the board of levee commissioners? Third, does the fact that the principal, Williams, failed to sign his official bond, render the instrument void as to the Aetna Indemnity Company, which did sign it? Fourth, if the bond in the case is void, does the chancery court lose its jurisdiction, or has it the power to determine the question as to the liability of the principal, without regard to the bond? Fifth, is the surety on this official bond liable for interest received on the public funds by the principal, Williams? Sixth, is the treasurer of the levee board required to pay into the treasury money received by him as interest on the funds intrusted to his keeping? We entertain no doubt whatever that, under § 161 of the Constitution, the chancery court had jurisdiction to try this case, it being a suit on the bond of Williams, a fiduciary and a public officer. Section 556 of the Code of 1906 is a re-script of § 161 of the Constitution of 1890. The proposition that the revenue agent is not the proper party to maintain this suit is answered completely by § 4730 of the Code of 1906, in which the duties of the revenue agent are described, and by which it is made the duty of the revenue agent to investigate the accounts of levee board officers, and to maintain suits against them. This power has been recognized by this court already. *State Revenue Agent v. Hill*, 70 Miss. 106, 11 So. 789.

Turning to one of the propositions now most seriously urged by the appellee to sustain the action of the court below, which sustained the demurrers and dismissed the bill, to wit, that the bond was void because Williams never signed it, we are clearly of the opinion that this contention cannot be maintained successfully under our statutes and decisions. It is to be noted that the surety in this case became such for a valuable consideration, \$300 per annum. The case mainly relied on by the appellee is the case of *State v. Martin*, 56 Miss. 108. The case was decided in 1878 under the Revised Code of 1871. The Revised Code of 1880 materially changed the law regarding liability on official bonds. Section 403 of the Revised Code of 1880

provided the condition of official bonds, and then added that this provision was declaratory, only, and that a failure to observe the form therein prescribed should not vitiate any official bond, but that all official bonds should be valid and binding in whatever form they might be taken, whether in the proper penalty or without any penalty, whether correct or incorrect in their recitals of any kind, whether properly payable or not, and whether approved by the proper officer, or not approved at all, and whether irregular in any other respect whatever, if only such bonds should be delivered as the official bond of the officer and serve as such. This section expressly provided that such bonds should be obligatory on everyone who should subscribe them as such. This provision was not in the Revised Code of 1871. Section 403 of the Code of 1880 is § 3463 of the Code of 1906, and was § 3055 of the Code of 1892. The obvious purpose of the legislature in the passage of this section of the three Codes of 1880, 1892, and 1906, was to make an official bond binding on all who subscribed it, without regard to any irregularity whatever, and whether the instrument should be signed by the principal or not. This last point, which is conclusive of the contention here, was expressly held in *Gloster v. Harrell*, 77 Miss. 793, 23 So. 520, 941, 27 So. 609. This case is much stronger for appellants than the *Gloster Case*, in which also there was a demurrer, because in the *Gloster Case* it was admitted that the bond was not signed or adopted by the principal Ratchiff, and that he did not request the sureties to sign it, and that he did not even know that any of the sureties had signed it; whereas, in this case, the allegation, admitted by the demurrer, is that the Aetna Indemnity Company signed at the instance and request of Williams, and that Williams ratified and adopted the bond, and that he himself, for the board, paid the surety \$300 per annum. The fact, therefore, that Williams failed to sign the bond is of no avail to the appellees.

It must be kept in mind that the bond in this case is a joint and several obligation, and this is an answer to several cases cited in brief of learned counsel for appellees; as for example, *Sacramento v. Dunlap*, 14 Cal. 421, and *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758. The bonds in those two cases were joint, and not several, nor is the statute of California identical at all with our statute. Section 3463, of the Code of 1906. The liability of Williams as treasurer was fixed by the law, and was not affected by his failure to subscribe the bond. Under our statutes, the plain purpose of § 3463 in the Code of 1906 was to hold both

the principal and the sureties on the official bonds liable without any regard to irregularities whatsoever, if only the bond served as the official bond during the term for which it was given. The purpose of the law was to declare emphatically that no official, and no surety on any official bond, should be relieved of liability thereupon, provided only that such bond was accepted, and that such bond served as the official bond intended by law. The statute is grounded in the highest possible considerations of justice and right. It is not to be tolerated that Mr. Williams, or the surety here, shall come into a court of conscience, when this official bond had served the same purpose precisely that the bond would have served had he signed it, and quibble about liability with the state or the levee board, whose treasurer he was and whose funds he handled. It comes with poor grace from the *Ætna Indemnity Company*,—this technical quibbling,—when it knew, or had every reason to know, that the bonds had not been signed by Williams, and when it was scrupulously careful to collect every year its \$300 paid to it for its signature to the bond. There was not the slightest obstacle to its ascertaining the fact that Williams had not signed, by the exercise of the very slightest degree of care. We said, in the case of *Gloster v. Harrell*, and we reiterate now, that "it is not for the treasurer or his sureties, the money of the town being traced to his hands by other competent evidence, to find shelter under the absence of a mere receipt warrant, or the fact that his bond was approved by resolution instead of ordinance; neither he nor they can be heard to make such defense."

Another contention of learned counsel for appellees is that the bond is void because it contains conditions not prescribed by the statutes. In other words, because it contains the following conditions: "And it is further provided that the said surety shall not be liable to the obligee by reason of public moneys being now deposited, or hereafter placed or deposited with any bank depository or depositories it being the true intent and purpose of this bond to indemnify said obligee from any loss by reason of the personal acts only of said principal, to the extent of the penalty of this bond, subject to the terms, covenants and conditions thereof." But the bond had the proper condition, that said Williams "should properly account for and dispose of the money coming into his hands for the Yazoo-Mississippi Delta levee board, and should faithfully perform all other duties devolving upon him as such treasurer." The act of 1884 (*Laws 1884*, chap. 168), providing for

the creation of the levee board and fixing the condition of this bond, provided that the treasurer should give bond "conditioned for the prompt and efficient discharge of the duties required by him, to be performed under the provisions of this act for the safe-keeping, accounting for, and paying over all moneys, property, or effects that may come into his custody." It is perfectly obvious that the condition of the bond as written is a substantial compliance with the condition prescribed above by the said act of 1884. The bond as executed had the condition the law required; and the addition to the condition of the bond, which we have hereinbefore set out, is mere surplusage. If the bond contained, as executed, the conditions which the law required, the sureties can neither add to, nor detract from, those conditions by anything they may choose to insert. The law fixed the liability of the treasurer and of the sureties, and the law prescribed the exact conditions on which liability should attach, and it is not for the principal nor for the sureties, nor for both, by any evasions or subtuges or adroit efforts to escape the law, to add anything that should have any effect on the conditions in the bond required by the law. The law declares all such surplus conditions absolutely void, and this is expressly laid down in the case of *Johnson v. Erskine*, 9 Tex. 1, cited by learned counsel for appellees. This case was decided after the case of *Mays v. Lewis*, 4 Tex. 1, and *Lawton v. State*, 5 Tex. 270. And in addition to all this, the express language of the § 3463 of the Code of 1906 ends all controversy along this line. So, as the conditions in the bond do not provide for the performance of an act in violation of the law, the form of the conditions is immaterial, provided only the bond served its office as his bond. In the case of *State ex rel. Mitchell v. Smith*, 87 Miss. 551, 40 So. 22, we said: "When one signs what purports and is intended to be an official bond, whether as principal, obligor, or surety, the law writes in all necessary recitals. No other interpretation of the statute can subsist without disturbing the whole governmental system, and ignoring the plain intentment of the legislative department." We think § 3463 applies to the bond of the levee treasurer as well as to all other official bonds, and it is immaterial as to whom the bond of the treasurer was payable, the state or the levee board. We held that this statute applied to a municipal treasurer, although his bond was payable to a municipality. *Gloster v. Harrell*, supra. There can be no sort of doubt, on any rational view, that this § 3463 of the Code of 1906 does apply to the bond of the treas-

urer of the levee board, and that such bond is an official bond, within the meaning of that section. See, in this connection, *United States Fidelity & G. Co. v. Union Trust & Sav. Co.* 142 Ala. 532, 38 So. 177.

Consider for one moment the preposterousness of the claim of Williams and of his surety. This surety received the \$300 per annum every year through Williams himself, as the secretary and treasurer of this board. Williams drew his salary regularly as such treasurer. He exercised full authority and control of the funds of this board, which were committed to his charge by virtue of this bond. In other words, from the beginning to the end of his term of office, he exercised in all respects the same authority and control over these funds, and in all other respects as treasurer, that he could possibly have exercised had he signed the bond, and had it been in absolutely perfect technical harmony with the statutes. He was bound to have known that he had not signed the bond, and, under the facts of this case, this surety company was also bound to have known that this bond had not been signed by Williams. To argue to the contrary is superficial to the last degree, and will not bear analysis.

Williams was both secretary and treasurer of this board. As secretary, he was the lawful custodian of all records, bonds, etc., belonging to said board. At his election, he applied to the *Ætna Indemnity Company* to become his surety. That company did so for a valuable consideration, and properly executed and delivered to Williams the bond. Upon receipt of this bond, Williams had it filed and recorded by the clerk of the chancery court of Coahoma county. When it was recorded, it was returned to him as secretary of the board, and was held by him until the expiration of his term of office. By authority of this bond, he collected his salary, received and controlled hundreds of thousands of dollars of the people's money, and enjoyed all the privileges of the office. Never once did he indicate to the board that he had failed to sign this bond. In the face of these facts it is worse than idle for either Williams or the surety company to attempt to escape liability on the ground that the bond was not signed by Williams. No such defenses will be tolerated in a court of conscience, on the facts in this record.

Since we hold that the bond was not void, it is, of course, unnecessary to discuss the question whether, if it had been void, and surety released, equity would have had any jurisdiction.

We come now, after disposing of these preliminary matters, to the real point in this case, the soul of the whole contro-

versy, and that question is: Can Williams and his surety be held for the interest he received for the use of this money by the bank? The duty which the law—Act 1884, § 6—put upon Williams was, amongst other things, "to safely keep, account for, and pay over all moneys, property, or effects that might come into his custody as treasurer, under that act and by direction of said board, as said board might require or direct." This obligation the law wrote into his bond. In addition to the condition just above recited, it is further provided by § 6 of the act of 1884 (*Laws 1884*, p. 140, § 6) as follows: "In addition to the duties herein specifically required of him, it shall be the duty of the treasurer to receive, safely keep, and account for all moneys required to be paid to, or received by, him, by the provisions of this act or by the direction of said board; and all other moneys, property, and effects for which he is properly accountable as such treasurer." We think the necessary intendment of this concluding clause was to hold the treasurer liable for everything that might come into his hands by virtue of his office. The act first made him accountable for any money paid to him by virtue of any act of the legislature. It then made him accountable for all moneys which might come into his hands in the usual way, and then, out of abundance of caution, this last clause was added, providing that he should be liable for all other moneys for which he, as such treasurer, might be accountable.

The appellees contend that the interest collected by Williams came into his hands *colore officii*, that he got it as a result of wrongdoing, and that the surety cannot be held liable therefor, any more than the surety could be held liable for the act of the treasurer in robbing a bank or holding up a train. This court disposed of this contention as applied to the facts in this case in the following language in *Lewis v. State*, 65 Miss. 468, 4 So. 429: "There is much refinement and quibbling in the books in behalf of sureties on official bonds, who are sought to be held responsible for the misconduct of their principal, as to whether the act of the officer was done *colore officii*, or *virtute officii*. . . . While the liability of sureties is not to be extended beyond the terms of their engagement, the public is entitled to some consideration as well as the voluntary sponsors of unfaithful public officers, and it must be true that if an officer, under bond to faithfully discharge the duties of his office does an act as such officer injurious to the county or to others, in regard to a subject over which he has jurisdiction and control, his sureties cannot escape responsibility for

the act no matter by what technical name it may be called."

In the same case, it is said, at page 472 of 65 Miss., speaking of the circuit clerk: "Construed according to its manifest scope and legal import, and with reference to the subject-matter to which it relates, the bond was a contract by which Bracey and his sureties covenanted and agreed, in effect, not only that he would faithfully perform the duties enjoined by law, but that he would not, by virtue or under color of his office, commit any illegal act, to the injury of the county or others. Indemnity to this extent is within the terms of the bond and the contemplation of the law which required it to be given." Again, in the same case, at page 473 of 65 Miss., the following passage is quoted with approval from the case of the People v. Treadway, 17 Mich. 480: "If such an officer is to be regarded as acting unofficially whenever he violates his duty, it is not easy to see what object there can be in requiring official bonds. They are not meant to be mere formalities, and they can only be made to secure against the consequences of some sort of misdoings. Their object is to obtain indemnity against the use of an official position for wrong purposes, and that which is done under color of office, and which would obtain no credit except from its appearing to be a regular official act, is within the protection of the bond and must be made good by those who signed it." We think this quotation states the principle which is the soul of the whole controversy on this subject. Neither the officer nor his sureties can be liable while he has violated no law; and if it is to be held that the mere fact that he has, in his official capacity, violated some law, constitutes the release of the sureties, then the very object for which the bond was given fails, and there had just as well be no bond at all.

The argument here, in large part, is that, because § 29 of the acts of 1884, approved February 28, 1884, made it a misdemeanor for anyone intrusted with the custody or disposition of any money intrusted to his care by virtue of his office, to use such money for his own benefit, therefore, the sureties are not liable if the treasurer violates this section; and this contention has two branches: First, that the condition of the bond itself is, as provided by law (§ 3463 of the Code of 1906), that official bonds shall be valid except "so far as they may be conditioned for the performance of acts in violation of the laws of the state;" and, second, "that it never could have been within the contemplation of the sureties that they should become liable for the acts of Williams, the treasurer, which amounted 30 L.R.A. (N.S.)

to a violation of any law." So far as the first proposition is concerned, it has no application to the condition of the bond involved. Of course, if there was a condition in the bond providing for the violation of some law, the condition would be utterly illegal, and sureties would not be bound for a violation of such condition. This is not that sort of case. There is no statute prohibiting the treasurer from depositing the funds in a bank, nor was there any statute prohibiting his contracting for interest, provided he had done what he ought to have done, contracted for the interest to be paid to the levee board, which owned the money. The treasurer, in depositing the money in the bank, deposited it by virtue of his office, under authority of his office, and was fully within the right and law of his office, in so doing. His wrong consisted in abusing that power by making the interest payable to himself instead of to his principal, whose money he had loaned. The Renfroe Case, *infra*, decided in Georgia, is wholly unlike this case in this respect, on its facts, though we do not desire to be understood as approving the principle of that case in any respect.

As to the second proposition above, that it was not within the contemplation of the sureties in this case that they should become liable for an act of Williams in violation of the law, the answer is that the surety company accepted it with the knowledge of the law as set forth in § 6 and § 29 of the act of 1884 (Laws 1884, p. 140). Section 6 provided that the treasurer should execute a bond "for the faithful performance of the duties of his office, and also conditioned for the prompt and efficient discharge of the duties required of him to be performed under the provisions of this act, and for the safe-keeping, accounting for, and paying over all moneys, property, and effects that may come into his custody and possession under this act and by direction of said board, as said board might require; and it contained this further provision: "In addition to the duties herein specifically required of him, it shall be the duty of the treasurer to receive, safely keep, and account for all moneys required to be paid to, or received by, him, by the provisions of this act or by the direction of said board; and all other moneys, property, and effects for which he is properly accountable as such treasurer." The surety knew, when it signed the bond, that this was the law of the bond, and that Williams was, by the conditions aforesaid last recited, especially required to account for all other moneys for which he was properly accountable as treasurer, and to pay over to the board all moneys required to be paid over by the law.

These moneys coming into his hands, were the money and property of the board, and not his money, and the interest, which was a mere accretion on this money, was payable, like the property to which it was an accretion, to the board whose property the same was. Because thereof, the surety knew of these conditions in the bond, and because these conditions required the treasurer to pay over all increments on the fund to the levee board as well as the principal, this defense is unsound. The act of Williams in depositing the money in the bank was legal, and an act done *virtute officii*; the abuse being his applying the interest to his individual use in violation of § 29. The case of *State v. Harney*, 57 Miss. 863, and of *Adams v. Saunders*, 89 Miss. 784, 119 Am. St. Rep. 720, 42 So. 602, 11 A. & E. Ann. Cas. 327, are direct authorities in support of this proposition, that the act of Williams in taking this interest for his own use was an illegal act, done however, by virtue of his office, and an act that could not have been done except by virtue of his office, and because he was such treasurer and handled this vast sum of money. What all the world knew, this court certainly knows, to wit: That the moneys which Mr. Williams deposited in the bank came from and through the levee board, whose property the money was.

One of the authorities chiefly relied on by the counsel for the appellees to show that the act of Williams in this case in taking the interest payable to himself was done *colore officii*, but not *virtute officii*, is the case of *State, Allen, Prosecutor, v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54, in which it was gravely held that a sheriff who, having an execution against A, levied upon the property of B, was not thereby guilty of a breach of his official bond, and that his sureties were not liable. Such nonsense as this has long since been exploded by the march of modern jurisprudence. Mr. Freeman, in his note to this case, at pages 64 and 65, states that the weight of authority clearly shows the contrary proposition from that laid down in the principal case, to be the law. There can be no rational doubt, on the allegations of this bill, that this money of the levee board was loaned by Williams, as treasurer, under and by virtue of his office, and because he was such officer, and the argument that it was not so done is wholly unsatisfactory on principle or sound authority. But the learned counsel for the appellees have two other contentions upon which they earnestly insist: First, "that Mr. Williams was an absolute insurer of all levee board money which came into his possession or under his control by virtue of

his office, and therefore was not liable to account to his principal for this interest." And second, that the legal title to all moneys which thus came into his possession vested in him as an individual, and that, being an insurer of such money, the relationship of debtor and creditor immediately arose between him and the levee board, and therefore he was only legally liable to account for the exact amount so received by him, and not any interest.

The leading authority in support of these views is the case of the *State v. Walsen*, 17 Colo. 170, 15 L.R.A. 456, 28 Pac. 1119. Indeed, this is the only case directly in support of these views. The states of Indiana, Kentucky, Colorado, and the territory of New Mexico, in effect, sustain this doctrine, resting their decisions, however, not on general principle wholly, but upon their particular statutes. The Georgia case (*Renfroe v. Colquitt*, 74 Ga. 618) rested in part upon a special statute, but may be classed as substantially supporting this view. All the authorities along this line are reviewed in the case of *McFetridge*, 84 Wis. 473, 20 L.R.A. 223, 54 N. W. 1, 098, and this whole line of reasoning repudiated as utterly unsound. The courts of the states of New York, Ohio, and the territory of Oklahoma, and Wisconsin, held the direct opposite of the Colorado supreme court, and, after a most careful examination and comparison of these conflicting authorities, we announce our approval of the doctrine of the *McFetridge* Case, and our repudiation of the doctrine of the court of Colorado as announced in the *Walsen* Case. See *Richmond County v. Wandel*, 6 Lans. 33; *Eshelby v. Cincinnati Bd. of Edu.* 66 Ohio St. 71, 63 N. E. 586; *Thompson v. Territory*, 10 Okla. 409, 62 Pac. 355; *McFetridge* Case, *supra*. And see also specially *United States v. Mosby*, 133 U. S. 273, 33 L. ed. 625, 10 Sup. Ct. Rep. 327, in which the United States Supreme Court approves the doctrine of the *McFetridge* Case. The Supreme Court of the United States said that the moneys in that case were public moneys, and that any interest on them was an increment belonging to the owner of the funds, the government, and it expressly stated that, whilst the counsel in that case was not required to put the funds out at interest, yet, if in fact he did, the accretion belonged to the government. The supreme court of New York, in the *Wandel* Case, *supra*, said very pertinently: "The notion that a public officer may keep back interest which he has received upon a deposit of public moneys, as a perquisite of office, is an affront to law and morals [and such act] . . . is nothing less than embezzlement." The great underlying principle here is that the

interest on this money logically, legally, and necessarily belongs to whoever owns the money. The use of that money earns the interest. The interest is a mere increment to the principal fund, and it is impossible, on any clear thinking in logic or in law, to escape the conclusion that the interest is necessarily payable to the owner of the principal fund. Whenever, therefore, the question is settled as to who owns the principal fund, all the rest follows without difficulty. Nothing more is necessary to show who is the owner of this fund than a reading of our statutes. Always and everywhere, public money is referred to and treated as the property of the state or the county, or the levee board, etc., etc. In no just legal sense can it be possible to say that the treasurer, Williams, was the owner of this money; that he had the legal title to this money in the sense that the money was his absolutely. He is the custodian of the money. He handles the money, he deals with it, but he has the custody, he handles it, deals with it for and on account of his principal, the levee board. The money is the money of the levee board. If Williams died, the money would not go to the administrators of his estate as Williams's money. It would pass into the hands of his administrator temporarily only; but it is made the statutory, legal duty of his administrator to promptly pay over the money to the proper authorities. Sections 3485 and 3486 of the Code of 1906. See *Fogg v. Bank of Friar's Point*, 80 Miss. 750, 32 So. 285, a case which supports the appellant, not the appellee, and shows that the money is the property of the levee board.

It is a very singular confusion of mind into which some courts have fallen, when they say, as is argued for appellee, that, if an officer is absolutely bound as an insurer, therefore any interest which he receives on the money is his, and not the state's. As well remarked by Judge Newman, quoted in the *McFetridge Case*: Nobody ever heard of the claim that a common carrier, by reason of its absolute liability, became the owner of the goods it carried. And in the main case (84 Wis., at page 517) the court says: "While such absolute liability of the treasurer will be assumed for the purposes of the case, it seems to us that no such conclusion necessarily results therefrom. The treasurer may well be held liable absolutely for all moneys of the state coming to his hands, and be held liable also for interest on the deposits in question. Stated in another form, such absolute liability does not necessarily estop the state to maintain that such interest was received by the treasurer by virtue of his office, and 30 L.R.A. (N.S.)

belongs to his office." And this we think is plainly sound. It is a complete *non sequitur* to say that, because Williams was an absolute insurer, therefore the interest belonged to him. The two principles have no relation whatever to each other. Once settled clearly and definitely whose money the principal sum was, and the interest necessarily belongs to that person as an increment to the principal fund, and to argue to the contrary is simply to lose one's self in a metaphysical fog of sophistry, failing to give effect to the central principle of right and justice making the interest the property of the party who owned the principal sum. As said by the court in the case of *McFetridge* again: "It has already been held herein that the public funds were lawfully deposited by Treasurer *McFetridge* with the banks, and that he lawfully received from such banks compensation by way of interest for the use of such deposits." Under those circumstances, and in the absence of any statute separating the interest from the funds and diverting it to other uses, such interest was an accretion or increment to the fund, thus becoming a part of it, and logically and necessarily belongs to the owner of the fund, to wit, the state.

It is immaterial that the treasurer stipulated for interest on the deposits, or that the banks paid him such interest, or that both the treasurer and the banks thought he should retain the interest as his own, believing that he was entitled thereto. Such intention and belief cannot affect the ownership of the interest, or its essential character as a portion of the public funds in the hands of the treasurer. Notwithstanding such intention and belief, the interest was, in fact, paid to the said treasurer, and belonged to his said office, within the meaning and intention of the bond in suit. A lawful act cannot be rendered unlawful merely because the actors intended to follow it by an unlawful act. So, when the treasurer lawfully received money which of right belonged to his office, he received it by virtue of his office, and cannot, by forming and executing an intention to retain the money as his own, devert the act of receiving the money of its official character. It remains that he received it *virtute officii*. In the light of these principles, the contentions above referred to by the learned counsel for the appellee all fall to the ground. In the *Furlong Case*, 58 Miss. 717, the act was illegal. The act there of depositing the money was not illegal, and the citation of the *Furlong Case* is beside the mark. In the *Eshelby Case*, supra, it was said: "It does not necessarily follow [from the absolute liability of the treasurer] that funds

coming into the hands of the treasurer are his, nor that upon the receipt of money in his official capacity the relation of debtor and creditor is established between him and the district. To the contrary, it is quite clear that instead of being the debtor of the district, he is its treasurer, the custodian of its funds, and that he acquires custody of the funds without acquiring title to them."

Speaking of its own statutes, which for this purpose are just as our own, the court, in the *McFetridge Case*, *supra*, says: "From beginning to end, they are entirely inconsistent with the theory that the legislature intended by the enactment of any of them to vest the state treasurer with the legal ownership of the public moneys which come to his hands, thus making him merely the debtor of the state in respect thereto. If such were his relation to the state, it would be difficult to show that such funds were not subject to be seized for his debts, or, in case of the death of the treasurer in office, that the same would not go to his administrator as part and parcel of his estate; the state being, perhaps, a preferred creditor. It is inconceivable that any legislature could intend such results, and there is nothing in any statute which forces the conclusions that they did so. A close analysis of the above statutes, or any extended discussion of them, is quite unnecessary, for a perusal of them is sufficient to carry conviction to the mind that the legislature never intended to divest the state of its title to the public funds in the hands of its treasurer, and the consequent control over those funds which results from ownership thereof."

The learned counsel on both sides in this case have filed briefs of signal ability, showing the most exhaustive research. It follows that the court below erred in sustaining the demurrers of the defendant Williams and the defendant the *Ætna Indemnity Company*. These decrees are therefore both reversed, both demurrers overruled, and the cause remanded, with leave to answer within thirty days from the filing of the mandate in the court below.

Per Curiam: The above is adopted as the opinion of the court.

Reversed and remanded.

KENTUCKY COURT OF APPEALS.

JAMES SMITH, Appt.,
v.

W. E. FIELDS.

(— Ky. —, 129 S. W. 325.)

False Imprisonment—advice of attorney—bias.
30 L.R.A.(N.S.)

1. Advice by an attorney to his client during a trial, that an adverse witness is guilty of false swearing, is not so unbiased as to justify the client in acting upon it in procuring the arrest of the witness for such offense.

Same—suppression of facts.

2. Advice by a reputable attorney that a witness was guilty of false swearing will not constitute probable cause to justify the securing of a warrant for his arrest, if all the facts bearing upon the question were not stated to the attorney.

(June 17, 1910.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Fleming County entered on a directed verdict for defendant in an action brought to recover damages for alleged malicious prosecution of plaintiff by defendant. Reversed.

The facts are stated in the opinion.

Messrs. Thomas D. Slattery and Paul Heflin, for appellant:

Advice of counsel is not a defense to an action unless the facts are fully and fairly laid before the counsel.

Gatz v. Harris, 134 Ky. 550, 121 S. W. 462.

A party who consults an attorney at law in regard to his legal right to bring an action against another, when the attorney is interested in the subject-matter of the suit, and known by him to be so interested when consulted, cannot show the opinion of the attorney as a probable cause for bringing the suit, although the opinion is honestly given.

Newell, Malicious Prosecution, p. 314; *Bartlett v. Hawley*, 38 Minn. 308, 37 N. W. 580.

Messrs. J. H. Powers and O. R. Bright for appellee.

Nunn, J., delivered the opinion of the court:

This action was instituted by appellant for damages for the malicious prosecution of him without probable cause. The facts leading up to the prosecution of appellant occurred, in substance, as follows: Dr. J. J. Cook in his lifetime owned a farm adjoining appellee's. There was a division fence between the farms, which was erected before either Cook or appellee became the owners of their respective places. This fence had become somewhat dilapidated, and Cook tore half of it down, and put up a wire fence. Two or three years after this, appellee instituted an action in the Mason county quarterly court against Cook's ex-

Note.—As to advice of counsel as defense to an action for malicious prosecution, see note to *Van Meter v. Bass*, 18 L.R.A.(N.S.) 49.

executrices, he having died, for the value of the rails thus removed by Cook, appellee claiming that the whole fence belonged to him. The executrices answered, and denied the claim of appellee, and filed a counterclaim for \$150 in damages alleged to have been sustained by reason of the failure of appellee to erect a fence on his half of the line; that, by reason of such failure, appellee's stock went over the old fence and destroyed Cook's crops. The main issue was as to who owned the fence. The representatives of Cook claimed that it was a partnership fence, and appellee claimed that it was his. Cook purchased his land from Betsy Browning, and appellee, Fields, bought his from W. J. Hendrick. It was conceded by the parties that Hendrick erected the fence, and for that reason appellee claimed the whole of it. The representatives claimed that Hendrick erected the fence under a contract with Mrs. Browning by which she became a one-half owner thereof. Appellant in this action was introduced as a witness in that action in behalf of Cook's representatives. He testified that he lived upon and worked the Browning farm for many years; that Mrs. Browning asked him to see Mr. Hendrick about rebuilding this fence; that the old fence had rotted down and the line grown up in briers and bushes; that he saw Mr. Hendrick and he agreed to rebuild the fence upon condition that she would have the old fence removed and the briers and bushes cleared away, which was agreed to; that he, the witness, cleared away the briers and bushes and removed the old fence, and that Mr. Hendrick built the fence; that the work was done within a few weeks after the agreement was made with Mr. Hendrick. For the purpose of showing that no such conversation occurred between the witness and Mrs. Browning and that no contract was made with Hendrick, as stated, appellee testified in that case and also in the one at bar, that Betsy Browning died in the fall of the year 1891, and that the fence was built by Hendrick in the year 1892. He introduced a record, a copy of the petition filed in March, 1892, for the purpose of settling Mrs. Browning's estate, in which it was alleged that Mrs. Browning departed this life in the year 1891. He introduced another witness, at least in this case, who testified that he built the fence for Mr. Hendrick in the year 1892, and fixed the date of the birth of one of his children. It appears that two or three other witnesses testified in the Mason quarterly court that the fence was erected by Hendrick in the lifetime of Mrs. Browning, and that one or two colored men built it. Several witnesses testified in this action to the same effect. It appears that the trial in the

Mason quarterly court resulted against the claim of appellee, and Cook's representatives recovered on their counterclaim. Appellee appealed from that judgment, and on the day he did this he made an affidavit before a justice of the peace in that county, and obtained a warrant of arrest against appellant for false swearing in that he testified to a conversation with Mrs. Browning at a time when she was dead. Appellant was arrested in Fleming county, placed in jail there for a few hours, and then carried to Mason county and placed in jail until he could execute bond, which he did within a few hours thereafter. He waived an examining trial. The grand jury heard the evidence, but failed to indict him.

At the conclusion of the evidence in this case, the court gave the jury a peremptory instruction in behalf of appellee. The propriety of this instruction is the only question necessary to be considered. It will be observed from the above statement of facts that a sharp issue was made by the testimony, as to whether or not appellee had probable cause for having the warrant of arrest issued. If, in fact, Hendrick erected the fence in 1892, then appellee had probable cause to believe that appellant had sworn falsely and corruptly to the alleged conversation with Mrs. Browning; but, on the other hand, such may not be the case if the fence was erected in the lifetime of Mrs. Browning. We are of the opinion that the court did not give the instruction upon this ground, however, but upon the testimony which we will now consider. Appellee testified that, before causing the warrant to issue, he submitted the facts to an attorney who represented him in the case in the Mason county quarterly court, and also to a reputable attorney in Flemingsburgh, and they advised him that he had probable cause for the issual of the warrant. The attorney of Mason county testified that he represented appellee in the quarterly court trial, heard the evidence, and told appellee, during the trial, that Smith, appellant, was guilty of false swearing, but did not remember that he advised the issual of the warrant. He admitted that he had said to the attorneys for appellant about the time or before this action was brought that he had advised appellee against having the warrant issued. He also testified that he had a contract with appellee for a fee, whereby he was to get \$10 either way the case was decided, and \$15 if he won the case. The law is that, when a party institutes a prosecution on the advice of counsel properly obtained, the proof of such advice is a defense to an action like this. We do not mean to impune the motives of this attorney, but we are of the opinion that the ad-

vice given in the way it was and under the circumstances related did not show as a matter of law that it was given by a wholly disinterested and unbiased attorney, and was given during the excitement of the trial. His advice under the circumstances did not authorize the lower court to give the peremptory instruction. The other attorney consulted was a reputable lawyer in Flemingsburgh, Kentucky. Appellee testified that he did not remember whether or not he told this attorney all the facts testified to on the trial in the Mason quarterly court with reference to the issue above named; nor was the attorney able to state what facts appellee told him, but remembered that he told him what appellant testified and about obtaining a copy of the petition in the suit to settle Mrs. Browning's estate, and that appellee told him that the fence was erected in 1892, and, upon these facts, he gave it as his opinion that appellant had sworn falsely. He did not remember, however, that he advised the issue of the warrant.

In the case of *Lancaster v. Langston*, 18 Ky. L. Rep. 299, 36 S. W. 521, this court said: "Before bringing the action against Langston, Lancaster consulted a competent attorney, and, as he claimed, laid all the facts before him, who advised him that he had a cause of action and was entitled to the remedy pursued. Lancaster claims that he acted in good faith upon the advice which his counsel gave him. It was proper for the court to submit the question to the jury as to whether he obtained such advice from counsel, and as to whether he obtained it fairly and in good faith, acted upon it." In the case of *Gatz v. Harris*, 134 Ky. 550, 121 S. W. 462, the court said: "Advice of counsel is not a defense in an action for malicious prosecution unless the facts are fully and fairly laid before the counsel. If the real facts are not laid before the counsel, his opinion is no defense to an action for malicious prosecution. *Crawford v. Keyser*, 5 Ky. L. Rep. 693; *Burke v. Rhodes*, 13 Ky. L. Rep. 431; *Anderson v. Columbia Finance & T. Co.* 20 Ky. L. Rep. 1790, 50 S. W. 40; *Ahrens & O. Mfg. Co. v. Hoeher*, 106 Ky. 692, 51 S. W. 194. In addition to this, the advice of counsel will constitute probable cause only when reasonable diligence is used to learn the facts on which the advice of counsel is sought. In the case last referred to, the court said: 'He who consults an attorney about a matter affecting a third person ought to use that care which men of ordinary prudence would ordinarily use in matters of like magnitude. Less than this would not show good faith. Of course, it is absolutely necessary in questions of this sort that people should act upon the advice of counsel; but they must exercise, in 30 L.R.A.(N.S.)

doing so, reasonable care to get the truth before the counsel.' Upon the evidence it was a question for the jury whether Dr. Harris laid the facts fully and fairly before his counsel, and whether he had used reasonable diligence to learn what the actual facts were when he laid the matter before his counsel. The advice of counsel, when properly obtained, is a defense to an action like this, however erroneous the advice may be." Under the facts of this case and the authorities cited, the court erred in giving the peremptory instruction.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

NEW JERSEY COURT OF ERRORS AND APPEALS.

KATE FAULKNER, Resp't.,

v.

JOHN WASSMER et al., Appts.,

(— N. J. —, 77 Atl. 341.)

Sale — rescission — fraud — delay — effect.

1. A purchaser who has a right to elect whether or not he will rescind a sale because of material misrepresentations must exercise such right with reasonable promptness; otherwise, his delay in so doing will afford plenary proof of an election not to rescind, which is final. The delay to which

Headnotes by GARRISON, J.

Note. — Watver of purchaser's right to rescind contract for purchase of real property.

I. General rule, 872.

II. Mere delay.

a. In general, 874.

b. When delay excused.

1. Dismissal of prior suit, 875.

2. Pending litigation, 876.

3. Acts of vendor, negotiations, etc., 876.

III. Delay coupled with other acts, 877.

IV. Selling or offering property for sale, 878.

V. Leasing, etc., 878.

VI. Expressly recognizing contract, 878.

VII. Acceptance of deed with knowledge of defect in title, 879.

VIII. Miscellaneous, 879.

IX. What is sufficient knowledge, 880.

I. General rule.

A purchaser of real estate, upon obtaining knowledge that he has been defrauded in his purchase, may resort to an action at law to recover damages for the fraud, or he may, by an equitable proceeding, have the transaction set aside by a rescission of his

this probative force is given is that which arise from the vendee's failure to rescind during the period of time within which one would naturally act, who knew that to act effectively he must act promptly.

Same — action for deceit.

2. The distinction pointed out between the rescission of a contract and an action for deceit in respect to the compensation recoverable.

(July 8, 1910.)

APPEAL by defendants from a decree of the Court of Chancery in complainant's favor in a suit to rescind a contract and to recover the amount which had been paid thereon. Reversed.

Statement by Garrison, J.:

By a deed dated July 1, 1908, which was acknowledged and recorded on July 9, 1908, the appellants conveyed to Kate Faulkner,

the respondent, a house and lot in the town of Irvington, subject to certain restrictions that were set forth at length in the deed, and which the grantee had been told by the grantors were also set forth in all deeds previously made for lots in the same tract. On the following day—i. e., July 10, 1908—Albert Faulkner, the husband of the grantee, who attended to the business for his wife, learned that this statement was untrue, and at once spoke to the vendors about it, intimating that he could make trouble, to which their reply was to "go ahead." The case shows that by August 1, 1908, at the latest, the grantee was fully aware of the falsity of her vendors' statement and of all the facts upon which her right to elect to rescind the sale arose. No election to rescind was made until Mrs. Faulkner filed her present bill announcing such election and offering to deliver back the property with certain additions and improvements

contract of purchase. If he elect the latter remedy, he must rescind promptly, and thereafter consistently adhere to that course. It is fatal to the right to rescind unreasonably to delay taking steps to that end, or thereafter to treat the property as his own, or recognize the validity and binding effect of the contract. *Boyce v. Grundy*, 3 Pet. 210, 7 L. ed. 655; *Grymes v. Sanders*, 93 U. S. 62, 23 L. ed. 801, 10 Mor. Min. Rep. 445; *Shappirio v. Goldberg*, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. Rep. 259; *Scheffel v. Hays*, 7 C. C. A. 308, 19 U. S. App. 220, 58 Fed. 457; *Richardson v. Lowe*, 79 C. C. A. 317, 149 Fed. 625; *Old Colony Zinc & Smelting Co. v. Carrick*, 82 C. C. A. 347, 153 Fed. 173; *Cullum v. Bank of Alabama*, 4 Ala. 21, 37 Am. Dec. 725; *Beck v. Simmons*, 7 Ala. 71; *Barnett v. Gaines*, 8 Ala. 373; *Griggs v. Woodruff*, 14 Ala. 9; *Burkett v. Munford*, 70 Ala. 423; *Orendorff v. Tallman*, 90 Ala. 441, 7 So. 821; *Coleman v. First Nat. Bank*, 115 Ala. 307, 22 So. 84; *Fratt v. Fiske*, 17 Cal. 380; *Owen v. Pomona Land & Water Co.* 131 Cal. 530, 63 Pac. 850, 64 Pac. 253; *Southern P. R. Co. v. Choate*, 132 Cal. 278, 64 Pac. 292; *Evans v. Duke*, 140 Cal. 22, 73 Pac. 732; *Brown v. Gordon-Tiger Co.* 44 Colo. 311, 97 Pac. 1042; *Houston v. Hurley*, 2 Del. Ch. 247; *Lockridge v. Foster*, 5 Ill. 569; *Cox v. Montgomery*, 36 Ill. 396; *Patten v. Stewart*, 24 Ind. 332; *Sieveking v. Litzler*, 31 Ind. 13; *Colyer v. Thompson*, 2 T. B. Mon. 16; *Nealon v. Henry*, 131 Mass. 153; *Diabrow v. Jones*, Harr. Ch. (Mich.) 102; *Mestler v. Jeffries*, 145 Mich. 598, 108 N. W. 994; *Key v. Jennings*, 66 Mo. 356; *Lewis v. Brookdale Land Co.* 124 Mo. 672, 28 S. W. 324; *American Bldg. & L. Assn. v. Rainbolt*, 48 Neb. 434, 67 N. W. 493; *Pollock v. Smith*, 49 Neb. 864, 69 N. W. 312; *Kaufmann v. McLaughlin*, 24 Mich. 603, 54 N. Y. Supp. 160; *Knight v. Houghtalling*, 85 N. C. 17; *Annis v. Burnham*, 15 N. D. 577, 108 N. W. 549; *Vaughn v. Smith*, 34 Or. 54, 55 Pac. 99; *Dundee Mortg. & T. Invest. Co.* 30 L.R.A. (N.S.)

v. Goodman, 36 Or. 453, 60 Pac. 3; *Williams v. Thomas*, 7 Kulp, 371; *Smith v. Detroit & D. Gold Min. Co.* 17 S. D. 413, 97 N. W. 17 (statutory); *Precious Blood Soc. v. Elythe*, 102 Tenn. 40, 50 S. W. 759; *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831; *Hudson v. Waugh*, 93 Va. 518, 25 S. E. 530; *Trammell v. Ashworth*, 99 Va. 646, 39 S. E. 593; *Slothower v. Oak Ridge Land Co.* 2 Va. Dec. 506, 23 S. E. 466; *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 561; *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. 909; *State Bank v. Brown*, 142 Iowa, 190, 134 Am. St. Rep. 412, 119 N. W. 81; *Deutsman v. Kuntze* (Iowa) 125 N. W. 1007; *Flint v. Woodin*, 9 Hare, 622; *Jennings v. Broughton*, 5 DeG. M. & G. 139.

In *Grymes v. Sanders*, supra, Mr. Justice Swayne thus stated the rule: "Where a party desires to rescind upon the ground of mistake or fraud, he must, upon discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

In *Knight v. Houghtalling*, supra, the rule was thus stated: "He who would rescind a contract to which he has become a party must offer to do so promptly on discovering the facts that will justify a rescission, and while he is able of himself, or with the aid of the court, to place the opposite party substantially *in statu quo*; he must not only act promptly upon the first discovery of the fraud, if fraud be the cause assigned for the rescission asked, but he must act decidedly, so that his vendor may certainly know his purpose, and thereby have the opportunity afforded him to assent to the rescission, resume the property, and look out for another purchaser. In no case is he permitted to rescind when

made by her, for which repayment was demanded of the vendors in the following paragraph of the bill:

"Acting upon the faith of such representations, your orator changed her position, and did pay and lay out necessarily the following payments, repairs, and expenses in good faith upon the property so purchased by your orator, to wit: Cash paid for house and lot \$3,600, extra ground purchased to one side as part of same transaction \$175, building \$175, grading, sodding, hedges, and clothes poles \$20, wood-bin shelves and benches in cellar \$25, staining floor \$35, window screens and doors \$75, awnings \$75, window shades \$25, carpet (fitted to rooms) \$250, hose connections \$10, moving into house from Jersey City and prospective

moving out \$100, connecting gas stove \$5, time and labor making repairs and alterations \$150, fence across extra ground \$10, ground and porch chairs \$10, water meter \$14, making a total of \$5,154 paid out by your orator in purchase and establishing her family in and upon said lot and house, in addition to which your orator has been damaged and put to trouble and expense and time, lost opportunities of getting other residence property at a reasonable figure, and has been otherwise damaged and incommoded by reason of having been unsuccessful (by reason of fraud) in establishing herself and family in a neighborhood where the adjoining and other lots are fully restricted; and in being compelled to break up and move elsewhere."

he has continued to treat with his vendor upon the basis of the contract, after his discovery of the fraud practised upon him; and neither is it allowed him to rescind in part and to affirm in part, but if done at all, it must be done *in toto*."

In *Richardson v. Lowe*, supra, it was said: "Rescission of a contract on the ground of fraud is not a mental process undisclosed and unacted upon. It requires affirmative action immediately on its discovery. Some overt act and outward manifestation of the intention to clearly apprise the other party to the contract of the right asserted."

In *Precious Blood Soc. v. Elsythe*, supra, the court asserted that promptitude on the part of a purchaser of real estate, in order to rescind the purchase, was required; and added that once having disaffirmed, that course must be adhered to; vacillation is fatal to the right. A vendee cannot disaffirm and affirm. If he does any material act with knowledge of the fraud, which assumes that the transaction is valid, he will be presumed to have waived the fraud.

II. Mere delay.

a. In general.

The right of rescission may be lost to a purchaser of real estate by his failure to manifest an election to disaffirm the contract within a reasonable time after discovery of grounds therefor. What constitutes a reasonable time is determined from the circumstances of the case. Generally undue and unnecessary delay in exercising the power of rescission is evidence of an election to treat the sale as valid, and may, where not explained, be conclusive against the purchaser's right of rescission, especially where he is in possession of the real estate. *Orendorff v. Tallman*, supra; *Coleman v. First Nat. Bank*, 115 Ala. 307, 22 So. 84 (seven years); *Southern P. R. Co. v. Choate*, 132 Cal. 278, 64 Pac. 292 (seven years); *Evans v. Duke*, 140 Cal. 22, 73 Pac. 732 (four years); *Brown v. Gordon-Tiger Min. & Reduction Co.* 44 Colo. 311, 97 Pac. 30 L.R.A.(N.S.)

1042 (twenty-one months); *Dishrow v. Jones*, Harr. Ch. (Mich.) 102 (several months); *Hunt v. Blanton*, 89 Ind. 38 (five months); *Lewis v. Brookdale Land Co.* 124 Mo. 672, 28 S. W. 324 (six months); *Cox v. Montgomery*, 36 Ill. 396 (eighteen months); *Dundee Mortg. & T. Invest. Co. v. Goodman*, 36 Or. 453, 60 Pac. 3 (over three years); *Smith v. Detroit & D. Gold Min. Co.* 17 S. D. 413, 97 N. W. 17 (fifteen months); *Hagan v. Taylor*, 110 Va. 9, 65 S. E. 487 (eighteen years); *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831 (two years,—in the meantime innocent third person had acquired purchaser's note for purchase price); *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161 (five years); *Williams v. Maxwell*, 45 W. Va. 297, 31 S. E. 909 (three years); *Akerly v. Vilas*, 21 Wis. 88.

The effect of delay on the right of rescission was given considerable attention by the court in *Wicks v. Smith*, 21 Kan. 412, 30 Am. Rep. 433, which, however, involved the right of a vendor of real estate to rescind for fraud practised upon him by the purchaser. The question as to the effect of delay was, however, considered as applicable to that right generally, without reference to which party of the contract was seeking to exercise it. On this point the court said: "It is generally true that where anything of value has been received by the defrauded party, he must not only tender back all he has received, but the rescission must be prompt or within a reasonable time after the fraud is discovered; but mere delay in rescinding the fraudulent contract does not take away the right,—such delay being material principally as it furnishes evidence of an election to affirm." As sustaining this proposition, the court also quotes with approval from *Clough v. London & N. W. R. Co.* L. R. 7 Exch. 26, as follows: "In such cases the question is, Has the person on whom fraud was practised, having notice of the fraud, elected not to avoid the contract, or has he elected to avoid it, or has he made no election? We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if, in the

The decree of the court below was that the complainant was entitled to the relief sought for, and that "the prayer of her bill be and the same is hereby granted," that the sale be rescinded, and that the defendants repay to the complainant the purchase price with interest, and, in addition thereto, a further sum for improvements and so forth, to be ascertained by a reference to a master. From this decree the defendants have appealed.

The following is the opinion of Howell, V. C. (orally):

"This bill is filed by Mrs. Faulkner, the wife of Alfred Faulkner, against John Wassmer and Henry M. Radcliffe, for the purpose of rescinding a deed of conveyance of lands on Smith street, in the village of

interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or, if, in consequence of his delay, the position of the wrongdoer is affected, it will preclude him from exercising his right to rescind. Lapse of time without rescinding would furnish evidence that the defrauded party has determined to affirm the contract, and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined."

While the two cases immediately preceding state the general rule applicable alike to proceedings by a defrauded party to a contract, whether relating to realty or personalty, to rescind, as affected by his delay, it should be remembered, in applying this general principle to the right of a purchaser of real estate to rescind, that generally he is in possession of the real estate and receiving the fruits and benefits therefrom, and, hence, it is his duty promptly to exercise the right after obtaining knowledge of the facts authorizing it.

It is of the essence of the right of rescission that prompt action to that end be taken by the purchaser after obtaining knowledge of the facts upon which he relies for that relief (*Evans v. Duke*, supra); such right must not be slept upon. Prompt action is essential (*Slothower v. Oak Ridge Land Co.* 2 Va. Dec. 506, 27 S. E. 406); an unreasonable delay in rescinding after knowledge of the fraud is a waiver of the right (*Leiker v. Henson* [Tenn.] 41 S. W. 862); rescission will not be granted a purchaser of real estate guilty of inexcusable delay in seeking relief (*Hagan v. Taylor*, supra); he must rescind as soon as he discovers the defect; otherwise he will be deemed to have waived his right to do so (*Owen v. Pomona Land & Water Co.* 131 Cal. 530, 63 Pac. 850, 64 Pac. 253); and he must show that he has exercised reasonable diligence in ascertaining the facts and in seeking his remedy after discovery of the fraud (*Patten v. Stewart*, 24 Ind. 332).

But mere delay of three and one-half months, where possession of land is not taken by the purchaser and there is no

Irvington. The deed was dated on the 1st day of July, 1908, was acknowledged on the 9th day of July, 1908, and was recorded on the same day. It conveys to Mrs. Faulkner a lot of land on Smith street subject to certain restrictions which are fully set out in the deed, and are fully copied in the bill of complaint. The evidence shows that Mr. Faulkner first saw the land in question about the 4th day of May, 1908, and that within a day or two after that he saw Mr. States, who is a real-estate agent, and who was specially authorized by Mr. Wassmer and Mr. Radcliffe to make sales of the lands in question. The bill charges that Mr. Wassmer and Mr. Radcliffe were partners in the enterprise, although the lands which they were disposing of were held in severalty

proof of any change of conditions which will make a rescission inequitable, does not constitute a waiver. *Lightcap v. Nicola*, 34 Pa. Super. Ct. 189.

Where the purchaser of real estate was a stranger and a resident of another state at the time he discovered that the title to the property was not as represented, and at that time yellow fever was prevalent in the locality of the land, a delay of about seven months is not a waiver of his right to rescind. *Orendorff v. Tallman*, 90 Ala. 441, 7 So. 821.

A delay of about three years is not a waiver of the right to rescind, where the purchaser rescinded as soon as he had knowledge of the fraud practised upon him, and it did not appear that the rights of third parties had intervened, nor the position of the vendor substantially changed. *Grosh v. Ivanhoe Land & Improv. Co.* 95 Va. 161, 27 S. E. 841.

A delay of about four years after entering into possession of the purchased land does not constitute a waiver of the right to rescind for fraudulent representations as to the quantity thereof, where the offer to rescind was made within eight months after the purchaser had caused a survey of the land to be made, and thus for the first time obtained accurate knowledge of the fraud. *Quarg v. Scher*, 136 Cal. 406, 69 Pac. 96.

A delay of six months is not unreasonable where it does not appear that the fraud was sooner discovered. *Concord Bank v. Gregg*, 14 N. H. 331.

What is a reasonable time or undue delay in rescinding a contract for purchase of real estate, where the facts are not in dispute, is a question of law for the court; of course, when the facts are in dispute, the question is for the jury. *Davis v. Stuard*, 99 Pa. 295.

b. When delay excused.

1. Dismissal of prior suit.

Delay in rescinding a purchase of real estate by the purchaser does not always

by them. Mr. Faulkner had notice that the lands were restricted. He saw a large sign on one of the lots near the corner of Smith street and Clinton avenue, which contained the information that the land in that neighborhood was restricted land. In order to ascertain what the restrictions were, he went to see Mr. States, who showed him a typewritten copy of the restrictions, and stated to him that the land in that neighborhood was restricted in that manner; and Mr. Faulkner says in addition to that that Mr. States told him that the restrictions were matters of record. Some days after that, one evening while Mr. and Mrs. Faulkner and their daughter were examining the premises, Mr. Wassmer appeared, and there was still further conversation about the re-

strictions, and on those occasions, one or more of them, the extent of the tract of land owned by them and so restricted was talked about, and the extent and area of the restrictions discussed. The evidence indicates to my mind that probably Mr. Wassmer and Mr. Radcliffe intended to restrict the whole tract by a general scheme which was embodied in the typewritten statement that they gave to Mr. States to show to intending purchasers. Now that was the situation at the time that Mr. Faulkner paid the first \$25. That I think was on the 5th day of May, 1908, and Mr. Faulkner is chargeable with notice of restrictions of some sort or other by the receipt which he took at that time, because that states that the conveyance was to be made subject to restrictions,

amount to a waiver, but such delay may be explained by showing that the delay was consistent with his right to disaffirm the contract, and inconsistent with the theory of thereby affirming it. Thus, a bill by a purchaser of real estate to rescind a purchase is not demurrable for laches where it shows that a prior bill for the same relief was filed within three months from the discovery of the fraud; that this bill was dismissed for want of proper parties, and within a reasonable time thereafter the bill demurred to was filed. *Henninger v. Heald*, 51 N. J. Eq. 74, 26 Atl. 449.

The fact that a suit to rescind, commenced upon the day the purchaser obtained knowledge of grounds for rescission, was dismissed about a year thereafter, does not constitute laches where a new suit was commenced the day of the dismissal of the prior one. *Hartwig v. Clark*, 138 Cal. 668, 72 Pac. 140.

A delay of about three months on the part of a purchaser of real estate in commencing a proceeding to rescind a purchase is excused by showing that a similar suit was previously commenced in the United States court and discontinued upon a plea by defendant to the jurisdiction of the court. *California Farm & Fruit Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593.

2. Pending litigation.

Where a defect in title depends upon a question of fact, and litigation with reference thereto is assumed by the vendor, the vendee is entitled to await the outcome of such litigation before exercising his right to rescind for such defect. *Nealon v. Henry*, 131 Mass. 153.

And a purchaser of real estate who is merely a party with the vendor to a proceeding affecting the title thereto is not required in such suit to assert his right to the same; it is sufficient if he commences proceedings after the termination of the suit wherein the invalidity of the title of his vendor is determined. *Olschewske v. King*, 43 Tex. Civ. App. 474, 96 S. W. 665.

The mere assertion of an adverse claim

to real estate by a stranger does not justify a purchaser thereof in pronouncing the title bad, and thereupon rescinding his contract of purchase; and where an action is brought upon the adverse claim, and the vendor assures the purchaser that there is nothing in the claim, and after an adverse judgment in the lower court, he makes similar representations and gives the purchaser to understand that he has appealed from such judgment, and that, upon such appeal, he will establish his title, a delay by the purchaser of three months after the rendition of the judgment, before rescinding, does not show that he had not exercised reasonable diligence in his rescission. *Wilcox v. Lattin*, 93 Cal. 588, 20 Pac. 220; *Lattin v. Wilcox* (Cal.) 29 Pac. 228.

Under very similar circumstances, in *Read v. Loftus*, 82 Kan. 485, — L.R.A. (N.S.) —, 108 Pac. 850, the court said that the question whether the purchaser of real estate had waived objections to the title was clearly one of fact, and added: "The mere circumstance that he took and held possession of the property is not conclusive. Possession was expressly stipulated for in the contract, and his continuance in holding it is explained by the repeated promises of the defendants to remove the objections. The nature of the remedy which they proposed, namely, a suit to quiet title, would necessarily require time, and a reasonable delay for that purpose should not be construed as a waiver until some act was done or notice given evincing an intention to refuse to comply with the promise."

3. Acts of vendor, negotiations, etc.

The failure to obtain knowledge of a defect in the title of real estate purchased, for about four years after the purchase, and a delay thereafter of about nine months before commencing proceedings to rescind, do not constitute laches, where the land is located in another state, and the vendor has lulled the purchaser in a false security by repeated representations that the title is all right. *Campbell v. Spears*, 120 Iowa, 670, 94 N. W. 1126.

a copy of which had been previously shown to him by Mr. States in his conversation with Mr. States; but I think, on the whole, that Mr. Faulkner, acting on behalf of his wife, and Mrs. Faulkner, acting on her own behalf, were justified in believing that the tract of land which was pointed out to them by Wassmer and by States as the tract of land that was owned by Wassmer and Radcliffe was restricted throughout in accordance with the restrictions that were shown to them by Mr. States. They were under no obligation (as contended by the complainant) to go to the public records to find out whether the restrictions were on record. They had the right to rely on the statements made to them by Mr. States and the owner of the property.

"Now I take it that there was a representation made by Mr. Wassmer and Mr. Radcliffe, either personally or through their agent, that this whole tract was restricted in accordance with the plan of restrictions disclosed by Mr. States. I think that was a statement which led the Faulknors to make the purchase. I think that was a statement of material fact, and that a misrepresentation in regard to it would entitle them to relief. Now what is meant by restrictions, restrictions of the whole tract? Why surely not something that is temporary, but something that is permanent, something that runs with the land, something that is enforceable by somebody, and in this case I should say enforceable by Mrs. Faulkner, the purchaser of a portion of the

Where the vendee of land under an executory contract paid all of the purchase price except \$1, which was to be paid when the deed thereto was executed by the vendor, which was to be executed when he filed a plat of the land, a delay by the vendee of about eight years is not a waiver of his right to rescind, where he was waiting for the vendor to execute the deed and file a plat of the land, he commencing his action to rescind within about a year from the denial by the vendor of his right to a deed according to the plat, which the vendor also refused to file. *Isaacs v. Bardon*, 114 Wis. 142, 89 N. W. 913.

So, where the purchaser of real estate, after obtaining knowledge that a fraud had been practised upon him in the sale of the property, notified the vendor of his repudiation of the contract, and invited him to test in an action at law its validity, if he was unwilling to take the property back and release the purchaser, it did not constitute laches defeating the right to rescind, for the purchaser to await action on the part of the vendor, although for a period of some time. *Barnard v. Riendeau*, 31 Can. S. C. 234.

And if the vendor in effect suggests that if time is given him, the misrepresentation complained of by the purchaser will be cured, and he put in as good position as if the representation had been true, a delay on the part of the purchaser thus induced does not waive his right to rescind upon the vendor's failure to make good his suggestion. *Tibbatts v. Boulter*, 73 L. T. N. S. 534.

A delay of about fifteen months, during which time the parties were negotiating for settlement of the matters constituting the grounds upon which the purchaser based his right to rescind, is not a waiver of the right. *Clapp v. Greenlee*, 100 Iowa, 586, 69 N. W. 1049.

So, a delay of five months during which there are negotiations for settlement is not fatal to the right to rescind. *Rackemann v. Riverbank Improv. Co.* 167 Mass. 1, 57 Am. St. Rep. 427, 44 N. E. 990.

Compare with *Follett v. Brown*, 188 30 L.R.A. (N.S.)

Ill. 244, 58 N. E. 943, which holds that a delay of six months after knowledge of fraud authorizing the purchaser to rescind a purchase of real estate, together with the exercise by him of acts of ownership over the property, is a waiver of his right to rescind, although within about a month after discovering the fraud, he approached the vendor with reference to the matter, and he agreed to take the property back in about six months, without, however, agreeing as to the terms.

III. Delay coupled with other acts.

As already seen, mere delay by a purchaser of real estate to assert his right to rescind may amount to a waiver thereof, so delay when coupled with affirmative acts on his part recognizing the validity of the contract or its binding effect is conclusive evidence of a waiver of his right to rescind, unless explained by him. *Scheffelt v. Hays*, 7 C. C. A. 308, 19 U. S. App. 220, 58 Fed. 457 (delay of three years and making claim on vendor for damages for the fraud); *Delano v. Jacoby*, 96 Cal. 275, 31 Am. St. Rep. 201, 31 Pac. 290 (two years and making payments upon purchase price); *Houston v. Hurley*, 2 Del. Ch. 247 (several years and paying taxes assessed against the property); *Provident Loan Trust Co. v. McIntosh*, 68 Kan. 452, 75 Pac. 498, 1 A. & E. Ann. Cas. 906 (three years and collecting rents from the property); *Haldane v. Sweet*, 55 Mich. 196, 20 N. W. 902 (over six years, making payments on purchase price and changes in the property); *Wylie v. Gamble*, 95 Mich. 564, 55 N. W. 377 (over two years and obtaining time for payments on purchase price and attempting to contract with the vendor to lumber the land); *Bennett v. Hickey*, 112 Mich. 379, 70 N. W. 900 (six months and making payments on the contract of purchase); *Mestler v. Jeffries*, 145 Mich. 598, 108 N. W. 994 (over a year and making payments on the contract of purchase); *Eibel v. Von Fell*, 55 N. J. Eq. 670, 38 Atl. 201 (two and one-half to three and one-half years and leasing the property and paying upon a mortgage giv-

restricted land. And it becomes a very material fact in the case, I think, to determine just exactly what is meant by the statement that was made to them by Mr. States and by the owners. I think that there was a statement made that the whole tract was restricted, and that they had a right to act upon the statement and to pay their money and close up the deal, believing that that statement was true.

"Now what was the situation at the time the statement was made? The statement was made I believe in the early part of May, 1908. At that time a lot had been agreed to be sold to Mr. Krah by an agreement in writing which contained no restrictions whatever. I do not see how I can keep the Krah Case out of this case. It was tried be-

fore me by counsel who is engaged in this case. The defendants were the same persons who are the defendants in this case, and I hardly see how I can say that I do not know about it. That case came to a final hearing, and under the circumstances and under the evidence in that case, the opinion of the court was that Mr. Krah was entitled to a deed containing no restrictions. Now, it appears, also, that at that time (that is, at the time of the delivery of the Faulkner deed) a conveyance had been made to Mr. Williams, also without restrictions. It also appears by the testimony in this case that there were three mortgages made upon three separate parcels of land belonging to this tract to three several building and loan associations. Those three mort-

gages for a portion of the purchase price); Kaufmann v. McLaughlin, 24 Misc. 803, 54 N. Y. Supp. 160 (one year and collecting the rents and making payments on a purchase price mortgage); Annis v. Burnham, 15 N. D. 577, 108 N. W. 549 (six months and expressly recognizing the validity of the contract); Kenner v. Goodloe, 2 Handy (Ohio) 283 (four years and offering to pay in a manner different from contract); Max Meadows Land & Improv. Co. v. Brady, 92 Va. 71, 22 S. E. 845 (over a year and paying instalment on purchase price); State Bank v. Brown, 142 Iowa, 190, 134 Am. St. Rep. 412, 119 N. W. 81 (about three years and selling portion of the land); Deutschnann v. Kuntze (Iowa) 125 N. W. 1007 (five months and paying on purchase price);

portion of it before discovering that he had been defrauded in its purchase is not a waiver by the purchaser of the right to rescind, where he can restore the property to the vendor. Jandorf v. Patterson, 90 Mich. 40, 51 N. W. 352.

Listing the property for sale prior to ascertaining that vendor would not furnish a good abstract of title, according to his contract, does not estop the purchaser for rescinding, it not appearing that the vendor was misled thereby to his prejudice. Fagan v. Hook, 134 Iowa, 381, 105 N. W. 155, 111 N. W. 981.

V. Leasing, etc.

A purchaser's right to rescind a purchase of real estate is deemed to have been waived if he, with knowledge of the facts authorizing a rescission, exercises such rights of ownership over the property as the leasing of it. Shappirio v. Goldberg, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. Rep. 259 (collecting rents and negotiating for the future rental of the property); Precious Blood Soc. v. Elsythe, 102 Tenn. 40, 50 S. W. 759; Pollock v. Smith, 49 Neb. 864, 69 N. W. 312. And see Scott v. Walton, supra.

Also by renting a dwelling house upon the property, making valuable improvements, and allowing a default judgment to be taken against him for the purchase price. Lockridge v. Foster, 5 Ill. 569.

But where the purchaser of real estate had informed the vendor of his repudiation of the contract on the ground of fraud, and had invited him to test the validity of the contract in an action at law, if he was unwilling to rescind, he did not waive his right of rescission, and ratify the contract, by remaining in possession of the property and collecting rents while he was awaiting action on the part of the vendor. Barnard v. Riendeau, supra.

VI. Expressly recognizing contract.

A purchaser of real estate will lose his right of rescission if he, with knowledge of the facts entitling him to rescind his purchase, affirmatively recognizes the validity

IV. Selling or offering property for sale.

It is fatal to the right to rescind for the vendee to delay for about three months after obtaining knowledge of the facts, where the delay was at a time when the real-estate market was feverishly active, and during which time he attempted with reasonable hope of success to sell the property at an increased price (Kornblum v. Arthurs, 154 Cal. 246, 97 Pac. 420); the right to rescind for failure by the vendor to furnish an abstract according to his agreement is also waived by offering the property for sale (Boulware v. Crohn, 122 Mo. App. 571, 90 S. W. 796); and offering the property for sale at public sale, listing it with brokers for sale, and paying a mortgage thereon, is also a waiver (Marshall v. Gilman, 47 Minn. 131, 49 N. W. 688; Colyer v. Thompson, 2 T. B. Mon. 16); so, also, is the leasing of the property, collecting the rents, and endeavoring to sell or dispose of the property (Scott v. Walton, 32 Or. 460, 52 Pac. 180); or by contracting for the sale of a portion of the realty (Smith v. Busby, 15 Mo. 388, 57 Am. Dec. 207); or selling the land to a third person (Colyer v. Thompson, supra); or a portion of it (Akerly v. Vilas, 21 Wis. 88).

Platting the land and selling a small 30 L.R.A. (N.S.)

gages were put in evidence, and it appears upon an inspection of them that they contained no restrictions. It also appears by the evidence of Mr. Wassmer himself that there are upon the tract or were then upon the tract other mortgages, and that the whole number put by them upon the property was thirteen or fourteen, and that none of them contained any restrictions. I consider that a very important element in this case. While it is true, as is argued on behalf of the defendant, that mortgages are mere security for the repayment of moneys loaned on the faith of them, it is likewise true that at law the mortgagee has an additional right, namely, to take possession of the property mortgaged in case of a default. In such case he may foreclose his

mortgage, and the person who takes the sheriff's deed would take title free and clear of all the restrictions, unless it could be shown positively and directly that the building and loan association was duly informed of the restrictions at the time it took its mortgage. That brings up another question, too,—whether, by the making of those mortgages without restrictions, the defendants evinced an intention to abandon the restrictions. It is difficult to say whether it would have that effect, whether it would have the effect of an abandonment, from the view point of their intention; but from the view point of actuality, is it not an abandonment? Is it not a giving up by them of their right to control these mortgaged premises? Although they may have

of the contract by doing some act based thereon or making some claim thereunder; as by asserting his title in a collateral suit (*Akerly v. Vilas*, supra); or defending his right to possession in an action against him by the vendor (*Corbett v. Schulte*, 119 Mich. 249, 77 N. W. 947); or defending the foreclosure of a purchase price mortgage without offering to put the vendor *in statu quo* (*National Bank v. Levanseler*, 115 Mich. 372, 73 N. W. 399); also by requiring a subsequent purchaser to furnish an abstract of title, and negotiating with him in reference to future payments on the contract of purchase (*Kreibich v. Martz*, 119 Mich. 343, 78 N. W. 124); or by entering into additional stipulations with vendor in reference to the contract (*Griggs v. Woodruff*, 14 Ala. 9); or extending the time to the vendor to prove his title, making payments on the purchase price, and making important alterations in the premises (*Caswell v. Black River Cotton & Woolen Mfg. Co.* 14 Johns. 453); or executing renewal mortgages (*Ruhl v. Mott*, 120 Cal. 668, 53 Pac. 304); also by arbitrating the question of fraud and executing to the vendor a note due him according to such arbitration (*Edwards v. Roberts*, 7 Smedes & M. 544).

But payment of a note held by third person given for portion of purchase price does not deprive the purchaser of the right to prosecute his suit then pending for a rescission of the purchase. *Breaux v. Sarvoie*, 39 La. Ann. 243, 1 So. 614.

The purchaser does not waive the fraud arising from a defective title, by sending a deed to an insurance company to enable them to obtain a description of the land in order to examine the title. The fact that, without his consent or knowledge, the company caused the deed to be recorded is of no significance. *Muller v. Palmer*, 144 Cal. 305, 77 Pac. 954.

Merely demanding from the tenant of the vendor the possession of the premises, where the demand was made without full knowledge of the fraud, does not constitute an election by the vendee to affirm the fraud, where immediate steps were taken to rescind as soon as full knowledge of the fraud 30 L.R.A. (N.S.)

was had. *Annis v. Ferguson*, 27 Ky. L. Rep. 56, 84 S. W. 553.

VII. Acceptance of deed with knowledge of defect in title.

If the purchaser of real estate, with knowledge of a defect in the vendor's title, accepts a deed with covenants of title, he thereby waives his right to rescind on that ground. *Royster v. Shackleford*, 5 Litt. (Ky.) 228; *Russell v. Handy*, 22 Ky. L. Rep. 933, 59 S. W. 320; *Gale v. Conn*, 3 J. J. Marsh. 538; *Beck v. Simmons*, 7 Ala. 71; *Kingman & Co. v. Stoddard*, 29 C. C. A. 413, 57 U. S. App. 379, 85 Fed. 740.

If the vendee had an opportunity to investigate the title, and did not do so, it will be presumed that he relied upon the warranties in his deed, and his relief will be restricted to such warranties. *Van Lew v. Parr*, 2 Rich. Eq. 321.

VIII. Miscellaneous.

A purchaser of real estate, by making improvements thereon after knowledge of facts authorizing him to rescind the purchase, waives his right so to do (*Vaughn v. Smith*, 34 Or. 54, 55 Pac. 99); also, where he takes possession of the property, keeps it for many years, and confesses judgment in an action on the notes given for the purchase price (*Roach v. Rutherford*, 4 DeSauss. 126, 6 Am. Dec. 606); or remains in possession, enjoying the advantages and benefits therefrom, without complaint or offer to rescind, until required to perform the obligations of the contract of purchase (*McCourt v. Johns*, 33 Or. 561, 53 Pac. 601); or continues to work a mine in the property for a number of years (*Richardson v. Lowe*, 79 C. C. A. 317, 149 Fed. 625); or pays monthly instalments upon the property as they fall due, until the rental value has decreased about one half (*Hudson v. Waugh*, 93 Va. 518, 23 S. E. 530).

Merely giving one reason for refusing to carry out a contract for the purchase of real estate is not a waiver by the purchaser of other objections. *Boulware v. Crohn*, 122 Mo. App. 571, 99 S. W. 796.

been conveyed subsequently to the making of the mortgages, subject to restrictions, would not a foreclosure of the mortgage cut out the restrictions? I mean actual restrictions put in a deed after a mortgage was made, wouldn't a foreclosure of a mortgage cut out those restrictions? That I understand is the situation. There may be some doubt as to whether the intention that Mr. Wassmer and Mr. Radcliffe had in mind to restrict this property was given such publicity and efficiency as to bind people who should purchase a portion of the property. Of course, I do not think it would bind people to whom no notice of it ever came; but it could hardly be said that Mr. Wassmer could have restricted his property by keeping in his own mind the fact that he did restrict it, and that he intended to restrict it, without doing something to actually restrict it. What did he do when the building and loan associations came to examine the property? He remembers one case in which he notified the examining committee of the building and loan associations, that the property was restricted; but they were very careful not to put any restrictions in their mortgage; and I doubt whether notice to the committee would be notice to the building and loan associations anyhow.

"So that I am very clear that there was a

representation made by the defendant Wassmer of a material fact, which, at the time it was made, was untrue, and that the complainant is entitled to a rescission of the contract upon equitable terms.

"The defendants say that the bill is filed for the purpose of recovering damages,—no, not for the recovery of damages, much less for the recovery of unliquidated damages, because, if there are any damages following in the trial of this transaction as set out in the bill, they are not unliquidated damages. It is very well settled in New Jersey now by the recent decision of our court of appeals, that this court will not entertain a suit for unliquidated damages, but will entertain a suit for liquidated damages, damages that can be liquidated, damages of a variety that do not have to go to a jury.

"There are some expenditures here which seem to me to be chargeable against the two defendants, and I say the two defendants because they are charged in the bill as partners, and they admit by the answer that they are partners in this whole enterprise; and therefore whatever personal claim would run against anybody would run against both of them. Therefore I say that the complainant, on the rescission of this deed of conveyance, would have a right to charge against both of these parties whatever amount of

By pleading fraud and misrepresentation in an action by the vendor on notes given for the purchaser price, and not seeking a rescission of the purchase on that ground, but professing to be anxious to keep the property if the title is perfected, the vendee waives his right to rescind on that ground. *American Land & Improv. Co. v. Crawford*, 10 Ky. L. Rep. 376, 40 S. W. 672.

IX. What is sufficient knowledge.

Where the purchaser of real estate has evidence sufficient reasonably to actuate him to rescind, and on which he has once acted, any subsequent discovery of cumulative evidence cannot operate to excuse his waiver of the fraud, if one has in the meantime occurred, or to revive a once lost right of rescission. *Richardson v. Lowe*, supra; *Brown v. Gordon-Tiger Min. & Reduction Co.* 44 Colo. 311, 97 Pac. 1042.

But where the full extent of the fraud is not immediately discovered by the purchaser, and not until sometime after taking possession of the property, his retaining possession after a partial discovery of the fraud, and demanding of the vendor that he remedy the defects discovered, is not a waiver of his right to rescind after complete discovery of the fraud, although he also, while retaining possession, made payments upon the purchase price. *Culver v. Avery*, 161 Mich. 322, 126 N. W. 430.

Extending time to the vendor to perfect 30 L.R.A.(N.S.)

his title is not a waiver by the purchaser of his right to rescind at the expiration of the time as extended, where time is of the essence of the contract and the vendor failed to perfect his title. *Garrett v. Cohen*, 63 Misc. 450, 117 N. Y. Supp. 129.

A judgment affecting the title of real estate does not entitle the purchaser thereof, prior to such judgment, under an executory contract, to rescind, as the vendor may procure the title evidenced by such judgment; hence, it is not laches if the purchaser continue under his contract after rendition of the judgment. *Latimer v. Capay Valley Land Co.* 137 Cal. 286, 70 Pac. 82.

That the purchaser of real estate permitted some three months to elapse after his suspicions were aroused that the wrong land had been pointed out to him by the vendor, before causing a survey to be made, the weather in the meantime being inclement, does not show a waiver of the right to rescind. *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051; *Freeman v. Gloyd*, 43 Wash. 716, 86 Pac. 1053.

Where the purchaser of the lot by ordinary diligence might have ascertained its boundaries before putting valuable improvements thereon, he cannot, after a delay of years, rescind the sale for deficiency, and require the vendor to pay for the improvements which were evidently made in bad faith. *King v. Sharp*, 7 Ky. L. Rep. 307.

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money was paid out by her, necessarily paid out by her, on the faith of the instrument, because I am going to limit it to the necessity,—necessarily paid out by her in consequence of the making of the contract and the deed.

"It is impossible from the testimony for me to tell now just what those items would be, and it will have to be referred to a master for the purpose of ascertaining the same, unless counsel can agree.

"One of the defenses that is set up is defense of acquiescence, and consequently of laches. The doctrine relating to that question is pretty well settled in New Jersey in the case of *Dennis v. Jones*, 44 N. J. Eq. 513, 6 Am. St. Rep. 899, 14 Atl. 913. In *Dennis v. Jones* there was an attempt made to set aside a chattel mortgage on the ground of fraud, and there the question of laches was discussed, and it was held that in case of a rescission the party rescinding the contract must bring his suit at the very earliest possible moment. But I do not think a delay from August until November is such a delay as would admit the defense of laches. It is not shown that during that period the defendants' situation was changed at all, and it does not appear that the delay has caused the defendants any damage.

"I will advise a decree in accordance with these views."

Mr. Frank E. Bradner, for appellants:

As to the duty of the defrauded party to rescind promptly see—

Clampitt v. Doyle, 73 N. J. Eq. 678, 70 Atl. 129; *Conlan v. Roemer*, 52 N. J. L. 53, 18 Atl. 858.

Messrs. Osborne & Astley, for respondents:

Rescission before action is not necessary.

Du Bois v. Nugent, 69 N. J. Eq. 145, 60 Atl. 339.

Garrison, J., delivered the opinion of the court:

We agree with the learned vice chancellor that Mrs. Faulkner purchased the lot in question upon an untrue representation of such a nature that, upon the discovery of its untruth, she was entitled to elect to rescind the sale. We do not, however, agree that such election was still open to her four months later, when the present bill of complaint was filed declaring for the first time her election to rescind. At this time, viz., November 28, 1908, her right to elect, which arose on or about July 10, 1908, no longer existed, not upon the doctrine of laches, discussed in the conclusions filed in the court below, but upon the ground that the lapse of such a length of time under the circumstances afforded plenary proof of an election

by her not to rescind, to which conclusive effect should have been given.

The learned vice chancellor was in error in testing the complainant's right to elect solely by the doctrine of laches, and notably so in conceiving that the decision of this court in *Dennis v. Jones*, 44 N. J. Eq. 513, 6 Am. St. Rep. 899, 14 Atl. 913, turned upon that doctrine, which in point of fact was not even mentioned in the opinion of Chancellor McGill in this court. *Dennis v. Jones* was decided, not upon the quasi estoppel that is involved in the doctrine of laches, but upon a totally different ground, viz., that of conduct evidence.

Authorities cited by Chancellor McGill had settled the law "that the defrauded party to a contract has but one election to rescind, that he must exercise that election with reasonable promptitude after discovery of the fraud, and that when once he elects, he must abide by his decision." Other cases cited in the opinion had held that "delay in the rescission of the contract is evidence of a waiver of the fraud and an election to treat the contract as valid." The approval and adoption of both of these lines of decision by this court resulted, in *Dennis v. Jones*, in our holding "that after the appellants had knowledge of all the substantial features of the alleged fraud, and were fully aware of the deceit which had been practised upon them, they so acted as to afford plenary evidence of an election to abide by their contract," and that "their election thus made was irrevocable."

It is this rule, and not the doctrine of laches, that *Dennis v. Jones* lays down and illustrates.

To the same effect is the more recent case of *Clampitt v. Doyle*, 73 N. J. Eq. 678, 70 Atl. 129. The rule of *Dennis v. Jones* is so clearly stated by Chancellor McGill that in actual practice the only question likely to arise is whether or not the delay was such as to warrant its application, i. e., whether the vendee's failure to act extended beyond the period within which one would naturally act, who knew that to act effectually he must act promptly. The question in itself is not peculiar to this class of cases. It is present in all cases involving a reasonable time, concerning which it is admitted that no hard and fast rule obtains, and also that the difficulty that exists in cases that lie close to the line disappears with the lapse of time that has been permitted to intervene. Thus, the question whether a landowner who is under a duty to make repairs upon notice is in default on the very day he had notice or the day after may present difficulties that entirely disappear if he has suffered weeks and months to elapse. The case before us is of this latter character,

in that an election that could in reason have been made within a few days or at most a few weeks after the right to make it arose was, without any adequate excuse that was consistent with promptitude of action, delayed for months. It is precisely this conduct that (as we decided in *Dennis v. Jones and Clappitt v. Doyle*) affords plenary proof of an election to abide by the contract, which is irrevocable. For this reason, the bill of complaint should have been dismissed by the court of chancery, and for this reason the decree of that court must be reversed.

This result renders it unnecessary to do more than allude to the fact that the prayer of the complainant's bill, with respect to the several sums to be paid to her by the defendants in excess of purchase price, interest, insurance, and taxes, is made up for the most part, if not wholly, of items for which a court of equity upon the rescission of a contract gives no compensation, as to some of them because they are in the nature of unliquidated damages, and as to others because of the essential difference in this respect between the rescission of a contract and an action for deceit based thereon.

To obtain the former, the complainant must show a material misrepresentation not necessarily untrue to the knowledge of the defendant; whereas the gist of the action for deceit is such conscious falsification. Hence the injured party may not, by selecting the action that is the more easily proved, obtain in equity the measure of redress that is recoverable only when the more onerous burden has been sustained in a court of law. This distinction is pointed out in *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1, *Newbigging v. Adam*, L. R. 34 Ch. Div. 582, L. R. 13 App. Cas. 308, and is treated extensively in the notes in 6 Eng. Rul. Cas. pp. 754 et seq.

The theory of the complainant's bill as exemplified by its specific prayer for relief is entirely indefensible, and the decree therefore granting such relief in general terms is upon its face erroneous.

The learned vice chancellor, however, in his conclusions expressly disavowed the purpose of allowing unliquidated damages, and confined his order of reference to such improvements as were the "necessary and proper consequences" of the sale that was set aside. Inasmuch, however, as "necessary" is quite generally construed to mean "suitable" rather than "indispensable" (*State, New Jersey R. & Transp. Co., Prosecutors, v. Hancock*, 35 N. J. L. 537; *State, Camden & A. R. & Transp. Co., Prosecutors, v. Woodruff*, 36 N. J. L. 94; *State, Morris Canal & Bkg. Co., Prosecutors, v. Love*, 37 N. J. 30 L.R.A. (N.S.)

L. 60), it may be doubted whether the error of the decree was thereby removed or rendered harmless to the defendant. The matter, however, need not be further pursued, since the decree must be reversed, and the bill dismissed for the reason first given. To this end, the decree is reversed.

FLORIDA SUPREME COURT.

GERMAN AMERICAN LUMBER COMPANY, Plff. in Err.,

v.

C. P. HANNAH, by Next Friend.

(— Fla. —, 53 So. 516.)

Appeal — verdict contrary to law — reversal.

1. A verdict should be set aside when it clearly appears to be contrary to law.

Same — reversal — contributory negligence.

2. Where contributory negligence prevents recovery, and it clearly appears from the evidence that the negligence of the plaintiff so contributed proximately to the injury complained of that it would not have occurred but for the plaintiff's negligence, a verdict awarding damages should be set aside.

Contributory negligence — minor.

3. Where contributory negligence is a complete defense, a minor may be guilty of such contributory negligence as will bar a recovery by him where his age, intelligence, and experience, and the surrounding circumstances, render him capable of appreciating and avoiding obvious dangers.

Same — recovery — at common law.

4. At common law a plaintiff could not recover for injuries to himself, caused by the negligence of another, if he in any appreciable way contributed to the proximate cause of the injury, upon the theory that there is no apportionment of the results of mutual negligence.

Master — duties owed to employee.

5. It is the duty of the master to use due diligence in providing a reasonably safe place for the servant to work in, and also to inform the servant of any dangers in the employment that are not of such a character that the servant would know of them, and to warn young and inexperienced employees of dangers in their employment as to which they have no knowledge or appreciation.

Headnotes by WHITFIELD, Ch. J.

Note. — As to duty to warn minor servant of dangers of which he is already aware, see note to *Cronin v. Columbian Mfg. Co.* 29 L.R.A. (N.S.) 111.

As to presumption and burden of proof as to capacity of minor servant to comprehend and avoid danger, see note to *Ewing v. Lanark Fuel Co.* 29 L.R.A. (N.S.) 487.

Servant — injury — contributory negligence — effect.

6. If a servant fails to exercise ordinary care for his safety, he cannot in general recover damages for an injury.

Master — obvious dangers — necessity of warning capable servant.

7. Where dangers are obvious, and the servant is capable of appreciating them, a warning as to such dangers by the master is unnecessary.

Same — injury to minor — contributory negligence.

8. Where an employee nineteen years of age, of at least ordinary intelligence and experience, and accustomed to working in a sawmill, needlessly subjects himself to an obvious danger, he cannot recover for injuries to himself that apparently would not have occurred but for his own lack of ordinary care for his safety.

(October 26, 1910.)

ERROR to the Circuit Court for Escambia County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. John C. Avery, for plaintiff in error:

A servant in the performance of his duties is bound to exercise ordinary care for his own safety, or that degree of care which prudent persons so exercise under similar circumstances, and if he is injured by failing to exercise such care the master is not liable.

German American Lumber Co. v. Brock, 55 Fla. 589, 46 So. 740.

The plaintiff was guilty of contributory negligence, barring recovery.

Flowers v. Louisville & N. R. Co. 55 Fla. 603, 46 So. 718.

If plaintiff did not actually know of the defect, he knew the risk, and voluntarily exposed himself to it.

Duval v. Hunt, 34 Fla. 85, 15 So. 876; Russell v. Tillotson, 140 Mass. 201, 4 N. E. 231; Lemoine v. Aldrich, 177 Mass. 89, 58 N. E. 178; 1 Labatt, Mast. & S. § 394.

Messrs. Reeves & Watson, for defendant in error:

The presumption is that the servant exercised ordinary care, and was free from contributory negligence.

German American Lumber Co. v. Brock, 55 Fla. 589, 46 So. 741.

So far as a minor is concerned, ordinary risks are treated as extraordinary.

1 Labatt, Mast. & S. § 703, 1074.

A master is under the absolute duty of providing reasonably safe equipment and a reasonably safe place to work, and if he

tenders it unsafe, or for any reason there are abnormal risks of which the servant may be excusably ignorant, he is under the duty of warning the servant against such risks.

South Florida R. Co. v. Weese, 32 Fla. 234, 13 So. 436; Bailey, Master's Liability for Injuries to Servant, §§ 34, 111 et seq.; Flowers v. Louisville & N. R. Co. 55 Fla. 603, 46 So. 721; German American Lumber Co. v. Brock, supra; 1 Labatt, Mast. & S. §§ 48, 139, 152, 537; Swoboda v. Ward, 40 Mich. 423; Dowling v. Gerard B. Allen & Co. 74 Mo. 13, 41 Am. Rep. 301, s. c. 102 Mo. 213, 14 S. W. 752; Craver v. Christian, 36 Minn. 413, 1 Am. St. Rep. 675, 31 N. W. 457; Barbo v. Bassett, 35 Minn. 485, 29 N. W. 198.

The servant is under no duty of inspection to find unusual and concealed dangers, but may act on the assumption, in the absence of anything putting him on inquiry, that the master has done his duty.

Floralia Saw Mill Co. v. Smith, 55 Fla. 447, 46 So. 335; Flowers v. Louisville & N. R. Co. supra; Swoboda v. Ward, 40 Mich. 420; 1 Labatt, Mast. & S. §§ 408, 411 (a).

The question of contributory negligence was for the jury.

Johnson v. Louisville & N. R. Co. (Fla.) 52 So. 195; Floralia Saw Mill Co. v. Smith, and German American Lumber Co. v. Brock, supra; 2 Labatt, Mast. & S. §§ 2377 et seq; Swoboda v. Ward, supra; Ingberman v. Moore, 90 Cal. 410, 25 Am. St. Rep. 138, 27 Pac. 308.

Plaintiff acted in good faith, and reasonable and prudent persons would, under like circumstances, in all human probability, have adopted the course which he took.

Florida C. & P. R. Co. v. Mooney, 45 Fla. 286, 110 Am. St. Rep. 73, 33 So. 1010.

The evidence was amply sufficient to sustain the verdict of the jury.

Dowling v. Gerard B. Allen & Co. and Ingberman v. Moore, supra; Prukey v. South Park Foundry & Mach. Co. 68 Minn. 305, 71 N. W. 276.

In order to show contributory negligence on the part of the plaintiff, the act which he did must have been one which he could reasonably anticipate would result in his injury.

29 Cyc. Law & Proc. p. 520; Davis v. John L. Whiting & Son Co. 201 Mass. 91, — L.R.A. (N.S.) —, 87 N. E. 199; Crawford v. Kansas City Stock Yards Co. 215 Mo. 394, 114 S. W. 1057; Beach, Contrib. Neg. §§ 36, 38, 67; 1 Labatt, Mast. & S. §§ 149, 152, 153.

Whitfield, Ch. J., delivered the opinion of the court:

This writ of error was taken to a judg-

ment awarding damages for personal injuries sustained by Hannah while working in the lumber company's sawmill. The plaintiff was assisting in repair work about the mill, and was told by the man with whom he worked, alleged to be "his superior workman," to ask Mr. Thomas, who was in charge of the work, for a babbitt ladle to be used in the repairing being done. Plaintiff asked Mr. Stokes, the foreman of the mill, for Mr. Thomas, and was told where he could be found. While looking for Mr. Thomas, the plaintiff went up a ladder, and, in going along a board about 10 inches wide used by the oilers and mill-wrights in their duties, passed over a rapidly revolving shaft. In returning the same way the plaintiff's pants caught in a set screw that projected 5/16 or 1/2 of an inch out from a safety collar on the revolving shaft, and the plaintiff was seriously injured.

The negligence of the defendant, as alleged, is that it "negligently suffered said set screw to project above the surface of said collar aforesaid; and through said superior workman negligently directed the plaintiff to seek and find said ladle, and to make inquiries for same of persons in the lower part of said mill, without giving him any warning whatever as to the unsafe and dangerous condition of said set screw." Pleas of not guilty, and of the plaintiff's sole and contributory negligence, were filed. The question to be determined is whether the plaintiff so contributed to the proximate cause of the injury as to preclude a recovery by him.

A verdict should be set aside when it clearly appears to be contrary to law. Where contributory negligence prevents recovery, and it clearly appears from the evidence that the negligence of the plaintiff so contributed proximately to the injury complained of that it would not have occurred but for the plaintiff's negligence, a verdict awarding damages should be set aside. Where contributory negligence is a complete defense, a minor may be guilty of such contributory negligence as will bar a recovery by him where his age, intelligence, and experience, and the surrounding circumstances, render him capable of appreciating and avoiding obvious dangers.

At common law a plaintiff could not recover for injuries to himself caused by the negligence of another, if he, in any appreciable way, contributed to the proximate cause of the injury, upon the theory that there is no apportionment of the results of mutual negligence. Where both plaintiff and defendant are at fault, the law does not in general interfere. The common-law rule that there can be no recovery by those guilty of contributory negligence has not

been changed by statute in this state except in certain cases of injuries by the operation of railroads. *Stearns & C. Lumber Co. v. Fowler*, 58 Fla. 362, 50 So. 680; *Atlantic Coast Line R. Co. v. McCormick*, 59 Fla. 121, 52 So. 712; *Florida R. Co. v. Dorsey*, 59 Fla. —, 52 So. 963.

It is the duty of the master to use due diligence in providing a reasonably safe place for the servant to work in, and also to inform the servant of any dangers in the employment that are not of such a character that the servant should know of them, and to warn young and inexperienced employees of dangers in their employment as to which they have no knowledge or appreciation. A failure in the performance of these duties renders the master liable in damages for injuries proximately resulting from such breach of duty, where the servant has not so contributed appreciably and proximately to his own injury as to be guilty of contributory negligence. *James v. Rapides Lumber Co.* 44 L.R.A. 33, and notes (50 La. Ann. 717, 23 So. 469); 10 Current Law, 731; *Bare v. Crane Creek Coal & Coke Co.* 8 L.R.A.(N.S.) 284, 123 Am. St. Rep. 966, and notes (61 W. Va. 28, 55 S. E. 907); *Burnside v. Peterson*, 43 Colo. 382, 17 L.R.A.(N.S.) 76, 96 Pac. 256; *Bertha Zinc Co. v. Martin*, 93 Vt. 791, 70 L.R.A. 999, 22 S. E. 869; *Camp v. Hall*, 39 Fla. 535, 22 So. 792. If a servant fails to exercise ordinary care for his safety, he cannot in general recover damages for an injury. *Green v. Sansom*, 41 Fla. 94, 25 So. 332.

Where dangers are obvious and the servant is capable of appreciating them, a warning as to such dangers by the master is unnecessary. 10 Current Law, 753. Whether warning is necessary depends upon the age, capacity, intelligence, and experience of the employee, as well as upon the nature of the danger and the surrounding conditions and circumstances. *Davis v. Augusta Factory*, 92 Ga. 712, 18 S. E. 974; *Ryan v. Armour*, 166 Ill. 568, 47 N. E. 60; *Mackin v. Alaska Refrigerator Co.* 100 Mich. 276, 58 N. W. 999; *Williams v. Churchill*, 137 Mass. 243, 50 Am. Rep. 304; *Bollington v. Louisville & N. R. Co.* 125 Ky. 186, 8 L.R.A.(N.S.) 1045, 100 S. W. 850; *Noden v. Verlenden Bros.* 3 A. & E. Ann. Cas. 367, and notes (211 Pa. 135, 60 Atl. 505); *Mundhenke v. Oregon City Mfg. Co.* 1 L.R.A.(N.S.) 278, and notes (47 Or. 127, 81 Pac. 977); *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 So. 740. These principles are not questioned, but difficulty frequently arises in applying them to the facts of particular cases.

In this case the plaintiff was nineteen years of age and of at least ordinary in-

telligence. He had worked about the mill for more than nine months, usually assisting in repair work, and had worked all over the mill. The order given him was to get the ladle and to ask Mr. Thomas for it. He was told by the foreman where he could find Mr. Thomas, but he was not told to go any particular way to find him. He was not warned of the danger in the projecting set screw in the rapidly revolving shaft, but he was not told to go by or over the shaft to find Mr. Thomas, and it was not necessary for him to do so in the discharge of his duty. It appears that the foreman simply answered plaintiff's question as to where he could find Mr. Thomas, and that there was at least one other ordinarily used way of going to the place where Mr. Thomas was supposed to be that could have been safely used. The plaintiff was evidently familiar, at least in a general way, with the machinery of the mill, though he had not been at that point before. He was of a somewhat mature age, and had had other experience in such mills. It is clear that the place where the injury occurred was intended for and used by only those engaged in using or repairing the machinery, and was not the usual means of passage from one part of the mill to the other. In taking this course and in passing over the rapidly revolving shaft, the taking of risks and the existence of real dangers must have been obvious to the plaintiff, even though he had not been warned as to the dangers of the place, and could not have seen the projecting set screw in the shaft. In going that way he subjected himself to risks and dangers that were not warranted by the orders given him or by the general nature of his employment. Even if it be conceded that the lumber company had failed to do its full duty as to furnishing a safe place for its employees, this employee was not required to be in that place. In being there and in unnecessarily passing within $\frac{5}{16}$ or $\frac{1}{2}$ of an inch of a rapidly revolving shaft, which was dangerous even without the projecting set screw on it, the plaintiff so contributed to the proximate cause of the injury to himself that he cannot on the evidence here presented recover damages. Apparently his injury would not have occurred if he had not needlessly gone into the dangerous place and actually allowed his clothing to come in close proximity to an object that was patently dangerous. His age, experience, intelligence, and instincts of self-preservation, and the surrounding circumstances, should reasonably have kept him from this needless exposure to an obvious danger and he cannot recover compensation for injuries to which he so di-

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rectly and needlessly contributed. The facts here are quite unlike the cases of *Camp v. Hall* and *German-American Lumber Co. v. Brock*, supra. It is not a case of using one of several usual means for discharging a duty, as in *Florida East Coast R. Co. v. Lassiter*, 59 Fla. 246, 52 So. 975. But it is a case of the use of an obviously dangerous means when safe means were available to him, as in *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. 145.

It is clear from the evidence as a whole that the defense of contributory negligence was established, and the verdict should have been for the defendant on the case as here made.

The judgment is reversed, and a new trial awarded.

Shackleford and Cockrell, JJ., concur.

Taylor, Hocker, and Parkhill, JJ., concur in the opinion.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down November 16, 1910:

A petition for rehearing suggests that the court failed to consider testimony that there was no way designed for a walk way which the plaintiff could have used; that the route taken was the quickest and plainest, but not the safest; that the plaintiff did not know of the projecting set screw; that the collar on the revolving shaft was designed for a safety screw, and not a projecting one; that of the many set screws used in the mill only eight or ten projected; that a projecting screw is more dangerous than one not projecting, and that the plaintiff knew of no other way to use.

All the testimony in the transcript was carefully considered. As contributory negligence of the plaintiff was clearly indicated by the facts and circumstances in evidence, it was not necessary to state more than the conclusions and the legal effect of the evidence. The plaintiff's age, intelligence, experience, and most ordinary observation, should have made him know and appreciate the risks and dangers of the conditions that surrounded him. Even if there was negligence in permitting the set screw to project $\frac{5}{16}$ of an inch from the safety collar on the revolving shaft, the defendant was under no duty to warn the plaintiff of it when he was not required or expected to go near it. The plaintiff's experience and observation while working "all over the mill," as he testifies, should reasonably have made him assume the risk he took. Whether the plaintiff knew of the projecting set screw or not, he contributed directly to the efficient cause of his own injury

by needlessly going where he did without being required to do so, and in allowing his clothing to come within 5/16 of an inch of a safety collar on a rapidly revolving shaft.

The main opinion cites and approves the Lassiter Case, which followed the cases of Florida C. & P. R. Co. v. Mooney, 40 Fla. 17, 24 So. 148, Id., 45 Fla. 286, 110 Am. St. Rep. 73, 33 So. 1010.

The danger of the route taken was obvious, and, under the facts and circumstances in evidence, the plaintiff reasonably should have known of and appreciated the different ways and the conditions actually existing, as he "had worked all over the mill" for several months, and, by the exercise of the ordinary care for his own protection that the law requires of him, he could readily have anticipated self-injury from his action.

A rehearing is denied.

Whitfield, Ch. J., and Shackleford and Cockrell, JJ., concur.

Taylor, Hocker, and Parkhill, JJ., concur in the opinion.

INDIANA SUPREME COURT.

STATE OF INDIANA EX REL. EDGAR
O. HUNTER, Appt.,
v.

THOMAS A. WINTERROWD, Building In-
spector, et al.

(— Ind. —, 91 N. E. 956.)

Mandamus — statutory duty — attacking constitutionality.

The constitutionality of a statute cannot be attacked in a mandamus proceeding to compel performance of an act which an official refuses to perform because of the statute.

(June 3, 1910.)

A PPEAL by relator from a judgment of the Supreme Court for Marion County sustaining a demurrer to a petition for a writ of mandamus to compel the building

Note. — As to right of relator in mandamus proceedings to attack constitutionality of statute relied upon by respondent, see note to State ex rel. Fooshe v. Burley, 16 L.R.A. (N.S.) 266, and on the converse question as to the right of respondent in mandamus proceedings to attack the unconstitutionality of statute, see notes to State ex rel. New Orleans Canal & Bkg. Co. v. Heard, 47 L.R.A. 512, and State ex rel. University of Utah v. Candland, 24 L.R.A. (N.S.) 1280.
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inspector of the city of Indianapolis to approve certain building plans and to issue a permit for the erection of a building in accordance therewith. Affirmed.

The facts are stated in the opinion.

Messrs. Charles O. Roemler, H. O. Chamberlin, Charles W. Smith, John S. Duncan, H. H. Hornbrook, and Albert P. Smith, for appellant:

Mandamus generally does not lie if the relator has any other legal remedy which is specific and adequate. The remedy, however, must be one which is adequate, that is, one which reaches the end intended, and actually compels the performance of the duty refused.

Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667, 3 Am. Crim. Rep. 524; People ex rel. Fiedler v. Mead, 24 N. Y. 114; McCullough v. Brooklyn, 23 Wend. 458; Re Strong, 20 Pick. 484; People ex rel. Smith v. Olds, 3 Cal. 167, 58 Am. Dec. 398; Eby v. School Trustees, 87 Cal. 166; Chinn v. Trustees, 32 Ohio St. 236; State ex rel. Dayton Gravel Road Co. v. Tippecanoe County, 131 Ind. 90, 30 N. E. 892; Marshall v. State, 1 Ind. 72; Johnson County v. Hicks, 2 Ind. 527; State ex rel. McCarty v. Montgomery County, 25 Ind. 210.

Messrs. Frederick E. Matson, Crate D. Bowen, James D. Pierce, J. E. Iglehart, and Linton A. Cox, for appellees:

The complaint has no allegation showing that the relator has no remedy at law, and therefore does not state a cause of action.

State ex rel. Reynolds v. Tippecanoe County, 45 Ind. 507; State ex rel. Allen County Orphans' Home v. Schmetzer, 156 Ind. 528, 60 N. E. 269; Gregg v. State, 161 Ind. 241, 51 N. E. 359.

Montgomery, J., delivered the opinion of the court:

This is a proceeding for a peremptory writ of mandamus to compel appellee Winterrowd, as building inspector of the city of Indianapolis, to approve certain plans for an apartment house, and to issue a permit for the erection of the same in said city. Appellees waived the issuance of an alternative writ, appeared, and filed a demurrer to the petition, on the ground that the facts therein stated were insufficient to constitute a cause of action. This demurrer was sustained, and, appellant declining to amend, final judgment was rendered in favor of appellees. The only error assigned is the sustaining of appellees' demurrer to the complaint.

The complaint averred that on April 20, 1909, the city of Indianapolis had a population of more than 100,000 inhabitants, according to the last preceding census of the United States, and that Thomas A. Winter-

rowd then was and still is the duly appointed, qualified, and acting building inspector of said city; "that, under and by virtue of a certain ordinance, duly passed by the common council of said city and approved by the mayor thereof, now, and for many years last past, in full force and effect therein, entitled 'An Ordinance Providing for All Matters Concerning, Affecting, or Relating to the Construction, Alteration, Repairs, or Removal of Buildings, Structures, and Appurtenances Thereof, Erected and to be Erected in the City of Indianapolis, Indiana,' said Thomas A. Winterrowd, as such building inspector, is authorized and required to examine and inspect the plans for all buildings proposed to be erected in said city, and, in the event he shall approve the same, to issue to the person so presenting said plans a license or permit to proceed with the erection of such proposed building; that by such ordinance it is further provided that it shall be unlawful for any person to proceed to erect any building in the city of Indianapolis, until he shall have caused plans to be prepared for its erection, and until he shall have submitted the same to such building inspector for his examination, and until such building inspector have approved the same, and issued to the person proposing to erect such building his permit as such building inspector for the erection of said building;" that on said date the relator was, and ever since has been, and still is, the owner of a certain described lot in said city, upon which he desires to erect an apartment house, and to that end he caused certain plans for such building to be prepared and presented to said building inspector, and requested him to inspect and approve such plans, and to issue a permit authorizing the erection of the proposed building; that said plans complied in every respect with the building ordinances of the city of Indianapolis; that appellee Winterrowd examined said plans, as requested, and found and declared the same to be in compliance with the building ordinances of said city, and that the designed building, if erected, would be safe, be supplied with abundant light and air, and provide commodious and convenient apartments; but he declined to approve said plans and to issue the requested building permit, because said plans did not comply with certain requirements of an act of the general assembly of the state of Indiana, entitled "An Act Relative to the Construction and Maintenance of Tenement, Lodging, and Apartment Houses," approved March 3, 1909 (Acts 1909, chap. 47), in ten specified particulars. It is then averred that the legislative act above mentioned is in conflict with certain provisions of the state Constitution and the 14th 30 L.R.A. (N.S.)

Amendment to the Constitution of the United States.

It was manifestly the purpose of appellant's counsel to invoke the judgment of the courts upon the constitutional validity of the tenement, lodging, and apartment house law of this state, approved March 3, 1909. The constitutional question suggested has been fully and ably briefed, and we have no inclination to evade or postpone its decision, but, upon mature consideration, have concluded that the question is not properly presented for decision in this proceeding. It is provided by statute in this state that "writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, 'trust, or station.'" Burns's Anno. Stat. 1908, § 1225. Appellees' counsel challenge the sufficiency of the allegations of the complaint to show a legal right in the relator to the thing demanded and a clear duty on the building inspector to do the act requested. The allegations of the complaint respecting the provisions of the city ordinance and the plans submitted for approval are indefinite and faulty; but, waiving these defects, we are of opinion that the writ was rightly denied by the trial court. The writ of mandamus was originally of a high prerogative character, and in no sense a writ of right. The writ is authorized in certain cases by statute in this state, as above shown; but it has always been and is still regarded as an extraordinary one, and in a sense discretionary. Relief by writ of mandamus may be had only in the absence of any other adequate remedy. The issuance of the writ is justifiable only in favor of a petitioner who shows a clear legal right to the thing demanded and an imperative duty on the part of the respondent to do the act required. State ex rel. Hatfield v. Cummins, 171 Ind. 112, — L.R.A. (N.S.) —, 85 N. E. 359; Auburn v. State, 170 Ind. 511, 83 N. E. 997, 84 N. E. 990; 19 Am. & Eng. Enc. Law p. 725; 26 Cyc. Law & Proc. p. 151. Courts have generally been unwilling to extend the operation of this writ, and its use has been kept within its own narrow limits. It will be denied when the object sought is an adjudication upon some question or right which may as well be settled in an ordinary action or according to usual procedure. In other words, this form of proceeding cannot be employed to adjudicate and establish a right or define and impose a duty, but only to enforce an existing legal right and the performance of a duty specifically enjoined.

Conceding that the terms of the building ordinance of the city of Indianapolis re-

quired appellee to approve the plans submitted, the complaint discloses that a statute of this state prohibits the erection of a building in accordance with such plans. The statute is paramount, and it is elementary that a municipal ordinance, in so far as it conflicts with the statute law of the state, is void. The relator is not asserting a clear legal right, but merely a claim of right, which he is seeking to have the courts in this action establish by striking down a legislative enactment prohibiting the thing which he desires to do. The respondent was not requested to perform a duty enjoined by law, but to do an act in plain disregard of the provisions of a public statute, which it is the duty of every officer and citizen to obey until repealed or judicially overthrown in a proper proceeding. It was not the province of appellee as building inspector to pass upon the constitutional validity of the statute; but his duty was unquestioningly to obey its mandates. The alleged neglected duty is not clear and plain, but will only appear in case the courts first establish the supremacy of the municipal ordinance over the statute, by declaring the latter invalid and void. The duty charged to appellee, performance of which is sought to be enforced herein, is not enjoined by law, pre-existent and imperative, but must in this proceeding be created, ascertained, and imposed. The validity of an objectionable statute should be litigated in an appropriate civil action between adversary parties, and in our opinion a petitioner for a writ of mandamus may not require the court to declare such statute unconstitutional in that proceeding as a condition precedent to the issuance of the writ demanded. *State ex rel. Lytle v. Douglas County*, 18 Neb. 506, 26 N. W. 315; *Maxwell v. Burton*, 2 Utah, 595; *State ex rel. Port Royal Min. Co. v. Hagood*, 30 S. C. 519, 3 L.R.A. 841, 9 S. E. 686; *Ex parte Lynch*, 16 S. C. 40; *People ex rel. Bradley v. Stephens*, 2 Abb. Pr. N. S. 348; *Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565; *People ex rel. Hall v. San Francisco*, 20 Cal. 591; 2 *Spelling, Inj.* § 1443; 26 *Cyc. Law & Proc.* p. 156; 19 *Am. & Eng. Enc. Law*, p. 763.

In the case of *Wright v. Kelley*, supra, the supreme court of Idaho declared mandamus to be not only an extraordinary, but in some respects a summary, remedy, and that it cannot be made an instrument for giving a court jurisdiction of litigation on collateral matters in an irregular way, and that the writ will not be granted to test collateral questions or the validity of an act of the legislature. The supreme court of New York, in the case of *People ex rel. Bradley v. Stephens*, supra, held "that it is

rarely, if ever, proper to award a mandamus in a case in which it can only be done by declaring an act of the legislature unconstitutional. That should be done in a more solemn mode of adjudication, upon a full trial, and not on an ordinary motion." In the *Lynch Case* the supreme court of South Carolina said: "That can hardly be considered a duty 'certain,' and allowing of 'no discretion,' which can only be made to appear by ignoring the law as it stands." The same court in the case of *State ex rel. Port Royal Min. Co. v. Hagood*, supra, said: "We have just seen that mandamus only lies for the enforcement of a plain ministerial duty, but it is not obvious how that can be a plain duty which is only made to appear by declaring an act of the legislature unconstitutional. It is not the province of the board of agriculture to determine the constitutionality of laws defining their own powers; nor will the courts, upon summary proceedings in mandamus, determine as to the constitutionality of statutes affecting the rights of third persons." In the case of *Maxwell v. Burton*, the supreme court of Utah said: "We find that there is a law on our statute books in reference to registration, compelling the respondent to do what we are now asked to compel him to undo. We cannot, for the purpose of this proceeding, inquire into its validity." In the cases of *Brooks v. State*, 162 Ind. 568, 70 N. E. 980, and *State ex rel. McKell v. Robins*, 71 Ohio St. 273, 69 L.R.A. 427, 73 N. E. 470, 2 A. & E. Ann. Cas. 485, and others which we have examined, the courts, without challenge or question of their right in that behalf or of the propriety of so doing, proceeded to determine the constitutionality of a legislative act preliminary to the issuance of a writ of mandamus. These cases are not regarded as decisive authority contrary to our conclusion and the holdings in the cases above cited.

It seems to us a manifest hardship to impose upon a petty ministerial officer the burden of determining at his peril and defending the validity of a law which he is required and willing to obey. He may have no personal interest in the law assailed, and be provided with no means to make a defense for the benefit of others. We conclude, therefore, that the relator in this proceeding cannot require the court to pass upon the constitutionality of the act called in question, and that no error appears in sustaining appellees' demurrer to his complaint.

The judgment is affirmed.

Petition for rehearing denied

SOUTH CAROLINA SUPREME COURT.

WILLIAM McINTOSH, Resp.,
v.

AUGUSTA & AIKEN RAILWAY COMPANY, Appt.

(— S. C. —, 69 S. E. 159.)

Street car — passenger — hand baggage — ice.

1. A passenger cannot be said as matter

Note. — Right of passenger to carry baggage or packages in street car.

The right of passengers on street cars to carry reasonable baggage and packages seems to have been assumed in some cases.

Thus in *Schalscha v. Third Ave. R. Co.* 19 Misc. 141, 43 N. Y. Supp. 251, a passenger was allowed to recover for damage done to his violin through the starting of the car before he had boarded it, and the consequent impact of the violin case with a pillar of the elevated road.

So, in *Morris v. Third Ave. R. Co.* 1 Daly, 202, which was an action against a railway for delivering a bag, left on a car, to the wrong person, the court said that the company did not engage for the carriage of such property, and did not incur respecting it the extraordinary liability imposed upon common carriers; but it was held that the compensation paid by the passenger was sufficient to constitute the carrier a bailee for hire and to render it liable for the wrongful delivery.

And in some cases, the companies, apparently recognizing the passengers' right to carry some articles, have established rules excluding certain specified things.

Thus a rule of a street railway company that "passengers must not be permitted to take into the cars packages or goods that are cumbersome or dangerous, such as barrels, boxes, trunks, gas pipe, lumber and panes of glass," has been held as a matter of law a reasonable regulation, and it was held error to leave the question of reasonableness to the jury. *Dowd v. Albany R. Co.* 47 App. Div. 202, 62 N. Y. Supp. 179.

And where one entered a closed car in which there were passengers, carrying in his hand a valise and two rifles, with bayonets attached, it was held that the court should instruct the jury that the conductor was entitled to eject him. *Ibid.*

And a bird cage 2 feet square and from 2 to 2½ feet high is, as a matter of law, a "cumbersome" package within the meaning of the foregoing statute. *Ray v. United Traction Co.* 96 App. Div. 48, 89 N. Y. Supp. 49.

In *Daniel v. North Jersey Street R. Co.* 64 N. J. L. 603, 46 Atl. 625, where a passenger carrying a small goat in his arms was refused admittance to a car, it was held that the reasonableness of a rule of the 30 L.R.A. (N.S.)

of law not to be entitled to carry upon a street car, as personal baggage, a small piece of ice wrapped so as not to drip.

Damages — punitive — exclusion of ice from street car.

2. Punitive damages may be awarded against a street car company for refusal to permit a passenger to take into the car as personal baggage, a small piece of ice wrapped so as to prevent dripping, which is needed by a sick person, notice of which has been given to the conductor.

(October 27, 1910.)

company forbidding the carrying of live animals in its cars was for the trial court, and that it was error to leave it to the jury.

In *Morris v. Atlantic Ave. R. Co.* 116 N. Y. 552, 22 N. E. 1097, where the railway company had a rule requiring an extra charge for each package "too large to be carried on the lap of the passenger without incommencing others," and a passenger boarded a car carrying a package of picture frames about 2 feet long and 20 inches wide, it was held that the court could not hold that the package was within the meaning of the regulation, and that the conductor's judgment was not conclusive, but that the question as to whether the particular package came within the regulation was for the jury.

While as a matter of law the decision of a conductor as to whether a certain package is prohibited by a rule of the company is not conclusive, yet it should have great weight, and his action should not be reversed by a jury unless it is a case of wilful or unreasonable judgment on his part. *Ray v. United Traction Co. supra.*

In *Vlasservitch v. Augusta & A. R. Co.* 85 S. C. 291, 67 S. E. 306, where the upper court only had power to determine whether there was any testimony to sustain the finding of the lower court, the judgment of the latter court holding that a graphophone horn about 5 feet long and from 18 to 24 inches across its mouth was personal baggage which the passenger might carry was affirmed, there being testimony tending to show that it did not come within the rules of the company prohibiting the carrying on its cars of specified property "or other articles too long or heavy to be taken with the passenger in car seat," the plaintiff having testified that he had at another time carried a similar horn to his seat and occupied it with another passenger.

In *Snerry v. Consolidated R. Co.* 79 Conn. 563, 10 L.R.A. (N.S.) 907, 118 Am. St. Rep. 169, 65 Atl. 962, 9 A. & E. Ann. Cas. 190, an action to recover for the loss of a suit case handed to the conductor by a woman upon entering the car, and placed by him in such a position as to be within her sight and control, the company was held not liable where the suit case was carried away by a man of ordinarily respectable appearance who was seated near it. J. T. W.

A PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Aiken County affirming a judgment of a Magistrate's Court in plaintiff's favor in an action brought to recover damages for alleged unlawful refusal to allow plaintiff to board defendant's car. Affirmed.

The facts are stated in the opinion.

Messrs. Boykin Wright, George T. Jackson, and J. B. Salley, for appellant: Ice is not baggage.

6 Cyc. Law & Proc. p. 666, c; Runyan v. Central R. Co. 61 N. J. L. 537, 43 L.R.A. 284, 68 Am. St. Rep. 711, 41 Atl. 367, 65 N. J. L. 228, 47 Atl. 422, 64 N. J. L. 67, 48 L.R.A. 744, 44 Atl. 985.

There was no evidence of any wanton or wilful conduct.

13 Cyc. Law & Proc. p. 109; 12 Am. & Eng. Enc. Law, p. 45; Gwynn v. Citizens' Teleph. Co. 69 S. C. 439, 67 L.R.A. 111, 104 Am. St. Rep. 819, 48 S. E. 460; 2 Sutherland, Damages, 1093, § 394; Funderburg v. Augusta & A. R. Co. 81 S. C. 143, 21 L.R.A.(N.S.) 868, 61 S. E. 1075.

Messrs. Croft & Croft for respondent.

Jones, Ch. J., delivered the opinion of the court:

This appeal is from the judgment of the circuit court affirming judgment of a magistrate for \$75 in an action for actual and punitive damages for unlawful and wanton refusal to allow plaintiff to board defendant's car.

It appears that on the 5th day of July, 1908, plaintiff attempted to board one of the electric passenger cars of the defendant at Langley, in Aiken county, having in his hand five cents' worth of ice wrapped in a sack. The plaintiff had bought the ice for a sick man at Bath, South Carolina, and was hastening to carry it to him. The conductor refused to allow plaintiff to board the train with the ice, testifying that the ice was in a crocus sack, and was leaking through the sack so that water would run over the floor of the car. The testimony of the plaintiff tended to show that the ice was fully wrapped, and was not leaking. This issue was found in favor of plaintiff by the magistrate and affirmed by the circuit court; hence it must be regarded as settled that the ice was wrapped in a sack, and was not leaking.

The defendant appellant contends that there was no evidence of any breach of duty, and that motion for nonsuit as to the entire cause of action, and especially as to punitive damages, should have been sustained. In arguing these propositions, contention is made that ice is not personal baggage. We cannot say as matter of law that a small piece of ice carried under the cir-

cumstances stated is not personal baggage. But the rule of the defendant company and the instructions given to its conductor assumed that it may be so regarded under certain circumstances. Rule No. 16 of the defendant company for carrying packages provided, "Passengers must not be allowed to carry bulky or dangerous packages aboard cars," and the verbal instructions to conductor were not to accept anything like ice which was not wrapped or boxed so as to prevent melting or leaking over the floor. Hence the rules of the company did not prevent the acceptance as baggage of a small piece of ice wrapped so as not to leak over the floor.

The circuit court concurred with the magistrate in finding that there was some evidence of wilful invasion of plaintiff's right. We think there was not a total failure of evidence on this point, and therefore the finding of the circuit court cannot be disturbed. There was testimony that plaintiff and the conductor had a previous difficulty; that plaintiff was attempting to board the car in a proper manner and with proper personal baggage; that he informed the conductor of the urgency of his carrying the ice to the sick man; that plaintiff offered to stay upon the platform with the ice and to pay for its transportation, but that nevertheless the conductor rudely shut the gate, and would not let him get aboard; that the conductor following on next train permitted plaintiff to board the car with the ice wrapped in the same manner, without objection.

The judgment of the Circuit Court is affirmed.

IOWA SUPREME COURT.

MARGARET ASHER, Appt.,
v.

JULIUS PEGG, Admr., etc., of Elias W. Pegg, Deceased.

(— Iowa —, 123 N. W. 739.)

Election of remedy — widow's claim — claim for services.

1. The assertion of a claim to a widow's share in a decedent's estate which fails for lack of proof of marriage is not an election of remedy so as to bar a claim against the estate for services rendered.

Note. — As to effect of choosing by mistake remedy not legally available, see notes to Clark v. Heath, 8 L.R.A.(N.S.) 144, and Harrill v. Davis, 22 L.R.A.(N.S.) 1153.

As to right to recover for household services rendered while the parties were living in illicit relations, see note to Emmerson v. Botkin, 29 L.R.A.(N.S.) 787.

Decedent's estate — claim — delay.

2. An equitable excuse for failure to file a claim for services against a decedent's estate within the time required by statute is shown where claimant was to within a reasonable time before presenting her claim prosecuting before the courts a claim to share in the estate as decedent's widow.

Same — meretricious claim.

3. A judgment denying the claim of a widow to share in the estate of decedent as his widow, on the ground that the marriage was not proved, does not of itself require the rejection of her claim against his estate for services, which was not presented within the time required by statute, on the ground that equity would not interfere because the relations between the parties were meretricious.

(December 15, 1909.)

A PPEAL by plaintiff from a decree of the District Court for Harrison County disallowing a claim against the estate of Elias W. Pegg, deceased, for compensation for services rendered deceased during his lifetime. Reversed.

Statement by McClain, J.:

A claim in probate in favor of plaintiff against the estate of Elias W. Pegg, deceased, for \$10,500 as compensation for services rendered by plaintiff to defendant in his lifetime, was disallowed by the trial court, and the plaintiff appeals.

Mr. S. H. Cochran, for appellant:

The assertion of a claim to a widow's share was not an election of remedy, barring a subsequent claim for services.

Zimmerman v. Robinson, 128 Iowa, 72, 102 N. W. 814, 5 A. & E. Ann. Cas. 960.

Plaintiff was not required to file the claim until her status or relation to decedent was determined.

Lamm v. Sooy, 79 Iowa, 593, 44 N. W. 893; *Senat v. Findley*, 51 Iowa, 20, 50 N. W. 575.

Messrs. Roadifer & Arthur and C. A. Bolter for appellee.

McClain, J., delivered the opinion of the court:

The claimant is the same person who, under the name of Margaret Pegg, asserted the right of a widow's share in the estate of Elias W. Pegg, deceased, in the case which was before us on appeal, entitled *Pegg v. Pegg*, 138 Iowa, 572, 115 N. W. 1027, where it was decided, affirming the decision of the lower court, that plaintiff was not the widow of deceased, not having been formally married to him, and not having occupied toward him the relation of wife under a common-law marriage. Plaintiff now asks 30 L.R.A. (N.S.)

that she be allowed compensation for the services rendered by her to deceased during the period of about twenty-two years, during which she lived with him, keeping house for him and assisting him in carrying on his farm, as the employee of deceased and for wages under an express contract, the evidence of which has been lost, or under an implied contract, but, in either event, not as a member of his family. This claim was resisted in the lower court on the grounds that it was not filed within the statutory period for filing claims, and that, plaintiff having elected to assert as against the estate of deceased and his heirs that she was his wife during the time these services were rendered, an assertion wholly inconsistent with her right to have compensation for such services, she cannot in this proceeding against the estate have an allowance therefor.

1. It cannot properly be said that the prior action and proceeding in which plaintiff alleged that she lived with deceased as his wife was an election of remedies precluding her from now taking a position in this action as to the facts which is inconsistent with her position formerly taken. Plaintiff could not have two remedies, or two rights of recovery, for her services, the election of one of which would preclude her from afterward resorting to the other. There is no identity whatever, either of law or of fact, between the claim asserted in the former action and the one which is now being asserted. Plaintiff entirely mistook her remedy in the former action and asserted a state of facts which did not exist; that is, which was subsequently found in the proceeding not to be established by the evidence. This was a plain case of mistake of remedy, and not election of remedy. We do not understand that it is material, in determining that there is no election where a mistaken remedy is resorted to, that it should be found the claim first asserted was in good faith. If a claim is made which, as developed in subsequent proceedings, does not exist, then the claimant is not barred from asserting in an independent action that an inconsistent claim existed entitling him to legal redress. *Zimmerman v. Robinson*, 128 Iowa, 72, 102 N. W. 814; *William W. Pierce v. Hutchins*, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524; *Water, Light & Gas Co. v. Hutchinson*, 19 L.R.A. (N.S.) 219, 90 C. C. A. 547, 160 Fed. 41; *Sullivan v. Ross*, 113 Mich. 311, 71 N. W. 634, 76 N. W. 309; *Bandy v. Cates*, 44 Tex. Civ. App. 38, 97 S. W. 710; *Calhoun County v. Art Metal Constr. Co.* 152 Ala. 607, 44 So. 876.

2. It is agreed that the present claim was not filed within one year from the giving

of notice of appointment by the administrator of the estate, as required by Code, § 3349; but it is agreed that the claim was filed within a reasonable time after the adjudication in this court on the appeal that plaintiff was not a common-law wife. It is contended that the pendency of the former action in the lower court, or on appeal, constituted such a peculiar circumstance as to entitle complainant to equitable relief under the exception provided in that section. It appears that the estate of deceased is solvent and remains unsettled, and we think it clear that an equitable excuse for not sooner filing the claim is made out. It cannot be said that plaintiff was negligent in not sooner filing her claim, when she was proceeding in court apparently in good faith to assert against the estate the right as widow. *Sankey v. Cook*, 82 Iowa, 125, 47 N. W. 1077; *Wickham v. Hull*, 102 Iowa, 469, 71 N. W. 352. And in general, as supporting the conclusion that under the circumstances plaintiff was entitled to equitable relief as against the statutory bar, such relief being expressly authorized by the statute, see: *Lamm v. Sooy*, 79 Iowa, 593, 44 N. W. 893; *Senat v. Findley*, 51 Iowa, 20, 50 N. W. 575; *Security F. Ins. Co. v. Hansen*, 104 Iowa, 264, 73 N. W. 596; *Easton v. Somerville*, 111 Iowa, 164, 82 Am. St. Rep. 502, 82 N. W. 475; *Henry v. Day*, 114 Iowa, 454, 87 N. W. 416.

But the lower court refused equitable relief to plaintiff on the ground that the peculiar circumstances justifying such relief as against the bar of the statute must be such as to appeal to the conscience of a court of equity, and justify the allowance of the claim in the furtherance of right and justice, and that the delay of plaintiff in filing her claim while she was attempting to establish a fictitious and fraudulent claim as common-law wife constituted no excuse for failing to file her claim within the statutory period, as she might have done. No doubt the court may refuse to entertain a claim not filed in time, although there is a reasonable excuse for not so filing it, if the claim itself is not such as to entitle the claimant to any relief. *Lamm v. Sooy*, supra. It does not appear, however, in this case, that the former action was prosecuted in bad faith. True it is that in deciding the former case on appeal this court held on the evidence before it that the pretended marriage between plaintiff and the deceased was a mere blind, and that plaintiff had not regarded herself during the lifetime of deceased as his lawful wife, although she had cohabited with him; but it is not contended in argument that the decision in the former case was an adjudication binding on the parties in this case, and no such claim

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could well be made, for the two proceedings are wholly distinct as to subject-matter. The point adjudicated in the former case was that the marriage relation did not exist between plaintiff and deceased. The question as to whether there had been illicit cohabitation between them was purely collateral, and not necessarily involved. There might have been a pretended marriage without such cohabitation as to render the entire subsequent relations meretricious and defeat the right of plaintiff to recover *quantum meruit* for lawful services actually rendered. In the absence of any other evidence than that afforded by the adjudication in the prior case that plaintiff was not the wife of deceased, the lower court was not, we think, justified in holding that the relations between the parties, so far as involved in this record, had been such as to require the denial of equitable relief to the plaintiff as against the statutory bar to her claim. As already indicated, the court denied relief to plaintiff on her own allegations.

The disallowance of plaintiff's claim by the lower court on the ground that there were no equitable circumstances warranting the court in considering it as against the plea of the statutory limitation is reversed, and the case is remanded for further proceedings in the probate court in harmony with this opinion.

Reversed.

Petition for rehearing denied.

MICHIGAN SUPREME COURT.

PEOPLE OF THE STATE OF MICHIGAN
v.
JOHN CURRY.

(— Mich. —, 128 N. W. 213.)

Intoxicating liquor — directed verdict — question of law.

The court cannot, in a prosecution for making an unlawful sale of intoxicating liquor, direct a verdict of guilty, and cause the clerk to enter it, without giving the jury a chance to disobey the instruction, although the court acts upon the theory that the facts proved present the question whether or not in contemplation of law there has been a violation of the statute.

(November 11, 1910.)

EXCEPTIONS by defendant to the direction by the Circuit Court for Ionia

Note. — As to right of court in criminal case to direct a verdict of guilty, see note to *Konda v. United States*, 22 L.R.A. (N.S.) 304.

County of a verdict of guilty on the trial of an indictment charging him with violating the local option law. Conviction reversed.

The facts are stated in the opinion.

Mr John Nichol for defendant.

Messrs. Dwight C. Sheldon and John E. Bird, Attorney General, for the People.

Blair, J., delivered the opinion of the court:

A number of young men of Ionia county, where the local option law was in force, arranged to obtain a quantity of lager beer from Grand Rapids, where such law was not in force. The arrangement was, according to the undisputed testimony, that each of the parties thereto, including respondent, was to contribute \$1 to a fund which was to be used by respondent in purchasing beer, cigars, and sandwiches, and paying respondent's expenses. The refreshments, when secured, were to be delivered to the contributors at the fair grounds in the city of Ionia. In accordance with the arrangement, respondent went to Grand Rapids and purchased a half barrel and a case of beer, which was consigned and shipped to him by express, received by him, and by him caused to be transported to the grand stand at the fair grounds, where any of the contributors to the fund helped himself to as much as he chose and as often as he chose, without reference to the proportion that he had paid for. The record is silent as to whether respondent paid the dollar which he was to pay, or whether he drank any of the beer, although he remained at the fair grounds until the next morning, and shipped the empty half barrel and bottles to Grand Rapids. The circuit judge directed a verdict of guilty, and from such verdict respondent appeals, on the ground that the court should have directed a verdict of not guilty.

Respondent's counsel takes the position that since the purchase of the beer was made in a county where such purchase was lawful, and the evidence shows, as he alleges, that the respondent merely acted as the agent of the others in the shipment and delivery of the beer, he was guilty of no offense and was entitled to an instructed verdict. There would be force in this contention if the evidence disclosed that respondent had no interest in the beer and merely purchased with the money furnished to him by individuals, and delivered to each of such individuals the amount of beer paid for and belonging to him. *People v. Converse*, 157 Mich. 30, 121 N. W. 475. Such was not this transaction.

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The witness Miller testified: Curry was to go down and get the beer.

Q. What was he to get out of it?

A. He wasn't to get nothing out of it. He was to get his expenses. He was to contribute the same as the rest of us, \$1. I think we got a rebate for it, 10 cents, something like that. Somebody gave it to me the next day at Lynes's. I am not sure, I got 10 or 15 cents. He figured out the expense of the hack and everything and gave us the rebate. I don't know what the beer cost, nor what the hack hire was, and I never asked Curry his expenses. . . .

Q. As I understand it, you boys were to put up \$1 apiece and somebody was to go down to Grand Rapids and get some beer?

A. Yes, sir. It was agreed that whoever went should be paid his expenses. At the time we put up the dollar apiece I didn't expect to get any money back. It was to pay for the picnic and the expenses of the parties who purchased the beer and sandwiches and cigars. That was what the dollar apiece was contributed for. The money was placed in the hands of either Bowersox or Curry. Each man helped himself to the beer he wanted. I don't know whether any beer was left in the keg or whether there wasn't. Each man had what he wanted. I considered it my own beer I was drinking. I didn't purchase any beer from John Curry, nor did he give me any, or furnish me any except as he ordered it from Grand Rapids.

Q. By Mr. Sheldon: No attempt whatever at any equitable distribution of this beer, was there?

A. No, sir.

It is clear therefore, that, under the agreement, respondent had the same interest in the beer, sandwiches, and cigars that the others had; and the testimony of all of the participants demonstrates that it was not the intention that the beer should be proportionately divided between them, but should be drunk, indiscriminately by all, in accordance with their respective thirsts and holding capacity. It is clear that if each of the parties had received individually a certain number of quarts or bottles of beer as his own property, and each had poured such beer into a receptacle to be drunk in common, he would have been guilty of furnishing such beer to the others, in violation of the local option act. *People v. Myers*, 161 Mich. 40, 125 N. W. 701.

It seems equally clear to us that where, as in this case, the beer is undivided and drunk in common, each person is furnishing a portion of the beer paid for by him to others, and that each of the parties to the agreement engaged in drinking the beer in question was guilty of a violation of the

local option law. We are also of the opinion that, whether respondent had any pecuniary interest in the beer or not, or whether he drank any of it, he would be equally guilty with the others, if he procured the beer for them to be used as it actually was used.

We feel obliged to reverse this case, however, for the reason that in directing the verdict the court invaded the constitutional rights of respondent. In his instructions to the jury the court said, among other things: "The Court: I think the way the case stands, gentlemen, it is one for the court to dispose of. I would much rather submit the matter to the jury if based upon any facts that might warrant the court in submitting it. . . . In the judgment of this court the title and control of that property was in Mr. Curry, and by permitting others to take from what was then, in part at least, his individual property, it has been a violation of the law, and it would be your duty to return a verdict of guilty on all three counts. Take the verdict, Mr. Clerk. (Verdict received.) The Court: I think, in view of what our court have held in this class of cases, there will be an order entered giving you until the first day of next term of this court to have this matter passed upon by the supreme court; in the meantime, the respondent will remain upon the same recognizance for his appearance here until the first day of the next term of this court." These instructions really made the verdict that of the court, and not of the jury, and compel a reversal of the conviction. *People v. Doyle*, 160 Mich. 423, 125 N. W. 358. In view of the important nature of the constitutional right invaded, we have felt it to be our duty to consider the point, although it is not raised by respondent.

The conviction is reversed, and a new trial ordered.

McAlvay, J., concurs.

Stone, J.: I concur in the result, because of the directed verdict.

Ostrander, J., concurred with Stone, J.

Hooker, J., concurring:

I concur in the conclusion reached by Mr. Justice Blair, upon the ground that, in directing the clerk to enter a verdict directed without giving the jury an opportunity to retire, the learned circuit judge gave the jury no opportunity to consider the case and disobey the instruction. The case of *People v. Collison*, 85 Mich. 105, 48 N. W. 292, is a case directly in point, and established the rule in this 30 L.R.A. (N.S.)

state that, in a case of misdemeanor, a party has a right to expect, if not to ask, a jury to disobey the instructions of the court to find a verdict of guilty, and that the trial court must give the jury the opportunity of doing so, though we have held that a defendant was not entitled to an instruction that they might disobey the instruction of the court to find a verdict of guilty, in the case of a misdemeanor. See *People v. Gardner*, 143 Mich. 116, 117, 106 N. W. 541. The *Collison* Case has been followed since. See *People v. North*, 153 Mich. 616, 117 N. W. 63.

I am not convinced that where several persons send one of their number to purchase beer at a city where the purchase is lawful, and it is received by them via an express company, the one who purchased becomes liable for furnishing to one of their number, who drinks more than his proportionate share, as measured by the cost of the beer and their several contributions to the fund expended for the beer; nor am I sure that the evidence warrants the conclusion that one or more did so. The beer being owned in common, each had a right to help himself to his share, and another would not be liable as a furnisher of beer merely because one took more than he paid for. Apparently, my Brother Blair's opinion rests upon the expectation of the parties that this beer, paid for and owned jointly, would or might not be accurately divided,—a proposition that I doubt. On the other hand, I am not sure that I would withhold my assent to the doctrine that one who causes beer to be shipped to himself, or himself and others, with the understanding with his fellows that it is to be divided in proportion to their respective contributions or to be used in common, might not be guilty of unlawfully furnishing beer, if the beer was so delivered and shared by himself and others. I am unable to distinguish such a case from *People v. Lapham* (Mich.) 127 N. W. 366. Such would seem to be a clear case of furnishing wherever he might get the beer.

I think, also, that such act is not within the decision in the case of *People v. Converse*, 157 Mich. 30, 121 N. W. 475. That case holds that the shipment by express from a county in which the selling of beer is lawful, to a purchaser residing in a county where it is prohibited, and the delivery there by the agent of the express company in the due course of business, does not make such express agent the keeper of a place where liquor is given away and furnished, or of unlawfully furnishing the same, which were the charges upon which the defendant was tried. It does not hold that a private citizen living in a "wet"

county may by agreement go and procure liquor, in his own county, or anywhere else, and bring it or have it brought into the "dry" county, and deliver or cause it to be delivered therein to another, and not be guilty of "furnishing" within the local option act. The *Converse Case* protects the agent of the express company, but it in no way sustains the claim that a party procuring and delivering liquor personally or in any other way within the dry county may escape the law against furnishing, because he does it at the request of or under employment by the person for whom it is procured, and therefore was an agent. An agent may violate the law against furnishing as well as another, in my judgment. The acts done in the "dry" county constitute the breach of the law. The case holds that the law, being penal, cannot be extended to the act of the express company and its agent in the course of business. This follows the rule requiring strict construction of penal statutes.

The conviction should be set aside, and a new trial ordered.

RHODE ISLAND SUPREME COURT.

FRANK L. STAPLES

v.

ALTON E. WAITE.

(30 R. I. 516, 76 Atl. 353.)

Limitation of action — change of residence — conflict of laws.

A debtor who, after contracting in the state of his residence, where his creditor continues to reside, takes up his residence in another state, may, when suit is brought there on the contract, set up its statute

Note. — See note to *Thomas v. Clarkson*, 6 L.R.A.(N.S.) 658, on the general subject of the law governing limitation of actions on contract. Upon its facts *STAPLES v. WAITE* seems to come clearly within the rule which obtains in the absence of statutory provisions to the contrary, that the limitation of actions is governed by the law of the forum, inasmuch as the exceptions made by the local statutes to this general rule were plainly inapplicable.

As to construction and effect of statute of the forum admitting bar of statute of state or country in which cause of action arises or accrues, see notes to *Doughty v. Funk*, 4 L.R.A.(N.S.) 1029, and *Bruner v. Martin*, 14 L.R.A.(N.S.) 776. And see in this connection *Moran v. Moran*, post, 898.

As to applicability to nonresidents of provision suspending limitations against defendant who is out of state, until his "return," see note to *Jamieson v. Potts*, 25 L.R.A.(N.S.) 24. 30 L.R.A.(N.S.)

of limitations, although the action is not barred by the statute of the state where the contract was made.

(June 24, 1910.)

CERTIFICATION by the District Court for Providence County for the opinion of the Supreme Court of a question arising upon the trial of an action brought to recover compensation for services rendered as an attorney. Affirmative answer returned and cause remanded.

The facts are stated in the opinion.

Mr. John P. Beagan for plaintiff.

Mr. Harry P. Gross, for defendant.

The defendant's plea of the statute of limitations of Rhode Island bars the plaintiff's action.

Weiser v. McDowell, 93 Iowa, 772, 61 N. W. 1094; *Weber v. State Harbor*, 18 Wall. 57, 21 L. ed. 798; *Story*, Conf. L. 8th ed. §§ 576-580, 582, 582b; *Cronan v. Fox*, 50 N. J. L. 417, 14 Atl. 119; *Commercial Nat. Bank v. Davidson*, 18 Or. 57, 22 Pac. 517; *Denny v. Faulkner*, 22 Kan. 89; *Security Co. v. Eyer*, 36 Neb. 507, 38 Am. St. Rep. 735, 54 N. W. 838; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Hoadley v. Northern Transp. Co.* 115 Miss. 304, 15 Am. Rep. 106; *Brunswick Terminal Co. v. National Bank*, 48 L.R.A. 625, 40 C. C. A. 22, 99 Fed. 635; 25 Cyc. Law & Proc. p. 1018; *Dacey*, Conf. L. pp. 711, 712, 715, 718; *British Linen Co. v. Drummond*, 10 Barn. & C. 903; *Huber v. Steiner*, 2 Scott, 304; *Harris v. Quine*, L. R. 4 Q. B. 653; 2 *Wharton*, Conf. L. 3d ed. §§ 535-537, 541; *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177; *Don v. Lippman*, 5 Clark & F. 1, 5 Eng. Rul. Cas. 930; *Nash v. Tupper*, 1 Caines, 402, 2 Am. Dec. 197; *Lamberton v. Grant*, 94 Me. 508, 80 Am. St. Rep. 415, 48 Atl. 127; *Thompson v. Reed*, 75 Me. 404; *Thibodeau v. Levassuer*, 36 Me. 362; *Leroy v. Crowninshield*, 2 Mason, 151, Fed. Cas. No. 8,269; *Ruggles v. Keeler*, 3 Johns. 263, 3 Am. Dec. 482; *Perkins v. Guy*, 55 Miss. 155, 30 Am. Rep. 510; *Townsend v. Jamison*, 9 How. 407, 13 L. ed. 194; *Crocker v. Arey*, 3 R. I. 178; *Levy v. Boas*, 22 Bail. L. 217, 23 Am. Dec. 134; *Home L. Ins. Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334; *Van Schuyver v. Hartman*, 1 Alaska, 431; *Jones v. Jones*, 18 Ala. 248; *Obeav v. First Nat. Bank*, 97 Ga. 587, 33 L.R.A. 384, 25 S. E. 335; *Patterson v. Crawford*, 12 Ind. 241; *Willard v. Wood*, 4 Mackey, 538; *Atwater v. Townsend*, 4 Conn. 47, 10 Am. Dec. 97; *Bruce v. Luck*, 4 G. Greene, 143; *Farmers' & T. Nat. Bank v. Lovell*, 8 Ky. L. Rep. 261, 1 S. W. 426; *McLenaghan v. Hetherington*, 8 Manitoba L. Rep. 357; *Hoggett v. Emerson*, 8

Kan. 262; Walworth v. Routh, 14 La. Ann. 201; Carvell v. Wallace, 9 N. S. 165; Williams v. Jones, 13 East, 440; Bigelow v. Ames, 18 Minn. 527, Gil. 471; Stirling v. Winter, 80 Mo. 141; Star Wagon Co. v. Matthiessen, 3 Dak. 234, 14 N. W. 107; Young v. Hart, 101 Va. 480, 44 S. E. 703; 3 Page, Contr. §§ 1734, 1737; New York L. Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732; Barbour v. Erwin, 14 Lea, 716; Morgan v. Camden & A. R. Co. 2 Pa. Co. Ct. 97; Adams v. Kelly, 2 Wash. Terr. 263, 5 Pac. 601; Carrigan v. Semple, 72 Tex. 306. 12 S. W. 178; Brown v. Bicknell, 1 Pinney (Wis.) 226, 39 Am. Dec. 299; Cartier v. Page, 8 Vt. 146; Mason v. Union Mills Paper Mfg. Co. 81 Md. 446, 29 L.R.A. 273, 48 Am. St. Rep. 524, 32 Atl. 311; Graves v. Weeks, 19 Vt. 178; Brigham v. Bigelow, 12 Met. 272; Power v. Hathaway, 43 Barb. 217; Paine v. Drew, 44 N. H. 306; Mowry v. Cheesman, 6 Gray, 515; Lincoln v. Battelle, 6 Wend. 475; Andrews v. Herriot, 4 Cow. 508; Angell, Limitations, 6th ed. §§ 65 et seq.; Wood, Limitations, 3d ed. § 8; 2 Parsons, Contr. 9th ed. ** 589, 590.

Article 4, § 1, of the Constitution of the United States, does not require Rhode Island to enforce the Maine statute of limitations.

M'Elmoyle v. Cohen, 13 Pet. 326-328, 10 L. ed. 184, 185; Black, Const. Law, 2d ed. p. 248; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398; Crippen, D. & Co. v. Loughton, 69 N. H. 540, 46 L.R.A. 467, 76 Am. St. Rep. 192, 44 Atl. 538; Bonaparte v. Appeal Tax Ct. 104 U. S. 592, 26 L. ed. 845; Story, Const. §§ 1302, 1309; Cole v. Cunningham, 133 S. 107, 112, 33 L. ed. 538, 541, 10 up. Ct. Rep. 269; Patterson, Const. 2d ed. § 118; Christmas v. Russell, 5 Wall. 290, 302, 18 L. ed. 475, 478; Joice v. Scales, 18 Ga. 725; Shelton v. Johnson, 4 Sneed, 672, 70 Am. Dec. 265.

Blodgett, J., delivered the opinion of the court:

Under the provisions of § 478, court and practice act, the following question has been certified to this court by the district court of the sixth judicial district, viz.:

"In assumpsit brought in Rhode Island on a debt contracted in the state of Maine, both the plaintiff and defendant at the time said alleged debt accrued being residents of Maine, is a plea of the statute of limitations in Rhode Island a good plea in bar,—it appearing that the plaintiff, since such debt was contracted in Maine, has always been, and was at the time of bringing his 30 L.R.A. (N.S.)

action, a resident of Maine; that the defendant was continuously for more than six years after such cause of action accrued, and prior to the bringing of said action, in Rhode Island, a resident of Rhode Island; and that, under the law of Maine, such debt is not barred, because a debtor's absence from that state interrupts the running of its statute of limitations?"

Sections 250, 252, and 253, court and practice act, are as follows:

"Sec. 250. All actions of account, except on such accounts as concern trade or merchandise between merchant and merchant, their factors and servants; all actions on the case, except for words spoken and for injuries to the person; all actions of debt founded upon any contract without specialty, or brought for arrearages of rents; and all actions of detinue and replevin, shall be commenced and sued within six years next after the cause of action shall accrue, and not after."

"Sec. 252. If any person against whom there is or shall be cause for any action hereinbefore enumerated, in favor of a resident of the state, shall at the time such cause accrue be without the limits thereof, or, being within the state at the time such cause accrues, shall go out of the state before said action shall be barred by the provisions of this chapter, and shall not have or leave property or estate therein that can be attached by process of law, then the person entitled to such action may commence the same within the time before limited after such person shall return into the state in such manner that an action may with reasonable diligence be commenced against him by the person entitled to the same.

"Sec. 253. If any person at the time any such cause of action shall accrue to him shall be within the age of twenty-one years, or of unsound mind, or imprisoned, or beyond the limits of the United States, such person may bring the same within such time as hereinbefore limited after such impediment is removed."

When the cause of action is in favor of a resident of this state, § 252, supra, extends the time as therein provided, and as decided by this court in Cottrell v. Kenney, 25 R. I. 99, 103, 54 Atl. 1010, 1011, wherein it is said by Douglas J., in construing the similar provisions of chapter 205, Pub. Stat. 1882: "The true meaning of the statute is expressed in very plain language. The first four sections of the chapter prescribe the periods within which various common-law actions may be brought after the several causes of action accrue. This section pro-

vides for a different computation of the period of limitation in two specified cases: First, when the cause of action accrues when the defendant is out of the state; secondly, when the defendant goes out of the state after the cause of action has accrued, and before the limited time for bringing the action has expired. In both cases a new time is fixed at which the statute begins to run *i. e.*, when the defendant comes or returns into the state in such manner that the plaintiff can begin his action against him. Under this section the coming or return into the state is analogous to a new promise in an action of assumpsit. It does not add a certain increment to so much of the prescribed period of limitation as has already passed, but it fixes a new time for the prescribed period of limitation to begin."

But, even if the plaintiff had been continuously a resident of this state from the time the cause of action accrued, he would now be barred by the six years' residence of defendant in Rhode Island, and, by the express provisions of the question submitted, the plaintiff was not a resident of this state, but was a resident of Maine at the time the cause of action accrued in his favor; nor has he ever been a resident of this state. His right of action, therefore, in this state, is dependent upon the provisions of § 250, *supra*, and is barred by the lapse of six years' residence of the defendant in Rhode Island after the cause of action accrued, whatever may be his right in the state of Maine, or in other jurisdictions having other statutory provisions. Having been a resident of Maine, and thus not having been without the limits of the United States, he is not aided by the provisions of § 253, *supra*.

The case of *McCann v. Randall*, 147 Mass. 81, 84, 9 Am. St. Rep. 666, 17 N. E. 75, 80, cited by the plaintiff, seems to have been placed on his brief by mistake, inasmuch as it is directly opposite to his contention. In that case the defendant made a promissory note in Maine, and then, before the statute of limitations of Maine had run, the defendant moved to New York, where he resided for more than six years. Subsequently, he was sued in Massachusetts, and Devens, J., in considering whether the action was barred in Massachusetts under the statute of that state, observes: "When this bill was brought, any action by the plaintiff in the courts of New York was there barred, as the statute of limitations of that state is found to exist; *Randall* [the defendant] having resided there more than six years."

The precise question here involved has 30 L.R.A. (N.S.)

been determined in other jurisdictions. Thus, in *Bruce v. Luck*, 4 G. Greene, 143, it was held as follows: "This suit was commenced by Thomas Bruce and others against L. P. Luck on the transcript of a judgment rendered by a justice of the peace on a promissory note in the state of Missouri in 1834. The defendant pleaded the statute of limitations of 1843. To this the plaintiffs replied that they and the defendant were not residents of this state at the time the note was made; and that, although the defendant had been for many years a citizen of Iowa, still they, the plaintiffs, had continued to reside in Missouri; that said note and judgment had not been subject to the laws of Iowa until the commencement of this suit; and that therefore their right of action ought not to be barred by defendant's plea. Defendant's demurrer to this replication was sustained, and judgment rendered in his favor. On this ruling errors are assigned. It is objected that the statute of limitations is not applicable to foreign contracts or notes and nonresident plaintiffs. If the laws of other states are to prevail over the remedial statutes of our own state, if the law of the place where the contract was made is to govern in all matters affecting the remedy, there would be good reason for this objection. The doctrine seems to be settled beyond controversy that the *lex fori* must prevail in all matters merely remedial. In this connection no rule is better settled than that the statute of limitations of the state in which the action is brought is to prevail, and not that of the state in which the contract was made,"—citing cases. "It is not pretended that the defendant in this case was not a resident of the state from the time the statute commenced to run until the limitation had expired. The replication rested entirely upon the facts that the plaintiff had been a nonresident during that time, and that the contract was made in another state. So far as those facts are concerned, we are fully confirmed in the opinion that they cannot remove this case from the effect of the statute. Judgment affirmed." See also *Home L. Ins. Co. v. Elwell*, 111 Mich. 689, 70 N. W. 334; *Brown v. Stone*, 4 La. Ann. 235; *Beardsley v. Southmayd*, 15 N. J. L. 171, affirmed in *Wood v. Leslie*, 35 N. J. L. 472. And see *Crocker v. Arey*, 3 R. I. 178; *Townsend v. Jemison*, 9 How. 407, 13 L. ed. 194.

The cause will be sent back to the District Court of the Sixth Judicial District, with the decision of this court certified thereon, for further proceedings.

IOWA SUPREME COURT.

IOWA L. MORAN, Exrx., etc., of Shelby
B. Moran, Deceased,

v.

GEORGE W. MORAN, Appt.

SAME

v.

VIRGINIA RICHARDS, Appt.

SAME

v.

FRANK B. MORAN, Appt.

(— Iowa —, 123 N. W. 202.)

Conflict of laws — limitation of action — note.

1. Where, in response to notification by a person resident in one state, that he will lend money to one residing in another state, upon receipt of a note for the amount, the latter forwards the note, and the former upon receiving it sends the money, the contract is made in the state where the lender resides, and a suit upon it is governed by its statute of limitations, and not by that of the state where the maker resides.

Limitation of actions — foreign debtor.

2. The statute of limitations of the state where the maker of a note resides when it falls due does not govern an action brought upon it in the state where it is in fact payable, where the statute of that state, although prohibiting actions in its courts upon causes of action which are fully barred by the laws of the country where defendant had previously resided, states that the provisions shall not apply to causes of action arising within the state.

Will — forbidding contest — validity.

3. A provision in a will forfeiting the share of one who contests it is valid and enforceable.

Same — asserting independent title — effect.

4. An attempt to assert title to property embraced in testator's will, under an independent title, is within a provision forfeiting the share of one who contests the will, if its success would effectually upset and destroy the whole plan which testator had formed for the disposition of his estate.

(November 17, 1909.)

(Evans, Ch. J., dissents from propositions 3 and 4.)

SEPARATE APPEALS by defendants from judgments of the District Court

Note. — The question as to where a cause of action is deemed to arise for the purposes of a statute of the forum admitting the bar of a statute of another state or country is discussed in notes to *Doughty v. Funk*, 4 L.R.A.(N.S.) 1029, and *Bruner v. Martin*, 14 L.R.A.(N.S.) 776, 30 L.R.A.(N.S.)

for Harden County, defendant George W. Moran appealing from a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain promissory note, and defendants Virginia Richards and Frank B. Moran appealing from judgments declaring certain legacies forfeited under the will of Selby B. Moran, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Dawley & Wheeler and Herbert A. Huff, for appellants:

A nonresident may plead that an action is barred by the statute of limitations of the state where he resides.

Lebrecht v. Wilcoxon, 40 Iowa, 93; *Smyth v. Peters Shoe Co.* 111 Iowa, 388, 82 N. W. 898.

By depositing a note in the mail with the intent that it shall be transmitted to the payee in the usual way, the maker parts with control over it, and the delivery is complete.

Barrett v. Dodge, 16 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530; *Tharp v. Thero*, 112 Iowa, 573, 84 N. W. 709.

The "cause of action" arises only when the aggrieved party has the right to apply to the proper tribunal for relief.

25 Cyc. Law & Proc. p. 1066; *Jett v. Hempstead*, 25 Ark. 462; *Everett v. O'Leary*, 90 Minn. 154, 95 N. W. 901; *Larason v. Lambert*, 12 N. J. L. 247; *Eller v. Church*, 121 N. C. 269, 28 S. E. 364; *Dunn v. Dunn*, 137 N. C. 533, 50 S. E. 212; *Smith v. Bythewood*, Rice, L. 245, 33 Am. Dec. 111; *Buntin v. Chicago, R. I. & P. R. Co.* 41 Fed. 744; *Barry v. Minahan*, 127 Wis. 570, 107 N. W. 488; *Williamson v. Chicago, R. I. & P. R. Co.* 84 Iowa, 583, 51 N. W. 60; *Weiser v. McDowell*, 93 Iowa, 773, 61 N. W. 1094; *Ware v. State*, 74 Ind. 181; *Miller v. Perris Irrig. Dist.* 85 Fed. 693; *Atherton v. Williams*, 19 Ind. 105; *Ganser v. Ganser*, 83 Minn. 199, 85 Am. St. Rep. 461, 86 N. W. 18; *Culver v. Culver*, 31 N. J. Eq. 448; *Sterrett v. Northport Min. & Smelting Co.* 30 Wash. 164, 70 Pac. 266; *Wilson v. Tucker*, 105 Iowa, 55, 105 N. W. 55.

The "cause of action" arises in the foreign state when the plaintiff has the right to sue the defendant in the courts of such foreign state, regardless of the place where the contract originated.

Osgood v. Artt, 11 Biss. 160, 10 Fed. 365; *Luce v. Clarke*, 49 Minn. 356, 51 N. W. 1162; *Drake v. Bigelow*, 93 Minn. 112, 100 N. W. 664; *Hyman v. Bayne*, 83 Ill. 256; *Berry v. Krone*, 46 Ill. App. 82; *Wooley v. Yarnell*, 142 Ill. 442, 32 N. E. 891; *Strong v. Lewis*, 204 Ill. 35, 68 N. E. 556; *Bruner v. Martin*, 76 Kan. 862, 14

L.R.A. (N.S.) 775, 123 Am. St. Rep. 172, 93 Pac. 165, 14 A. & E. Ann. Cas. 39.

The "cause of action" arises when the debt becomes due, and where the debtor resides at the time.

Luce v. Clarke, *supra*.

A provision in a will to the effect that a legacy shall be forfeited in case the legatee contests the will is invalid.

Mallet v. Smith, 6 Rich. Eq. 12, 60 Am. Dec. 107; *Re Barandon*, 41 Misc. 380, 84 N. Y. Supp. 937.

The word "contest" in Constitutions and statutes has a distinct, defined meaning. It is a litigation. It implies a plaintiff and defendant, and a thing in controversy.

Pratt v. Breckenridge, 112 Ky. 1, 65 S. W. 136, 66 S. W. 405; *Smithsonian Inst. v. Meech*, 169 U. S. 398, 42 L. ed. 793, 18 Sup. Ct. Rep. 396.

Messrs. Albroom & Lundy for appellee.

Weaver, J., delivered the opinion of the court:

In February, 1904, Selby B. Moran, a resident of Hardin county, Iowa, died testate, leaving surviving him Iowa L. Moran, his widow, and Selby A. Moran, Lee Moran, Virginia Richards, Frank Moran, George W. Moran, and Eldon Moran, children by a former wife, his only heirs at law. His will, which was duly probated, consists of seven paragraphs, as follows:

Paragraph 1 is formal only, and need not be here set out.

Paragraph 2 gives to his wife in her own right all his personal property, moneys, and credits.

Paragraph 3 is in the following words: "I devise, give, grant, and bequeath unto my said wife, I. L. Moran, in fee simple, my home farm, upon which I now reside, and described as follows: The south half of the northwest quarter and the southwest quarter of the northeast quarter of section seventeen, township eighty-seven, range nineteen west of the 5° P. M., in Hardin county, state of Iowa, to have and to hold the same as her own absolutely."

Paragraph 4 gives to his wife the use of all the rest of his real estate for one year after the testator's death.

Paragraph 5 directs his executrix to sell all the real estate not devised to his wife for the best obtainable cash price, and to distribute the proceeds, as follows: "She shall pay to my son Selby A. Moran the sum of \$500, to my son Lee Moran the sum of \$500, to my daughter, Virginia Richards, the sum of \$500, to my son Frank Moran the sum of \$500, to my son George W. Moran the sum of 500, and shall pay to my son Eldon Moran the remainder of 30 L.R.A. (N.S.)

the net proceeds of the sale of said described premises."

Paragraph 6 is in the following words: "I further declare and provide that in case any of the legatees named as beneficiaries in this instrument shall contest the same, such beneficiary or legatee, or beneficiaries or legatees, making such contest, shall forfeit thereby his right to any portion of my estate, and the provision or legacy provided in this will for such beneficiary or legatee or legatees shall by such act become the property of my said wife, I. L. Moran, absolutely, in her own right."

Paragraph 7 appoints Iowa L. Moran the executrix of his will without bond.

After the probate of said will, Virginia Richards, Lee Moran, Frank Moran, and George W. Moran united in beginning an action in equity in the district court of Hardin county, against Iowa L. Moran, alleging that the plaintiffs therein were heirs at law of Miranda Moran, first wife of Selby B. Moran, who died intestate in the year 1885, seized of a tract of land which Selby B. Moran afterward pretended to devise to his second wife by the third paragraph of the will, hereinbefore referred to, when, in truth and in fact, said Selby B. Moran had no right, title, to, or interest in said lands which he could lawfully devise to anyone, and that his will, by which he attempted to devise or dispose of said lands, was of no force or effect against said plaintiffs, who inherited the same from their mother. This claim was based upon the allegation that the lands had been conveyed by a former owner to the said Miranda Moran by a good and sufficient warranty deed, and that Selby B. Moran, without her knowledge and consent, had fraudulently erased her name as grantee in said deed, and inserted his own in place thereof, which forged and altered deed he caused to be recorded, and, after her death in ignorance of said wrong, he had fraudulently procured a decree of the district court quieting his title in said lands against her children, all of whom, by his fraud and concealment, had been kept in entire ignorance of their rights in the premises until after his death. Upon these allegations, they sought to have the will adjudged inoperative and of no effect, so far as the same purported to devise or dispose of any of the lands alleged to have been owned by Miranda Moran, and their own title quieted thereto, against the said Iowa L. Moran. The litigation thus begun terminated in a decision by this court sustaining the devise to the second wife. *Richards v. Moran*, 137 Iowa, 220, 114 N. W. 1035.

While the action above referred to was still pending, Iowa L. Moran, as executrix

of her husband's will, began an action against George W. Moran to recover the amount of a promissory note given by him to Selby B. Moran July 25, 1896, due six months after date, for the sum of \$100, with interest at 7 per cent. By a second count of her petition therein, she pleaded the provision of the will of Selby B. Moran for a legacy of \$500 to the said George W. Moran, and asked that the amount due the estate upon the said promissory note be indorsed and allowed as a payment or set-off against said legacy. By a later amendment to her petition, she further set up the sixth paragraph of the will, providing for a forfeiture of all benefits under said will by any heir contesting said instrument, and alleged that said George W. Moran, by uniting in the action above mentioned, to dispute the effectiveness of the provisions of said will, had forfeited all right to demand and recover said legacy, and asked that it be so adjudged and decreed by the court. Said Iowa L. Moran also instituted other proceedings against Virginia Richards and Frank B. Moran to have their legacies under the will of Selby B. Moran declared forfeited alleging the same grounds therefor as were assigned by her in her petition against George W. Moran. To the claim on the promissory note, George W. Moran answered, denying the execution of the instrument sued upon. In a second count he alleged that the note was made and delivered in the state of Michigan, where he then lived and has ever since resided, and that plaintiff's cause of action on said instrument is fully barred by the statute of limitations of that state, as well as by the statute of limitations of this state. George W. Moran, Frank B. Moran, and Virginia Richards severally entered their denial of the alleged forfeiture of their right to demand and receive the legacies provided for them by the will of Selby B. Moran. On the trial the executrix, in support of her claim that defendants had forfeited their legacies under the will, introduced the records and files of the action in equity hereinbefore referred to. In support of her claim upon the promissory note of George W. Moran, she introduced the instrument, which is in the following form:

\$100

July 25th. 1896.

Six months after date I promise to pay to the order of S. B. Moran one hundred dollars at 7 per cent interest. Value received.

Geo. W. Moran.

The defendant, George W. Moran, offered evidence tending to disprove the genuineness of the signature to said note, 30 L.R.A. (N.S.)

and plaintiff in rebuttal offered other evidence tending to sustain it. It was also shown without dispute that by the statutes of Michigan actions upon promissory notes are barred if not commenced within six years after the cause thereof accrues. On the record thus made, the district court found the plaintiff entitled to recover from George W. Moran the amount of the note sued upon, and entered judgment accordingly. Upon the issue involving the alleged forfeiture of the legacies to George W. Moran, Frank B. Moran, and Virginia Richards, the court further found that the prosecution of the action first above mentioned was a contest of the will, within the meaning of that term in the sixth paragraph thereof, and that the legacies which would otherwise have been payable to said George W. Moran, Frank B. Moran, and Virginia Richards were thereby forfeited. The defendants severally appeal. Though the issues between plaintiff and the several defendants were kept distinct and separate in the court below, we think the appeals can be disposed of without confusion in a single opinion.

The appeal of George W. Moran from the judgment rendered against him on the promissory note is submitted upon the single proposition, variously stated, that the trial court erred with respect to the operation of the statute of limitations. Our general statute governing the time within which actions may be commenced provides that claims for recovery upon promissory notes may be begun at any time within ten years after the "causes of action accrue." Code, § 3447. By Code, § 3452, it further provides that "when a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be the same defense here as though it had arisen under the provisions of this chapter; *but this section shall not apply to causes of action arising within this state.*" The note in suit fell due December 25, 1896, and action was begun thereon November 3, 1906. It was therefore barred by the Michigan statute before the death of Selby B. Moran, and whether it is barred in this state depends upon whether it falls within the general provision of § 3452 above quoted, as contended by appellant, or within the exception mentioned in the italicized clause thereof, as contended by the appellee. As bearing upon the question whether the note is an Iowa contract, we may say that the evidence fairly tends to show that in the summer of 1896 the appellant applied to his father by letter to borrow \$100. Appellant was then at his home in Detroit, Michigan, and his father at his home in Eldora, Iowa.

In response to this request, Selby B. Moran wrote to appellant under date of July 23, 1896, saying that he had no money himself, but after some effort had found where he could borrow \$100. He then proceeded: "Now, George, write me as soon as you get this, and let me know if that \$100 will answer your purpose, and, if you want it, you can send your note to me, and I will get it and send you draft on New York, for \$100 for six months at 7 per cent." It would appear that immediately upon receipt of this letter appellant executed the note as directed, and forwarded it to his father, who then remitted the promised amount. Under such circumstances, we are quite clear that the note should be regarded as an Iowa contract, even though it was, in fact, written and signed in Michigan, and forwarded to the payee by mail. The place where the parties agree upon the terms of their contract, or where the written evidence of the agreement is prepared, is not necessarily the place of contract, within the meaning of the law. The intention of the parties with respect thereto will ordinarily prevail, and that intention may be found from the circumstances surrounding the transaction. *Bigelow v. Burnham*, 83 Iowa, 120, 32 Am. St. Rep. 294, 49 N. W. 104; *Id.*, 90 Iowa, 300, 48 Am. St. Rep. 442, 57 N. W. 865; *Bell v. Packard*, 69 Me. 105, 31 Am. Rep. 251; *Lawrence v. Bassett*, 5 Allen, 140; *Barrett v. Dodge*, 16 R. I. 740, 27 Am. St. Rep. 777, 19 Atl. 530.

It is said, however, on authority of the case last above cited, and *Tharp v. Thero*, 112 Iowa, 573, 84 N. W. 709, that the contract is completed when the delivery of the note is complete, and that the deposit of the note in the mail operates as such delivery at the place of mailing. That this proposition is correct under some, and perhaps most, conditions, will be admitted, but it is certainly not a rule of universal application. Whether the contract is completed by the mailing of the note depends upon the nature of the transaction and the intent of the parties. In the *Tharp Case* the debt had been contracted long before the note was given, and the defendant, a resident of Colorado, proposed to plaintiff, a resident of Iowa, to transfer to him in settlement of the claim the note of a third person, and to give his own note for the remainder. The offer was accepted, and defendant made his note in Colorado, payable in Iowa, and sent it to plaintiff by mail. After the right of action had been barred by the Colorado statute, suit was brought on the note in this state, and we held that, if defendant deposited the note in the postoffice to be transmitted to the

plaintiff, "intending such deposit as a delivery," it was a sufficient delivery in law to make the note a Colorado contract, and in such case the bar of the Colorado statute would operate also as a bar to the action in this state. In the instant case, however, there was no antecedent debt. The direction given by Selby B. Moran to the appellant was to make the note and send it to him in Iowa, and, on its receipt, he would obtain and remit the money. The making and mailing of the note were the incipient steps in a transaction which was to be completed in Iowa after the receipt of the paper here. No obligation rested upon the payee until that paper came to his hands. The appellant made use of the postal service as his own agent or convenience in bringing about the desired loan. The case is not materially unlike *Bell v. Packard*, supra, decided by the supreme court of Maine. There the plaintiff, a resident of Maine, holding an overdue note of the defendant, a resident of Massachusetts, wrote the latter, offering to surrender the note to him on delivery of a new note with surety. A new note was accordingly made and sent to the plaintiff by mail, and it was held to be a delivery in Maine and governed by its laws. It has also been held that a contract made by correspondence or negotiations between parties residing in different states is to be treated as a contract in the state where the last act is done which is necessary to give the contract validity. 3 Page, Contr. § 1718; *Ivey v. Kern County Land Co.* 115 Cal. 196, 46 Pac. 926. Applying this test to the case before us, the note must still be held an Iowa contract, for it had no validity and represented no obligation to pay, until presented to the payee here and the promised loan had been made. If we understand counsel correctly, they further contend that, even conceding the contract to have been completed in Iowa, yet, as the appellant was a resident of Michigan when the note fell due, the cause of action is one arising in that state, and not in Iowa. The argument is that no cause of action arises on a note until due, and it arises then only in the jurisdiction where the maker may then be sued. From this premise the conclusion is sought to be reached that as appellant was and at all times since the giving of the note has been in the state of Michigan, and might have been sued in the courts of that state immediately upon the maturity of the debt, the cause of action cannot be said to have "arisen" in Iowa. Of the authorities cited in support of this provision, none is directly in point upon the question as here presented. We must concede, however, that some of

the reasoning employed in *Luce v. Clarke*, 49 Minn. 356, 51 N. W. 1162, and *Hyman v. McVeigh*, 87 Ill. 708, an unreported Illinois case, cited in *Strong v. Lewis*, 204 Ill. 35, 68 N. E. 556, goes far to sustain the appellants' theory; but in neither case was the court considering the effect of a foreign statute of limitations upon a domestic contract, though it does go to the extent of saying, in effect, that a cause of action "arises," within the meaning of the statute of limitations, in the jurisdiction where the defendant resides when the contract becomes enforceable by suit. We are unable to find such meaning in the language of our statute, and think the course of our own decisions compels us to another interpretation. As we have already noted, our general statute of limitations provides that "actions may be brought within the times herein limited respectively after their causes of action accrue." After further providing for giving effect to foreign statutes of limitations, it excepts therefrom "causes of action arising within this state," thus leaving this cause of action to be governed solely by the limitations of our own state. While technically speaking there is perhaps no such thing as a "cause of action" on a promissory note until it is due, and the holder is entitled to sue thereon, there is a sense in which such cause exists from the moment when the promise becomes a legal and binding obligation. True, it is an imperfect or inchoate right, but it is none the less real. The right to institute action "accrues" when, by maturity of the note and default in payment, the holder may maintain a suit thereon, but it "arises" or has its origin in the transaction which brought the obligation into existence. The two phrases—"cause of action accrues" and "cause of action arises"—are both used in our statute, and in a manner which clearly indicates an attempt to express different ideas, and the distinction we have above indicated effectuates what we think was the apparent legislative purpose. We are not without precedents in point. In *Emerson v. The Shawano City*, 10 Wis. 434, it is said: "A cause of action may be said to arise when the contract out of which it grows is entered into or made." Also in *Steele v. Rutherford*, 70 N. C. 139, a statutory phrase, "where the cause of action arose," was held to mean where the debt was contracted, and not the place of failure to pay the debt. In *Lloyd v. Perry*, 32 Iowa, 144, the defendant executed a note in Ohio to a citizen of that state, but moved to Iowa before the debt was due. He remained here two years, during which time the note matured, then removed to Kansas, living there long enough 30 L.R.A. (N.S.)

for the statute of that state to bar an action in its courts upon this obligation. Returning then to this state, suit was brought on the note, and he set up in defense the bar of the Kansas statute. The plaintiff attempted to avoid the effect of this plea by arguing that the cause of action "arose" in this state during the defendant's former residence here; hence he could not avail himself of the defense of the statute. It will be seen at once that this objection was perfectly sound if appellant's theory of the construction of the statute is correct. But the court refused to so rule, holding that "the cause of action did not arise in this state." The last clause of Code, § 3452, "but this section shall not apply to causes of action arising within this state," had its origin in chapter 167, p. 206, Acts 13th Gen. Assem. The court had occasion to cite that provision in *Thompson v. Read*, 41 Iowa, 48, and in construing its terms Mr. Justice Beck, writing the opinion, says: "It is presumed that the language was intended to apply to actions arising upon contracts executed in this state, and it is so construed." The same effect is given the statute in *Goodnow v. Stryker*, 62 Iowa, 224, 14 N. W. 345, 17 N. W. 506, and *Bradley v. Cole*, 67 Iowa, 652, 25 N. W. 849. It follows from these conclusions that the trial court did not err in overruling the appellant's plea of the statute of limitations.

2. We now come to the question of chief importance in this controversy,—the rights, if any, of these appellants under the will of Selby B. Moran. The first proposition of counsel is that the provision contained in the sixth clause of the will is void and of no effect, as being contrary to public policy. Testamentary provisions of this kind have received judicial consideration both in England and the United States. Upon some phases of the discussion there is no little confusion in the decisions. In this country, however, we find no authority going to the extent of holding that a testator may not under any circumstances impose upon the acceptance of his bounty a valid condition against an attack upon his will by the legatee. Without taking time to cite the cases, it may be said that some courts incline to the view that such conditions are valid only in cases where the testator names some third person to receive the legacy in the event of a breach of the condition by the legatee first named. Others sustain all such conditions attached to devises of real estate, but hold there must be a gift over upon its breach in order to make valid a condition of the same kind attached to a bequest of personality. A few courts have held the con-

dition inoperative where the beneficiary has probable cause for the contest of the will, while still others reject all these distinctions as arbitrary, and hold the condition valid and enforceable in all cases, whether the gift be of realty or personalty, and without regard to the cause or ground of contest. The latter view appears to be the one now generally held, and to our minds is most in consonance with reason and sound principle. *Bradford v. Bradford*, 10 Ohio St. 546, 2 Am. Rep. 419; *Thompson v. Gaut*, 14 Lea, 310; *Re Bratt*, 10 Misc. 491, 32 N. Y. Supp. 168; *Hoit v. Hoit*, 42 N. J. Eq. 388, 59 Am. Rep. 43, 7 Atl. 856; *Donegan v. Wade*, 70 Ala. 501; *Sackett v. Mallory*, 1 Met. 355. The objection that such conditions are against public policy has frequently been made; but we do not find that it has ever been upheld by any court of this country. In *Mallet v. Smith*, 6 Rich. Eq. 12, 60 Am. Dec. 107, the only case cited by counsel for the appellant, the writer of the opinion, Chancellor Wardlaw, expressing his individual opinion, favors the view that public policy is opposed to such restriction upon the rights of the beneficiary of a will. But the court declined to follow the learned writer of the opinion to that extent, but held that such condition is valid where there is a gift over upon breach thereof. For ourselves we cannot believe that public interests are in any manner prejudiced, or the fundamental rights of any individual citizen in any manner violated, by upholding a gift or bequest made on condition that the donee waive or release his claim to some other property right, or even upon condition that he observe some specified line of personal conduct not in violation of law or contrary to good morals. The donee is under no compulsion to accept the gift. He is free to elect. The question he has to decide is the ordinary one which arises in nearly every business transaction,—whether the thing offered him is worth the price demanded. The owner of property may give or refrain from giving. He may attach to its offer such lawful conditions as his reason, caprice, or malice may dictate, but he is dealing with his own, and the donee, who claims the benefit of the gift, must take it, if at all, upon the terms offered. The rule is well expressed in *Rogers v. Law*, 1 Black, 253, 17 L. ed. 58. Dealing with a will which made provisions for certain heirs on condition that if they should assert any claims under certain deeds mentioned in the will, the legacies in their favor should become void, the court there says: "We entertain no doubt as to its force and validity. The condition is lawful, and one which the testator has a right to annex

in the disposition of his own property. The legatees are not bound to accept the bequest, but, if accepted, it must be subject to the disabilities annexed. It must be taken *cum onere*, or not at all." This view of the law appeals to us as eminently sound, and the objection to the validity of the condition prescribed in the sixth clause of the will in controversy cannot be sustained.

We have left only to inquire whether the suit instituted and prosecuted by the appellants, asserting title in themselves, independent of the will, to a large part of the estate which the testator had undertaken to dispose of by that instrument, was a breach of the condition against a contest. While "contest," as used in statutes, may be treated as a "word of art," it is hardly such in ordinary use and signification. The definition by Webster is "to make a subject of dispute; to call in question; to dispute." It is frequently used in the sense of "to litigate," "oppose," "to challenge," "to resist," and, as applied to legal proceedings, it ordinarily implies a dispute between parties plaintiff and defendant before a court, which is to decide the question put in issue. It is the contention of appellant that the words "shall contest the same," as employed by the testator in the will before us, ought to be construed as referring to a direct assault upon the entire instrument as a will, upon grounds which, if established, would render it void in all its parts. That such an attack would be a contest of the will is certain, but that an attack upon the validity of a material part of the will which, if successful, would destroy the integrity of the plan adopted by the testator for the distribution of the estate, is not also a contest within the fair meaning of the words, cannot be conceded. It is argued with much earnestness that in the litigation referred to the validity of the will was not made an issue; the only question there considered being the disputed title to certain real estate. But in a very essential respect the statement is misleading. It is true the validity of the will as a will, generally speaking, was not there called in question. But that the litigation had its genesis and purpose in the proposed defeat of the will as to a large portion of the estate which it purported to devise is perfectly clear. The widow was made a party thereto both in her own right and as executrix of the will. It was alleged that she claimed title under the will, but that said devise was void and of no effect because Selby B. Moran's title to the property was fraudulent and void as against the heirs of his former wife, who was the true owner of the land at the time of her death. The land thus sought to be

recovered constituted 100 of the 120 acres devised to the wife by the third clause of the will, and with this provision defeated, the whole plan and scheme which the testator had framed for the disposition of his estate would be even more effectually upset and destroyed than would have been the case had the will been refused admission to probate. Evidently the first thought of the testator was to make suitable provision for his wife. The relations between himself and some of the children had become strained, if not hostile, and, while not desiring to repudiate their claims upon his bounty, he proposed as far as possible to secure his widow in the property given her against assault by his heirs. In view of the family history in relation to this land, it is not at all improbable that in attaching a condition to the legacies given his children, he was seeking to fence against the very claim which was asserted by them in the action referred to. The suit so brought could be successfully maintained only by proof of the invalidity of the devise to the wife. The appellants therein disputed, challenged, contended against, put in issue, and sought to invalidate, an essential part of the will, and take out from under its operation a material part of the estate of which it purported to make disposition; and this, we think, was a contest of the instrument within the evident meaning of its terms. The case of *Smithsonian Inst. v. Meech*, 169 U. S. 398, 42 L. ed. 793, 18 Sup. Ct. Rep. 396, is here quite in point. The testator, having no direct heirs, gave certain legacies to relatives of his wife, but devised the bulk of his estate to the Smithsonian Institute, including certain real estate, the title to which was in the name of his wife, whose death preceded his own. He further provided that the several legacies provided for in the instrument were made upon condition "that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter named." After the death of the testator, certain heirs of his deceased wife, who were also legatees under his will, asserted title by descent from the wife, to the property standing in her name at the date of her death, and which her husband had undertaken to devise to the institution. They do not appear to have instituted any action to enforce their alleged rights; but, the question having been raised by them, the institution brought an action to establish its right to the property, and asked that the legacies given to the parties claiming the land adversely to the will be declared forfeited. To this action the legatees appeared and asserted title in 30 L.R.A. (N.S.)

themselves as heirs of the testator's wife. The court of last resort held that the act of the legatees in resisting the operation of the will according to the intent of the testator was a breach of the condition, and that the legacies were forfeited. In nearly every essential respect this precedent is directly in point with the case before us. There, as here, the husband devised lands alleged to have belonged to a deceased wife, and at the same time provided certain legacies for the wife's heirs. There, as here, those heirs sought to avoid, not the will as such, but only so much thereof as disposed of this particular property, and this was held to be a breach of the condition provided for forfeiture of the legacies. The only distinction between them urged upon our attention by counsel is in the language of the condition imposed. In the case at bar the condition is: "In case any of the legatees named as beneficiaries shall contest the same, such legatee making such contest shall forfeit thereby his right to any portion of my estate;" while in the cited case the condition is "that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee." It would be allowing the intention of the testator to be overthrown by indulgence in very finely drawn distinctions, to say that one who refuses to "acquiesce" in a will, and invokes the aid of a court to "dispute" the validity and effectiveness of one of its material provisions, does not in very obvious sense "contest" the same. The same thought has been variously expressed, but in practically every instance has been given effect. For example, a condition that if a legatee prevents or opposes the carrying out of a will, he shall forfeit his right to benefits under the instrument, is held to be violated by the act of the legatee in bringing suit against the executor individually for the conversion of property bequeathed to other legatees, but claimed by the legatee. *Re Bratt*, 10 Misc. 491, 32 N. Y. Supp. 168.

In another case a testator, after giving legacies to his children, devised land of which he was tenant in tail to his wife, and provided that the gifts to the children should "be void if they attempted to dispossess their mother." After the testator's death, the son, who was heir in tail, sold the land to a third party, who brought ejectment against the mother, and this was held to work a forfeiture of his legacy. *Harper v. Little*, 2 Am. L. Reg. 185. A contest by a husband of the legatee is a breach of such condition, where the latter takes no steps to repudiate the responsibility for the proceeding, and silently per-

mits it to be prosecuted. *Evanturel v. Evanturel*, L. R. 6 P. C. 1. A legatee who unites in an agreement to reimburse another legatee in case the latter, by contesting the will, shall lose his legacy under a condition against contest, is held to have violated the condition, although not a party to the proceeding. *Re Stewart*, 1 Connoly, 412, 5 N. Y. Supp. 32. It will thus be seen the tendency of the courts is to look to the essence of the condition imposed upon a legacy, and give effect to the lawful intention of the testator, and they will therefore decline to put any strained or overtechnical construction upon the verbiage employed, to enable a legatee to occupy the position of one who affirms a will so far as it is to his own profit, and at the same time repudiates the validity of its provisions for the benefit of others. Such a position is inequitable. The doctrine of equitable election is not perhaps a controlling consideration in this case, but it is so nearly akin to the rule we have here affirmed that it should not be passed without notice. That doctrine is stated in *Beall v. Schley*, 2 Gill, 181, 41 Am. Dec. 415, and quoted in the *Meech Case*, supra, as follows: "From the earliest case on the subject, the rule is that a man shall not take a benefit under a will, and at the same time defeat other provisions of the instrument. If he claims an interest under an instrument, he must give full effect to it as far as he is able to do so. He cannot take what is devised to him, and at the same time [claim as his own] what is devised to another, although but for the will it would be his; hence he is driven to his election to say which he will take." In other words, he must take what the will gives him, and relinquish all claim to what the will gives another, even though it be his own property; or he must relinquish all claim to the benefits provided for him in the will, and take his chance of making good his claim to the estate or some part thereof in opposition to the will. He cannot occupy both positions; and, having chosen one and defended it to an unsuccessful conclusion, he cannot return and take advantage of the other. *Hoit v. Hoit*, 42 N. J. Eq. 388, 59 Am. Rep. 43, 7 Atl. 856; *Chipman v. Montgomery*, 63 N. Y. 221; *Hainer v. Iowa*, L. H. 78 Iowa, 250, 43 N. W. 185.

Upon the probate of their father's will, either of three courses was open to the appellants. They could yield to its terms, and by accepting the legacies abandon all claims of right in hostility to the will, or they could by proper action in court seek to have the will decreed invalid in its entirety, upon allegation of proper grounds 30 L.R.A. (N.S.)

therefor, or, without asserting the invalidity of the instrument as a will, they could bring action to defeat its provisions by claiming ownership in themselves of the property of the estate independent of the will. They chose the latter course, denying the testator's title to the land, and impeaching the validity of the devise thereof by the will, and this election we think was a breach of the condition which the testator annexed to his gifts. It follows that the trial court did not err in holding the legacies to have been forfeited.

The decree appealed from in each of the entitled cases is therefore affirmed.

Evans, Ch. J., dissenting:

Upon one branch of this case I am not able to concur in the majority opinion. The question whether a provision in a will forbidding any contest thereof, under penalty of forfeiture of all legacies therein, should be given unqualified effect, is one upon which there is a diversity of opinion in the courts. The cases on the subject are comparatively few. It is perhaps true that the numerical majority of the courts which have passed upon the question have adopted the affirmative of the proposition, but some of these have done so with reluctance. I am convinced that the real merit of the argument is with the other view, and that such provision in a will is contrary to public policy, unless it be limited in its application to those contests wherein an element of bad faith enters. Under the law no will can become effective in any of its provisions until it shall have been admitted to probate by the court. Before admitting it to probate, it is the duty of the court to investigate the facts and circumstances attending its execution and bearing upon its validity, and to find judicially therefrom that such will was executed in due form, voluntarily, and understandingly by the purported testator. If the court should find otherwise, it must reject the will and refuse its probate. This duty is often, perhaps usually, performed in a formal and perfunctory manner. But the duty itself is more than formal. It is substantial and imperative, and as sincere and solemn as any other judicial investigation and determination. Manifestly, in order to attain true judicial results, the court has need to learn true facts. These must come, if at all, from those who are or were in a position to know them. In obedience to the law, a day of hearing is fixed, and notice thereof is published to the world. If the court is to learn the truth from outside sources of information, it is manifestly important that the highway of information to the court be kept

open, and that there shall be no lion in the way. But here is a forfeiture provision in the purported will itself, which may be a roaring lion intended to terrorize every beneficiary of the will. Its demand is that no adverse evidence be volunteered. Its tendency is necessarily to suppress material facts, and thus to impede the administration of the law according to its true spirit. A good faith contest of a will is in strict line and in strict consistency with the duty of judicial investigation and determination imposed on the court by the law. It differs from an *ex parte* investigation in no sense except in degree. In the one case the court is too often compelled to grope in the dark; in the other the lights are made to burn. A contest intensifies an investigation, and adds to it zest and thoroughness; but the duty of the court remains the same. A contest in good faith is necessarily based upon facts material for the consideration of the court in determining the validity of the instrument as a will. It does not change the essential quality of the investigation, nor of the judicial determination resulting therefrom. It is not a sound answer to this argument to say: "Thus saith the testator." Did he say it? That is the very question under investigation by the court in the contest. It is necessarily involved in the question of the genuineness and validity of the alleged will. If the purported will of a purported testator should contain a proviso forbidding that it be presented for probate to any court or judge thereof and that it should be deemed the genuine will of the testator without other proof or probate proceeding, doubtless no lawyer would say that such proviso could have any effect. The question would still remain for judicial determination, whether the instrument was his will or not. If such purported will should contain a further provision forfeiting legacies therein made in the event that the first provision should be violated, doubtless again we would find unanimity of opinion as to the invalidity of such provision. The law guarantees to the living and to the dead that no instrument shall be deemed the will of the purported testator, until a judicial investigation and determination of such fact be first had. This is the law's protection to the dead and to his estate, as well as to the living. From the very nature of the case, no testator can waive it nor forbid it nor make it the basis of penalty or forfeiture. By the same logic he cannot direct the form or method of such judicial investigation, nor its extent nor its degree of thorough-

ness. Why, then, should he be deemed to speak through an unprobated instrument, and deemed thus to foil a thorough investigation by forbidding contest before the court,—the most practical means known to judicial experience for the disclosure of the truth?

To give unqualified effect to such provision in a will can serve no very useful purpose to the great body of wills, which can always bear investigation. Its real efficiency consists in the protection which it will afford to an instrument of doubtful validity against a free and unhampered examination. It is into this class of instruments that this provision will find its way. The number of wills which are actually contested constitutes an exceedingly small percentage of the whole number of wills presented for probate, and it is only an occasional will that is defeated for invalidity. I know there is a popular impression to the contrary, but this is a mistake in fact. For every will which is defeated hundreds are admitted to probate. When it is considered that vast property interests are carried by these instruments, and that they are often executed under different circumstances and in the last days of the last sickness, it is quite to be expected that a small percentage of them should prove to be invalid. And it does sometimes happen in very truth that a will regular in form, bearing the genuine signature of the testator in the presence of witnesses is nevertheless not his will. On the contrary, it was framed and dictated by another, and the dying man may have put to it his listless hand without knowledge to comprehend or will to resist. Into such a will the proviso under consideration will hereafter surely find a place. The dictator of such a will will be more likely to incorporate such a provision in the will than would the testator himself. On principle, therefore, and in the interest of good public policy, it seems clear to me that the contest of a will in good faith and for probable cause should not be forbidden nor penalized, nor should it be permitted to work a forfeiture of a legacy. Where a contest is in bad faith, and intentionally vexatious without probable cause, a different situation arises. This view is supported by the following authorities: *Jackson v. Westfield*, 61 How. Pr. 399; *Rhodes v. Muswell Hill Land Co.* 29 Beav. 560; *Powell v. Morgan*, 2 Vern. 90; *Morris v. Burroughs*, 1 Atk. 404; *Loyd v. Spillet*, 3 P. Wms. 344. In *Chew's Appeal*, 45 Pa. 232, the following language is used in relation to such conditions: "Undoubtedly, I think, no pro-

vision could be formed to oust the supervisory power of the law over such conditions and limitations, to control them within their legitimate sphere, which is generally to prevent vexatious litigation." In *Smithsonian Inst. v. Meech*, 169 U. S. 413, 42 L. ed. 800, 18 Sup. Ct. Rep. 402, Justice Brewer says: "When legacies are given to persons upon conditions not to dispute the validity of or the dispositions in wills or testaments, the conditions are not in general obligatory, but only *in terrorem*. If, therefore, there exists *probabilis causa litigandi*, the nonobservance of the conditions will not be forfeitures."

2. I dissent from the majority opinion for the further reason that in the case under consideration there was no contest of the will. This was the only condition specified in the will, the breach of which should work the forfeiture. The legatees were children of the testator by his first wife. What they did do was that they asserted title as heirs of their mother to an undivided interest to certain land which they claimed belonged to their mother at the time of her death. The will in question devised such land to the testator's widow. The will contained no declaration of fact as to the nature or extent of testator's title. It is held in the majority opinion that this was in effect a contest of the will because it aimed to disturb the distribution of property therein provided for. To my mind such a construction of the will enlarges its provisions, and imposes conditions as a basis of forfeiture which were omitted therefrom by the testator. A condition in a will forbidding a contest thereof, and a condition requiring the relinquishment of other rights arising to the legatee outside of the will, are essentially different from each other. And this distinction is important to be observed in this case. A condition attached to a legacy that the legatee shall receive the same in satisfaction of a claim, or that he shall relinquish certain rights, real or apparent, existing independent of the will, is clearly valid. It has in it no element repugnant to public policy, and the authorities are uniform in the support of such a condition. Such a case was *Rogers v. Law*, 1 Black, 253, 17 L. ed. 58, which is cited in the majority opinion. The legacies in that case were made upon condition, not that the legatees should not contest the will, but that they should relinquish all claim of right under certain specified deeds which existed independent of the will, and prior to its execution. In the case under consideration, if the testator had incorporated a condition to the legacies that the legatees should relinquish all claim of right to the real estate in question, such condi-

tion would have been clearly valid. He did not do so. The only condition imposed was that they should not contest the will. The contest of a will is a proceeding well defined and well understood. There is no room for fair argument as to what is meant by it. In the quieting title suit the plaintiffs tried no issue, nor tendered any, which could have been tried or tendered in a contest of the will. As respects the condition imposed, the language of the will is direct and free from ambiguity. Instead of following the elementary rule that a strict construction will be interposed against a claim of forfeiture, the majority opinion adopts a construction which is much broader than the language of the will. In support of this construction, *Smithsonian Inst. v. Meech*, 169 U. S. 398, 42 L. ed. 793, 18 Sup. Ct. Rep. 396, is relied upon as a controlling precedent. But a careful reading of the opinion in that case will disclose the fact that it does not support the conclusion of the majority at this point. On the contrary, it is quite adverse to it in all its reasoning. I have already quoted from such opinion, The facts in that case were that the testator claimed to own certain real estate, the legal title to which rested in the name of his deceased wife. The will contained a recital of facts to the effect that the testator did own such property, and stating the circumstances of the purchase, and that the title was taken in the name of the wife in trust for himself, and making reference to certain affidavits and other evidence in support of his assertion of title. He first executed a will making certain legacies therein to his wife's relatives on "condition that no attempt be made to break the will." This condition was afterwards changed by substituting therefor the condition "that the legatees acquiesce in this will." And this latter condition is the one that was construed by the court. The court declared a distinction between the latter condition and the former. It was held, in effect that this latter condition was not only a condition against the contest of the will, but that it called upon the legatees to "acquiesce" in the recitals of fact contained in the will. By such construction the case was put into that class of cases wherein the legatee is required to relinquish rights arising independent of the will, such as *Rogers v. Law*, already referred to. I urge, therefore, that the majority opinion has no support in the cited case, and that it presents a marked departure from safe rules of construction. I think, therefore, that upon this branch of the case there ought to be a modification of the decree entered below.

MARYLAND COURT OF APPEALS.

GEORGEANNA K. LEWIS et al., Appts.,
v.

PINCKNEY T. PAYNE, Impleaded, etc.

COLUMBUS Z. BOTELER, Exr., etc., of
Joseph Zane, Deceased, et al., Impleaded,
etc., Appts.,

v.

SAME.

RUTH L. BOTELER et al., Impleaded, etc.,
Appts.,

v.

SAME.

(— Md. —, 77 Atl. 321.)

Will — executory devise — destruction.

1. Under a devise in trust to one for

Note. — Will remainder contingent upon child surviving parent vest, upon death of parent during lifetime of child, but before the determination of a precedent estate outstanding in a third person.

Cases are omitted where the remainder is given to the child as an alternative remainder only in case the parent does not live to take the remainder, as, for example, where a devise is to testator's wife for life, remainder to testator's son in fee, but if he dies before life tenant, then to his issue, and in default of issue, over.

As to the time to which the contingency of the death of a legatee or devisee without child or issue, upon which a gift is conditioned, is referable, see note to Smith v. Smith, 25 L.R.A.(N.S.) 1045.

As to character of remainder created by grant or devise to one for life, with remainder to his children, see note to Robertson v. Guenther, 25 L.R.A.(N.S.) 888.

The decision in LEWIS v. PAYNE finds support in Delony v. Delony, 24 Ark. 7. In that case the owner of a slave made a deed of gift thereof to her son in trust (1) for the use of grantor for life, (2) at her decease for the support of her son and his children during his life, (3) at the son's death the slave was to belong to a named daughter of the son and such other children as should survive him, and (4) if, at the son's decease, he should leave no child or grandchild surviving, then the slave was to belong to a named grandson. The son died during the existence of the grantor's life estate, leaving a daughter who survived the grantor, and then died. Although the son died during the lifetime of his mother, it was held that at the moment of his death his daughter took the slave absolutely, and that the contingency on which the grandson was to take never happened.

But the question of vesting or not vesting of a remainder depends upon the intent of the testator or grantor, and this is not 30 L.R.A.(N.S.)

life, remainder to his daughter for life, remainder to her children in fee, if she leaves issue, and if she dies without issue to testator's heirs at law, the death of the daughter leaving issue vests the property in such issue, and will destroy all interests of testator's heirs, although such issue dies before the first life tenant.

Same — codicil — reference to provision in will — effect.

2. Where one, after devising property to one for life, remainder to his daughter for life, remainder to her issue in fee, gives in a codicil certain other property to the first taker, subject to the same conditions as stated in the will, the daughter and her issue take under the codicil the same interest that they took under the will,—at least where the will indicates an intention to dispose of all of testator's estate.

(April 1, 1910.)

to be determined by an arbitrary, invariable rule, but is to be ascertained from the whole instrument; and in Paget v. Melcher, 21 Misc. 190, 47 N. Y. Supp. 244, it was held that, under the provisions of the grant there under consideration, the remainder to the child did not vest on the death of the parent during the existence of the particular estate. In that case the owner of realty conveyed it in trust for the grantor's wife for life, remainder to the grantor for life, and upon the death of the survivor of them, "to convey the said lands . . . to the children of the said . . . [grantor] in fee, the issue of any child of the said . . . [grantor] who shall have died leaving issue living at the death of the survivor of the said . . . [grantor and his wife], to take the same share the parent would if living; and, in default of issue of the said . . . [grantor] living at the time of decease of the survivor of said . . . [grantor and his wife], then to convey the same to the heirs at law of the said . . . [grantor]." The grantor died before his wife, leaving two daughters and a son, the latter of whom died before grantor's wife without having married and without leaving issue. The two daughters survived the grantor's wife. It was held that it was not the grantor's intent that any estate should vest in his children until the death of both himself and wife, and hence that a will made by the son before his decease to his mother and one of his sisters was of no effect, and that the two daughters would share the remainder equally. This case was affirmed in 26 App. Div. 12, 49 N. Y. Supp. 922, so far as this question was concerned, though modified on another point; and also affirmed in the court of appeals in 156 N. Y. 399, 51 N. E. 24. In the latter case the court said that "the provisions of the deed directing the trustee to convey to the heirs at law of . . . [grantor] in case none of his children or their issue survive, of necessity, indicate that it was not intended that the children should take a vested remainder." R. A. E.

CONSOLIDATED APPEALS by complainant and certain defendants from a decree of the Circuit Court for Baltimore City dismissing a bill filed for the construction of the will and distribution of the estate of Joseph Zane, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. William Milnes Maloy and George Moore Brady, for appellants Lewis et al.:

A testator may, in making his will, fix the absolute vesting of the different estates created by it at such times as he sees fit, within the period allowed by law, and when he has done this with reasonable certainty, the courts, in construing his will, will give effect to his wishes.

Lumpkin v. Lumpkin, 108 Md. 470, 25 L.R.A.(N.S.) 1063, 70 Atl. 238.

The end of the life estate is the period when the second estate vests.

Reiff v. Strite, 54 Md. 298; Engel v. State, 65 Md. 539, 5 Atl. 249; Straus v. Rost, 67 Md. 465, 10 Atl. 74; Bailey v. Love, 67 Md. 592, 11 Atl. 280; Mercantile Trust & D. Co. v. Brown, 71 Md. 166, 17 Atl. 937; Demill v. Reid, 71 Md. 175, 17 Atl. 1014; Larmour v. Rich, 71 Md. 369, 18 Atl. 702; Reid v. Walbach, 75 Md. 205, 23 Atl. 472; Cherbonnier v. Goodwin, 79 Md. 55, 28 Atl. 894; Small v. Small, 90 Md. 550, 45 Atl. 190; Lee v. O'Donnell, 95 Md. 538, 52 Atl. 979; Reilly v. Bristow, 105 Md. 333, 66 Atl. 262; Lumpkin v. Lumpkin, 108 Md. 496, 25 L.R.A.(N.S.) 1063, 70 Atl. 238; Fisher v. Wagner, 109 Md. 254, 21 L.R.A.(N.S.) 121, 71 Atl. 999; 1 Roper, Legacies, p. 587; 2 Redf. Wills, p. 239. ¶ 39; 2 Fearn, Contingent Remainders, p. 142, ¶ 281; Goebel v. Wolf, 113 N. Y. 405, 10 Am. St. Rep. 464, 21 N. E. 388.

Following the life estate to Sarah Clarinda Zane is an alternative bequest which in real estate would be termed a remainder with a double aspect, but in a bequest of personal property is a quasi remainder.

1 Fearn, Contingent Remainders, pp. 416-418; 2 Fearn, Contingent Remainders, p. 15; 1 Preston, Estates, p. 83.

The direct descendants must be in existence at the death of the first life tenant.

2 Jarman, Wills, p. 436, ¶ 821.

The taking by Sarah Clarinda Zane being postponed until the death of the life tenant, the taking by her children being postponed until her death, no change in circumstances, such as the death of Sarah Clarinda Zane before the death of Joseph Zane, could accelerate or make transmissible the interest of children who might survive her. It would still be necessary that these children should outlive Joseph Zane. 30 L.R.A.(N.S.)

2 Jarman, Wills, 446; Re Rogers, 97 Md. 674, 55 Atl. 670.

The life estate to Joseph Zane is manifestly to end before any future estate is taken. To the gift to the children of Sarah Clarinda Zane, time is annexed not to the payment only, but to the gift itself.

Spence v. Robins, 6 Gill & J. 507, 26 Am. Dec. 587; Reed's Appeal, 4 Am. St. Rep. 592, note; Note to Ducker v. Burnham, 37 Am. St. Rep. 147.

Messrs. Albert C. Tolson and John C. Tolson, for appellants Columbus Z. Boteler et al.:

The gift in the codicil was an additional one to Joseph Zane, and as there was no express limitation over, it cannot go to Sarah and her issue under the limitations in the will.

Buchanan v. Loyd, 64 Md. 306, 1 Atl. 845, 6 Atl. 171; Mann v. Fuller, Kay, 626; Re Mora, 10 Hare, 171.

A part of the residue of which the disposition fails will not accrue in the augmentation of the remaining parts, as a residue of residue, but devolves as undisposed of, and goes to the next kin and heirs at law.

Skrymsner v. Northcote, 1 Swanst. 570; Prison Asso. v. Russell, 103 Va. 572, 49 S. E. 966; Cresswell v. Cheslyn, 2 Eden, 123, 3 Bro. P. C. 216; Sykes v. Sykes, L. R. 4 Eq. 207; Humble v. Shore, 7 Hare, 247; Floyd v. Barker, 1 Paige, 480; Mason v. Methodist Episcopal Church, 27 N. J. Eq. 47; Burnet v. Burnet, 30 N. J. Eq. 599; Waln's Estate, 156 Pa. 190, 27 Atl. 59; Ford v. Ford, 1 Swan, 431; Smith v. Haynes, 111 Mass. 346, 18 Am. & Eng. Ency. Law, p. 765.

Messrs. Walter H. Taylor and Ralph Robinson, for appellee:

Inasmuch as the remainder is limited to the children of Sarah Clarinda Zane which may survive her, provided she have issue, the remainder is contingent.

Demill v. Reid, 71 Md. 175, 17 Atl. 1014; Larmour v. Rich, 71 Md. 369, 18 Atl. 702.

The remainder to the children of Sarah Clarinda Zane thereupon immediately ceased to be a contingent remainder, and became vested in the infant Pinckney T. Payne, Jr.

Cox v. Handy, 78 Md. 108, 27 Atl. 227, 501; 24 Am. & Eng. Enc. Law, 2d ed. p. 389.

A vested remainder, like any other vested estate or interest in property, passes on the death of the remainderman to his heirs at law and distributees.

Buck v. Lantz, 49 Md. 439; 4 Kent, Com. p. 262; Fisher v. Wagner, 109 Md. 243, 21 L.R.A.(N.S.) 121, 71 Atl. 999; Roberts v. Roberts, 102 Md. 131, 1 L.R.A.(N.S.) 782,

111 Am. St. Rep. 344, 62 Atl. 161, 5 A. & E. Ann. Cas. 805.

Inasmuch as Sarah Clarinda Zane married and died leaving issue surviving her, the only condition upon which the limitation over can operate, namely, failure of issue of Sarah Clarinda Zane, her surviving, is unqualifiedly negated for all time.

Demill v. Reid, 71 Md. 188, 17 Atl. 1014.

If a remainder vests, the right of the remainderman is not divested by his death during the life of the life tenant.

Meyer v. Eisler, 29 Md. 28; Cox v. Handy, 78 Md. 108, 27 Atl. 227, 501; Roberts v. Roberts, *supra*.

There can be no coalescing when the estates are not of the same quality, both legal or both equitable.

Shreve v. Shreve, 43 Md. 382.

The limitation provided for by the will attached to the property bequeathed by the codicil.

Buchanan v. Lloyd, 88 Md. 644, 41 Atl. 1075; Hollyday v. Hollyday, 74 Md. 458, 22 Atl. 136.

Thomas, J., delivered the opinion of the court:

Joseph Zane of Boston, Massachusetts, died leaving a last will and testament and codicil, which were duly admitted to probate in the probate court of Suffolk county, Massachusetts, and in the orphans' court of Baltimore city. The will, which was executed the 31st of March, 1896, disposes of a large estate to his wife, brother and sister, nieces and nephews, grandnieces and grandnephews, and certain nieces of his wife. Among the numerous devises and bequests is the following provision for his nephew, Joseph Zane, of Baltimore city, and said nephew's daughter and her children: "I give, devise, and bequeath to John Grace Suman, of Baltimore, Maryland, my real estate corner of Baltimore and Carey streets, in said Baltimore, containing about 1,500 square feet of land, and the buildings thereon, and the sum of \$20,000 in trust, nevertheless, for the uses and purposes following, to wit: The annual income of said real estate and of said \$20,000 shall be paid by said trustee quarterly to my nephew, Joseph Zane of said Baltimore, for the full term of his natural life, and after his decease, the remainder of said real estate and said \$20,000 shall go to Sarah Clarinda Zane, daughter of said Joseph Zane (my grandniece), during the term of her natural life, and to her children in fee simple, if she leaves issue; but if she dies without issue, at her decease said real estate and said \$20,000 shall go to my heirs at law, discharged of all trusts." The residuary

clause of the will is as follows: "All the rest and residue of my estate, real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at my decease, I give, devise, and bequeath to my heirs at law and their heirs by right of representation, in fee simple," etc. In March, 1899, the testator executed a codicil in which he confirms his said will, "so far as this codicil is consistent therewith," and, after a number of devises and bequests therein, disposes of the entire remainder of his estate as follows: "All the rest and residue of my estate, real, personal, and mixed, wheresoever it may be found and of whatsoever it may consist, I desire it to be divided into three equal parts, and disposed of as follows: To my nephew, Joseph Zane, one part, subject to the same trusteeship and conditions as stated in my will of March 31, 1896. To my niece, Ellen Amelia Zane Clairage, one part. To my niece, Georgianna Kelly, one part."

John Grace Suman declined to accept the trust created by the above provisions of the will and codicil, and William J. O'Brien, Jr., of Baltimore city, was by the probate court of Suffolk county, Massachusetts, appointed trustee in his place, and the entire trust estate created by said provisions of the will and codicil, consisting, as now invested, of Baltimore city ground rents and mortgages on property in Maryland, and amounting to about \$65,000, was in possession of said substituted trustee at the time of the filing of the bill in this case, and until he was, by an order of the court below in this case, appointed receiver to take and hold the same until the further order of said court. Sarah Clarinda Zane, the daughter of Joseph Zane, of Baltimore City, referred to in the above paragraph of the testator's will, who survived the testator, married Pinckney T. Payne, had one child, Pinckney T. Payne, Jr., and died on the 15th day of July, 1905, leaving her said child, an infant, and her husband surviving. Pinckney T. Payne, Jr., the infant, also died in the lifetime of Joseph Zane of Baltimore, leaving surviving him his said father, Pinckney T. Payne. Joseph Zane of Baltimore is now dead, and after his death the trustee of one of the heirs at law of the testator filed the bill in this case against the testator's other heirs at law, William J. O'Brien, as trustee and as executor of a deceased heir at law, and Pinckney T. Payne, alleging, among others, the facts we have stated, claiming the property devised and bequeathed to Joseph Zane by the will and codicil, and asking for a construction of said will and codicil, the appointment of a receiver to take charge of the property, and for a partition of the same among

those entitled thereto. Pinckney T. Payne demurred to the bill, and the three appeals in the record in this case are by different defendants from the decree of the court below sustaining the demurrer and dismissing the bill.

The contention of the appellants, in respect to the property mentioned in the above paragraph of the will, is that Pinckney T. Payne, Jr., the infant child of Sarah Clarinda Payne, having died before the expiration of the equitable life estate of Joseph Zane of Baltimore, the estate he would have taken had he survived his grandfather passed by the terms of the will to the heirs at law of the testator; and in respect to property devised and bequeathed to Joseph Zane of Baltimore by the codicil, that the testator did not intend that, after the death of Joseph Zane, it should go to said nephew's daughter and her children, according to the provisions of the will relative to the property therein given to said nephew.

It is insisted that Pinckney T. Payne, Jr., did not, at the time of his death, have a vested interest in the property; but in this we think the appellants are clearly wrong. The will gave alternative contingent remainders, first, to the children of Sarah Clarinda Zane, if she left any, and, if she died without leaving issue, then to the testator's heirs at law. During the life of his mother, the interest of Pinckney T. Payne, Jr., was contingent, depending for its vesting upon his surviving her, and the remainder in favor of the testator's heirs at law was contingent upon Sarah Clarinda Payne's dying without issue. Upon the death of Mrs. Payne leaving a child, the only contingency upon which the remainder in favor of her children depended by the terms of the will had happened, and her child took a vested remainder, thereby destroying all possibility of a future interest in the heirs at law of the testator, whose remainder was limited to take effect only upon the death of Mrs. Payne without issue. It is said in 24 Am. & Eng. Enc. Law, 2d ed. p. 417, that "the rule that a remainder cannot be limited after a fee simple does not forbid the limitation of two or more remainders in fee simple, as substitutes or alternatives the one for the other; that is, on such contingencies that only one of the remainders can possibly vest. Such limitations are variously called contingencies with a double aspect, or gifts on a double contingency, or gifts or devises on two alternative contingencies. Each of such fees is a remainder in regard to the particular estate, but none is a remainder in regard to any other of them." The same rule is stated in 2 Washburn on 30 L.R.A. (N.S.)

Real Property, 6th ed. § 1575, as follows: "Notwithstanding a remainder limited after a remainder in fee would be void, yet two remainders may be so limited, though each a fee, as to be good, provided this is done that only one is to take effect; the one being a substitute for, and not subsequent to, the other. The consequence is that, if the first takes effect and becomes vested, the other at once becomes void. Such limitation is said to be of a fee with a double aspect."

In the case of *Demill v. Reid*, 71 Md. 175, 17 Atl. 1014, the testator devised certain property to his son, Henry J. Willett, in trust for his grandson, John Willett Belt, for life, "and from and immediately after the decease" of said grandson, to the children of said Belt, to be "divided between them as tenants in common." His will further provided: "But in case the said John Willett Belt should depart this life without leaving a child or descendant thereof living at the time of his death, or in case he should have a child, children, or descendants of the same living at the time of his death, and such child, children, descendant, and descendants should all subsequently depart this life under lawful age, and without issue living at the time of his, her, or their decease, then in trust that the said principal estate and property shall go to and become the property of the children of my said son, Henry J. Willett," etc. Judge Miller, in disposing of that case, said: "As to the character of the estates thus created, we have no difficulty. It is a clearly established general rule in the construction of wills that a limitation which may operate as a remainder shall not be construed an executory devise. Here there is first a life estate given to the grandson, Belt, and upon his death alternative contingent remainders in fee are limited, first, to the child or children of Belt, if he leaves any which shall attain lawful age, or die before that time leaving issue, and failing this then to the children of the testator's son Henry. If Belt had left a child who attained the age of twenty-one or died before that time leaving issue, the fee would have vested in such child or issue, and such vesting would forever have excluded any possible future interest in the children of Henry J. Willett. Their interest took effect only upon the failure of the preceding contingency. There are, therefore, here two contingent fees, not limited to take effect the one upon or after the other, but the one to take effect to the entire exclusion of the other, and the falling out of the contingencies is to decide which of the two is to take effect."

Demill v. Reid is so conclusive as to the

character of the estates with which we are dealing in this case, and has been so frequently cited and relied on in this state, that it is not necessary to do more than refer to some of the cases. *Larmour v. Rich*, 71 Md. 369, 18 Atl. 702; *Re Banks*, 87 Md. 425, 40 Atl. 268; *Nowland v. Welch*, 88 Md. 48, 40 Atl. 875.

It is claimed, however, that these cases do not apply because of the outstanding life estate of Joseph Zane of Baltimore, and that the remainder in favor of the child and of Mrs. Payne could not become vested until after the death of the first life tenant. But that view is not warranted by any reasonable construction of the will. By its terms it was to be determined at the death of Mrs. Payne which of the alternative remainders was to take effect. If she left issue, they were to take to the exclusion of the heirs at law of the testator. No other time was appointed, and the remainder to her children was not dependent upon any other contingency. It could not, of course, vest in possession until after the death of Joseph Zane of Baltimore, but the right of Pinckney T. Payne, Jr., to the possession of the estate after the death of the life tenant, became a certain and vested right upon the death of his mother. The fact that his possession of the property had to await the determination of the preceding life estate did not make the remainder a contingent remainder. It is said in 24 Am. & Eng. Enc. Law, 2d ed. p. 389, that "the true criterion of a vested remainder is the existence in an ascertained person of a present fixed right of future enjoyment of the estate limited in remainder, which right will take effect in possession immediately on the determination of the precedent estate, irrespective of any collateral event, provided the estate in remainder does not determine before the precedent estate." In *Cox v. Handy*, 78 Md. 108, 27 Atl. 227, 501, Judge Bryan, after stating the test by which a vested remainder may be known, given in 1 Preston on Estates, 70, adopts the following statement of the rule by the chancellor in *Moore v. Lyons*, 25 Wend. 144: "For where a remainder is so limited as to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event which must unavoidably happen by the afflux of time, the remainder vests in interest as soon as the remainderman is *in esse* and ascertained, provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession." In *Fearne on Contingent Remainders*, vol. 1, Butler's ed. *216, the author says: "It is not the uncertainty of 30 L.R.A. (N.S.)

ever taking effect in possession that makes a remainder contingent, for to that every remainder for life or in tail is and must be liable; as the remainderman may die, or die without issue, before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."

Applying the rule as stated to the remainder of Pinckney T. Payne, Jr., if the preceding life estate had determined any time after his mother's death and before his death, he would have come into possession of the estate, and his remainder after his mother's death was, therefore, a vested remainder, and, being in fee, upon his death before the expiration of the life estate of Joseph Zane, it passed, so far as it is real estate, to his heirs at law, and, to the extent that it is personal property, to his personal representative, subject to said life estate. *Cox v. Handy*; *Re Rogers*, 97 Md. 674, 55 Atl. 679; *Roberts v. Roberts*, 102 Md. 131, 1 L.R.A. (N.S.) 782, 111 Am. St. Rep. 344, 62 Atl. 161, 5 A. & E. Ann. Cas. 805.

In respect to the one third of the residue of the estate devised and bequeathed by the codicil to Joseph Zane, "subject to the same trusteeship and conditions as stated in my will of March 31, 1896," it is claimed by the appellants that these words do not mean that Joseph Zane's daughter and her children were to have the property after his death according to the terms of the devise and bequest to them in the will; but we think they are also wrong in this contention. By his will the testator gave all the rest and residue of his estate to his heirs at law. This provision of his will was, as was said in *O'Brien v. Clark*, 104 Md. 30, 64 Atl. 53, changed by his codicil, in which, after making a number of additional bequests, he directed all the rest and residue of his estate, of every kind, to be divided into three equal parts, and one of these parts he gave to his said nephew, Joseph Zane, as stated, and the other two parts he gave to his two nieces, one part to each. He thereby intended to dispose of his entire estate, and to give the whole residue thereof, after the devises and bequests previously made, to these two nieces and his said nephew; yet, if the contention of the appellants be sound, the testator did not dispose of the remainder of the third given to his nephew after the expiration of his life estate, and to that extent he died intestate, for it must be con-

ceded that his said nephew took only an equitable life estate in the third devised and bequeathed to him. There is nothing in the will to justify the suggestion that the testator only intended to dispose of a life estate in the third given to his nephew; on the contrary, the whole tenor of his will and codicil clearly indicates his intention to dispose of his entire estate, and to give to his nephew's daughter and her children, if she left any, the share he was to enjoy for his life only. What, under the circumstances, do the words "subject to the same trusteeship and conditions stated in my will of March 31, 1896," naturally suggest? Can we infer that the testator, when disposing of his entire estate, meant to limit the devise and bequest to a life estate? There is nothing in either the will or codicil indicating a desire on the part of the testator to withhold from his nephew's daughter and her children the share intended for him. The only reasonable conclusion, in the absence of some provision in the will or codicil indicating a contrary intention, is that the testator, in disposing of the residue of his estate, and desiring his nephew to have one third of it, had in mind the provisions of his will relative to the previous gift to him, and that he intended all of those provisions to apply also to his share of the rest and residue of his estate. In *Lavender v. Rosenheim*, 110 Md. 154, 132 Am. St. Rep. 420, 72 Atl. 670, Judge Pearce quotes the following statement of Judge Alvey in *Dulany v. Middleton*, 72 Md. 75, 19 Atl. 146: "It is very clear from all the provisions of the will, that the testator intended to dispose of all his estate, and that he did not contemplate the possibility of a state of intestacy as to any part of his estate, with respect to any event or for any interval of time. . . . As said by Lord Alvanley, M. R., in *Booth v. Booth*, 4 Ves. Jr. 407: 'Every intendment is to be made against holding a man to die intestate, who sits down to dispose of the residue of his property.'"

The appellants rely mainly on the case of *Buchanan v. Lloyd*, 64 Md. 306, 1 Atl. 845, 6 Atl. 171. In that case Governor Lloyd by his will, after making provision for his widow, disposed of his estate to his sons and daughters and his daughters' children. The shares of his daughters were left in trust. He devised and bequeathed to his three sons, Edward, James M., and Daniel Lloyd, in trust for his daughter Elizabeth Tayloe Winder for life, with remainder to her children, a farm and \$5,000. Similar provisions were made for his other daughters, and, after various bequests of personal property, the testator, by a residuary clause of his will, bequeathed all the residue of

his personal estate to his three sons, to be equally divided between them. By a codicil the testator, after ratifying his will except so far as altered by the codicil, bequeathed to his two sons, Edward and James M. Lloyd, "in special trust, agreeably with the provisions of my said will, the sum of \$5,000 (in addition to the \$5,000 devised in my said will); . . . for the use and benefit of my said daughter, Elizabeth Tayloe Winder." After Mrs. Winder's death her children claimed the \$5,000 bequeathed to her by the codicil. Judge Alvey interpreted the words "in special trust, agreeably with the provisions of my said will," to mean "upon the same trust as that specified in the will, namely, to hold for the life of Mrs. Winder, and no longer," and then says: "And the question is whether, upon the will and codicil together, there is any such manifest intention, by implication or otherwise, that the property thus bequeathed by the codicil for the life of Mrs. Winder should go to her children at her death, as in the preceding devise by the will, and thus withdraw the property from the operation of the residuary clause of the will. Of course, it is very clear that, if there be no such limitation over in favor of the children, the property passed under the residuary clause; for it is too obvious to admit of serious question that Mrs. Winder did not take more than an equitable life estate in the property given her by this particular clause of the codicil. It is certainly a well-settled principle that the will and codicil are to be construed together as one instrument, and are to be reconciled as far as practicable. But what is plainly given by the will is not to be revoked or withdrawn by doubtful or ambiguous expressions employed in the codicil. Here the effort is by construction, and in total absence of plain words expressive of any such intention, to give an effect and operation to a clause in the codicil whereby the residuary clause of the will must be curtailed of the subject-matter of its operation."

It is apparent that there is a marked difference in the words employed in the two wills. Following the construction adopted by Judge Alvey, if the testator in this case had said, "subject to the same trusteeship as stated in my will of March 31, 1896," it would have been interpreted to mean that the property was to be held in trust for the life of Joseph Zane. But that is not what the testator said. The gift to his nephew was not subject to the same trusteeship as stated in the will, but subject to the same trusteeship and conditions as stated in the will. If "subject to the same trusteeship as stated in the will" would have meant that his nephew was

only to have an equitable life estate, what significance is to be given to the additional qualification, that it was to be subject also to the same conditions as stated in the will? It can only mean that the devise and bequest was to be subject to all the terms and provisions contained in the will relating to the property there given to his nephew. Moreover, in the case referred to the effect of the claim of Mrs. Winder's children would have been to withdraw the \$5,000 from the operation of the residuary clause of the will, by which the testator bequeathed the residue of his personal estate to his sons, and it was that feature of the case that largely controlled the court in reaching its conclusion. Here the effect of the contention of the appellants would be not only to withdraw the fee in the third given to Joseph Zane from the operation of the residuary clause of the codicil, but to also defeat the obvious purpose of the testator to dispose of his entire estate. So, if we adopt the reasoning of the court in *Buchanan v. Lloyd*, it furnishes ample authority for withholding our assent to the claim of the appellants in this case; and in the later case of *Buchanan v. Lloyd*, 88 Md. 642, 41 Atl. 1075, the court, in construing a somewhat similar clause in the codicil to said will in favor of another daughter of the testator, held that the name of the legatee in the codicil was used in a representative sense and meant the legatee and her children.

After carefully considering all the provisions of the will and codicil in this case, we can reach no other conclusion than that Pinckney T. Payne, Jr., the infant child of Sarah Clarinda Payne, took, at his mother's death, a vested remainder in the property devised and bequeathed by the will and codicil in trust for Joseph Zane of Baltimore city, for life, etc., and that the heirs at law of the testator have no interest in this property. The decree of the court below, sustaining the demurrer of the appellee and dismissing the bill, must therefore be affirmed.

Decree affirmed, with costs, in each appeal.

NEW HAMPSHIRE SUPREME COURT.

DRUSILLA A. MORSE

v.

ALFRED OSBORNE, Guardian of Doris A. Morse.

(— N. H. —, 77 Atl. 403.)

Parent and child — adoption — issue.

An adopted child is not issue within the 30 L.R.A. (N.S.)

meaning of a statute giving a widow certain rights in her husband's estate in the absence of issue of the marriage, although the statute provides that an adopted child shall, for the purpose of inheritance by it and all other legal consequences and incidents of the natural relation of parents and children, be deemed the child of the parents by adoption.

(June 7, 1910.)

Note. — Do terms "child," "children," "issue," etc., in statutes governing distribution of decedent's estate include adopted children.

As to whether the terms "child," "children," "issue," etc., in a will, include adopted children, see note to *Re Leask*, 27 L.R.A. (N.S.) 1159.

As to the right of an adopted child to inherit property from a relative of its adoptive parent, see note to *Hockaday v. Lynn*, 8 L.R.A. (N.S.) 120.

As to right of child adopted in another state to take under local statute of descent and distribution, see notes to *Irving v. Forc*, 65 L.R.A. 186; *Brown v. Finley*, 21 L.R.A. (N.S.) 679; and *Finley v. Brown*, 25 L.R.A. (N.S.) 1285.

As to the legal status of an adopted child in general, see note to *Warren v. Prescott*, 17 L.R.A. 435.

The terms "children," etc., include both children by birth and by adoption in a number of states (see N. D. Rev. Code 1899, § 5112; S. D. Civ. Code 1903, § 2446; Okla. Rev. Laws 1903, § 2785), but as the purpose of this note is simply to compile the adjudication on the question under annotation, no attempt has been made to collect the statutes which themselves define the meaning of the terms involved.

Cases of legitimation of a bastard child are included only in case the child is treated as having been adopted.

The cases involving the questions under discussion have arisen principally in four different classes of cases, namely: Those in which statutes defining the rights of the surviving wife were involved; those respecting statutes providing for the revocation of a will by birth of issue, etc.; those construing statutes involving the right of the adopted child, himself, to inherit; and those in which an attempt has been made to include an adopted child in the terms "child," "children," etc., as used in collateral inheritance tax laws; and the cases will be taken up in the order mentioned.

In general the statutes of descent and distribution must be understood as laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to inherit. Generally, they do not undertake to define the various terms used, or to state what is necessary to constitute the various legal relations involved. Since these requisites must be looked for elsewhere, the statutes of adoption, which usually define, at least to some extent, the status

TRANSFER by the Superior Court for Hillsboro County for the opinion of the Supreme Court of an appeal by plaintiff from a decree of the Probate Court in plaintiff's favor for less than was demanded in a proceeding for a division of the real estate of Joseph G. Morse, deceased. Appeal sustained.

Plaintiff's husband, Joseph G. Morse, died leaving as his only heirs his wife, Drusilla A. Morse, and defendant's ward, Doris A. Morse, an adopted daughter. Plaintiff executed a release of her dower and homestead rights in the estate of her deceased husband, and under Public Statutes, chapter 195, §§ 10, 11, claimed title in fee to one half of such real estate, on the ground that the deceased left no issue whatever surviving

of the child adopted, must be looked to, in order to determine the rights of an adopted child under the statutes of distribution. However, statutes of adoption, which define the rights of adopted children, are not included in this note, except in so far as a consideration of such cases has been necessitated by questions arising upon the distribution of a decedent's estate, as to the scope of the terms "child," "children," "issue," etc. The statutes of adoption, being in derogation of the common law, are, of course, strictly construed, and to this fact the decisions which limit the rights of adopted children under the statutes of descent and distribution are undoubtedly due.

As interpretations of statutes depend almost entirely upon the peculiar statutes involved, a decision considering one statute is of little value in considering another, and for this reason the cases are set out rather fully, and where important, the essential part or parts of the statute or statutes involved have been given.

As affecting right of surviving widow.

The decision in *MORSE v. OSBORNE* is not supported by the weight of authority. On the other hand a decided majority of the cases hold an adopted child to be within the meaning of the words "children," "issue," etc., as used in the statutes of descent and distribution.

Thus, the terms "children" and "issue," as used in a statute providing that the lands and personality of an intestate descend "first to his children," but "if an intestate leaves issue, his widow shall have one third, and if no issue" one half, of the surplus personality, and the use for life only of the lands, include adopted children, which have inheritable rights, so that the surviving widow is only entitled to one third of the surplus personal state. *Drain v. Violet*, 2 Bush, 155.

An adopted child, which has "all the rights of a child and heir," and is entitled to share the inheritance with the natural born children, if any, of the adopting parent in case of intestacy, "as if all had been 30 L.R.A. (N.S.)

him. The probate court held the adopted child to be issue within the meaning of the statute, and decreed plaintiff to be entitled to a one-third interest only.

Further facts appear in the opinion.

Messrs. **Branch & Branch**, for appellant:

The statutory definition of the word "issue," as well as its natural definition, excludes adopted children from its meaning.

2 Woerner, Am. Law of Administration, 903; 23 Cyc. Law & Proc. p. 359; 17 Am. & Eng. Enc. Law, p. 544; *Phillips v. McConica*, 59 Ohio St. 1, 69 Am. St. Rep. 753, 51 N. E. 445; *Stanley v. Chandler*, 53 Vt. 624; *New York L. Ins. & T. Co. v. Viele*, 22 App. Div. 80, 47 N. Y. Supp. 841,

the lawful children of the same parent," is issue, within a statute limiting the widow's interest in the adopting husband's estate to a one third in case he died intestate leaving issue, she having refused to take under a will, and having elected to take the share of the estate to which she would be entitled had her husband died intestate, the court saying that to hold otherwise would be to disregard the plain provision and evident purpose of the act, and to render the adoption of no effect. *Rowan's Estate*, 6 Pa. Co. Ct. 461, affirmed in 132 Pa. 299, 19 Atl. 82.

And an adopted child is issue, under a statute providing that, as to surplus personality, "if the intestate leaves issue" his widow shall have one third, where the adoption statute makes the adopted child capable of inheriting as though the child of the adopting parents, and this is not affected by the fact that the adoptive father left a will, if the widow renounces its provisions. *Atchison v. Atchison*, 89 Ky. 488, 12 S. W. 942.

And an adopted child is "issue," within the meaning of a statute providing that where a husband dies intestate, and "leaves no issue living," his widow shall receive a certain portion of his land, the adoption statute providing that an adopted child shall inherit from his adopting parent as if born to such parent in lawful wedlock. *Buckley v. Frazier*, 153 Mass. 525, 27 N. E. 768, cited in *MORSE v. OSBORNE*.

An adopted child of the husband is a child capable of inheriting, within the meaning of a statute providing that where the husband die without any child or other descendants in being, capable of inheriting, his widow shall be entitled to one half the husband's real and personal estate absolutely, where, under the adoption statute, the adopted child becomes, for all purposes of inheriting from the adopting parents, their lawful child, so as to prevent the widow taking one half under the statute. *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962, cited in *MORSE v. OSBORNE*, and approved on subsequent appeal in 132 Mo. 73, 33 S. W. 443. The decision is also ap-

affirmed in 161 N. Y. 11, 76 Am. St. Rep. 238, 55 N. E. 311; *Jenkins v. Jenkins*, 64 N. H. 407, 14 Atl. 557.

Mr. Alfred Osborne in propria persona.

Parsons, Ch. J., delivered the opinion of the court:

The status of an adopted child, unknown to the common law, may now be created in nearly all the states by proceedings authorized by legislative action. 1 Cyc. Law & Proc. p. 917. As such status is entirely created by statute, the numerous and conflicting decisions with reference thereto, based upon the varying language found in the different enactments, are of little value in the present inquiry.

Is an adopted child "issue" within the

proved in *Moran v. Moran*, 151 Mo. 558, 52 S. W. 378.

An adopted child is a child, within the meaning of a statute giving the widow of a testator the right to renounce the will and elect to take one half the property in lieu of dower, where the testator leaves no child, where the adoption statute provides that the child adopted shall be deemed the lawful child of the testator for the purpose of inheritance. *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480.

In *Markover v. Krauss*, 132 Ind. 294, 17 L.R.A. 806, 31 N. E. 1047, cited in *MORSE v. OSBORNE*, the words "children alive, by a former wife," were held to include a child adopted by a man and such wife, within the meaning of a statute limiting the interest of a subsequent childless wife of such man to a life estate.

But a child adopted by a man after the death of his wife and their child is not, as to a wife whom he married after the adoption, a child of the former marriage, within the meaning of such a statutory provision limiting the interest of the subsequent wife upon his death. *Isenhour v. Isenhour*, 52 Ind. 328.

In *Stanley v. Chandler*, 53 Vt. 619, cited in *MORSE v. OSBORNE*, where, by special legislative act, a child was adopted by the husband and made his legal heir at law, to which proceeding, as well as to the adoption, the wife did not consent, it was held that such child was neither "child" nor "issue," within the meaning of the general statutes of decents, so as to allow him to inherit as a natural child to the exclusion of the widow. The decision seems to have been based on the question of the legislative power to deprive a wife without her consent of her inchoate interest in her husband's property, and therefore should not be regarded as in conflict with the authorities holding a child adopted with the consent of the wife to be issue.

As effecting revocation of will.

The decisions are conflicting as to whether the adoption of a child will effect a revocation. 30 L.R.A. (N.S.)

meaning of §§ 10-13, chap. 195, Pub. Stat., which give the surviving husband or wife certain rights in the estate of the deceased wife or husband, dependent upon whether such deceased left issue of the marriage or no issue whatever surviving? Under § 11 of the chapter the appellant upon the facts stated is entitled in fee to one third of her husband's real estate if he left issue by her surviving him, and to one half "no issue whatever surviving him." "The word 'issue' means child, grandchild, or other lineal descendant." *Kimball v. Penhallow*, 60 N. H. 448. In common understanding the word includes natural descendants, and not children by adoption. *Jenkins v. Jenkins*, 64 N. H. 407, 14 Atl. 557; *Stanley v. Chandler*, 53 Vt. 619; *New York L. Ins.*

cation of a previously drawn will in the same manner as subsequent birth of issue.

A child adopted after a will is made is within the meaning of a statute of distribution providing that, on the birth of a child after the making of a will, unless an intention to disinherit it shall appear from the will, the devises and legacies shall be abated in equal proportions, to raise a portion for such child equal to that which such child would have been entitled to receive out of the testator's estate had he died intestate, where, by statute, an adopted child, for the purpose of inheritance, is declared to be in law the child of the parents the same as if he had been born to them in lawful wedlock. *Flannigan v. Howard*, 200 Ill. 396, 59 L.R.A. 664, 93 Am. St. Rep. 201, 65 N. E. 782.

And a will is revoked by the testator's subsequent adoption of a child, under a statute which provides that the subsequent birth of a legitimate child to the testator before his death will operate as a revocation of his will, where the adoption statute, without exception or qualification, declares that all rights, duties, and relations between the parent and child by adoption, shall be the same that exist by law between parent and child by lawful birth. *Hilprie v. Claude*, 109 Iowa, 159, 46 L.R.A. 171, 77 Am. St. Rep. 524, 80 N. W. 332.

Marriage and adoption of a child will revoke a will in favor of a third person not made in contemplation of marriage, where marriage and birth of issue would do so, where the statute provides that an adopted child shall be deemed, for purposes of inheritance and succession and all other legal consequences and incidents of the natural relation of parents and children, the same, to all intents and purposes, as if he had been born in lawful wedlock of such parents of adoption. *Glascott v. Bragg*, 111 Wis. 605, 56 L.R.A. 258, 87 N. W. 853.

And in *Sandon v. Sandon*, 123 Wis. 603, 101 N. W. 1089, it was held that a child adopted under the statute set out in *Glascott v. Bragg*, supra, subsequent to the making by the adopting father of a will in no way

& T. Co. v. Viele, 161 N. Y. 11, 20, 76 Am. St. Rep. 238, 55 N. E. 311; Phillips v. McConica, 59 Ohio St. 1, 69 Am. St. Rep. 753, 51 N. E. 445. "The word 'issue,' as applied to the descent of estates, shall include all the lawful lineal descendants of the ancestor." Pub. Stat. chap. 2, § 20. Upon the question whether an adopted child is issue, the statutory definition gives but little aid, for the question is whether by force of the act of adoption the child has acquired the status of, or has become, a lawful lineal descendant of the adopting parents. In *Jenkins v. Jenkins*, supra, the statute appears to have been regarded as defining the word "issue" to mean "heir of the body." The question in that case was the meaning of the word "issue" in a will probated

long before either the adopting or defining statutes were passed; and, inasmuch as the legislative definition was given for use in the construction of statutes (Pub. Stat. chap. 2, § 1; Comm'rs' Rep. R. S. p. 1, note), the reliance thereon in *Jenkins v. Jenkins* adds but little support to the undoubtedly sound result reached. But the judicial view therein taken in 1887 is doubtless entitled to some weight in ascertaining the meaning given to the word when introduced in 1891 into the statute defining "the rights of the husband or wife surviving, in the estate of the deceased husband or wife."

The statute providing for the adoption of children was enacted in 1862. Laws 1862, chap. 2603. Section 4 is: "A child so

referring to such child, was within the meaning of a statute providing that any child "born after the making of his parent's will," in which no provision is made for him, shall have the same share as if he had died intestate, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for him.

But in *Davis v. Fogle*, 124 Ind. 41, 7 L.R.A. 485, 23 N. E. 860, it was held that a child adopted after the making of a will was not born legitimate issue of the testator, within the meaning of statutes giving the adopted child all the rights and interest in the estate of the adopting father, by descent or otherwise, that he would have if the natural heir, and providing that if, after the making of his will, the testator shall have born to him legitimate issue, such will shall be deemed revoked, unless provision shall have been made in such will for such issue, although no provision was made in the will or otherwise for the adopted child.

In *Re Comassi*, 107 Cal. 1, 28 L.R.A. 414, 40 Pac. 15, it was held that the adoption of a stranger in blood is not equivalent to having issue of a marriage, within the meaning of a statute respecting the effect of issue to work a revocation of a will.

In *Theobald v. Fugman*, 64 Ohio St. 473, 60 N. E. 606, it was held that designated heirs not of the blood of the testator, who by statute were deemed and held to stand in the same relation, for all purposes, to the declarant as if born in lawful wedlock, were not "issue of the body," within the meaning of a statute declaring any devise and bequest to charity made less than one year before the testator's death, void, if he left any issue of his body.

And if a natural child would have been cut off by a will not mentioning it, an adopted child is likewise cut off, where by statute the legal effect of an adoption is to put the person adopting and the child adopted in the relation of parent and child, accompanied by all the legal consequences of that relationship. *Re Gregory*, 15 Misc. 407, 37 N. Y. Supp. 925. 30 L.R.A. (N.S.)

As determining right of adopted child to inherit.

In *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321, Chief Justice Gray said that the terms "children," "child," "issue," "if he leaves no issue," and "kindred," as used in the general statutes of descent in force in Massachusetts in 1873, which provided that the realty of an intestate shall descend "in equal shares to his children, and to the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants, etc. 'Second. If he leaves no issue, then to his father. Third. If he leaves no issue nor father, then in equal shares to his mother, brothers, and sisters,' etc. 'Eighth. If the intestate leaves a widow and no kindred, his estate shall descend to his widow; and if the intestate is a married woman and leaves no kindred, her estate shall descend to her husband. Ninth. If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to the commonwealth,'" included an adopted child, which by the adoption statute was deemed, for the purpose of inheritance and other legal consequences of the natural relation of parent and child, to be the child of the parent by adoption, so as to allow it to inherit from its adoptive father in preference to a brother of such father.

In California, where by statute an adopted child is "regarded and treated in all respects as the child of the person adopting," and is to "have all the rights and be subject to all the duties of the legal relation of parent and child," the word "issue," as used in a statute providing that if the decedent leave no surviving husband or wife, but leave issue, the estate goes to such issue, "issue" being used in the sense of "child" or "children," was held in *Re Newman*, 75 Cal. 213, 7 Am. St. Rep. 146, 16 Pac. 887, to include an adopted child.

In *Power v. Hailey*, 85 Ky. 671, 4 S. W. 683, it was said that the words "kindred" and "children," as used in the statutes laying down the general rules of inheritance,

adopted shall be deemed, for the purposes of inheritance by such child, and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock; except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption." Substantially the same language, with some verbal changes and an addition immaterial upon the present question, forms the existing statute. Pub. Stat. chap. 181, § 5. The purpose of the statute is to define the status of, and to confer the right of inheritance upon, the adopted child,—not to regulate the rights of the surviving adopting parent in the estate of the one deceased.

In 1842, in the Revised Statutes the husband's common-law right of curtesy was

recognized in the provision for the descent of real estate subject to that right. Rev. Stat. chap. 166, § 1. The only other statutory reference thereto prior to 1862 appears to be in the reservations to the husband of such right in the acts in relation to married women. Laws 1846, chap. 327; Laws 1860, chap. 2342. Subsequent enactments enlarging the property holding capacity of married women contain similar reservations, while the present statute gives the husband an estate by the curtesy "when he would be entitled to hold as tenant by the curtesy at common law." Pub. Stat. chap. 195, § 9. As the common law did not recognize the status of an adopted child, it seems clear that the statutory adoption of a child was not intended to invest the husband with the common-law right of curtesy. It was so held in a recent case. *Murdock v. Murdock*, 74 N. H. 77, 65 Atl. 392.

included adopted children, which are by statute made the legal children of their adopted parents.

A legally adopted child, which is made by statute to all intents and purposes the child of its adopters, the same as if born to them in lawful wedlock, is a "lineal descendant" of them, within the meaning of a statute providing that in case a legatee mentioned in a will shall die before the testator, his share shall not lapse, but go to his lineal descendants. *Warren v. Prescott*, 84 Me. 483, 17 L.R.A. 435, 30 Am. St. Rep. 370, 24 Atl. 948.

In *Thomas v. Maloney*, 142 Mo. App. 193, 126 S. W. 522, it was held that an adopted child was entitled to the rights of a "permitted heir," under Mo. Rev. Stat. 1899, § 4611, so as to entitle her to a distributive share of the estate of her adoptive father, which he had willed to another without mention of the adopted child, notwithstanding the absence of a specific agreement that such child should inherit in like manner as a natural offspring.

In *Clarkson v. Hatton*, 143 Mo. 47, 39 L.R.A. 748, 65 Am. St. Rep. 635, 44 S. W. 761, it was held that "children" and "heirs" of a life tenant to whom a remainder was given by statute, under a deed to a person and his "bodily heirs," do not include an adopted child, where there was no law authorizing an adoption of children at the time of the enactment of such statute, and the adoption was not made until after the life estate vested. The decision was upon the ground that a life tenant could not destroy the vested right of all statutory heirs by an adoption, and therefore is not in conflict with either *Moran v. Stewart* or *Moran v. Moran*, supra.

But in *Barnes v. Allen*, 25 Ind. 222, it was said that children adopted by the husband only were not the "children by marriage" of his widow, within the meaning of a statute providing that, in case of her subsequent marriage and death, real estate

coming to her by the former marriage should go to her children by that marriage; and also that they were not children of the first marriage, within the statutory provision for a reversion to the children of such marriage after the death of the subsequent wife of the adopting father.

And in *Keith v. Ault*, 144 Ind. 626, 43 N. E. 924, it was held that an adopted child of a deceased husband, but not of the wife, is not entitled to the protection of a statute providing that in case of the widow's subsequent marriage and death, real estate coming to her by the former marriage should go to her children by that marriage, notwithstanding the statutory provision that an adopted child shall receive all the rights and interest in the estate of the adopting father which a natural heir would be entitled to.

But in *Patterson v. Browning*, 146 Ind. 160, 44 N. E. 993, it was held that a child adopted alone by the wife's deceased husband is her forced heir, within the meaning of a statute providing that if a man marry a second or subsequent wife, and has by her no children, but has children alive by a previous wife, the land which at his death descended to such wife shall at her death descend to his children, the adoption statute providing that an adopted child shall have all the rights and interest in the estate of the adopting father which a natural heir would be entitled to. The court states that its conclusion is not inconsistent with *Kirth v. Ault*, supra, for the reason that such case was founded on a different statute. But notwithstanding this, the principle involved is practically the same, and it would seem that the present law of Indiana is as laid down in this case. It should also be noted that in the *Patterson* Case a dissenting opinion was rendered in which objection was made to extending the doctrine to a case where the wife did not join in the adoption.

In *Phillips v. McConica*, 59 Ohio St. 1,

In 1862 the widow's share in her husband's estate, in addition to homestead and dower, depended in part upon whether or not the husband left a lineal descendant. Comp. Stat. 1854, chap. 175, §§ 2, 9, 12. As it is clear the legislature did not understand that the husband's right in his wife's real estate was increased by the capacity of inheriting from the wife conferred upon an adopted child, it is reasonable to conclude that it was not understood the wife's right in her husband's estate was diminished by the capacity of the adopted child to inherit from the husband. The child was rendered capable of inheriting from each, but the rights of husband and wife in the property of the other were not disturbed.

The term "lineal descendant," in the statute determining the right of the wife in the husband's estate, appears in Gen. Stat. 1867, chap. 183, §§ 7-12. In the General Laws, in similar provisions, for "lineal de-

scendant" was substituted "child or the issue of any child." In this revision the provisions on the subject in behalf of both parties are first grouped together. Gen. Laws, chap. 292. That the change from "lineal descendant" to "child or the issue of any child" was not made for the purpose of including adopted children appears from the history of the section directly involved (§ 11), under which the right claimed depends upon a release of dower and homestead by the widow. *Nute v. York*, 66 N. H. 541, 23 Atl. 420. This section originated in 1892. By that act the widow of every person, whether leaving lineal descendants or not, by waiving her dower and homestead and the provision by will in her favor, if any, and releasing her distributive share, could take one third of the estate after payment of debts and expenses. Laws 1872, chap. 41. This act was in addition to the provisions of the General Statutes

69 Am. St. Rep. 753, 51 N. E. 445, cited in *MORSE v. OSBORNE*, an adopted child was held not to be "issue," within the meaning of a statute providing that when a legatee dies before the testator, the legacy lapses, unless such legatee was a child or relative of testator, and left issue surviving, on the ground that issue in such case must be of the blood of the testator and of the deceased child or other relative by birth, although the adoption statute provided that an adopted child "shall be to all intents and purposes the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges, and subject to all the obligations, of a child of such person begotten in lawful wedlock."

As affecting inheritance tax.

Cases construing inheritance tax laws which expressly exempted children adopted in conformity of law (as, for example, *Re Butler*, 58 Hun, 400, 12 N. Y. Supp. 201, and *Re Winchester*, 140 Cal. 468, 74 Pac. 10), and those persons standing in the "mutually acknowledged relation" of children to the deceased, such as *Re Spencer*, 1 Connoly, 208, 4 N. Y. Supp. 399, have been excluded.

The collateral inheritance tax laws are without exception construed strictly against adopted children, and in no known instance has an adopted child been construed to be within the meaning of the general terms "child," "children," "issue," etc., as used in such laws.

Thus in *Re Miller*, 110 N. Y. 216, 18 N. E. 139, affirming 47 Hun, 394, it was held that the word "children" in a statute exempting "children" born in lawful wedlock from the payment of a collateral inheritance tax did not include an adopted child. However, the New York statute (Laws 1885, chap. 483) has been by amendment 30 L.R.A. (N.S.)

(Laws 1887, chap. 713) changed so as expressly to include adopted children in the exemption.

In *Com. v. Nancrede*, 32 Pa. 389, an adopted child having the right to inherit was held not exempted, within the meaning of a collateral inheritance tax law exempting property devised to children and lineal descendants, the court saying that giving an adopted son a right to inherit did not make him a son in fact.

And the same is true of an adopted child which by statute was made capable of taking and inheriting any estate from the adopting parents as fully and effectually as if he were their own child born in lawful wedlock. *Tharp v. Com.* 58 Pa. 500; *Packard's Appeal*, 37 Phila. Leg. Int. 135; *Com. v. Ferguson*, 137 Pa. 595, 10 L.R.A. 240, 20 Atl. 870.

And the same is true where the adopted child is invested with "all the legal rights of a legitimate daughter and legal heir." *Wayne's Estate*, 2 Pa. Co. Ct. 93.

An adopted child not of the testator's blood is not "lineal issue," within the meaning of an act imposing a succession tax on legatees and distributees classified with reference to their degree of blood relationship to the deceased, lineal issue being in one class and strangers in blood being in another, although such child was entitled to all the rights of heirship of a child born in lawful wedlock. *Kerr v. Goldsborough*, 80 C. C. A. 177, 150 Fed. 289.

An adopted child which by statute has all the rights of a legitimate child in the estate of the adopting person, when not related by blood to him, is neither an ascendant nor a collateral, within the meaning of a law imposing an inheritance tax upon inheritances to ascendant and collateral relatives of deceased whose estate is being distributed. *Frigalo's Succession*, 123 La. 71, 48 So. 652.

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in her favor. *Colby v. Cate*, 64 N. H. 476, 13 Atl. 864.

In 1877 the act of 1872 was modified by the provision that it should not be in force "if there are any children of the testator or intestate by any former wife, or the issue of any such children, living at the time of his death." Laws 1877, chap. 38, § 1. As the law then was, nothing stood in the way of the widow's taking one third of the estate upon execution of the prescribed waivers and release, except the existence of children of the husband by a former wife, or the issue of such children. The commissioners preparing the revision known as the General Laws, in compiling these provisions, made the widow entitled to one third the real estate in fee under the same circumstances, "when the husband leaves any child or the issue of any child surviving him, and to one half when he left no child or issue of any child surviving him." Comm'rs' Rep. Gen. Laws, chap. 196, §§ 9, 10. The commissioners apparently intended to restore the act of 1872, giving the widow the right to take one third of her husband's estate in every case, and to make a new provision giving her one half of the estate when he left no child or issue of a child surviving him; but the legislature substituted for § 9 the provision making the right to take one third in fee dependent upon the existence of a child of the marriage. In the language of the statute, she could take one third when the deceased left "any child by her, or the issue of any child by her, surviving him" (Gen. Laws, chap. 202, § 9), while the adoption of § 10 as proposed by the commissioners gave the widow the right to take one half if the deceased left no child or issue of a child surviving him. It seems probable that the same meaning would be attached to the word "child" in each section dealing with subjects so closely connected.

Referring to the act of 1877, it is apparent that the child surviving the widow not her own, which would prevent her taking one half the estate, was a child of the deceased by a former wife. Whatever rights of inheritance the statute of adoption gives the adopted child, the child by adoption cannot, without doing violence to the ordinary meaning of English words, be spoken of as the child of one of the parents by the other. Neither can an adopted child be said to be the child of the deceased husband by a former wife. It is probable the words were used in their ordinary sense, and so they must be interpreted, in the absence of evidence tending to show a contrary purpose. There is nothing here to justify the conclusion that when a natural

child was described, an adopted child was also intended. The word "issue" was substituted for "child or the issue of any child," in the Public Statutes, without intent to change the meaning. Comm'rs' Rep. Pub. Stat. chap. 194, §§ 10, 13. An adopted child is not issue within the meaning of §§ 10, 11, chap. 195, Pub. Stat., and, as the intent of the legislature was to give the husband the same rights in the estate of the wife that she would have in his, were he dead and she living (Gen. Stat. 1807, chap. 164, § 4; *Hayes v. Seavey*, 69 N. H. 308, 46 Atl. 189), the same word has the same meaning in §§ 12 and 13. The conclusion in *Murdock v. Murdock*, 74 N. H. 77, 65 Atl. 392, is reaffirmed. In case of adoption, the adopting parents take the same part of the other's estate upon the death of either that they would have taken if they had not adopted the child.

The contrary conclusion in other jurisdictions has not been overlooked. In Missouri, where the right of the widow to take one half in fee in lieu of dower is dependent upon the husband's dying without leaving a child capable of inheriting, it is clear that an adopted child, being made capable of inheriting, is within the statute. *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962. The Massachusetts statute that the word "child" shall include adopted child helps the conclusion in *Buckley v. Frasier*, 153 Mass. 525, 27 N. E. 768. Other cases not so readily distinguishable are not of sufficient weight to overthrow the plain meaning of the simple words of the statute. The vigorous dissent in *Markover v. Krauss*, 132 Ind. 294, 17 L.R.A. 806, 31 N. E. 1047, upon the ground that "by no course of legitimate reasoning can the conclusion be reached that a child by adoption is a child by a former wife," does not seem open to logical answer.

Appeal sustained.

All concur.

OKLAHOMA SUPREME COURT.

JOHN HOLMES et al., Plffs. in Err.,
v.

LUELLE HOLMES.

(— Okla. —, 111 Pac. 220.)

Probate court — decree — recital of jurisdiction — necessity for.

1. The orders and decrees of a probate court are not required to recite the existence of facts or the performance of acts upon which the jurisdiction of the court depends; and the failure to recite such jurisdictional

Headnotes by Hayes, J.

facts does not raise a presumption that such facts do not exist.

Homestead — childless widow — rights against heirs.

2. When a husband dies seised in fee of land occupied and used by himself and family as a homestead, his surviving wife, although without children, is entitled, by reason of § 1607, Wilson's Rev. & Anno. Stat. 1903, as against his heirs, to occupy and possess the whole of such homestead as long as she preserves its homestead character by maintaining a home thereon.

Same — rights of heirs to partition.

3. Where a wife occupies as a home the homestead set apart by order of the probate court from the estate of her deceased husband for the use of herself as a

home, the same is not liable to partition at a suit of the heirs of the deceased husband.

(September 13, 1910.)

ERROR to the District Court for Kingfisher County to review a judgment dismissing a petition for the partition of certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. M. W. Hinch, for plaintiffs in error:

A single individual cannot claim the right to a homestead.

Rock v. Haas, 110 Ill. 528; Dendy v. Gamble, 64 Ga. 528; Woodworth v. Comstock, 10 Allen, 425; Woodbury v. Luddy, 14 Allen, 1, 92 Am. Dec. 731; Betts v. Mills, 8 Okla. 351, 58 Pac. 957.

Note. — When homestead deemed "otherwise disposed of according to law" within statute providing for its continuance until that time.

The decision in HOLMES v. HOLMES, holding that under a statute providing for the continuance of a homestead until "otherwise disposed of according to law," the right of the surviving spouse to the homestead is not terminated by the final administration of the deceased spouse's estate, is based on the decision in Fore v. Fore, 2 N. D. 260, 50 N. W. 712, where a like holding was made under a statute containing an identical provision.

In Iowa a like provision is in force, and in that state a subsequent section enacts that "the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is contemplated in the preceding section."

In Nicholas v. Purcell, 21 Iowa, 265, 89 Am. Dec. 572, it was held under this statute that a wife surviving her husband was entitled to possess and occupy the whole homestead without partition by the heirs of the husband, and that that right was not affected by the words of the statute "until it is otherwise disposed of according to law." To the same effect is Dodds v. Dodds, 26 Iowa, 311. In the former case the court said: "That language may refer to cases where the homestead is liable for an antecedent debt, as provided for in § 2281 [1249] of the Revision; or to cases where the title of the owner is less than a fee, and terminates under conditions annexed to the title by contract or by law; or to cases of alienation, by the parties having right to convey, or other cases not needful to mention."

So the surviving widow does not take a fee in the homestead property and the homestead right is terminated by an attempted conveyance in fee, and her grantee will not become invested with the possessory homestead right which the widow would have had if she had not sold it and had re-

mained in possession. Size v. Size, 24 Iowa, 580.

It is held that in order to make the subsequent section operative the distributive share must be set apart during the survivor's life and an attempt to claim this right in the will of the surviving spouse in lieu of the homestead, is of no effect where such spouse resided on the homestead until his death. Darrah v. Cunningham, 72 Iowa, 123, 33 N. W. 445; Mobley v. Mobley, 73 Iowa, 654, 35 N. W. 691.

And where a surviving husband occupies the homestead premises until his death the homestead character of the estate is not lost although he had commenced proceedings to have his distributive share set apart, and the proceedings were pending at the time of his death. Burdick v. Kent, 52 Iowa, 583, 3 N. W. 643.

Continued occupancy of the homestead by a surviving spouse, in the absence of an election to take a distributive share, will be deemed an election to claim the homestead right. Holbrook v. Perry, 66 Iowa, 286, 23 N. W. 671; Thomas v. Thomas, 73 Iowa, 657, 35 N. W. 693.

But the surviving spouse has a reasonable time in which to make an election between a distributive share or a right of homestead. Cunningham v. Gamble, 57 Iowa, 40, 10 N. W. 278.

It has been held that the occupancy by a surviving spouse of the premises as a homestead for more than ten years amounts to an election to take a homestead for life. Conn v. Conn, 58 Iowa, 747, 13 N. W. 51.

And where a surviving wife occupies the homestead premises for six years she elects to retain the homestead notwithstanding the fact that in the meantime she began and abandoned proceedings to have her distributive share set apart, and executed a mortgage on her undivided share to secure a debt, and just prior to her death she proposed to execute another mortgage. Zwick v. Johns, 89 Iowa, 550, 56 N. W. 665.

In Smith v. Zuckmeyer, 53 Iowa, 14, 3 N. W. 782, the surviving spouse elected to take his homestead right in lieu of his

Messrs. Nagle & Blair, for defendant in error:

The surviving wife, where there are no minor children, can continue to hold as a homestead what was prior to the death of the decedent the homestead of the husband or wife.

Fore v. Fore, 2 N. D. 260, 50 N. W. 712; *Weaver v. First Nat. Bank*, 76 Kan. 540, 16 L.R.A.(N.S.) 110, 123 Am. St. Rep. 155, 94 Pac. 273; *Wilkinson v. Merrill*, 87 Va. 513, 11 L.R.A. 632, 12 S. E. 1015; *Stults v. Sale*, 92 Ky. 5, 13 L.R.A. 743, 36 Am. St. Rep. 575, 17 S. W. 148.

Hayes, J., delivered the opinion of the court:

Plaintiffs in error, who originally brought this action in the district court of Kingfisher county, seek by it to obtain a decree adjudging them as the heirs of Edwin M. Holmes, deceased, to be each the owner of an undivided one-fourteenth interest in 80 acres of land situated in Kingfisher county, and grant them a partition thereof. The judgment of the trial court was against them and dismissed their petition. Judgment was rendered upon the pleadings without the introduction of any evidence.

It is not necessary to set out the pleadings in full, and only such parts will be stated as are necessary to present the question of law which we are asked by this pro-

ceding to decide. For several years prior to the 5th day of September, 1905, defendant in error, Lucella Holmes, resided with her husband, Edwin M. Holmes, upon the land in controversy as their homestead. The fee simple title thereto was owned by the husband. On said mentioned date, Edwin M. Holmes died intestate, and left surviving him his wife, defendant in error, without children. Plaintiffs in error are the brothers of the deceased. In November, 1905, an administrator of the estate of the deceased was appointed, and upon application of defendant in error the land in controversy was set aside to her as a homestead. The administration of the estate was proceeded with, and all the debts of decedent were paid from his personal estate. Whereupon notice of final settlement was given, at which time plaintiffs in error appeared before the probate court, made proof of their heirship, and obtained a judgment of that court decreeing them to be each the owner of an undivided one-fourteenth interest in said land. Since the death of Edwin M. Holmes, defendant in error has continued to occupy the land as her homestead. The pleadings disclose that she alone occupied said premises at the time of the institution of this suit. Plaintiffs in error contend in their brief that the order setting aside the homestead to defendant in

error like mortgage, and one on the undivided interest of one of the heirs which she had acquired, and then filed a petition to have her distributive share assigned and a decree therefore was entered but set aside on petition of the heirs, she cannot then claim the homestead and defeat the mortgage liens. *Wilcox v. Wilcox*, 89 Iowa, 388, 56 N. W. 517.

Where a surviving wife has her dower set off in such a way as to include the dwelling house and part of the land comprising the homestead she cannot maintain a claim for the balance as a homestead right. *Meyer v. Meyer*, 23 Iowa, 359, 92 Am. Dec. 432; *Whitehead v. Conklin*, 48 Iowa, 478.

Where a widow appealed from a decision of the court requiring her to elect between her distributive share and her homestead right before the amount of the debts of the husband's estate were ascertained, the theory being that she had elected to hold under her homestead right by remaining in possession of the premises, it was held that her appeal arrested the proceedings in the case so far as to forbid the court to then require the widow to make her election. *Thomas v. Thomas*, 73 Iowa, 657, 35 N. W. 693.

For a note on whether continuance of family is a condition of the continuance of homestead, where its existence is a condition of the inception of the homestead see *Weaver v. First Nat. Bank*, 16 L.R.A.(N.S.) 110. J. T. W.

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error was void, because it was made without notice to them.

Whether the order of the probate court setting aside to defendant in error the homestead was made without notice to the heirs is not presented by the pleadings. No allegation to that effect is made in plaintiffs' petition. Defendant attaches to her answer as an exhibit said order, and the order fails to recite that notice was given; but failure of the order to recite that notice was given to the heirs, if such notice to them is jurisdictional (which we do not decide), does not impeach the order, for, by § 1478, Wilson's Rev. & Anno. Stat. 1903, it is provided that the proceedings of a probate court are to be construed in the same manner and with like intendments as the proceedings of courts of general jurisdiction, and records, orders, judgments, and decrees shall be accorded like force, effect, and legal presumption as the records, orders, judgments, and decrees of district courts. And the orders and decrees of the probate court need not recite the existence of facts or the performance of acts upon which the jurisdiction of the court depends. Section 1780, Wilson's Rev. & Anno. Stat. It is sufficient, except as otherwise provided, that the order contains the matters ordered or adjudged, and there is no provision of the statute requiring that the order setting aside the homestead to the surviving wife or husband shall recite that notice was given to the heirs. In order for plaintiffs to have raised the questions whether notice to them of application for the order setting aside the homestead was jurisdictional, it was necessary for them to have alleged such failure of notice. The record does not disclose what facts relative to defendant in error's then being the head of the family were before the probate court when the order setting aside to her the homestead was made; and we are not informed whether the order was made upon the theory that she was then the head of the family because of having someone dependent upon her, or that she is entitled to occupy and use the homestead as the surviving wife, although she be without children or other persons dependent upon her. The pleadings do disclose, however, that she is at this time occupying the premises alone, without anyone dependent upon her; and the question now presented for decision is: Has the surviving wife, without children, the right to retain possession and occupy the whole homestead, the title to which was owned by her deceased husband? A decision of this question incidentally involves the question: To whom did the title to the homestead descend upon the death of Edwin M. Holmes? If, as contended by counsel for defendant in 30 L.R.A. (N.S.)

error, the surviving wife succeeded to the title to the land, it is then immaterial what her homestead rights therein are, for plaintiffs in error would have no interest which would authorize them to maintain this action. By §§ 6894 and 6895, Wilson's Rev. & Anno. Stat. it is provided that property, both real and personal, of one who dies intestate, shall pass to the heirs of the intestate subject to the control of the probate court; and, when any such intestate shall have title to any estate not limited by marriage contract, it is succeeded to and must be distributed, except as otherwise provided in the Code and the chapter on Probate Courts, in the following manner: First, where there are children, the estate goes to the surviving husband or wife and the children. The share each receives is dependent upon the number of children, and is fixed by the statute. Second, where decedent leaves no issue, that estate goes in equal share to the surviving husband or wife and to decedent's father; but if there be no father, then one half goes to the surviving wife or husband and the other half to the brothers and sisters of decedent; and if he leaves a mother also, she takes equal shares with the brothers and sisters. Subsequent paragraphs provide for succession, if decedent leaves surviving no issue, husband or wife, or father or mother, etc.

By reason of said § 6895, defendant in error as the wife of decedent succeeded to one half of all his estate, both real and personal, and plaintiffs in error to the other half in equal shares, unless their rights are affected by other statutes, which is the case. Section 1607, Wilson's Rev. & Anno. Stat. reads: "Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law; and upon the death of both husband and wife, the children may continue to possess and occupy the whole homestead until the youngest child becomes of age. And in addition thereto, the following personal property must be immediately delivered by the executor or administrator to such surviving wife or husband, and child or children, and is not to be deemed assets, namely: First. All family pictures. Second. A pew or other sitting in any house of worship. Third. A lot or lots in any burial ground. Fourth. The family Bible and all school books used by the family, and all other books as a part of the family library not exceeding in value \$100. Fifth. All wearing apparel and clothing of the decedent and his family. Sixth. The provisions for the family necessary for one year's supply, either provided or growing, or both; and fuel necessary for one year.

Seventh. All household and kitchen furniture, including stoves, beds, bedsteads, and bedding, not exceeding \$150 in value. The executor or administrator must make a separate and distinct inventory of all the personal property specified in this section, by articles, and opposite each article give the appraised value of the same, in dollars and cents, as given in the general inventory of the appraisers appointed by the court, and return the same to the probate court, and no such property shall be liable for any prior debts or claims whatever." Section 1608 provides that, in addition to the property mentioned in § 1607, there shall also be allowed and set apart to the surviving wife or husband, or the minor child or children of the decedent, all such personal property or money as is exempt by law from levy and sale on execution, to be, with the homestead, possessed and used by them. Section 1613 provides that, when the personal property is set apart for the use of the family in accordance with §§ 1607 and 1608, the same shall become the property of the surviving wife or husband, if there are no minor children; and if there are minor children, one half of the same shall become the property of the widow or surviving husband and the other one half shall go to the minor child, if there be one; and if there be more than one, then one third of such property belongs to the surviving widow or husband and the remaining in equal shares to the minor children. This section determines to whom the title of the personal property which is set aside from the estate for the use of the family shall go; but it makes no provision relative to the title to the homestead or any other real estate of a decedent. Section 1607 does not provide that the title shall pass to the surviving husband or wife or to the children; it provides only that the husband or wife, and upon the death of both of them, the children, shall have the right to continue to possess and occupy the whole homestead for the time therein provided; and no other section of the chapter on Probate Courts or of the Code provides who shall succeed to the title to the homestead. The descent of such title, therefore, is governed by § 6895; and in this case, there being no children, the decedent leaving no father or mother, plaintiffs in error, as his surviving brothers, succeed each to one-fourteenth interest in the fee of the homestead, and defendant in error, as his surviving wife, succeeds to the other one-half interest. Do they succeed to such interest subject to any homestead right of decedent's family and the members thereof? If so, what is the extent of that right? In the language of § 1607 is found the answer to this question: 30 L.R.A. (N.S.)

The surviving wife or husband "may continue to possess and occupy the whole homestead until otherwise disposed of according to law; and upon the death of both husband and wife, the children may continue to possess and occupy the whole homestead until the youngest child becomes of age."

It is contended by counsel for plaintiffs in error that the phrase "until it is otherwise disposed of according to law" limits the right of the surviving husband or wife to occupy the homestead to the period during the administration of the estate; and that it is contemplated that when the estate is finally administered, that right ceases, and the homestead is to be partitioned as the other real estate of the decedent. What was intended by this language of the statute is not entirely clear, but that it was not intended that the homestead should become a part of the estate subject to administration and to the payment of the debts and liabilities of the decedent is made manifest by § 1610, which provides that the homestead shall not be subject to the payment of any debts or liabilities contracted by or existing against the husband or wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the law relating to homesteads. As was said by the court in *Fore v. Fore*, 2 N. D. 260, 50 N. W. 712, in construing a statute of that state in the identical language of § 1607, there are various ways by which, under the law, the right of occupancy of the homestead may be terminated. It may be sold for taxes, or upon foreclosure of any mortgage thereon executed by both husband and wife, or upon execution to enforce judgment for the purchase price or any part thereof, or in the enforcement of a mechanics' lien. A termination of the homestead right under any of the foregoing procedures would be a termination thereof within the meaning of the phrase "until it is otherwise disposed of according to law;" and we think the legislature in the use of such language had in contemplation the termination of the homestead right by such methods, rather than intended to provide that the right of use and occupancy conferred by § 1607 should be only temporary and be terminated with the administration of the estate. It is clear that it was not intended that such right should be terminated upon the death of both husband and wife, when there are children; for it is provided that such right shall continue until the youngest child becomes of age.

But it is insisted that the surviving wife must be the head of the family in order to be entitled to possess and occupy the homestead, under the provisions of § 1607; and

the case of *Betts v. Mills*, 8 Okla. 351, 58 Pac. 957, is cited as deciding this question favorably to the contention of plaintiffs in error. In the second paragraph of the syllabus to that case, it is held that the provisions of § 1607 do not confer upon the single survivor of the family, husband or wife, the right to continue to occupy and possess the whole homestead; that such right is dependent upon the survivor's being the head of the family. This conclusion was reached after it had been found that the evidence in the case established that the homestead claimant had abandoned the premises claimed by him as his homestead, and for that reason he would not be entitled to hold the same as exempt from execution, even though his not being the head of a family did not defeat his right to continue to hold his homestead upon the death of his wife. The question decided by the court in the syllabus was presented by the issues in the case; and, although a decision thereon was not absolutely necessary to dispose of the case, such decision is not *dixtum*. *Florida C. R. Co. v. Schutte*, 103 U. S. 118, 26 L. ed. 327; *Clark v. Thomas*, 4 Heisk. 421; *Kane v. McCown*, 55 Mo. 181. But we think that because the first question decided disposed of the case and required an affirmance of the case, regardless of the conclusion reached by the court upon the question decided in the second syllabus, the learned justice who delivered the opinion of the court in that case reached his conclusion without giving to the question that consideration and investigation which characterize his opinions and the importance of the question demanded. He announces his conclusion without citing or referring to any authority upon the real question decided. The authorities cited in the opinion all go to the question of what constitutes a family, and as to what is essential to make one the head of a family. We think the construction given the statute in that case is within neither its letter nor spirit. The exemption of the homestead is a creation of statutory law; and the provisions of the statutes of the various states thereon are by no means uniform, and it is somewhat difficult to make a strict classification of the decisions upon this or any other question arising under the homestead statutes. It is the almost uniform rule that an existence of a family is essential to the acquisition of a homestead; but when a homestead has once been acquired, there is some division among the authorities whether the continuation of the homestead depends upon the continuation of the family, and is destroyed by the breaking up of the family by death of the wife or husband, 30 L.R.A. (N.S.)

without children, or by the children departing from the homestead.

There is nothing in the letter of § 1607 that makes the right of the surviving wife or husband to use and occupy the homestead depend upon the decedent's leaving children surviving him or her. The language of the statute is: "Either the husband or wife, the survivor, may continue to possess," etc.,—not, "either the husband or wife, the survivor, if there are children, may continue," etc. At the time of the decision in the case of *Betts v. Mills*, *supra*, the exemption of the homestead of the family was reserved to the head of the family. Section 2985, *Wilson's Rev. & Anno. Stat.* Under this statute it was held that a wife was not entitled to a homestead out of her own land, nor the husband entitled to a homestead belonging to his wife; and that the exemption thereof was a right conferred only upon the head of the family, and applied only to property the title to which was owned by the husband. *McGinnis v. Wood*, 4 Okla. 499, 47 Pac. 492. Section 2985 was amended by an act of the territorial legislature, approved March 15, 1905 (*Sess. Laws 1905*, p. 255), so as to provide that the homestead shall be reserved to every family as exempt, instead of the head of the family, whether the title to the same is lodged in or owned by the husband or wife. We do not consider, however, that this change in the statute has any effect upon the question involved here, because the existence of a family under both statutes is essential to an acquisition of a homestead. The beneficent purpose of both statutes is to preserve and protect the home in the possession and enjoyment of not only the head of the family, but all the members thereof, against the exaction of creditors, the improvidence or misadventure of the head of the family, upon whom the members thereof are dependent for support. It seems to us that it would be a construction strained and foreign to the spirit of the statute, to hold that it was intended, so long as the husband, who may by labor support his wife, to protect the wife against the misfortune of being deprived of her home to satisfy the debts of the husband, who perhaps has suffered a business failure or financial loss; but when the hour of death comes, with its sorrow and the expenses that sickness and death entail upon the family, the law will then withdraw from her the shield that protected her in her home while her husband lived, and let the accumulated misfortunes or improvidences of the husband, that the law has withheld until the dark hour of his death, be then visited upon her. This would indeed be converting that which was intended

for a shield into a sword. Not only do we think the decision in *Betts v. Mills*, supra, against both the spirit and letter of the statute, but, so far as we have been able to ascertain from an investigation of authorities, it is against the weight of authority construing statutes the same or similar to the one under consideration. In Arkansas, where the exemption of the homestead is reserved to a person who is married or the head of the family, it is held that the existence of a family is necessary to the acquisition of a homestead, but that, when once acquired and still occupied by the owner, it is not lost by death of his wife and the arrival of the children at the age of maturity, or their removal from the premises. *Stanley v. Snyder*, 43 Ark. 429; *White Sewing Mach. Co. v. Wooster*, 66 Ark. 382, 74 Am. St. Rep. 100, 50 S. W. 1000; *Baldwin v. Thomas*, 71 Ark. 206, 72 S. W. 53.

In *Taylor v. Boulware*, 17 Tex. 74, 67 Am. Dec. 642, where the statute exempts "the homestead of a family," the death of the wife without children does not terminate the homestead exemption in behalf of the husband, where he continued to reside thereon. In *Silloway v. Brown*, 12 Allen, 30, it is said: "Although a homestead estate cannot be acquired except by a householder having a family, yet when once acquired and still occupied by him, it has been held not to be defeated or lost by the death or absence of his wife and children. *Doyle v. Coburn*, 6 Allen, 73. Any other construction would render a husband who had been deprived of his family by accident or disease or by their desertion, without any fault of his, liable to be instantly turned out of his homestead by his creditors." "It seems to be settled, on general principles, that a homestead once acquired by the head of a family will not be defeated or lost by the death or absence of his wife and children, if he continue to occupy it." *Beckmann v. Meyer*, 75 Mo. 333. *Fore v. Fore*, 2 N. D. 260, 50 N. W. 712, is another case in point. In construing a statute the same as § 1607, it was held that when the decedent leaves a widow, but no minor child, and dies seised in fee of land occupied and used by himself and family at the time of his death, his surviving widow is entitled, as against his heirs or devisees, to occupy and possess the whole of such homestead as long as she preserves the homestead character by maintaining a home thereon. Other cases either in point or containing reasoning that supports the rule which we here adopt are: *Palmer v. Sawyer*, 74 Neb. 108, 103 N. W. 1088, 12 A. & E. Ann. Cas. 715; *Wilkinson v. Merrill*, 87 Va. 513, 11 L.R.A. 632, 12 S. E. 1015; 30 L.R.A. (N.S.)

Barney v. Leeds, 51 N. H. 253; *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853; *Burns v. Keas*, 21 Iowa, 257; *Ellis v. Davis*, 90 Ky. 183, 14 S. W. 74; *Holder v. Holder*, 120 Ky. 802, 87 S. W. 1100; *Weaver v. First Nat. Bank*, 76 Kan. 540, 16 L.R.A. (N.S.) 110, 123 Am. St. Rep. 155, 94 Pac. 273; *Cross v. Benson*, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558. To the class of cases holding the contrary view, the following cases belong: *Heard v. Downer*, 47 Ga. 629; *Benedict v. Webb*, 57 Ga. 348; *Hill v. Franklin*, 54 Miss. 632.

In so far as views herein expressed are in conflict with *Betts v. Mills*, 8 Okla. 351, 58 Pac. 957, that case is overruled; and we conclude that upon the death of *Edwin M. Holmes*, his heirs succeeded to the title to all his real estate, including his homestead, as provided by § 6895, *Wilson's Rev. & Anno. Stat.*, subject, however, to the right of defendant in error to use and occupy the same as a homestead so long as she resides thereon and makes it her home. While she occupies said premises as her home and homestead, the same is not subject to be partitioned at the suit of the heirs. *Miller v. Hassman*, 24 Okla. 381, 103 Pac. 577; *Funk v. Baker*, 21 Okla. 402, 129 Am. St. Rep. 788, 96 Pac. 608.

The judgment of the trial court is affirmed.

Dunn, Ch. J., and Williams, Kane, and Turner, JJ., concur.

WASHINGTON SUPREME COURT.

JOHN JEMO et al., Respts.,
v.

TOURIST HOTEL COMPANY, Appt.

(55 Wash. 595, 104 Pac. 820.)

Appeal — time — re-entry of judgment.

1. Where after the entry of a judgment and the denial of a motion for new trial, the successful party causes a new judgment to be entered, its date is that from which to reckon the time allowed for appeal.

Lease — existing conditions — right to continue.

2. The mere lease by the proprietor of a hotel for restaurant purposes of a room be-

Note. — Right of tenant to have entrances kept open.

This question was treated in the note to *Whitcomb v. Mason*, 4 L.R.A. (N.S.) 565. But one subsequent case, in addition to *JEMO v. TOURIST HOTEL CO.*, has been found, which rests upon considerations relevant to the question indicated by the foregoing title.

In *Kaiser v. Cinberg*, 130 App. Div. 254,

tween the street and the rotunda of the hotel, with entrances upon both, does not include the right to have the entrance into the rotunda kept open, although closing it will cause a loss of patronage to the restaurant.

Damages — proof — estimate.

3. A landlord cannot escape liability for injury to the floors and wall of the leased building, which the lessee is compelled to repair, because the cost of the repairs cannot be stated with exactness, if it can be reasonably estimated from known and approved data.

(November 10, 1909.)

APPEAL by defendant from a judgment of the Superior Court for King County in plaintiffs' favor in an action brought to recover damages alleged to have been caused by the alleged violation of a lease. Modified.

The facts are stated in the opinion.

Messrs. Hughes, McMicken, Dovell & Ramsey, for appellant:

As the lease does not expressly give plaintiffs the right to have the passageway kept open, or refer to any appurtenances; their right to have it kept open must rest upon the fact that it was necessary to the beneficial use of the demised premises.

114 N. Y. Supp. 716, the plaintiff was the lessee of premises for the purpose of starting and conducting a moving picture show. Shortly after the execution of the lease he ascertained that the existence of a rear exit was a prerequisite to the securing of a license to maintain the business. Thereupon the lessor made affidavit that he thereby granted permission to the lessee to use the rear of the premises for the purposes of an exit. It seems that the exit was obstructed by a locked iron gate, and for this reason the authorities refused to issue a permit. The lessee brought suit to restrain the lessor from maintaining the locked gate. In determining that such relief could not be granted, the court said: "There is no contention that the lease embraces the premises whereon this exit exists, or that it contemplates the use of such exit in connection with the leased premises. It does not even appear that, at the time of the execution of the lease for the use of the premises for a moving picture show, it was in the contemplation of the parties that such use necessarily required the use of the exit in question. The lease is not in the record. The plaintiff points out that the lease provided that the repairs should be done according to the laws of the building department, but the requirement by that department for an exit into a street, which admittedly must pass through property outside of the lease, is hardly to be construed into a covenant that the plaintiff perform of his lease, shall have such right of passage." 30 L.R.A. (N.S.)

Walker v. Clifford, 128 Ala. 67, 86 Am. St. Rep. 74, 29 So. 588; Patterson v. Graham, 140 Ill. 531, 30 N. E. 460; Oliver v. Dickinson, 100 Mass. 114; Hill v. Shultz, 40 N. J. Eq. 164.

A mere convenience is not sufficient to create or convey a right or easement, or impose burdens other than those granted as incident to the grant.

Barrett v. Bell, 82 Mo. 110, 52 Am. Rep. 361; Walker v. Clifford, supra; Cummings v. Perry, 169 Mass. 150, 38 L.R.A. 149, 47 N. E. 618; Ward v. Robertson, 77 Iowa, 159, 41 N. W. 603; Gale v. Heckman, 16 Misc. 376, 38 N. Y. Supp. 85; Howell v. M'Coy, 3 Rawle, 256; Re New York, 83 App. Div. 513, 82 N. Y. Supp. 417.

The fact that the defendant or its predecessors in title permitted plaintiffs to use the passageway for some time did not establish the right of the plaintiffs to have it kept open.

Cummings v. Perry, supra.

The evidence as to the injury to the floors and walls of the leased building was insufficient to enable the jury to compute the damages with reasonable certainty.

Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; Bowen v. Illinois C. R. Co. 70 L.R.A. 915, 69 C. C. A. 444, 136 Fed. 306.

Moreover, the plaintiff in his affidavit but deposes that such exit could only 'be conveniently' (therefore not necessarily) 'had through the land adjoining the said stores, and which adjoining land belongs to this defendant.' There is no contention that this permission, given about a month after the execution of the lease, to permit passage through this exit across the land of the defendant into the street, was granted upon any express consideration, and the defendant deposes that there was none. I cannot see that there is any consideration for such user. For aught that appears, such permission was a mere license, revocable at the pleasure of the defendant, which conferred no rights on the plaintiff after such revocation. . . . I think that the injunction order, in so far as it interferes with the defendant in the control of any of his property upon his own land, exclusive of the premises subject to the lease, was wrong, and that, therefore, it must be modified accordingly."

See Lindbloom v. Berkman, 43 Wash. 356, 86 Pac. 567, which is sufficiently set out in the JEMO CASE.

On eviction of tenant by discontinuance of, or interference with elevator service, see the note in 21 L.R.A. (N.S.) 38.

On right of landlord to render tenement uninhabitable, under provision of lease reserving right of re-entry for condition broken, see the note in 17 L.R.A. (N.S.) 672.

L. A. W.

Messrs. John E. Ryan and C. K. Poe for respondents.

Gose, J., delivered the opinion of the court:

The appellant owns and conducts the Tourist Hotel, situate on the corner of Occidental avenue and Main street in the city of Seattle, and fronting on Occidental avenue. On April 1, 1905, its predecessors in title leased to respondents for the term of three years a room, to be used as a restaurant, on the ground floor of the hotel building, adjoining the rotunda of the hotel and connected therewith by a doorway, and fronting and having its entrance on Main street. It was described in the lease as "the room situated on the ground floor of 156 Main street." The respondents entered into the possession of the leased premises, and began and continued to conduct a restaurant therein, with the slight interruption hereafter noticed, until the expiration of the lease. In November, 1906, the appellant closed the doorway between the hotel rotunda and the restaurant. After the expiration of the lease the respondents commenced this action, seeking to recover damages on two counts. The first cause of action is predicated on the loss of patronage arising from the closing of the door between the hotel rotunda and the restaurant. The second cause of action proceeds from certain alleged injuries to the interior of the restaurant, caused by the appellant in repairing and changing the hotel building. The appellant demurred to the first cause of action upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer being overruled, issue was joined and the cause tried to a jury, resulting in a verdict for respondents on both causes of action, upon which a judgment was entered, from which this appeal was taken. At the close of the case, the appellant moved the court to instruct the jury that there could be no recovery.

The respondents have moved to dismiss the appeal because the appeal bond was not given or filed within five days after the service and filing of the notice of appeal, nor within ninety days after the motion for a new trial was denied. The record shows that the verdict was filed January 13, 1909; that a motion for a new trial was filed January 15, denied January 30, and a judgment rendered upon the verdict on the motion of the respondents February 3, and filed February 4. The notice of appeal and the appeal and supersedeas bond were served and filed May 3. Upon the record this appeal was taken within the ninety 30 L.R.A. (N.S.)

days provided by law. 2 Ballinger's Anno. Codes & Statutes, § 6502 (Pierce's Code, § 1050). However, the respondents assert that the clerk at once entered a judgment as provided by law (Laws 1903, chap. 148, p. 285, § 1); that on February 9th the notice of appeal was filed and a defective bond filed the following day; that the second notice of appeal and the appeal bond were served and filed more than ninety days after the denial of the motion for a new trial, but within ninety days after filing the last judgment. We will assume the record to be as the respondents state, and the question then presented by the motion is whether the time for taking an appeal commenced to run on January 30, when the motion was denied, or on February 4, when the last judgment was entered. If the appeal was from the judgment entered by the clerk, then it should be dismissed for two reasons: (1) Because not taken within ninety days from the denial of the motion; (2) because the notice of appeal states that it is taken from the judgment entered February 4. We have seen that the last judgment recites that it was rendered on the motion of the respondents.

In *Herzog v. Palatine Ins. Co.* 36 Wash. 611, 79 Pac. 287, we held that when the respondent caused the later judgment to be entered, he estopped himself from asserting that it was not the final appealable one. However, the respondents assert that a different view was taken in the later case of *Chilcott v. Globe Nav. Co.* 49 Wash. 302, 95 Pac. 264. In this case the clerk entered a judgment on the day the verdict was returned. Thereafter a motion for a new trial was denied. One month later a judgment was entered at the instance of the losing party. We held that the defeated party could not extend the time for taking an appeal by having a subsequent judgment entered. It was not the intention of the court to modify the rule announced in the *Herzog Case*, as is shown by the reasons stated in the opinion and the fact that the case was not referred to. We think that, where a judgment has been entered by the clerk, and later a motion for a new trial made and denied, and a new judgment entered by the court upon the motion of the successful party, he is not only estopped to deny that it is the final judgment, but that in effect it vacates and supersedes the former judgment. The motion is therefore denied.

Upon the first cause of action, we find that the lease did not in terms include the right to use the door between the rotunda of the hotel and the restaurant. If the right exists at all, it arises by necessary implication. We have seen that the

restaurant fronted, and had its entrance, on Main street. A right of way by implication arises only from necessity, and never from convenience. If it exists in the instant case, it must rest upon the fact that the doorway was necessary to the beneficial use and enjoyment of the demised premises. It is urged that the closing of the door lost the respondents a considerable patronage which had theretofore passed from the lobby of the hotel into the restaurant, furnishing a substantial part of respondents' business, and that appellant is liable in damages for this loss. Stated in the fewest words, the contention means that the respondents had a right of way through the door into and through the lobby of the hotel, and through its main entrance as well, as an easement appurtenant to the restaurant, and that the appellant was required to maintain and operate the hotel as a hotel during the life of the lease. The full effect of the respondents' position is that the hotel was a servient estate, and that the appellant owed them an implied duty to carry on a hotel business so as to furnish them customers, without regard to the effect upon it or its property, for the loss alleged was that they no longer receive the patronage of the guests of the hotel. It would seem that the bare statement of the contention demonstrates its fallacy. If the appellant is liable in damages for closing the door in question, it would have been liable if it had closed the front door. That the doorway was a convenience to respondents none will deny, but it was not necessary to the beneficial enjoyment of the property, and was therefore not an appurtenance. While not stated in direct terms in any of the cases, the doctrine of an implied easement is founded on the intention of the parties, not expressed, but to be gathered from all the surrounding circumstances. If the right claimed is necessary to the enjoyment of the property, as contradistinguished from beneficial, it will be implied. Applying this principle to the case at bar, it becomes clear that the landlord did not intend to make the hotel servient to the restaurant. Cases may arise in which the question of an appurtenance is one of mixed law and fact, but in this case it is clearly one of law. The respondents urge that the court would have been justified as a matter of law in instructing the jury that the doorway was necessary to the beneficial use of the property, and that, therefore, it was included in the lease as an appurtenance to the restaurant. We agree with them that the determination of the question was one of law, but disagree with them as to the further part of their contention.

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Our view is supported by the following cases: *Ward v. Robertson*, 77 Iowa, 159, 41 N. W. 603; *Walker v. Clifford*, 128 Ala. 67, 86 Am. St. Rep. 74, 29 So. 588; *Cummings v. Perry*, 169 Mass. 150, 38 L.R.A. 149, 47 N. E. 618; *Gale v. Heckman*, 10 Misc. 376, 38 N. Y. Supp. 85; *Patterson v. Graham*, 140 Ill. 531, 30 N. E. 460; *Oliver v. Dickinson*, 100 Mass. 114; *Hill v. Shultz*, 40 N. J. Eq. 164; *Barrett v. Bell*, 82 Mo. 110, 52 Am. Rep. 361; *Howell v. M'Coy*, 3 Rawle, 256; *Re New York*, 83 App. Div. 513, 82 N. Y. Supp. 417. In the *Walker Case* the owner of certain property leased to another a part of it, known as the Florence Hotel building, including the hotel rotunda therein, for occupancy as a hotel, excepting therefrom certain stores in the building. Prior to the lease he had leased to another certain portions of the building, including the saloon and billiard hall agreeing that all doors between the hotel and the last-described property should be kept open for the use of the latter lessee. The hotel building was built especially for hotel purposes, and the saloon and billiard hall were accessible from the hotel rotunda by means of doors. A door opened from the saloon to the street, and the billiard hall could only be reached by passing through the saloon or the hotel corridor, and only through the latter when the former was closed. The lessee of the saloon and the billiard hall asserted that the lessee of the hotel took the lease with knowledge of such facts and subject to an easement, and sought to enjoin the latter from closing the doors leading from the rotunda into the billiard hall. A temporary injunction was granted, and latter was dissolved on the ground that no easement or right of way had been reserved by implication or otherwise. On appeal the decree was affirmed, on the ground that the facts did not disclose an implied easement. The court said that the saloon and billiard hall were easily accessible from the street, and that the way claimed was not a way of necessity, but merely of convenience, and that an implied easement could only arise from necessity. In the *Ward Case* certain wholesale druggists had leased the north part of a block fronting on a street, in which to carry on their business. The lessor owned the entire block, the south side of which was bounded by another street, upon which there was a line of railroad, and which had been leased to another. The lessees of the north rooms claimed a right of way through the south room to the railroad street, for the purpose of unloading freight and carrying it through the south room, thence through a doorway leading to their place of business, as an easement appurtenant to the use of their property. The

court held that the right claimed was only a convenience, and not necessary to the beneficial use and enjoyment of their property, and that it could not arise by implication. In the Gale Case the plaintiff had let to the defendant an apartment on the second story of a building known as the Hotel San Remo. At the time the lease was made, the lessor carried on a restaurant in the same building with the demised apartment, but the lease was silent as to the restaurant. The lessee vacated and refused to pay rent because the restaurant had deteriorated in appointments, management, and purveyance. Upon the trial evidence tending to show the existence of the restaurant and its deterioration was admitted. Upon appeal it was held that the evidence was incompetent and irrelevant, and the judgment was reversed.

The respondents cite and rely upon *Lindbloom v. Berkman*, 43 Wash. 358, 86 Pac. 567, *Snow v. Pulitzer*, 142 N. Y. 263, 30 N. E. 1059, and *Kitchen Bros. Hotel Co. v. Philbin*, 2 Neb. (Unof.) 340, 96 N. W. 487. In the *Lindbloom* case the appellants leased to the respondents the second, third, and fourth floors of a building located at the corner of Occidental avenue and Washington street in the city of Seattle, to be used as a hotel and rooming house, reserving the right in the lessors to change, alter, or repair the stairway leading to the leased premises on Occidental avenue. The only entrance to the leased premises was one from Occidental avenue through a large and attractive hall to the elevator. At the time of the execution of the lease, the hall was unoccupied, but thereafter the appellants let a part of the hallway to a huckster who, over the objection of the respondents, entered therein with his wares and greatly impeded the ingress and egress to and from the leased premises. Later they changed the stairway, moving it from near the center of the hallway to one side, and from time to time thereafter leased the space thus made to hucksters and dealers in cheap wares, and left them in possession until forbidden by an injunctive order of the trial court. This court held that, while the hall was not a part of the second, third, and fourth floors, it was the only means of going to and from them, and that it passed as an appurtenance to the property leased. In the *Snow* Case a party erected a seven-story building in the city of New York. Subsequently another person erected an adjoining four story building, and still later another owner erected another adjoining building; thus making three buildings in one block, each having

independent walls. Subsequently the first builder acquired the three properties and converted them into a hotel called French's Hotel; the three being used together as one building. Thereafter the owner of the entire property leased the first story of the four-story building, and then conveyed the entire property, describing it as French's Hotel, subject to the lease. Thereafter the owner tore down the four upper stories in the seven-story building, when it was found that the wall of the four-story building was supported by the adjoining wall of the seven-story building, and that it could not stand without such support, and it began to crack and break, and there was imminent danger of its falling. Upon discovering this fact the owner discontinued the work. Thereafter the four-story building was condemned by the city, torn down, and the tenant was deprived of the benefit of his lease and ousted from the property. In an action for damages, the owner contended that the tenant was not entitled to have the building in which his store was situated supported by the adjoining wall of the seven-story building; that there was no easement in that wall for the support of the wall of the four-story building. It was held that, if the wall of the four-story building could not stand of itself, then the tenant was entitled to the support of the wall of the seven-story building; that the two walls constituted the wall of the leased building, and that the owner had no right to remove the support so as to drive the tenant from his store; that he had no more right to remove the supporting wall than he would have to tear down the demised building or remove its roof. These cases do not in our opinion support the respondents' contention. In the *Kitchen Bros. Hotel Co. Case* it was held that, where the owner of a hotel leased a storeroom upon the ground floor of the hotel building, to be used as a ticket broker's office, the room fronting upon and having a front door opening on a street, and also a back door opening into a hall leading to the hotel rotunda, the closing of the latter door by the lessor was a breach of the implied covenant for quiet enjoyment, and rendered him liable in damages. We cannot yield our assent to the view announced in this case, and it is not in harmony with the other authorities to which reference has been made. We think the court overlooked the vital distinction between a necessity and a convenience. As was said in *Hill v. Shultz*, 40 N. J. Eq. 164: "Since the parties did not adjudge it important enough to contract respecting the use of this plat-

form in plain terms, is the necessity so strong as to make the demands . . . appear reasonable?" We think not. The guests of the hotel could, by passing through the main hotel entrance into Occidental avenue and around the corner a few steps, enter the respondents' restaurant. The first cause of action must therefore fail.

Passing to a consideration of the second cause of action, we find that the respondents' evidence tended to show that the appellant, in repairing the hotel, tore up the floors, tore the paper on the ceiling and the walls, and broke the plastering of the restaurant to such an extent that it became necessary for them to close the restaurant for a period of about seventeen days, and repair the interior at an expense of \$500 or \$600. The respondents did not produce any of the bills pertaining to the repairing, but estimate the expenses as stated. The verdict was of \$250 on this cause of action. The appellant urges that the verdict was based on speculation and conjecture, and that there is no substantial evidence to support it. "Damages," briefly defined, means compensation for the legal injury. It is a word easy to define, but often exceedingly difficult of application. Whilst it is true that a verdict for damages must not rest upon speculation or conjecture, it is likewise true that damages need not be shown with precision and accuracy, but approximately. *Kruegel v. Kitchen*, 33 Wash. 215, 74 Pac. 373. The testimony of the respondents makes it reasonably certain that the walls and floor of the restaurant were damaged by the negligence of the appellant, and it will not be permitted to escape liability because the amount of the damage or the cost of the repairs cannot be stated with exactness. It suffices if the loss sustained can be reasonably estimated from known or approved data. The respondents repaired the entire floor and walls at an expense of about \$1,100. They estimated that about one half of this expense was required on account of the acts of the appellant. Had they produced the bills, they would only have shown the expense as an entirety. The part for which the appellant should compensate them would still be provable only by estimate and comparison. The accounts have been lost. Not taking into account the damages claimed for loss of profits on the business, which has no basis on the evidence stronger than conjecture, we think there is sufficient evidence in the record to support the verdict on the second cause of action.

The judgment will be modified and the cause remanded, with directions to the trial court to enter a judgment for the respondents for \$250, with interest from date of

such judgment. The appellant will recover its costs.

Rudkin, Ch. J., and Chadwick and Fullerton, JJ., concur. Morris, J., took no part.

Petition for rehearing denied.

MISSOURI SUPREME COURT. (Division No. 1.)

NORA L. WOODSON, Resp't.,

v.

METROPOLITAN STREET RAILWAY
COMPANY et al., Appts.

(224 Mo. 685, 123 S. W. 820.)

Appeal — absence of evidence — assumption of parties.

1. Failure to show that the street on which an accident occurred for which a municipal corporation is sought to be held liable was a public street within its limits is not reversible error, where both parties assumed at the trial that it was so.

Evidence — judicial notice — location of streets.

2. Courts cannot take judicial notice of the location, use, and control of streets.

Pleading — variance — obstruction of sidewalk.

3. An allegation of an obstruction of a sidewalk is sustained by evidence that the obstruction was on the parking between the pavement and the curbing.

Highway — obstruction — contributory negligence.

4. It is negligence as matter of law for one fully cognizant of the facts to attempt to cross the streets by climbing over an obstruction between the pavement and the curbing of a sidewalk, when a few steps in either direction would have carried him around the obstruction.

Note. — As to liability of municipality for defects or obstructions in streets, see note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 513.

For contributory negligence as affecting liability of municipality for defects and obstructions in streets, see note to *Lerner v. Philadelphia*, 21 L.R.A. (N.S.) 614.

As to care required from one of defective sight in using streets, see note to *Keith v. Worcester & B. V. Street R. Co.* 14 L.R.A. (N.S.) 648.

Upon the general question of anticipation as an element of proximate cause, see note to *Kreigh v. Westinghouse, C. K. & Co.* 11 L.R.A. (N.S.) 684.

And as to obstructions in highway as proximate cause of an injury notwithstanding intervening cause. see note to *Louisville Home Teleph. Co. v. Gasper*, 9 L.R.A. (N.S.) 548.

Same—vertigo—effect on liability.

5. That one subject to vertigo is seized with an attack while walking on a sidewalk, and staggers against an obstruction negligently placed upon the walk, a fall upon which causes his death, will not destroy the liability for the accident of the one responsible for the obstruction.

Appeal—new theory—admissibility.

6. A judgment cannot be affirmed on a theory not presented in the pleading and proofs.

(December 23, 1909.)

APPEAL by defendants from a judgment of the Circuit Court for Jackson County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's husband, which was alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. John H. Lucas, and Charles N. Sadler, for appellant Metropolitan Street R. Co.:

Plaintiff must prove that Charlotte street, at the point where this accident occurred, is a public street, and that the part on which the accident occurred was actually thrown open to travel by the public.

Golden v. Clinton, 54 Mo. App. 100; Coffey v. Carthage, 186 Mo. 583, 85 S. W. 532; Pueschell v. Kansas City Wire & Iron Works, 79 Mo. App. 459; Fockler v. Kansas City, 94 Mo. App. 464, 68 S. W. 363.

Cities are not compelled to keep all parts of their streets and sidewalks in a reasonably safe condition for persons traveling thereon, but only such part as they have thrown open for public use.

Coffey v. Carthage; Pueschell v. Kansas City Wire & Iron Works; and Fockler v. Kansas City,—supra.

A person using that space left between the sidewalk and street curbing cannot presume such space is free from all obstructions.

Fockler v. Kansas City, supra; Coffey v. Carthage, 186 Mo. 573, 85 S. W. 532.

The owner of abutting property owes no duty to maintain the sidewalk or street in front of his premises in a safe condition, and is not responsible for any defects therein or obstructions thereon not caused by his own wrongful act.

Beck v. Ferd Heim Brewing Co. 107 Mo. 195, 66 S. W. 928; Reedy v. St. Louis Brewing Asso. 161 Mo. 523, 53 L.R.A. 805, 61 S. W. 859; Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009; Baustian v. Young, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; Independence v. Slack, 134 Mo. 66, 34 S. W. 1094; St. Louis v. Connecticut Mut. L. Ins. Co. 107 Mo. 92, 28 Am. 30 L.R.A. (N.S.)

St. Rep. 402, 17 S. W. 637; Norton v. St. Louis, 97 Mo. 537, 11 S. W. 242.

Injury resulting from either of two causes, for one of which defendant is liable, plaintiff must show with reasonable certainty that the cause for which defendant is liable produced the result; and if the evidence leaves it to conjecture, the plaintiff fails.

Smart v. Kansas City, 91 Mo. App. 586; Young v. Missouri P. R. Co. 113 Mo. App. 636, 88 S. W. 767; Browning v. Chicago, R. I. & P. R. Co. 106 Mo. App. 729, 80 S. W. 591; Fuchs v. St. Louis, 167 Mo. 620, 57 L.R.A. 136, 67 S. W. 610; DeMaet v. Fidelity Storage, Packing & Moving Co. 121 Mo. App. 92, 96 S. W. 1045; Warner v. St. Louis & M. River R. Co. 178 Mo. 131, 77 S. W. 67.

The placing of rails in the place there were is not an illegal use of the street or sidewalk, and did not form an illegal obstruction.

Hesselbach v. St. Louis and Pueschell v. Kansas City Wire & Iron Works, supra; Gerdes v. Christopher & S. Architectural Iron & Foundry Co. 124 Mo. 354, 25 S. W. 557, 27 S. W. 615.

It is not negligence not to take precautionary measures to prevent an injury, which, if taken, would have prevented it when the injury could not reasonably have been anticipated, and would not, unless under exceptional circumstances, have happened.

American Brewing Asso. v. Talbot, 141 Mo. 674, 64 Am. St. Rep. 538, 42 S. W. 679; Chandler v. Kansas City Missouri Gas Co. 174 Mo. 327, 62 L.R.A. 474, 97 Am. St. Rep. 570, 73 S. W. 502; Fuchs v. St. Louis, 167 Mo. 626, 57 L.R.A. 136, 67 S. W. 610; Ray, Negligence of Imposed Duties, pp. 133, 134.

When specific acts of negligence are alleged, it devolves upon the plaintiff to prove the acts of negligence pleaded; and if she recovers at all, it must be on the specific acts of negligence pleaded, and not otherwise.

Orcutt v. Century Bldg. Co. 201 Mo. 425, 8 L.R.A. (N.S.) 929, 99 S. W. 1062; McGrath v. St. Louis Transit Co. 197 Mo. 97, 94 S. W. 872; Bartley v. Metropolitan Street R. Co. 148 Mo. 124, 49 S. W. 840; Feary v. Metropolitan Street R. Co. 162 Mo. 75, 62 S. W. 452; Ely v. St. Louis, K. C. & N. R. Co. 77 Mo. 34; Bunyan v. Citizens' R. Co. 127 Mo. 12, 29 S. W. 842; Hamilton v. Metropolitan Street R. Co. 114 Mo. App. 504, 89 S. W. 893.

Messrs. Edwin C. Meservey, and W. H. H. Platt, for appellant Kansas City:

The fall of deceased occurred in broad daylight, and the obstruction which plain-

tiff claims caused the fall was in plain view of the deceased. There was nothing to distract his attention therefrom, and his action in stumbling over said obstruction, if he did stumble, was negligence *per se*.

Wheat v. St. Louis, 179 Mo. 578, 64 L.R.A. 292, 78 S. W. 790; Davis v. California Street Cable R. Co. 105 Cal. 131, 38 Pac. 647; Yahn v. Ottumwa, 60 Iowa, 429, 15 N. W. 257; Cohn v. Kansas City, 108 Mo. 393, 18 S. W. 973; Grandorf v. Detroit Citizens' Street R. Co. 113 Mich. 496, 71 N. W. 844; King v. Colon Twp. 125 Mich. 516, 84 N. W. 1077; Casey v. Malden, 163 Mass. 507, 47 Am. St. Rep. 473, 40 N. E. 849; Forker v. Sandy Lake, 130 Pa. 123, 18 Atl. 609; Moore v. Huntington, 31 W. Va. 842, 8 S. E. 512; Durkin v. Troy, 61 Barb. 437; Ray v. Poplar Bluff, 70 Mo. App. 261; Wilson v. Charlestown, 8 Allen, 137, 85 Am. Dec. 693; Erie v. Magill, 101 Pa. 616, 47 Am. Rep. 739; Butterfield v. Forrester, 11 East, 60, 19 Eng. Rul. Cas. 189; Bruker v. Covington, 69 Ind. 33, 35 Am. Rep. 202; Bedford v. Neal, 143 Ind. 425, 41 N. E. 1029, 42 N. E. 815; McLaury v. McGregor, 54 Iowa, 717, 7 N. W. 91; Stackhouse v. Vendig, 166 Pa. 582, 31 Atl. 349; Knight v. Baltimore, 97 Md. 647, 55 Atl. 388.

The defendant city owed the deceased the duty only of keeping in a reasonably safe condition for him to walk upon and over that portion of the street which it had improved and put in condition for the use of pedestrians.

Craig v. Sedalia, 63 Mo. 417; Ely v. St. Louis, 181 Mo. 729, 81 S. W. 168; Ruppenthal v. St. Louis, 190 Mo. 222, 88 S. W. 612; Downend v. Kansas City, 156 Mo. 70, 51 L.R.A. 170, 56 S. W. 902.

The evidence is such as to leave the cause of the fall of the deceased to conjecture and surmise.

Smart v. Kansas City, 91 Mo. App. 593; De Maet v. Fidelity Storage Packing & Moving Co. 121 Mo. App. 92, 96 S. W. 1045; Warner v. St. Louis & M. River R. Co. 178 Mo. 131, 77 S. W. 67.

The city was not bound to keep the unimproved space between the sidewalk and curb in the same condition as the sidewalk itself.

Fockler v. Kansas City, 94 Mo. App. 464, 68 S. W. 363; Ruppenthal v. St. Louis and Craig v. Sedalia, *supra*; Holding v. St. Joseph, 92 Mo. App. 143.

The city is not liable for permitting construction materials to be put on a street open for travel, provided there is plenty of room for travel thereon in the ordinary modes by persons exercising ordinary care.

Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009; Pueschell v. Kansas City 30 L.R.A. (N.S.)

Wire & Iron Works, 79 Mo. App. 462; Cohn v. Kansas City, 108 Mo. 393, 18 S. W. 973; Ray v. Poplar Bluff; Holding v. St. Joseph and Wilson v. Charlestown, *supra*.

Defendants are not liable for an accident which could not be reasonably anticipated. It cannot be said that a person exercising ordinary care, and traveling in the ordinary modes on the street, could reasonably be expected to meet with such an accident as claimed in this case.

American Brewing Asso. v. Talbot, 141 Mo. 683, 64 Am. St. Rep. 538, 42 S. W. 679; Chandler v. Kansas City Missouri Gas Co. 174 Mo. 327, 62 L.R.A. 474, 97 Am. St. Rep. 570, 73 S. W. 502; Fuchs v. St. Louis, 167 Mo. 620, 57 L.R.A. 136, 67 S. W. 610.

Messrs. Frank P. Walsh and E. R. Morrison, for respondent:

It was conceded at the trial that this was a public street.

Knight v. Kansas City, 113 Mo. App. 561, 87 S. W. 1192; State v. Baldwin, 214 Mo. 290, 113 S. W. 1126.

As to the liability of the street railway company, acceptance of the street by the city need not be shown.

Beck v. Carter, 68 N. Y. 283, 23 Am. Rep. 175; Carroll v. Centralia Water Co. 5 Wash. 617, 32 Pac. 609, 33 Pac. 431; 28 Cyc. Law & Proc. p. 1435.

The space between the curb and the brick sidewalk should be kept reasonably safe.

Fockler v. Kansas City, 94 Mo. App. 468, 68 S. W. 363.

The evidence showed that the fall was caused by stumbling over the bent rail.

Soeder v. St. Louis, I. M. & S. R. Co. 100 Mo. 673, 18 Am. St. Rep. 724, 13 S. W. 714; Settle v. St. Louis & S. F. R. Co. 127 Mo. 341, 48 Am. St. Rep. 633, 30 S. W. 125; Buesching v. St. Louis Gaslight Co. 73 Mo. 219, 39 Am. Rep. 503; Shore v. American Bridge Co. 111 Mo. App. 278, 86 S. W. 905; Leeright v. Ahrens, 60 Mo. App. 118; Musick v. Jacob Dold Packing Co. 58 Mo. App. 333, 28 Cyc. Law & Proc. p. 1408.

The obstruction in question was unreasonable, unnecessary, and was a permanent use of the street, and therefore illegal; but even if it had been legal, the street railway company would be liable for its negligence.

28 Cyc. Law & Proc. p. 1434; Gerdes v. Christopher & S. Architectural Iron & Foundry Co. 124 Mo. 354, 25 S. W. 557, 27 S. W. 615; Wood v. Mears, 12 Ind. 520, 74 Am. Dec. 222; Jochem v. Robinson, 66 Wis. 642, 57 Am. Rep. 298, 29 N. W. 642; Chicago v. Robbins, 2 Black, 424, 17 L. ed. 302; Johnson v. Whitefield, 18 Me. 286,

36 Am. Dec. 721; *R. v. Jones*, 3 Campb. 230.

Deceased was not guilty of contributory negligence.

Barr v. Kansas City, 105 Mo. 558, 16 S. W. 483; *Stephens v. Macon*, 83 Mo. 345; *Perrette v. Kansas City*, 162 Mo. 251, 62 S. W. 448; *Chicago v. Babcock*, 143 Ill. 363, 32 N. E. 271; *Barry v. Terkildsen*, 72 Cal. 256, 1 Am. St. Rep. 55, 13 Pac. 657; *Houston v. Traphagen*, 47 N. J. L. 24; *Gilbert v. Boston*, 139 Mass. 313, 31 N. E. 734; *Dewire v. Bailey*, 131 Mass. 169, 41 Am. Rep. 219; *Albion v. Hetrick*, 90 Ind. 547, 46 Am. Rep. 230; *Jochem v. Robinson*, 66 Wis. 643, 57 Am. Rep. 298, 29 N. W. 642; *Augusta v. Tharpe*, 113 Ga. 158, 38 S. E. 389; *Brusso v. Buffalo*, 90 N. Y. 679; *Olathe v. Mizee*, 48 Kan. 435, 30 Am. St. Rep. 308, 29 Pac. 754.

Graves, J., delivered the opinion of the court:

Plaintiff, the widow of Maj. Blake L. Woodson, brings this action to recover damages for the alleged wrongful death of her husband, alleged to have been caused by the negligence of the defendants. The accident which resulted in the death of Maj. Woodson occurred on the west side of Charlotte street, between Twelfth and Thirteenth streets, and, as alleged, at a point 175 to 200 feet south of the southwest corner of Twelfth and Charlotte streets. On that side of the street practically all of the block between Twelfth and Thirteenth streets was occupied by a power house and shops belonging to the defendant railway company. It is charged: "Now comes the plaintiff, and for her cause of action against the defendants states that the defendant Metropolitan Street Railway Company is and was at all the times hereinafter mentioned a street railway company, organized and existing under and by virtue of the Constitution and laws of the state of Missouri, and operating a large number of lines of electric and street railway in Kansas City, Jackson county, Missouri, and particularly a certain line of cable railway known as the Twelfth street line in said city; that at all of the times hereinafter mentioned said defendant Metropolitan Street Railway Company had for its use in connection with said Twelfth street line a certain building or power house located at the southwest corner of Twelfth and Charlotte streets in Kansas City, Jackson county, Missouri; that defendant Kansas City is and was at all the times hereinafter mentioned a municipal corporation; that Charlotte street in said city, from Twelfth street to Thirteenth street, is, and was, at all the times hereinafter mentioned, 30 L.R.A. (N.S.)

a public street and highway of Kansas City, Jackson county Missouri; that all the times hereinafter mentioned plaintiff was the lawfully wedded wife of Blake L. Woodson, now deceased; that all the times hereinafter mentioned it was the duty of the defendant Kansas City to use ordinary care to keep said street and the sidewalks thereof in a reasonably safe condition for travel and free from all obstructions which would render said street not reasonably safe for use of the traveling public; that at all times it was the duty of defendant Metropolitan Street Railway Company not to render said streets and said sidewalks unsafe and dangerous by placing or permitting obstructions to exist thereon by its act; that on or about the 16th day of March, 1902, the sidewalk upon the west side of Charlotte street between Twelfth street and Thirteenth street, aforesaid, and immediately adjacent to the power house of defendant Metropolitan Street Railway Company, was unsafe and dangerous in this: that the defendants had placed and permitted to remain thereon a large number of iron or steel rails, said iron or steel rails lying in various positions upon said sidewalk, and forming a dangerous obstruction to travel thereon; that said sidewalk was in such defective, unsafe, and dangerous condition upon said day, and had been for a long period of time, to wit, for many months, so that the defendants, and each of them, had notice of said defective, unsafe, and dangerous condition on account of the obstructions aforesaid, or by the exercise of ordinary care would have known of such condition for a time reasonably sufficient to have removed said rails and remedied said defective, unsafe, and dangerous condition before the happening of the catastrophe hereinafter mentioned, but that both of said defendants carelessly and negligently failed and omitted so to do."

By admissions of the parties it appears that on the west side of Charlotte street there was a brick sidewalk 6.2 feet wide; that to the building line from this sidewalk was 4.1 feet; that from the east edge of the sidewalk to the curbing it was 5.8 feet. It was shown that there was a row of trees between the curbing and the sidewalk, and admitted that the tree near the point of accident was 2.7 feet from the curbing, and that the trees in the row were 20 feet apart. That these rails, such as were used in the construction of street railway tracks, had been there for some months, the evidence clearly shows. They were not on the brick pavement, but between the pavement and the curbing, and one witness says some were in the street. The evidence shows that there was at least one

curved rail, and for the plaintiff it was made to appear that one end of this curved rail came within 5 or 6 inches of the brick pavement.

On the day of the accident, which was Sunday, and about 11 in the forenoon, the deceased was walking north on the brick portion of the sidewalk, leisurely smoking a cigar, when, according to plaintiff's theory, he started across in a northeast direction to a drug store on the opposite side of the street, where he had occasionally traded, when he stumbled and fell, the back of his head striking the sharp edge of one of these rails, which cut a gash therein back of the left ear, and from the shock of this blow he then and there within a few minutes died. Plaintiff's theory is that his foot struck this curved rail, and that as he stumbled forward he reached for a tree near by, and, whether he grasped the tree or not, he so checked the forward movement as to be thrown backward in a manner to strike the rail as aforesaid. An autopsy was held, and from that it was developed that deceased was suffering from Bright's disease. Defendants' witnesses say deceased was walking in the middle of the brick pavement, when all at once he began to stagger, as a drunken man, and finally fell upon this rail. They also say he tried to catch to the tree, and one of them seemed to think his hand touched the tree. The medical testimony, as is usual in such cases, differs widely, save and except that the deceased had Bright's disease. Plaintiff's medical testimony was that it was chronic, and deceased might have lived for some time but for the shock of the blow. On the other hand, defendants' experts were of the opinion that deceased was practically a dead man before he struck the iron rail. Defendants also proved that several months prior thereto the deceased had been attacked by dizziness in the court room during the trial of a case, and remained at home some two or more weeks thereafter. On the other hand, it is shown that on the morning of the accident the deceased was hale and hearty as usual, being a man of strong physique, although advanced in years; that he ate his breakfast as usual, and after reading the morning papers started down town. He had gone but a few blocks when the end came.

The trial resulted in a verdict and judgment for the plaintiff in the sum of \$5,000, from which both defendants have duly appealed. This, in a general way, states the case.

Defendants press with great force the failure of the trial court to give their respective peremptory instructions, offered both at the end of plaintiff's case and at 30 L.R.A. (N.S.)

the end of the whole case. The disposition of the several points made against the trial court for this failure will require more details of the evidence, but these we will give in the course of the opinion.

1. There are some matters upon the question of the demurrers to the testimony which are common to both defendants, and others which only go to one or the other of them. To better understand the questions, we will state the character of the answers. The street railway filed a simple general denial. The city admitted its corporate capacity, and denied all other allegations of the petition in the first paragraph of its answer, and in the second paragraph was the usual plea of contributory negligence.

It is first urged that there is no proof that Charlotte street was one of the public streets of Kansas City, or was within the corporate limits of said city. This would be a very serious question were it not for the conduct of counsel throughout the trial, and even later in this court. In the very recent case of Vonkey v. St. Louis, 219 Mo. 37, 117 S. W. 733, we had occasion to condemn this method of trying a case. We there said: "There are at least two good reasons for sustaining the action of the trial court in this cause. In the first place, there are three streets mentioned in the evidence, to wit, Ewing avenue, Washington avenue, and Locust street, as being at or near the locus of the accident. One witness, Fraudenstein, testified: 'I am in the laundry business, 2907 Pine street. I have lived there for about thirty-five years. I know the locality of Ewing, between Washington avenue and Locust street. It has asphaltum on the street. I know it to be a street at least twenty-five years.' This is all we find in the entire record as to whether or not these streets are in the city of St. Louis, or that the accident occurred within the corporate limits of the city of St. Louis. Counsel for plaintiff seem to have proceeded upon the theory that not only the lawyers engaged in the case knew that the streets were in the city of St. Louis, and therefore the accident occurred in said city, but, further, that both the trial court and this court were fully advised as to the locus of the accident and these streets. The trial court could not take judicial cognizance of the fact that these three streets were within the corporate limits of the city of St. Louis. This was a matter of proof, and the issue was made by the general denial. Nor can this court take judicial cognizance of such fact, if it be a fact. For this reason, if for no other, the demurrer to the evidence was properly sustained. This loose method of

trying cases in the large cities should be stopped. A few lines of testimony or a short admission in the record will suffice, but we cannot strain the doctrine of judicial cognizance to the extent of entertaining judicial knowledge of the existence of streets in municipalities, and will not do so." In that case the trial court had forced a nonsuit, and plaintiff appealed. There, of course, were not the things in the conduct of the case, showing that both sides assumed that the street was one under the control and in the possession of the city, as in this case. The city, in the case at bar, only raises the question in the reply brief. In its first brief, the city says: "The sidewalk constructed by the city for the use of pedestrians was, at the time, absolutely safe, and the obstruction on the parking was in plain view, and all the conditions were perfectly obvious to the deceased."

The defendant railway, as tending to show its attitude in the matter, asked the following instruction: "The court instructs the jury that the petition in this case charges that the defendants, Kansas City and the Metropolitan Street Railway Company, carelessly and negligently permitted certain iron rails to remain on the sidewalk on the west side of Charlotte street at a point about 187 feet south of Twelfth street, which rendered said sidewalk unsafe and dangerous for travel thereon, and that Blake L. Woodson was, by reason of said condition, thrown to the ground and killed. The court instructs you that if you believe that this contention on the part of the plaintiff be true, then both the defendants are liable; but if you should believe that the defendant Metropolitan Street Railway Company negligently placed said rails upon said sidewalk, and that the city negligently permitted them to remain there, then the plaintiff cannot recover in this case, and your verdict will be for the defendants." Other things throughout the record might be cited as tending to show that both sides in the trial of this case assumed that Charlotte street was within the corporate limits of Kansas City, and was a public street over which the said city was exercising control. In this the facts are different from the Vonkey Case, *supra*. We are of opinion that there is clear evidence in this record that both sides assumed Charlotte street to be a public street under the control of the city, and, such being the situation, counsel will not be permitted to change attitude in this court. This contention will be ruled against the defendant. *Knight v. Kansas City*, 113 Mo. App. 561, 87 S. W. 1102. We repeat, however, that courts cannot take ju-

dicial notice of the location, the use, and control of streets, and whilst, under the peculiar state of this record, we find that both sides assumed these things to be true and as proven, yet this loose method of trying cases was properly condemned in the Vonkey Case, *supra*, and would be held fatal to this case but for the reason assigned above.

2. Point was made in the argument before this court that the obstruction complained of was not on the sidewalk, and therefore there is a variance between the pleading and proof. It should be noticed that the petition, a part of which is in the statement quoted, does say that it was the duty of the defendant city to keep Charlotte street and the sidewalk in question free of obstructions; but when the petition gets to the point of charging the negligent act, it leaves out the street, and confines the negligent act to an obstruction of the sidewalk. The language used in this connection is: "That on or about the 16th day of March, 1902, the sidewalk upon the west side of Charlotte street . . . was unsafe and dangerous in this: that defendants had placed and permitted to remain thereon a large number of iron or steel rails lying in various positions upon said sidewalk and forming a dangerous obstruction to travel thereon; that said sidewalk was in such dangerous condition upon said day, and had been for a long period of time," etc.

It thus appears that the obstruction charged is one upon the sidewalk, and not elsewhere. The variance urged is that the proof shows that the obstruction was not on the sidewalk, but on the parking between the sidewalk and the curbing. We are not impressed with this contention. As distinguished from the street proper, all of the space between the curb line might be denominated the sidewalk. In this instance, and in many instances, a space of level grass plot was left upon each side of the brick walk. Yet it would not do to say that these strips were withdrawn from public use, except so far as the city had exercised its right to place things of ornament or public use therein, in which case the traveler on or across the spaces would be bound by the uses to which the city had thus placed the spaces, and would have only the right to use them subject to the uses theretofore properly fixed thereon by the city. Trees might be planted at such places; a hydrant might be placed there; in fact, anything of this character; and the traveler would have to use the spaces with the inconveniences and risks thus imposed. It has been said that the word "sidewalk" has no strict legal interpreta-

tion, and what constitutes the sidewalk, as contradistinguished from the street must be determined from the facts. *Porter v. Waring*, 69 N. Y. 250; *Graham v. Albert Lea*, 48 Minn. 201, 50 N. W. 1108. It is usually recognized as that part of the street upon either side thereof that has been arranged for foot passengers, and not intended for use by vehicles and horsemen. In *Elliott on Roads & Streets*, 2d ed. § 20, it is said: "There are cases in which the term 'street' will be construed to mean only that part of the way which lies between the parts especially intended for footmen. These parts are usually placed on either side of the way and are commonly called sidewalks. It often becomes important to distinguish between the part of the way intended for horsemen and vehicles, and that part intended especially for the use of pedestrians, and the term 'sidewalks' has come to be generally used in this country for the purpose of designating this part of the way; and as the term is an expressive and convenient one, it is likely to find a permanent place in legal terminology." And in *Wabash R. Co. v. De Hart*, 32 Ind. App. 65, 65 N. E., loc. cit. 193, the term is thus defined: "The word 'sidewalk' has a well-understood meaning. We understand *ex vi termini*, that a part of the street is meant. It is the public way, generally somewhat raised, especially intended for pedestrians, and adapted to their use, usually constructed in this country as a part of a street, at or along the side of the part thereof especially designed and constructed for the passage of vehicles and animals; there being often, if not generally, a gutter, also constituting a portion of the street, between such parts; and when a sidewalk is spoken of as being on a specific side of a designated street, it is to be understood to be a part so reserved of that street, at or along the specific side of the roadway." We are of the opinion that all of that portion of the street from the building line to the curbing can properly be called the sidewalk of Charlotte street. Pedestrians have a right to use it all unless some portion thereof is specially restricted by ordinance. This use was fully recognized in the case of *Augusta v. Tharpe*, 113 Ga., loc. cit. 158, 38 S. E. 389. This contention is therefore ruled against the defendants.

3. It is next contended that the demurrers should have been sustained because that the alleged obstruction was open and obvious, and the deceased was guilty of contributory negligence in undertaking to pass over the brick sidewalk to the street over such obstruction. It was a bright forenoon. The sun was shining, but the day was windy. Defendants urge that if de-

ceased was not affected at the time by dizziness resulting from his disease, he was clearly guilty of such contributory negligence as will bar plaintiff's recovery, and they further say that if he was thus affected, and fell by reason thereof, and was injured on the rails, that such a case was not one which could have reasonably been anticipated as the result of the alleged negligence, and on that score the demurrers, should have been sustained. The plaintiff challenges both contentions. Of these, therefore, in their order.

(a) If deceased was at himself, and undertook to cross over at the point of this obstruction, was he guilty of contributory negligence as a matter of law? Usually contributory negligence is a question for the jury, but there are many cases where the evidence is so much one way that it becomes the duty of the trial court to declare the conduct negligent as a matter of law. Is this such a case? We think so. It appears that this street was on the route of deceased from his home to the city. His nephew, who lived with him, used the street. It appears that the deceased was in the habit of stopping and buying cigars at a drug store across and a little north from the place of injury. His residence was but a short distance therefrom, and he had resided at the one place for seventeen years. This pile of railroad rails had been there for at least five months, if not much longer. At that season of the year the grass had not grown up on the little plot between the bricks and the curb. The pile of rails was such an obstruction as could have been seen had deceased been in the exercise of ordinary care for his own protection. Even grant it that it was his desire to go to this drug store (of which fact there is no evidence, but is a mere surmise in the case), yet he had two ways open to him,—one a dangerous one, the other a safe one. By going up the brick sidewalk, which was unobstructed, to a point beyond the pile of rails, he could have crossed with safety.

In the case of *Wheat v. St. Louis*, 179 Mo., loc. cit. 581, 582, 64 L.R.A. 292, 78 S. W. 792, this court said: "In short, the rule is supported not only by the almost universal trend of authority, both English and American, but also by the plainest principles of right and justice. While the city owes the citizen the duty to keep the highways reasonably safe for persons to pass over, the citizen owes the city the duty to use his God-given senses, and not to run into obstructions that he is familiar with, or which by the exercise of ordinary care he could discover and easily avoid. And while the city may be negligent in the dis-

charge of its duty, the citizen may also be negligent in the discharge of his duty. And if both are negligent and their negligence contributes to the injury, there can be no recovery. And if the plaintiff's negligence necessarily contributes to the happening of the injury, there can be no recovery." To a like effect is *Kaiser v. St. Louis*, 185 Mo., loc. cit. 374, 84 S. W. 21:

"Moreover, the plaintiff had driven along that particular part of the street every day for at least ten days, and he therefore knew, or could have known by the exercise of ordinary care, that the pile of earth was there, and as it was no larger than a bucket, he could have easily avoided it, if he had used his senses and the degree of care that is required of one who drives a wagon on a public highway."

The italics in the foregoing quotations are ours. We simply desire to impress that it is the duty of a traveler to exercise ordinary care in traveling upon the public highways.

Again in *Coffey v. Carthage*, 186 Mo., loc. cit. 585, 85 S. W. 535, the rule of conduct of a traveler upon the highway or sidewalk (in that case a sidewalk) is thus stated:

"The law upon this proposition may thus be briefly stated: If plaintiff had no knowledge of the defect or hole in the sidewalk, then she had the right to assume that the sidewalk was in a reasonably safe condition. But while she was entitled to act upon this assumption, still she must exercise that degree of care and caution in walking on said sidewalk which a prudent person ordinarily employs under similar circumstances. If, by the exercise of a reasonable degree of care and caution, she could have discovered the defect or hole in the sidewalk, and avoided the injury, it was incumbent upon her to do so; and if she failed to comply with this duty that every citizen owes the city, and proceeded carelessly and without paying any attention to where she was walking, then there can be no recovery."

In *Cohn v. Kansas City*, 108 Mo., loc. cit. 393, 18 S. W. 974, Judge Black said: "While in general it is for the jury to say whether the plaintiff used ordinary care, and this question they are to determine from all the circumstances, still it often occurs that the court may declare the plaintiff wanting in due care on given facts. One who attempts to cross over a sidewalk as part of a road, known to him to be dangerous, when the dangerous place could have been easily avoided, as by passing around it, or taking another side of the road, is wanting in due care, and the court may so say as a matter of law."

30 L.R.A. (N.S.)

The Iowa court puts the rule thus in the case of *Yahn v. Ottumwa*, 60 Iowa, loc. cit. 433, 15 N. W. 259: "It was not claimed that the husband's attention was in any manner diverted from properly driving the team after he took his seat in the wagon. The accident happened in broad daylight. Now, if the stone was in full view of the husband when he started the team, it was his plain duty to have seen and avoided it. The defendant requested the court to instruct the jury that it was the duty of the plaintiff's husband to use care in driving, and to look where he was driving, and to avoid all obstacles which were dangerous in their character, and which were plainly visible and not obscured, and if he failed to do so, and the plaintiff was thereby injured, then she cannot recover." This instruction was refused. We think this, or some other explicit instruction applicable to this view of the facts of the case, should have been given. Where an obstruction is in the street in plain view of the driver of a vehicle, and his attention is in no manner diverted, so as to excuse him for not seeing the obstruction, and he drives against it or into it, he is clearly guilty of contributing proximately to any injury which may result."

It is not worth while going to other states for authority. The rule could not be more clearly stated than in the *Coffey Case*, supra, as to the duty of travelers to exercise ordinary care in walking over sidewalks. Now plaintiff's testimony shows that these rails were easily seen, and that deceased was leaving the usual pathway to go upon that part of the space not especially prepared for travel, although deceased had the right to travel it. We are satisfied that, if deceased was at himself at the time, the exercise of ordinary care upon his part would have avoided the accident. The cases, supra, are the latest utterances of this court upon the question, and it would serve no good purpose to further review the case law of the state, or of other states. To the mind of the writer it would appear that these last expressions of the court lose sight of the idea that a pedestrian can assume whilst walking over a sidewalk that the city has performed its duty, and that the sidewalk is reasonably safe for travel. But both divisions of the court have concurred in the doctrine of these late cases, and we feel that they should be followed.

(b) But plaintiff urges that, concede it to be true, as defendants say, and as their evidence strongly tended to prove, that deceased became affected and staggered from the brick walk to the sodded portion thereof, and in that condition received an in-

jury which hastened his death, yet plaintiff is entitled to recover. We shall consider this question, first, upon the merits of the contention without reference to the pleadings. We start with the proposition that, under the evidence, there was a dangerous obstruction upon the sidewalk, and the same had been there for such length of time that the law presumes notice upon the part of the city, and for that reason its maintenance there at the date of the accident was negligence upon the part of the city. As to the other defendant, we will discuss that later. Now, under these facts, with a part of the sidewalk negligently obstructed by the city, let us proceed with proper caution to get the case properly stated upon the theory that deceased was overcome by vertigo or some other condition superinduced by disease which was preying upon his vitals. The case made may be thus stated:

Deceased was leisurely walking along on that portion of the sidewalk which had been paved, and which was not obstructed. Suddenly he is seized with vertigo or something of that character. In his desperation he staggers toward the little tree and tries to grasp it, but fails, and falls upon the obstruction negligently there maintained by defendant city. He strikes his head with such force as to cut through to the skull bone for the length of an inch and a half. The plaintiff's physicians say that the shock from that blow was the cause of his death at that immediate time; that whilst subsequently he would inevitably have been overcome by the disease, but that the symptoms revealed were not such as to indicate this early demise, save and except as the diseased condition was augmented by the shock. Under the evidence, but for the obstruction, the fall of deceased would have been upon the soft grass-plot. Under these facts, is there liability upon the part of the city? The city says not, because it was an injury which was not to be reasonably anticipated as a sequence to its negligent act. Is this true? Under these facts, it cannot be said that deceased was negligent. A man blinded by vertigo, or suffering from some other similar condition, cannot be said to be negligent if he grasps for support a little tree planted by the city in a portion of the sidewalk. The proximate cause of his injury could consist of two acts, one coming from him in a dazed condition, and not negligent, and one coming from the city, in permitting an obstruction upon the sidewalk which act was negligence. It oft-times occurs that the proximate cause of an injury is of double character. In other words, there may be two or more causes

uniting to produce the injury. In such case, if the act of the plaintiff, which is one of the causes, is not negligent, and the act of the defendant, which is the other of such causes, is negligent, then there can be a recovery by the injured party or the one to whom the cause of action goes, if death results from the injury. *Musick v. Jacob Dold Packing Co.* 58 Mo. App. 322. This case was discussed and approved by this court in *Huss v. Heydt Bakery Co.* 210 Mo., loc. cit. 53, 108 S. W. 66. It is true that we distinguished the *Musick Case* from the *Huss Case*, but we fully recognized the soundness of the law announced in the *Musick Case*. In distinguishing the cases we used this language: "Here we have a record full of evidence that the plaintiff had neglected one of his duties in permitting the passageway to become slippery. The slippery condition occasioned his fall, and, as a result of the fall, his injury. The case is not on all fours with *Musick v. Jacob Dold Packing Co. supra*, relied upon by the plaintiff. In the *Musick Case* the fall of plaintiff was occasioned by a slippery floor, and, by the fall, the plaintiff was thrown into an uncovered vat of hot water and burned. There was no evidence in that record to the effect that the slippery condition was the result of a neglect or failure upon the part of *Musick*, and therein lies the distinction between that case and the case at bar. In other words, *Musick* had been guilty of no negligence which contributed to his own injury, as a proximate cause thereof, or as one of the proximate causes thereof. Here the jury could readily find that the fall upon the slippery floor, at least one of the proximate causes of the injury, was occasioned by the neglect of the plaintiff, and in that way his own neglect contributed to the jury received, and was one of the producing causes thereof. There may be a combination of causes producing an injury. In this case, but for the slippery floor (a condition superinduced by the negligence of the plaintiff), there would have been no fall, and consequently no injury. On the other hand, there might have been the fall and no consequent injury, had the machinery been guarded. The injury was not, therefore, entirely dependent upon one cause, but upon a result of the two combined, one of which was the product of plaintiff's neglect of duty and want of due care for his own safety."

In the case at bar, if the plaintiff fell for the reasons urged by defendants, there was no negligence in this act, which was one of the two causes which produced the injury. The other contributing cause is practically the conceded negligence of the

city. So that, on the evidence introduced by defendant, plaintiff was entitled to recover, if the result was one which could have reasonably been anticipated to flow from the negligent act. Because deceased was diseased, he was not precluded from walking upon the sidewalk. Nor is it a stretch of imagination to say that the city must know that afflicted persons of all kinds walk upon sidewalks. This court has taken broad grounds as to what cases may be considered as falling within the rule of reasonable anticipation of results from negligence in different cases. In *Dean v. Kansas City, St. L. & C. R. Co.* 199 Mo. 386, 97 S. W. 910, we have a case where the defendant had negligently overloaded the tender of its engine with coal, and in speeding along its tracks a lump thereof was thrown off and struck and injured the plaintiff's knee. We held defendant liable. In so doing we approved a rule of law announced by the Iowa court. In that case (199 Mo., loc. cit. 411), we said: "The fact that the effect in this case was somewhat unusual cannot defeat a recovery. The fact that but few accidents of this sort are recorded in the books cannot save the situation for defendant; for it is self-evident that the question of injury to a man's knee from a flying chunk of coal depends alone upon the coal and the knee coming in contact. If the knee was not there, the knee would not be injured; if the knee was there, then it is another story. In this case both the man and his knee were at a proper place, at a place defendant's lessee had reason to anticipate their presence. The rule of law controlling in this particular is thus formulated: 'The liability of a person charged with negligence does not depend on the question whether, with the exercise of reasonable prudence, he could or ought to have foreseen the very injury complained of, but he may be held liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission.' *Fishburn v. Burlington & N. W. R. Co.* 127 Iowa, loc. cit. 492, 103 N. W. 485 et seq., and cases cited."

The doctrine of this case was cited with approval by the court in banc in *Zies v. St. Louis Brewing Asso.* 205 Mo., loc. cit. 651, 104 S. W. 99. Upon this theory, we believe, there is substance in plaintiff's claim, the cause is one which should be submitted to a jury. But it does not follow from this that it was properly submitted under the pleadings and instructions herein.

(c) But grant it that there is a right to have the jury pass upon this theory of the case, can this verdict and judgment stand? We think not. Plaintiff, neither by her

petition nor instructions, presents this theory to the jury. Even if it be said that the petition is broad enough to cover this theory of the case, and we hardly think it is, yet the instructions for the plaintiff, and upon which the verdict was procured, presented no such theory. We have recently had occasion to review such a condition in the case of *Degonia v. St. Louis, I. M. & S. R. Co.* 224 Mo. 564, 123 S. W. 807. That case is so recent, and being from the court in banc after full consideration of two opinions from division, that we will not go over the matter again here. For the reasons expressed fully in that case, this verdict and judgment should not be affirmed; but we are of opinion that the case should not be reversed outright, but that it should be reversed and remanded, in order that it might be proceeded with in accordance with the views herein expressed, and if need be, that the petition may be amended so as to include the theory of the case discussed in this paragraph.

4. The defendant railway urges that there is no evidence that the rails which occasioned the injury were put there by it, and for that reason its demurrer should have been sustained. Plaintiff, to prove that fact, placed upon the stand one of this defendant's employees, and the evidence, when considered as a whole, is not of much probative force. It is extremely questionable as to whether the plaintiff had sufficiently connected this defendant, but inasmuch as we have concluded to remand the case, we reserve that question and leave it open for proof upon a new trial.

The above conclusions obviate the discussion of other points made. The judgment is reversed and cause remanded, to be further proceeded with in accordance with the views hereinabove expressed.

All concur, except Woodson, J., not sitting.

Petition for rehearing denied.

MINNESOTA SUPREME COURT.

RE ESTATE OF DAVID HERMAN LANDO, Deceased.

ADOLF LANDO, Resp't.,

v.

IDA LANDO, Appt.

(— Minn. —, 127 N. W. 1125.)

Conflict of laws — marriage — Americans in Germany.

1. Respondent, the father of David H. Lando, deceased, filed a petition for his

Headnotes by JAGGARD, J.

appointment as administrator of the estate of his deceased son. Appellant, Ida Lando, whose maiden name was Oberg, appeared and objected to the appointment, claiming that she was the widow of the said deceased.

Deceased and appellant, residents of Minnesota, there exchanged mutual promises to marry in the future. Subsequently at Hamburg, Germany, they exchanged matrimonial consents before, and were pronounced husband and wife by, a man believed by appellant to be a minister of the Gospel. She then, and at all times thereafter, in good faith believed that she and said deceased were thereby married to each other. Thereafter, and up to the time of the death of the deceased, in Vienna, deceased and appellant lived and cohabited as husband and wife in Austria, held themselves out as husband and wife, and were reputed to be husband and wife among their friends and acquaintances in Vienna and in Minnesota. They never lived or cohabited as husband and wife in this state, or in any of the United States. There was no other marriage ceremony. The person who performed the ceremony in Hamburg was not a civil magistrate or registrar, and was not a person authorized by the law of Germany to celebrate a marriage between German subjects.

It is held:

The validity of a marriage is to be determined by the law of the place where the ceremony is performed. A marriage regular where solemnized is valid everywhere. A marriage void where it is celebrated is void everywhere. The validity of the marriage here in question was determined by the law of Germany then in force.

Foreign laws — pleading — proof — judicial notice.

2. A foreign law is a fact, which must be pleaded and proved like any other fact. This court does not take judicial cognizance of the German law applicable to this case.

Conflict of laws — marriage — Americans in Germany — German laws — construction.

3. It was stipulated that such German law was correctly translated as follows:

"Art. 13. The contraction of a marriage (otherwise translated 'entering into'), even if only one of the parties is a German, is determined in respect of each of the parties by the laws of the country of which he (or she) is a subject (otherwise trans-

lated 'to which each respectively belongs'). The same rule applies to an alien who concludes a marriage within the Empire.

"The form of a marriage which is concluded within the Empire is determined exclusively by German law."

That stipulation concerned a matter which is here of fact, and not of law.

Neither the construction of the German Code as a whole, nor the relevant authorities, determine the construction to be placed on this equivocal translation.

The literal significance of the terms of the translation leads to the construction that, under the first paragraph of the article, the deceased and appellant were "aliens who had concluded a marriage within the Empire;" that such marriage was determined by the law of the country of which they were subjects; that, the parties being residents of Minnesota, the attempted marriage was governed by the law of that state; and that the last paragraph is a direction to German officials as to the manner in which they must celebrate marriages in Germany between German subjects.

Same — validity — presumptions — burden of proof.

4. When a marriage has been shown in evidence, whether regular or irregular, the law raises a strong presumption of its legality; not only casting the burden of proof upon the persons objecting, but requiring them throughout, to make plain, against the constant pressure of this presumption, the truth of law and fact that the marriage was irregular and void. The evidence to repel that presumption must be strong, distinct, and satisfactory.

In view of this presumption, the translated law as stipulated is held to have been satisfied by this marriage, valid under Minnesota law.

(October 21, 1910.)

APPEAL by objector from a judgment of the District Court for Ramsey County reversing a judgment of the Probate Court which appointed a disinterested administrator for the estate of David Herman Lando, deceased, and appointing petitioner as such. Reversed.

The facts are stated in the opinion.

Note. — As to law governing validity of marriage, see notes to *Hills v. State*, 57 L.R.A. 155, and supplementary notes to *Gabisso's Succession*, 11 L.R.A.(N.S.) 1082; and *State v. Fenn*, 17 L.R.A.(N.S.) 800; *Johnson v. Johnson*, 26 L.R.A.(N.S.) 179; *State v. Hand*, 28 L.R.A.(N.S.) 753.

In this connection attention is called to the fact—although the point is not alluded to in the headnote by the judge who wrote the opinion—that it appears from the opinion in *State v. Hand*, supra, that there is an express statutory provision in Nebraska to the effect that all marriages contracted

without the state which would be valid by the laws of the country in which the same were contracted shall be valid in all courts and places in the state. This statute, however, merely enacts the rule that is commonly recognized as a matter of comity even in the absence of the statute; and the implication of the opinion seems to be that, notwithstanding the statute, a foreign marriage may be denied recognition, if it is clearly opposed to the distinctive policy of Nebraska, just as when the recognition of foreign marriages is left to the ordinary principles of comity.

Mr. Otto Kueffner, with Messrs. Young & Stone, for appellant.

Mr. H. D. Frankel, with Messrs. Harris Richardson and Harold C. Kerr, for respondent:

The validity or invalidity of a marriage is determined by the law of the place where the ceremony is performed.

McHenry v. Bracken, 93 Minn. 510, 101 N. W. 900; Earl v. Godley (Earl v. Wilson) 42 Minn. 361, 7 L.R.A. 125, 18 Am. St. Rep. 517, 44 N. W. 254; State v. Johnson, 12 Minn. 476, Gil. 378, 93 Am. Dec. 241; Weinberg v. State, 25 Wis. 370; Lacon v. Higgins, 3 Starkie, 178; Hutchins v. Kimmell, 31 Mich. 126, 18 Am. Rep. 164; Vazakas v. Vazakas, 109 N. Y. Supp. 508; True v. Ranney, 21 N. H. 52, 53 Am. Dec. 164; Harding v. Allen, 9 Me. 140, 23 Am. Dec. 549; Fornhill v. Murray, 1 Bland, Ch. 479, 18 Am. Dec. 344; McDeed v. McDeed, 67 Ill. 545; Blaisdell v. Bickum, 139 Mass. 250, 1 N. E. 281; Leonard v. Braswell, 99 Ky. 528, 36 L.R.A. 707, 36 S. W. 684; Scrimshire v. Scrimshire, 2 Hagg. Consist. Rep. 395; Butler v. Freeman, 1 Ambl. 301; Compton v. Bearcroft, Bull, N. P. 114; Middleton v. Janverin, 2 Hagg. Consist. Rep. 437; Dalrymple v. Dalrymple, 2 Hagg. Consist. Rep. 54, 17 Eng. Rul. Cas. 11; Herbert v. Herbert, 2 Hagg. Consist. Rep. 263; Lacon v. Higgins, supra; Swift v. Kelly, 3 Knapp, P. C. C. 257; Kent v. Burgess, 11 Sim. 361.

A valid marriage was not entered into in Germany.

Odd Fellows Ben. Asso. v. Carpenter, 17 R. I. 720, 24 Atl. 578; Kresh v. Kresh, 58 Misc. 461, 111 N. Y. Supp. 437; Re Hall, 61 App. Div. 266, 70 N. Y. Supp. 406.

The rule applies to cases where the parties attempting to marry are mere sojourners in the place where the marriage ceremony is claimed to have been performed.

Middleton v. Janverin; Swift v. Kelly; and Kent v. Burgess,—supra; Simonin v. Mallac, Swabey & T. 67; State v. Shattuck, 69 Vt. 403, 40 L.R.A. 428, 60 Am. St. Rep. 936, 38 Atl. 81; Com. v. Lane, 113 Mass. 458, 18 Am. Rep. 509; State v. Ross, 76 N. C. 242, 22 Am. Rep. 678; Stull's Estate, 183 Pa. 625, 39 L.R.A. 539, 63 Am. St. Rep. 776, 39 Atl. 16; Pennegar v. State, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; Re Chace, 26 R. I. 351, 69 L.R.A. 493, 58 Atl. 978, 3 A. & E. Ann. Cas. 1050; True v. Ranney, supra.

The rules with respect to so-called common-law marriages do not apply.

Savage v. O'Neil, 44 N. Y. 298; Aslanian v. Dostumian, 174 Mass. 328, 47 L.R.A. 495, 30 L.R.A. (N.S.)

75 Am. St. Rep. 348, 54 N. E. 845; Castleman v. Jeffries, 60 Ala. 380.

The theory of common-law marriages is not highly regarded, and should be discarded.

Hulett v. Carey, 66 Minn. 327, 34 L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 31; Re Terry, 58 Minn. 268, 59 N. W. 1013; Heminway v. Miller, 87 Minn. 123, 91 N. W. 428; Pettit v. Pettit, 105 App. Div. 312, 93 N. Y. Supp. 1001; Re McLaughlin, 4 Wash. 570, 16 L.R.A. 699, 30 Pac. 651; Com. v. Monson, 127 Mass. 459, 34 Am. Rep. 411; Beverlin v. Beverlin, 29 W. Va. 732, 3 S. E. 36; Dunbarton v. Franklin, 19 N. H. 257; Norcross v. Norcross, 156 Mass. 425, 29 N. E. 506; Norman v. Norman, 121 Cal. 620, 42 L.R.A. 343, 66 Am. St. Rep. 74, 54 Pac. 143; Robinson v. Redd (Ky.) 43 S. W. 435; Offield v. Davis, 100 Va. 250, 40 S. E. 910; Denison v. Denison, 35 Md. 361; Milford v. Worcester, 7 Mass. 48; Morrill v. Palmer, 68 Vt. 1, 33 L.R.A. 411, 33 Atl. 829.

The common-law rule with respect to a promise of marriage *per verba de futuro* does not prevail in Minnesota.

Hulett v. Carey, supra; State v. Worthington, 23 Minn. 528; Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609; Duncan v. Duncan, 10 Ohio St. 181; Holmes v. Holmes, 1 Sawy. 99, Fed. Cas. No. 6,638; Sorensen, v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455.

If a marriage is illegal where it is attempted to be contracted, moving across a state line into another state would not validate it by raising new presumptions.

Norcross v. Norcross, supra; Cartwright v. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; Odd Fellows Ben. Asso. v. Carpenter, supra; Com. v. Stump, 53 Pa. 132, 91 Am. Dec. 198; Lanham v. Lanham, 136 Wis. 360, 17 L.R.A. (N.S.) 804, 128 Am. St. Rep. 1085, 117 N. W. 787; Randlett v. Rice, 141 Mass. 385, 6 N. E. 238; Collins v. Voorhees, 47 N. J. Eq. 555, 14 L.R.A. 364, 24 Am. St. Rep. 412, 22 Atl. 1054; Rose v. Rose, 67 Mich. 619, 35 N. W. 802; Eldred v. Eldred, 97 Va. 606, 34 S. E. 477.

Article 13 of the act introductory to the German Code, with the exception of the last paragraph, relates to capacity to enter into the marriage relation.

Westlake, International Law, § 13, p. 52; 1 Halleck, International Law (1903) pp. 209, 211; Foote, International Law (1904) p. 111; Meili, International Law (1905) pp. 32, 33, 173, 177, 33 Am. L. Rev. 396; 13 Harvard L. Rev. p. 627; 42 Am. L. Reg. N. S. 14, 26; 4 Canadian L. Rev. 372; 35 Am. L. Rev. 190, 202; 2 Dr. Cosack in Lehrbuch des Deutschen Buergerlichen

Rechts, p. 446; 2 Dr. Endermann in Lehrbuch des Buergerlichen Rechts, § 155; 32 Law Mag. & Rev. 363.

Jaggard, J., delivered the opinion of the court:

The respondent, Adolf Lando, filed a petition in the probate court of Ramsey county, for his appointment as administrator of the estate of his son, David H. Lando, deceased. The appellant, Ida Lando, appeared and objected to the appointment, claiming that she was the widow of deceased. On appeal to the district court, the essential issue was tried and determined, namely, whether David H. Lando at any time during his life married the appellant. If she was his legal wife, she is entitled to appointment as administrator, and, under the intestate law, to the property of the deceased; if she was not his wife, the respondent is entitled to administration, and the family of the deceased to inherit his estate. The deceased, at the time of his death and for many years prior thereto, had been a resident of the city of St. Paul, Minnesota, and engaged in the practice of medicine and surgery therein. The appellant, whose maiden name was Ida Oberg, is twenty-seven years of age, was born in Sweden, but has resided in St. Paul since early childhood. She had been a trained nurse, and associated with Dr. Lando in that capacity. In September, 1907, the doctor and the nurse left separately for New York, but sailed on the same ship to Hamburg.

The trial court was not only justified in finding, but was required by the evidence to find, that "on the 25th day of September, at Hamburg, Germany, they exchanged matrimonial consents before, and were pronounced husband and wife by, a man believed by respondent to be a minister of the Gospel. Respondent then and there, and at all times thereafter, in good faith believed that she and said David H. Lando were thereby married to each other." Cohabitation followed. The wedding ring and the watch, with the initials thereon, which the doctor gave her, were significant of that relationship. The parties then left for Berlin and went to Vienna. The doctor renewed his studies at the Viennese General Hospital, under the patronage of the distinguished surgeon, Baron von Eiselberg, who entertained the doctor and appellant as his wife. The evidence is abundant that they lived together openly as husband and wife, and were reputed to be such in Vienna. It is true that while the parties were in New York a St. Paul newspaper published an account of their marriage in New York. Dr. Lando wrote from Vienna, demanding a retraction of all these statements. There

was also evidence, however, that he wrote to a friend in America: "In my endeavor to become quietly married, the newspaper *furor* was intense, and I now regret that we did not announce our intentions before reaching New York. It would have sufficed to have kept many mouths shut. If I had ever known that a quiet marriage would have produced so much uncalled-for comment, I would have been married in the open space of Seven Corners before a public crowd." The record contains an abundance of letters written by the deceased in his life, which refer to appellant as his wife. He sent to the University of Minnesota an application for the position of professor of surgery, in which he stated that he was married.

The trial court properly found: "The respondent and said David H. Lando, at St. Paul, Minnesota, prior to September 25, 1907, exchanged mutual promises to marry in the future. . . . From and after September 28, 1907, up to the time of the death of David H. Lando, he and respondent lived and cohabited as husband and wife in Vienna, Austria, and held themselves out to be husband and wife, and were reputed to be husband and wife among their friends and acquaintances in Vienna, Austria, and in Minnesota. They never lived as husband and wife or cohabited in this state, or within any of the United States." The trial court also found, and was required by the evidence to find, that the marriage was not performed by any person authorized by the law of Germany to perform the celebration of a marriage. The learned trial judge thereupon concluded as matter of law that respondent never was the wife of David H. Lando, deceased, is not his widow, and is not entitled to letters of administration.

1. The validity of the marriage is to be determined by the law of Germany, where it was celebrated. It is a generally accepted principle of interstate and international law that the validity or invalidity of a marriage is to be determined by the law of the place where the ceremony is performed; that a marriage legal where solemnized is valid everywhere; and that a marriage void where it is celebrated is void everywhere. If the law of the place of trial were to control, a marriage might be valid in one state and invalid in another. It is obviously essential to the welfare of mankind that a marriage valid in one place should be valid everywhere. In *Hills v. State*, 61 Neb. 580, 57 L.R.A. 155, 85 N. W. 836, most of the cases will be found analyzed. And see *McHenry v. Bracken*, 93 Minn. 510, 101 N. W. 960; *Garcia v. Garcia* (S. D.) 127 N.

W. 586. Cf. Schuster, Principles of International Law, p. 481.

This rule applies to cases where the parties attempting to marry are mere sojourners in the place where the marriage ceremony is claimed to have been performed. *State v. Shattuck*, 69 Vt. 403, 40 L.R.A. 428, 60 Am. St. Rep. 936, 38 Atl. 81; *Com. v. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Van Voorhis v. Brintnall*, 86 N. Y. 18, 40 Am. Rep. 505; *Re Chace*, 26 R. I. 351, 69 L.R.A. 493, 58 Atl. 978, 3 A. & E. Ann. Cas. 1050; *True v. Ranney*, 21 N. H. 52, 53 Am. Dec. 164. But see contra, *Stull's Estate*, 183 Pa. 625, 39 L.R.A. 539, 63 Am. St. Rep. 776, 39 Atl. 16; *Pennegar v. State*, 87 Tenn. 244, 2 L.R.A. 703, 10 Am. St. Rep. 648, 10 S. W. 305.

2. The decisive question in the case is whether the parties were married in accordance with the German law. The court does not take judicial cognizance of the law on this point. It is elementary that foreign laws must be pleaded and proved like any other fact. 9 Enc. Pl. & Pr. p. 542; 3 Words & Phrases, 2886; 10 Current Law, 1184, note 15; *Hoyt v. McNeil*, 13 Minn. 390, Gil. 362; *Crandall v. Great Northern R. Co.* 83 Minn. 190, 85 Am. St. Rep. 458, 86 N. W. 10; *Myers v. Chicago*, St. P. M. & O. R. Co. 69 Minn. 476, 65 Am. St. Rep. 579, 72 N. W. 694; *Thomson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 178, 38 Am. St. Rep. 536, 53 N. W. 1137; *Rev. Laws 1905*, 4698, 4701. Cf. §§ 2601, 4766.

In this case it was stipulated between the parties "that the German law, which was in force from September 21, 1907, to May 19, 1908, so far as here applicable, is correctly translated by and in the 'schedule' which is hereto attached, hereby referred to and expressly made a part of this stipulation, the same . . . [which] may be received and read in evidence upon the trial of this proceeding with the same force and effect as though the provisions of law therein referred to were proven in the usual form by a duly authenticated copy of the Civil Code of Germany and its laws governing marriage in force on and between the dates [here involved]." This schedule set forth a number of provisions of the German Code relative to marriage, and in particular this stipulated translation:

"Art. 13. The contraction of a marriage (otherwise translated 'entering into'), even if only one of the parties is a German, is determined in respect of each of the parties by the laws of the country of which he (or she) is a subject (otherwise translated 'to which each respectively belongs'). The same rule applies to an alien who concludes a marriage within the Empire.

"In respect to the wife of an alien declared dead under article 9, ¶ 3, the conclusion of a new marriage is determined by German law.

"The form of a marriage which is concluded within the Empire is determined exclusively by German law."

(The original German words for the contraction of a marriage, at the beginning of the first paragraph, are *Die Eingehung der Ehe*, for "who concludes a marriage," at the end of that paragraph, are *eine Ehe eingehen*).

The proper interpretation of the provision abounds in doubt and uncertainty. That the original language, properly translated and interpreted in the light of the Code construed as a whole, is a clear and consistent provision, is most highly probable. That Code was prepared with the greatest care and the most consummate skill. "Unlike the Code Napoleon," says Mr. Chung Hue Wang in the introduction to his translation, "the German Civil Code is the most carefully worded and scientifically arranged Code extant, representing no less than twenty-two years of careful study and research by the most eminent German jurists." The late Professor Maitland referred to it in his *Political Theories in the Middle Ages*, § 17, as being "the most carefully considered statement of a nation's laws that the world has ever seen;" While Dr. A. Pierce Higgins speaks of it as being "a standing object lesson to all states that are looking forward to a scheme of codification."

The present controversy, however, does not concern the correct philological interpretation of the original language. The question comes before this court restricted by the stipulation. The parties have agreed that the translation is correct. Counsel for appellant insists upon the limitations which the translation imposes. That stipulation concerns a matter which is here of fact, and not of law. We must respect it. We are therefore not called upon to decide the abstract or general question, but the particular question of the interpretation of the statute as thus translated. We are not called upon to consider what the law meant in the German language, in which it was formulated, but what is the significance of the English words, into which it has been correctly translated.

One possible construction is that, under the first paragraph of this article, Dr. Lando and Ida Oberg were "aliens who had concluded a marriage within the Empire:" that such marriage was determined with respect to "each party" by the laws of the country of which (he or she) was a subject (or to which each respectively belongs); and that each of these parties be-

longed to America, and were therefore governed by American laws, under which the attempted marriage was undoubtedly valid. In this view, the last paragraph is a consistent direction to German officials as to the manner in which they must celebrate a marriage in Germany between German subjects. For this view appellant contends. Another possible construction is that the form of a marriage concluded in Germany is always governed by the German law; that the first paragraph of this article refers, not to the formal celebration of a marriage, but to the capacity of the parties to enter into a contract of marriage (that, in other words, the first paragraph refers to 'the contraction,' 'the entering into,'—has to do with the impediments to marriage; the last paragraph with the ceremony); and that the attempted marriage, in this case confessedly not in conformity with the German form, was not a marriage in law. For this view respondent contends.

Neither construction is clear nor free from objection. Neither party has satisfactorily answered the consideration urged by the other; and this is no fault of either counsel. It is necessarily the situation. The German Code must be construed as a whole, in order that the doubt may be resolved. We have considered the arguments of counsel in this connection, and have made our own independent investigation into other and related parts of the Code. The result, restricted as it must be by the stipulation, is not significant, and does not substantially tend to determine the controversy.

The authorities on this subject, which the exceptional industry of counsel in their briefs have exhausted, are not in themselves cogent. Their consideration of the particular controversy before this court is not direct. See for example, Mr. W. W. Smithers' valuable article in 41 Am. L. Reg. N. S. 685, 42 Am. L. Reg. N. S. 14, 26; 33 Am. Law Rev. 396-399; 35 Am. L. Rev. 190-202; 4 Canadian L. Rev. 372-378; 1 Annual Bulletin Comparative Law Bureau, American Bar Asso. 36-38. Nor are any authorities to which respondent refers founded upon the necessary condition of this opinion, namely, the correctness of the translation previously set forth. It is therefore immaterial, for example, that Dr. Schuster deplors that Dr. Wang did not refrain from coining new expressions in his translation, some of which were eminently calculated to mislead English readers. Dr. Schuster's interpretation of this part of the German law does not discuss the inconsistency in the translation of article 13 here urged by counsel, and does not proceed

upon the hypothesis which controls this case. Compare page 482, § 409, and subd. 5, p. 490, with note 15, p. 89. And see Meili's International Law, 173-177, 212, etc. No clear, convincing, or satisfactory conclusion is justified by the authority on this subject. The historical argument on this section tends to confirm appellant's view. Compare § 41, German Statute of 1875, with article 13; and see 42 Suffert's Archives, 303. The appellant is not without some, but inconclusive, authority. See Kent v. Burgess, 11 Sim. 361; Newbury v. Brunswick, 2 Vt. 151-161, 19 Am. Dec. 703; 2 Beal's Cases, 103; Bar, International Law, 358-361; Riding v. Smith, 2 Hagg. Consist. Rep. 371; Bishop, Marr. & Div. 360; Wharton, Ev. § 83, p. 81.

The natural and literal meaning of the translation is that for which appellant contends. These parties were in fact aliens who had concluded a marriage within the Empire. The words of the first paragraph declare that they should be governed by the law of their own state. Neither the words "capacity to contract," nor "impediments to marriage," nor any equivalent expression, appears in this paragraph. The language used does not purport to deal with competency to marry. On the contrary, it expressly and in appropriate terms concerns the conclusion of a marriage. To sustain respondent, new terms must be introduced or substituted by construction. No legal justification for such a construction appears.

The primary rule of interpretation, which we regard as controlling in this situation, is the familiar one, *Semper presumitur pro matrimonia*. "Every intendment of the law leads to matrimony," says Mr. Bishop, Marriage, Divorce & Separation, 956. "When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a strong presumption of its legality,—not only casting the burden of proof upon the person objecting, but requiring him throughout in every particular to make plain against the constant pressure of this presumption the truth of law and fact that it is illegal and void. . . . It being for the highest good of the parties, of the children, and of the community that all intercourse between the sexes in form matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all probabilities, and presses into its service all things else which can help it, in each particular case, to sustain the marriage, and repel the conclusion of unlawful commerce." In Piers v. Piers, 2 H. L. Cas. 331, there was a well-known declaration that "the question of the va

lidity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favor of marriage," and it is to be remembered that in this case the foreign law was a question of fact, and not of law. Lord Chancellor Cottenham said: "My Lords, I have not found that the rule of law is anywhere laid down more to my satisfaction than it is by Lord Lyndhurst in the case of *Morris v. Davies*, as determined in this House (5 Clark & F. 163). It is not precisely the same presumption as exists in the present case, but the principle is strictly applicable to the presumption which we are considering. He says (see p. 265) 'The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory, and conclusive.' No doubt, every case must vary as to how far the evidence may be considered as 'satisfactory and conclusive;' but he lays down this rule that the presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question." The celebrated Lord Brougham said in the same case, on 369: "I should say, 'clear, distinct, and satisfactory evidence.' I am not quite prepared to use the word 'conclusive.' I think some doubt may arise upon that, which it is unnecessary to raise, because, if the evidence required be clear and satisfactory, that is quite sufficient for me. I do not like ever to lay down the rule that evidence must be 'conclusive,' because that gives occasion very frequently to needless and inconvenient doubt." There is much more and familiar authority to the same effect.

In the case at bar the evidence of an attempted marriage and of a marriage valid under the laws of this state is certain and plenary. This woman believed, and under the laws of nature and under the laws of this state was justified in believing, that this man was her lawful spouse; that their intercourse was hallowed as between husband and wife, and not prostituted as between libertine and wanton; and that possible offspring would be legitimate, and not bastardized. It does not seem to us justifiable for the law, despite this presumption, to impose an uncertain construction upon this foreign law which would brand the dead with betrayal and the living with dishonor. We are unable to perceive why the presumption of validity of an attempted marriage should be denied to these parties, both innocent of moral wrong, and the presumption of innocence extended to the most

confirmed recidivist. Certainly the considerations relied upon to repel that presumption are not clear nor satisfactory, nor at all conclusive. We are therefore constrained to hold that the marriage in question, conforming as it did to the Minnesota law, conformed also to the German law as its translation has been here agreed upon.

It follows that the judgment must be reversed, and the cause remanded, with directions to the trial court to amend its conclusions of law, and to enter judgment for appellant in accordance with this opinion. So ordered.

O'Brien, J., being of counsel, took no part.

Petition for rehearing denied.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

v.

STEPHEN SMITH, Appt.

(152 N. C. 798, 67 S. E. 508.)

Intoxicating liquor — liability for sale.

One cannot escape punishment for illegal sale of intoxicating liquor because it was made to one employed by the police department to procure it, such department furnishing the money to pay for it.

(March 23, 1910.)

Note. — Instigation or consent to crime for the purpose of detecting criminal as a defense to prosecution.

For a statement of the principles underlying this subject, and cases prior to those cited in this note, see notes to *Connor v. People*, 25 L.R.A. 341, and *Com. v. Hollister*, 25 L.R.A. 349.

Illegal sale of liquor.

Since the earlier note, numerous cases have arisen in which it has been urged as a defense to a prosecution for the illegal sale of liquor, that the liquor was purchased for the very purpose of having the defendant prosecuted for its sale, and it has been almost unanimously held in such cases that such fact is no defense. Thus, in *Borck v. State* (Ala.) 39 So. 580, the court said: "If the defendant sold the whisky on Sunday, no matter to whom, he violated the statute, which admits of no exception. The fact that . . . [prosecuting witness] was an officer of the law can make no difference, since an officer could not, by giving his consent to the sale, any more justify the act on the part of the defendant than would be the consent of any pri-

APPEAL by defendant from a judgment of the Superior Court for Wake County affirming a judgment of the Raleigh Police Court convicting him of selling whisky in violation of law. Affirmed.

The facts are stated in the opinion.

Messrs. Douglass & Lyon, for appellant:

As the action of the chief of police of the city of Raleigh was not to detect a crime, but amounted to a part inducement and solicitation to commit the crime for which defendant was convicted, the criminality of the sale was destroyed.

Love v. People, 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710; Wilcox v. People, 17 Colo. App. 109, 67 Pac. 343; Pigg v. State, 43 Tex. 109; Saunders v. People, 38 Mich. 220;

vate person." And other cases holding that it is no defense that the sale upon which the prosecution is based was made to a public officer who purchased for the purpose of having the defendant prosecuted are State v. Gibbs, 109 Minn. 247, 25 L.R.A.(N.S.) 449, 123 N. W. 810, and Caveness v. State, 3 Okla. Crim. Rep. 729, 109 Pac. 125.

Cases to the same effect, in which the purchases upon which the prosecutions were based were made by others, at the request of public officials and with money furnished by them, for the purpose of laying foundations for such prosecutions, are STATE v. SMITH; Evanston v. Myers, 172 Ill. 266, 50 N. E. 204; De Graff v. State, 2 Okla. Crim. Rep. 519, 103 Pac. 538; and State v. O'Brien, 35 Mont. 482, 90 Pac. 514, 10 A. & E. Ann. Cas. 1006, where the court said: "It is no defense to a prosecution of this kind that the purchase was made by a spotter, a detective, or hired informer."

So, it has been held no defense to a prosecution that the sale upon which it was based was made to detectives employed to discover illegal sales (Gordon v. State, 7 Ga. App. 691, 67 S. E. 893; People v. Everts, 112 Mich. 194, 70 N. W. 430; People v. Rush, 113 Mich. 539, 71 N. W. 863); nor that the purchase was made by the prosecuting witness at the instance of public officers, and for the purpose of instituting a prosecution (Stack v. State [Okla. Crim. Rep.] 109 Pac. 126; Moss v. State [Okla. Crim. Rep.] 111 Pac. 950; nor that the prosecuting witness was paid by the state for the purpose of inveigling the defendant into selling him whisky, in order that he might be prosecuted by the state, and that such witness might appear against him for that purpose (Taggart v. State [Okla. Crim. Rep.] 111 Pac. 959; Cunningham v. State [Okla. Crim. Rep.] 111 Pac. 959).

In State v. Lucas, 94 Mo. App. 117, 67 S. W. 971, where the prosecuting witnesses were furnished money by citizens for the purpose of buying whisky at the place in question, with a view to prosecuting the seller, and they bought the whisky in ques-

United States v. Whittier, 5 Dill. 43, Fed. Cas. No. 16,688.

Mr. T. W. Bickett, Attorney General, for the State.

Clark, Ch. J., delivered the opinion of the court:

The defendant was indicted for retailing whisky. The evidence for the state tended to show that J. P. Stell, the chief of police of Raleigh, furnished certain money to witness Hammock with which to buy liquor, and also additional pay for his services in the matter, and, under orders of the chief of police, he went to the defendant, in company with one Pope, a city policeman, and purchased intoxicating liquor of the defendant, with the view of having him indicted

with the money so furnished, the court said: "To discover and bring to justice those who subtly, clandestinely, and illegally dispense liquors, the methods resorted to in this case are sometimes indispensable, and when nothing more than the truth is elicited and the guilty are brought to justice through their efforts, a valuable service to the community will have been rendered." And to the same effect is State v. Quinn, 94 Mo. App. 59, 67 S. W. 974, affirmed in 170 Mo. 176, 70 S. W. 1117.

So, in State v. Feldman (Mo. App.) 129 S. W. 998, following State v. Lucas, supra, it is held that it is no defense to a prosecution for an illegal sale of liquor to a minor, that the liquor dealer was enticed into selling illegally by a detective in the employ of the anti-saloon league, to discover and induce violations of the liquor laws, and who had been furnished money by that league with which to buy and so induce sales for the purpose of having the sellers prosecuted.

In Colorado, a somewhat different view seems to be taken, although most of the Colorado cases seem to be in the nature of civil actions by cities to recover penalties for violations of ordinances against certain sales of liquor. Thus, in Ford v. Denver, 10 Colo. App. 500, 51 Pac. 1015, where a city was instrumental in procuring a sale of liquor for the purpose of laying the foundation for a suit in which a judicial opinion as to what would constitute a violation of an ordinance against certain sales of liquor might be procured, though its purpose was unknown to the seller, the court said: "It was as much responsible for the sale of the liquor as the defendant, and it will not be permitted to replenish its treasury from penalties incurred at its instigation. It cannot be heard to complain of an act, the doing of which is solicited."

So, in People v. Braisted, 13 Colo. App. 532, 58 Pac. 796, it was held that an action by a town in the name of the people, to recover a penalty for a sale of intoxicating liquors in violation of a town ordinance, cannot be maintained where the town attorney instructed the complaining witness

ed and punished in the court of the police justice of the city of Raleigh.

The sole question presented by the appeal is whether this conduct on the part of the chief of police is a bar to the prosecution. In *McClain on Criminal Law*, § 118, it is said: "A question analogous to that discussed in the preceding section, and yet depending for its solution on somewhat different principles, is as to whether one who has been decoyed into the commission of a criminal act for the purpose of securing his detection and punishment is relieved from criminal liability by that fact. It is sometimes suggested that it is very improper and unworthy conduct on the part of prosecuting officers to induce men to be criminals for the purpose of securing their con-

viction, and such conduct has been criticized; but it is a well-settled principle that the wrongful acts of the officers of the state in connection with a prosecution will not be imputed to the state so as to excuse the defendant from criminal liability for what he actually does."

Evanston v. Myers, 172 Ill. 266, 50 N. E. 204, is directly in point. "A driver of a beer wagon who sells beer in violation of a city ordinance is liable to punishment, though the city furnished the money and employed the purchaser as a detective to discover violations of the ordinance, where no fraud or deceit was used in the purchase or any inducement offered other than a willingness to buy." In *Rater v. State*, 49 Ind. 508, it is held that "the fact that a

to purchase the liquor, giving him money to pay for it, for the sole purpose of involving the defendant in a violation of the ordinance, in order that a prosecution might be instituted against him and a penalty recovered. The court said: "It would be contrary to good morals to allow the plan to succeed. Public policy will not permit a municipality to derive profit from unlawful acts which are deliberately instigated and contrived by its officers."

And in *Walton v. Canon City*, 14 Colo. App. 352, 59 Pac. 840, where a deputy marshal of a city, part of whose official duty it was to find out where liquor was being sold, in behalf of the city, instructed a witness to purchase beer at defendant's place, giving the witness money to pay for it, for the purpose of involving defendant in a liability to the city through a violation of one of its ordinances, the court said: "We have held that public policy will not permit a municipality to derive a profit from acts which are instigated by its officers. . . . Conceding that he did violate the ordinance, his act was induced by the city through its officer, and the city cannot be allowed, by taking money out of his pocket, to turn the act so committed to its own advantage."

So, *Wilcox v. People*, 17 Colo. App. 109, 67 Pac. 343, holds that one cannot be convicted for selling liquor in violation of a town ordinance, where the prosecuting witness purchased the liquor at the instigation of the town, for the purpose of laying a foundation for the prosecution.

But in *People ex rel. Sterling v. Chipman*, 31 Colo. 90, 71 Pac. 1108, where a town attorney employed a private detective for the purpose of ascertaining whether or not the liquor ordinances of the town were being violated, and the detective gave a witness money with which the latter bought liquor from the defendant, the supreme court, distinguishing *Ford v. Denver*, supra, as not being applicable to the facts of this case, and *People v. Braisted* and *Walton v. Canon City*, supra, on the ground that in those cases, "witnesses were furnished money by the officers of the town with in-

structions to buy liquor from the defendants," said: "We do not understand that the court of appeals has gone to the extent of saying that a municipal officer cannot employ persons to ascertain whether the ordinances are being violated, and that prosecutions cannot be supported by testimony procured in the way shown in this case; although, if carried to its logical conclusion, the doctrine announced in the two cases referred to might include this case. However, we are not prepared to announce as a doctrine that town attorneys are to be so handicapped in the performance of their duties that prosecutions may not be sustained by the testimony obtained in the manner the testimony in this case was obtained."

Illegal use of mails.

Prosecutions for illegal use of the mails are similar to those already considered in that the particular offense instigated, or for which the opportunity is offered, is generally only one of a kind habitually committed, and, further, in that the offenses are more against the public generally than against the prosecuting witness. In these cases, therefore, it has been uniformly held to be no defense to a prosecution that evidence of the illegal use was obtained by means of decoy letters sent to defendant by government employees. Thus, in *Grimm v. United States*, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470, a prosecution for the illegal use of the mails for sending letters conveying information as to where obscene matter could be obtained, where such letters were sent in response to letters written by a postoffice inspector and signed with fictitious names, for the purpose of securing evidence against the defendant, and were directed and mailed to fictitious persons, the court said: "The law was actually violated by the defendant: he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those

party was deceived into violation of the law by one who was employed as a detective will not be a justification." In *People v. Rush*, 113 Mich. 539, 71 N. W. 883, it is held: "The fact that a witness to whom an unlawful sale of liquor was made was employed by the prosecuting attorney as a detective, with a view to respondent's prosecution, is no defense." Many other cases are to the same purport. Among them *Grimm v. United States*, 156 U. S. 604, 39 L. ed. 550, 15 Sup. Ct. Rep. 470, where a detective suspecting a person was using the mail for sending out obscene matter wrote a letter in response to which the defendant mailed such matter. It was held that the defendant could not set up the defense that but for such application he would not have

sent out this response. In *People v. Everts*, 112 Mich. 194, 70 N. W. 430, and *People v. Rush*, supra, it was held no defense in an indictment for an unlawful sale of liquor, that it was made to a detective sent by a prosecuting attorney that he might use such purchase and sale as evidence. Indeed, the authorities are numerous, and it would cripple the effective enforcement of the criminal law if it were not permissible to thus procure evidence.

There are some seeming exceptions, for instance in larceny, whenever the conduct of the owner amounts to a consent that his property may be taken. The reason is that in larceny it is an indispensable element of the offense that the property shall be taken "against the will of the owner." Also in

letters, no matter what his name; and the fact that the person who wrote under these assumed names, and received his letters, was a government detective, in no manner detracts from his guilt."

And on the authority of *Grimm v. United States*, supra, it was held in *Rosen v. United States*, 161 U. S. 29, 40 L. ed. 606, 16 Sup. Ct. Rep. 434, 480, 1 Am. Crim. Rep. 251, to be no defense to a prosecution for mailing an obscene paper, that it was mailed in response to a decoy letter.

So, it is no defense to a prosecution for mailing obscene letters that they were sent in answer to letters written under an assumed name by a government detective, for the sole purpose of obtaining evidence from the defendant upon which to base the prosecution. *Andrews v. United States*, 162 U. S. 420, 40 L. ed. 1023, 16 Sup. Ct. Rep. 798.

And it is no defense to a prosecution for the mailing of obscene publications that they were sent to the government inspector who instigated the prosecution, in response to decoy letters written by him for the purpose of discovering the fact whether or not defendant was engaged in violation of the law, and asking defendant to send them to him through the mail. *Price v. United States*, 165 U. S. 311, 41 L. ed. 727, 17 Sup. Ct. Rep. 366.

Stealing from mails.

Likewise, it has been held no defense to a prosecution for abstracting and embezzling money from the mails, that it was taken from a decoy letter addressed to a fictitious person, and mailed by an inspector, for the purpose of detecting defendant if he should commit the crime. *United States v. Jones*, 80 Fed. 513. The court said, however, in this case: "There is something repugnant in the idea of the government, by art and contrivance, entrapping one of its citizens into the commission of crime in order to subject him to criminal prosecution; and such prosecutions have been felt by the courts to be more or less objectionable in morals and in policy. The 30 L.R.A. (N.S.)

use of decoy letters for the purpose of discovering who the mail robbers are is in itself probably necessary, and, if objectionable, is at least tolerable, on the ground of necessity. But to go further, and, after the citizen has been seduced by the government into robbing the mail, to prosecute him criminally for the act, is more or less offensive to public sentiment. I should have been disposed to follow the rulings of some of the circuit courts in discouraging these prosecutions, but I think the Supreme Court has decided, unmistakably, not only that the use of decoy letters is necessary to the detection of certain offenses, but that criminal prosecutions based on decoys must be sustained."

So, in *Goode v. United States*, 159 U. S. 663, 40 L. ed. 297, 16 Sup. Ct. Rep. 136, the court said: "That the fact that the letter was a decoy is no defense is too well settled by the modern authorities to be now open to contention."

And in *Montgomery v. United States*, 162 U. S. 410, 40 L. ed. 1020, 16 Sup. Ct. Rep. 797, on the authority of *Goode v. United States*, supra, it was held no defense to a prosecution for embezzling and stealing letters containing money which had come into defendant's hands as a railway postal clerk, that such letters were decoys and had been mailed for the purpose of detecting him.

To the same effect are *Hall v. United States*, 168 U. S. 632, 42 L. ed. 607, 18 Sup. Ct. Rep. 237, and *Scott v. United States*, 172 U. S. 343, 43 L. ed. 471, 19 Sup. Ct. Rep. 209, where the court said: "A decoy letter is not subject to the criticism frequently properly made in regard to other measures sometimes resorted to, that it is placing temptation before a man, and endeavoring to make him commit a crime. There is no temptation by a decoy letter. It is the same as all other letters to outward appearance, and the duty of the carrier who takes it is the same. The fact that it is to a fictitious person is in all probability entirely unknown to the carrier, and even if known is immaterial."

proceedings for divorce, if the plaintiff secures someone to entice the defendant into illicit acts. The reason is that "connivance" is always a bar to the plaintiff's cause of action. *Dennis v. Dennis*, 68 Conn. 186, 34 L.R.A. 449, 57 Am. St. Rep. 95, 36 Atl. 34. But as to prosecution for offenses, not against individuals, but against the public, like the present, it is no defense that the illegal sale was made to a party who bought not for his own use, but to aid in convicting the seller. It is not the motive of the buyer, but the conduct of the seller, which is to be considered.

The attorney general in concluding his brief says: "In the case at bar it does not

appear that the chief of police told Hammock to induce any sale. He simply furnished the money and told him to endeavor to buy the liquor. The officer doubtless had the best of reasons for believing there was a live tiger, in the house of defendant. He put out his bait, and the tiger, for all his cunning, 'bolted it,' and now complains that the law of the jungle was violated, else he would not have been entrapped." The defendant's counsel, in reply to this, strenuously contended that his client was a donkey, not a tiger. As to that controversy. *Non nostrum est, tantas componere lites.*

In the appeal, we find no error.

Larceny.

In larceny and other crimes where a want of consent of the individual affected is an element of criminality, instigation or consent to the crime is a defense to prosecution, if it negatives one of the essential elements of the crime charged, though not otherwise. Thus, in *Lowe v. State*, 44 Fla. 449, 103 Am. St. Rep. 171, 32 So. 956, the court said: "The authorities are abundant and the law unquestioned, that a taking by the voluntary consent of the owner or his authorized servant or agent, even though with a felonious intent, does not constitute larceny. But where the criminal design originates with the accused, and the owner does not in person or by an agent or servant suggest the design nor actively urge the accused on to the commission of the crime, the mere fact that such owner, suspecting that the accused intends to steal his property, in person or through a servant or agent, exposes the property or neglects to protect it, or furnishes facilities for the execution of the criminal design, under the expectation that the accused will take the property or avail himself of the facilities furnished, will not amount to a consent in law, even though the agent or servant of such owner, by his instructions, appears to co-operate in the execution of the crime."

And in *State v. Adams*, 115 N. C. 775, 20 S. E. 722, it is said that the court correctly told the jury that "if there was the guilty intent previously formed by the defendant, to steal certain property, and he carried out such design previously formed, he is guilty, notwithstanding the owner of the property was advised of the intended larceny, appointed agents to watch him, and could have prevented the theft, but did not do so, and allowed him to commit the theft, with a view of having him subsequently punished."

So, in *Crowder v. State*, 50 Tex. Crim. Rep. 92, 96 S. W. 934, it was held no defense to a prosecution for the theft of mules, that the owner had employed a detective in order to catch defendant, who, he believed, had been stealing his stock, and that the detective, by direction of the owner, appar-

ently encouraged defendant's design and led him on, provided neither the owner nor the detective induced the original intent on the part of the thief,—though if the intent and purpose to steal originated with, and was suggested by, the detective, it would be a taking with the consent of the owner, and the defendant would not be guilty.

In *State v. Adams*, supra, however, it was further held that there was no larceny where an agent of the owner of cotton, being informed of an intended larceny by the defendant, watched for the latter two nights without his coming, and until late the third night, when, no one coming, the agent filled up two sacks of cotton and gave one of them to a servant of the owner, to take and give to defendant telling the latter that he could get some more, whereupon defendant returned with the servant and took the other sack and carried it away.

And where property was taken from the possession of a railway company with its knowledge and consent, and pursuant to a previous arrangement by a detective who, at the time, was the agent of, and in the employment of, the company, for the purpose of entrapping the driver of a transfer wagon and the defendant, who was suspected of receiving goods stolen from the company, and the detective delivered the goods to the driver and persuaded him, although he suspected that the goods were being stolen from the company by the former, to convey the goods to defendant's store, and defendant received them from the driver, it was held that, as the criminal design did not originate with the driver or the defendant, and the taking by the former was at the instigation and with the consent of the company, there was no larceny, and defendant was accordingly not guilty of the crime of receiving stolen goods. *State v. Waghalter*, 177 Mo. 676, 76 S. W. 1028, 12 Am. Crim. Rep. 283.

So, property is taken with the owner's consent, where one employed by the owner to detect thieves who had been stealing his property was authorized to use the property in any way he might see proper for that purpose, and, for the purpose of entrapping and prosecuting the thief, advises,

co-operates with, and assists the latter in planning and carrying out the taking. *State v. Hull*, 33 Or. 56, 72 Am. St. Rep. 694, 54 Pac. 159.

And there is no larceny where one acting as a detective, in order to catch cattle thieves, and having the consent of the owner to a taking, inaugurates and actively participates with defendant in the thieving enterprise. *McGee v. State* (Tex. Crim. Rep.) 66 S. W. 562, 14 Am. Crim. Rep. 413.

The trespass necessary to constitute larceny is absent, also, where a property owner, upon being informed of a design to steal his property, places it upon a platform where the intending thief is planning to get it, with instructions to his servant in charge of the platform to deliver it to the one who will call for it, so that when the intending thief arrives, he is treated as having a right to the property,—especially where another agent of the owner, sent to arrange for the taking of the property, has agreed to the place proposed by the thief, under circumstances which involve a promise of assistance in carrying out the plan. *Topolewski v. State*, 130 Wis. 244, 7 L.R.A.(N.S.) 750, 118 Am. St. Rep. 1019, 109 N. W. 1037, 10 A. & E. Ann. Cas. 627.

In *Faust v. United States*, 163 U. S. 452, 41 L. ed. 224, 16 Sup. Ct. Rep. 1112, it was held no defense to the prosecution of an assistant postmaster for embezzling money order funds of the United States, that it is not shown that the embezzlement took place without the consent of the postmaster.

And in *People v. Mills*, 178 N. Y. 274, 67 L.R.A. 131, 70 N. E. 786, affirming 91 App. Div. 331, 86 N. Y. Supp. 529, it was held no defense to a prosecution for an attempt to commit the statutory crimes of removing from the court records and stealing certain indictments, that defendant, having formed the purpose of corruptly effecting in some way the disposal of these indictments, was entrapped into what he did by representatives of the district attorney's office, or that the indictments were taken with the consent of the district attorney from a place where they had been placed by authority of the latter for the purpose of detecting defendant in the commission of the crime. The court said: "An important distinction between this case and those relied upon by the appellant is found in the difference between public and private ownership of the property taken by the accused. In most cases some third person is injured by the crime, and is directly or indirectly the complainant, but in this case the state was, as it must be in all criminal cases, the prosecutor, and it was also the injured party, for its property was the subject of the attempt at larceny. If an individual owner voluntarily delivers his property to one who wishes to steal it, there is no trespass; but when the property of the state is delivered by anyone, under any circumstances, to any person for the purpose of having him steal it, and he 30 L.R.A.(N.S.)

takes it into his possession with intent to steal it, there is a trespass, and the attempt is a crime." There was, however, a strong dissent in this case as to the effect of the conduct of the district attorney and his representatives upon the character of defendant's acts.

Burglary.

Consent of officers is no defense to a prosecution for burglary. Thus, in *People v. Laird*, 102 Mich. 135, 60 N. W. 457, the court said: "The duty of the police lies beyond the protection of the public from a particular offense. It will not do to lay down the rule that if a burglary is suspected, it is the duty of police officers to prevent the commission of that particular offense, rather than lie in wait and secure the guilty parties. In such case the police do not encourage the commission of the crime, but simply apprehend parties bent upon the crime, who, in carrying out plans already formulated, rush into the arms of the officers. Even an informant accompanying his associates does not necessarily encourage their purpose, and it is not proper that he should, but he simply acquiesces in a plan already formed."

And in *State v. Abley*, 109 Iowa, 61, 46 L.R.A. 862, 77 Am. St. Rep. 520, 80 N. W. 225, 12 Am. Crim. Rep. 279, though the court characterized the conduct of the officer as "outrageous," it was held no defense to a prosecution for burglary that defendant was instigated by a police officer to commit the crime, or that the owner of the building, being informed that the crime was contemplated, merely remained silent and permitted it to go on,—both for the purpose of having defendant apprehended and prosecuted.

In *State v. Currie*, 13 N. D. 655, 69 L.R.A. 405, 112 Am. St. Rep. 687, 102 N. W. 875, it was held no defense to a prosecution for burglary, that one present with and assisting defendant in the burglary was a detective, if the detective did not instigate the crime, and it was committed, as to every ingredient of it, by the defendant; nor that the owner of the building, to whom the detective disclosed that it was probably about to be burglarized by the defendant with the feigned assistance of himself, acting for the purpose of securing evidence of the intended burglary and other crimes, did not take steps to prevent the crime, but passively allowed it to go on.

And it is no defense to the prosecution of one who was the instigator and prime mover of an attempt to commit burglary with intent to steal, that one to whom the defendant proposed the crime, and who acted as a confederate, informed the owner of the premises to be burglarized of the intended burglary, and the latter, for the purpose of catching defendant, told the informer not to insist on defendant's coming, or to encourage him to come, but just to let him come along of his own free will and accord and voluntarily, if he would,

—such conduct of the owner not amounting to a consent for defendant to enter the house or take property therefrom. *Robinson v. State*, 34 Tex. Crim. Rep. 71, 53 Am. St. Rep. 701, 29 S. W. 40.

But burglary is not committed by those assisting a detective in entering a building and taking money from a safe, in pursuance of a previously arranged plan between him and the owner, with the sole intent of entrapping the others into the apparent commission of a crime. *Love v. People*, 160 Ill. 501, 32 L.R.A. 139, 43 N. E. 710. In this case the court said: "Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil when financially embarrassed and impoverished. A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity, so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act, by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself, but they must not aid, encourage, or solicit him that they may seek to punish."

So, there is no burglary where the entry was instigated and participated in by one acting with knowledge and assent of the occupant of the building as a decoy, for the purpose of having defendant apprehended, and the latter relied upon the other's statement that he was authorized to enter in the manner shown. *Roberts v. Territory*, 8 Okla. 326, 57 Pac. 840, 11 Am. Crim. Rep. 193.

Nor where the owner is connected with the original design to have his house broken, for the purpose of having defendant prosecuted therefor, and leaves the key at a point agreed upon with another, for the purpose of enabling him and defendant to go into the house, and the other person induces defendant to go into the house and unlocks the door for him,—the entry being with the owner's consent. *Bird v. State*, 49 Tex. Crim. Rep. 96, 122 Am. St. Rep. 803, 90 S. W. 651.

Robbery.

Consent to a robbery, so as to absolve the robber from criminal liability, is not shown by merely providing one's self with money which may be taken, and going where the deed may be done in anticipation of the commission of the crime, for the purpose of apprehending the criminal. *Tones v. State*, 48 Tex. Crim. Rep. 363, 1 L.R.A.(N.S.) 1024, 122 Am. St. Rep. 759, 88 S. W. 217, 13 A. & E. Ann. Cas. 455.

And it is no defense to a prosecution for an attempt to commit the crime of

robbery, that defendant's accomplices were acting under instructions from the district attorney's office for the purpose of apprehending defendant, where the latter made the first suggestion of the crime and the person to be robbed had no part in the transaction. *People v. DuVeau*, 105 App. Div. 381, 94 N. Y. Supp. 225.

So, it is no defense to a prosecution for taking property by force or threats, and against the owner's consent, in pursuance of a conspiracy for the purpose, that the prosecutor, after defendants had formed their guilty intent, laid a trap, and went voluntarily to their meeting place with money which was marked and furnished him by the prosecuting attorney for the purpose of entrapping defendants, who were thus entrapped into the hands of officers on the watch. *State v. Piscioneri* (W. Va.) 69 S. E. 375.

And it is no defense to a prosecution for a train robbery that, after the plans for the commission of the crime were completed, a pretended accomplice informed the superintendent of the railroad thereof, and the latter, doing nothing to aid in the crime, simply protected the train to be robbed by guards, to prevent the contemplated robbery and apprehend the would-be robbers. *State v. West*, 157 Mo. 309, 57 S. W. 1071.

Bribery.

It is no defense to a prosecution for the statutory crime of bribing a representative of a labor organization, that the latter lied to and "bluffed" defendants for the purpose of entrapping them. "Even though . . . [he] went farther than laying a trap, and actually solicited the appellants to commit the crime, it would furnish no defense to them, since . . . [he] was not a prosecuting or other public official of any kind." *People v. Block*, 125 N. Y. Supp. 301.

And on a prosecution for offering to bribe an officer, it is immaterial that the latter suggested bribery to the defendant, for the fact that the officer may have been willing to be bribed would not make defendant less guilty of offering the bribe. *Rath v. State*, 35 Tex. Crim. Rep. 142, 33 S. W. 229.

In *State v. Dudoussat*, 47 La. Ann. 977, 17 So. 685, it is held to be no defense to the prosecution of a city councilman for receiving a bribe, that, after he had made a proposal to the prosecuting witness that the latter pay him money for securing for witness a desired privilege, witness and others arranged and carried out a plan to entrap the defendant by witness's giving him marked money to the amount required, in the presence of the other parties secreted as witnesses. The court said, however, that if the "trap" prepared and arranged to procure evidence had been an inducement, an opportunity offered, and a temptation presented to commit the crime, the defendant should have been found not guilty; but as he had previously made up his mind to commit the offense, and pro-

posed to do so, and the means employed were not an inducement or temptation, but for the purpose of securing the evidence, they were no defense.

But in *People v. Liphardt*, 105 Mich. 80, 62 N. W. 1022, it is held no defense to the prosecution of a member of a board of education for receiving a bribe, that the prosecuting witness encouraged another member of the board to advise defendant that witness would accept a proposition from defendant to sell his vote, and that witness informed the mayor of this, and they, with the police, made plans to entrap and detect defendant in receiving a bribe paid by the witness for the purpose of so detecting defendant. The court said: "We know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal."

And on a prosecution of a state senator for asking and receiving a bribe, that after defendant had offered to receive the bribe, a plot was formed to entrap him and other senators, does not render inadmissible against the defendant the testimony of those implicated in the plot. *People v. Bunkers*, 2 Cal. App. 197, 84 Pac. 364, 370.

Subornation of perjury.

In *Com. v. Bickings*, 12 Pa. Dist. R. 206, it was held that a conviction of attempted subornation of perjury cannot stand, where it appears that defendant, having been engaged in litigation against his brother, in the course of which it became necessary to prove certain disputed facts by a witness additional to himself, was approached by an acquaintance of both the brothers, between whom and defendant's brother a relation is clearly made out, and was finally lured by the former into giving him a written statement of the facts to be testified to and a part payment of a sum to be paid to him for testifying, and that the whole was a trap so to discredit defendant in the civil proceedings as to compel him to abate all or a part of his demand. The court said: "Wharton (Crim. Law, § 149) says that 'a trap laid by which the defendant, previously intending the offense, is tempted to proceed with it in such a way as to lead to exposure, is ordinarily no defense.' And the supreme court of our state, in the case of *Campbell v. Com.* 84 Pa. 187, held that a detective might, in the interest of the community, join a gang of criminals for the purpose of exposing it and bringing the criminals to punishment. This, however, is the extreme position to which any court in this or any other state has ever gone. The liability of men to fall into crime by consulting their interests and passions is unfortunately great, without the stimulus of encouragement. No state, therefore, can safely adopt a policy by which crime is to be artificially propagated. This principle it is which leads to the limitations of the doctrine as 30 L.R.A. (N.S.)

laid down by Wharton, supra, namely, that the defendant who is trapped must himself have previously intended the offense into which he is trapped."

Extortion.

It is no defense to a prosecution for an attempt to commit the crime of extortion, that one from whom defendant sought to obtain money by threats of accusation of crime, and who paid the money to defendant, was at the time acting as a decoy of the police, and trying to induce defendant to receive money from him under such circumstances as would render defendant guilty of a crime, and enable the police to arrest and convict him of it. *People v. Gardiner*, 144 N. Y. 119, 28 L.R.A. 609, 43 Am. St. Rep. 741, 38 N. E. 1003, 9 Am. Crim. Rep. 82.

Criminal libel.

On a prosecution for criminal libel, it is no defense that the person libeled, having been informed and believing that the defendant designed to publish a libel, employed a detective to watch him and take every step to detect him if he committed the offense, and even to co-operate with him for that purpose, and allowed the crime to be committed, for the purpose of detecting and prosecuting the defendant, but the latter was not solicited to commit the crime, nor was it even suggested to him. *People v. Ritchie*, 12 Utah, 180, 42 Pac. 209.

Shipment of misbranded food.

It is no defense to a prosecution under the pure food act, for an interstate shipment of misbranded bottled water, that the shipment on which the indictment was based was secretly induced by a government detective in order to create a basis for a criminal charge. *United States v. Morgan*, 181 Fed. 587.

Counterfeiting.

It is no defense to a prosecution for falsely making the counterfeiting a trademark, that the counterfeiting was done at the instance of an agent of the owners of the trademark, and paid for with their money, for the purpose of ascertaining whether defendant was engaged in the unlawful business of counterfeiting their trademark, and defendant was not requested to print labels for the owners of the trademark, but was employed to print false labels for a person apparently designing to commit a fraud. *People v. Krivitzky*, 168 N. Y. 182, 61 N. E. 175, affirming 60 App. Div. 307, 70 N. Y. Supp. 173.

And on a prosecution for selling goods bearing counterfeit labels, it is no defense that the purchaser, acting with a special agent of the owners of the labels counterfeited, knew that the labels on the goods purchased were counterfeits, and made the purchase for the purpose of proving the fact of sale by the defendant and having him

prosecuted. *People v. Hilfman*, 61 App. Div. 541, 70 N. Y. Supp. 621.

Abortion.

In *People v. Conrad*, 102 App. Div. 566, 19 N. Y. Crim. Rep. 259, 92 N. Y. Supp. 606, affirmed in 182 N. Y. 529, 74 N. E. 1122, it is held to be no defense to a prosecution for an attempt to commit the crime of abortion, that it was brought about by means of a trap arranged by the officers of the County Medical Society. The court said: "[Defendant] was not a passive instrument in the hands of the entrapping parties. He did the act with which he was charged voluntarily, with full knowledge of the subject and of the consequences which would flow therefrom. Under such circumstances, setting a trap by which he was caught is not a defense."

Illegal practice of dentistry.

On a prosecution for practising dentistry without a license, it is no defense that the complaining witness went to the office of the defendant, had him fill a cavity in his tooth, and paid him for the service, with the view of prosecuting him therefor. *State v. Littooy*, 52 Wash. 87, 100 Pac. 170, 17 A. & E. Ann. Cas. 292. A. C. W.

TENNESSEE SUPREME COURT.

MRS. SADIE RICHMOND
v.
TRAVELERS' INSURANCE COMPANY,
Appt.

(— Tenn. —, 130 S. W. 790.)

Insurance — failure to renew — effect.

1. An accident insurance policy is not in force where a renewal receipt is mailed by the agent, held by the insured a couple of weeks, and returned with a notice to discontinue, although the agents do not accept the discontinuance, but write assured that they will hold the receipt for him and give him credit for the premium, where he dies before the letter reaches him; and it is immaterial that both parties think that the policy is in force until the discontinuance is accepted.

Same — keeping renewal receipt.

2. Mere delay in rejecting a receipt for renewal of an accident insurance policy does not amount to an acceptance which will continue the policy in force.

(June 11, 1910.)

APPEAL by defendant from a decree of the Chancery Court for Shelby County

Note. — See note to *Waters v. Security Life & Annuity Co.* 13 L.R.A.(N.S.) 805, on cancellation of insurance contract by return of policy.
30 L.R.A.(N.S.)

in complainant's favor in a suit brought to recover the amount alleged to be due on a policy of accident insurance. Reversed.

The facts are stated in the opinion.

Messrs. E. R. Turley and R. M. Heath, for appellant:

As the correspondence between the parties shows that their minds never met with respect to the terms, there is no contract.

1 Joyce, Ins. §§ 45, 55; 1 May, Ins. 4th ed. §§ 50-53; Mutual L. Ins. Co. v. Young, 23 Wall. 85, 23 L. ed. 152; Giddings v. Northwestern Mut. L. Ins. Co. 102 U. S. 108, 26 L. ed. 92.

A proposal for insurance must be accepted before it becomes a contract.

New York Union Mut. Ins. Co. v. Johnson, 23 Pa. 72.

Messrs. McKellar & Keyser for appellee.

Neil, J., delivered the opinion of the court:

After a very careful examination of this case we find ourselves unable to concur in the result reached by the learned chancellor. The letter of September 2d, written by the agents, Marx & Bensdorf, containing the renewal receipt, simply amounted to an offer on the part of the company to renew the insurance for the ensuing six months. This was, of course, open to the acceptance or rejection of George Richmond, the subject of the insurance. On the 18th of the same month he mailed a reply to the agents, in which he rejected the offer and returned the renewal receipt. On the next day, September 19th, the agents wrote George Richmond another letter, in which they renewed the offer and urged him to accept it. He, however, never received this last letter, but was killed on the 22d of the same month.

We think on this state of facts there could be no doubt whatever as to the true legal result. A different construction, however, is sought by the complainant to be placed upon this correspondence, based upon two or three considerations; the first being the language of the letters themselves, the second resting on the evidence to the fact that George Richmond thought himself bound by his failure to reply for so long, and the third resting on the delay itself, as an inference of acceptance.

The correspondence was as follows:

Sept. 2, 1908.

Mr. George Richmond,
City.

Dear Sir:—

We take pleasure in inclosing herewith renewal receipt No. A 995,695, renewing your accident policy, or 1,474,327, for six months from the 4th inst. Premium on

same is \$15, for which you can send us check at your convenience.

Thanking you for your business, and soliciting your further favors, we are,

Yours very truly,

Marx & Bensdorf,
District Managers.

The inclosed receipt was as follows:

Series A. No. 995,893.

The Travelers' Insurance Company,
of Hartford, Connecticut.

Received of George Richmond premium of \$15, continuing in force policy No. O O 1,474,327 from the 4th day of September, 1908, to the 4th day of March, 1909, at noon, subject to all the conditions in original policy. Not valid unless countersigned by a duly authorized agent or cashier of the company. B. A. Page, Secretary. Countersigned at Memphis, Tennessee.

Marx & Bensdorf, D. A.

Sept. 18, 1908.

Messrs. Marx & Bensdorf,

Dear Sirs:—

I am sorry, but owing to the present conditions I must discontinue my policy No. ———.

Thanking you for past favors, I am,

Yours very truly,

George Richmond.

Box 109.

Sept. 19, 1908.

Mr. George Richmond,

City:—

We are in receipt of your favor of the 18th inst., inclosing your accident renewal receipt for cancelation, and note your remarks that on account of present conditions you will be compelled to discontinue your accident policy. We would suggest, however, that you keep your insurance in force, as there is no telling when a serious accident may occur to you, and we are perfectly willing to allow you to pay this premium one half in sixty days and one half in ninety days, if you prefer.

We are holding the renewal receipt in the office, waiting to hear from you.

We are very truly yours,

Marx & Bensdorf,

District Managers.

This last letter was misdirected, and never reached George Richmond.

The language of the renewal receipt is to the effect that the policy is continued in force, and the language of the letter accompanying it is that the policy is by the receipt renewed for six months. The reply of George Richmond uses the word "discon-

tinue," indicating that he desired to put an end to something he thought then in existence, and the language of the letter of September 18th likewise indicated that the agents thought that the receipt evidenced a contract then in existence, because it mentioned the accident renewal receipt as something returned for cancelation, and suggested that "you keep your insurance in force," and says, "We will hold the renewal receipt in the office, waiting to hear from you." In addition to this, the evidence of the witness Bourne, and of Walter Richmond, the brother of George Richmond, clearly indicates that the latter thought that by holding the receipt so long as he had, he bound himself to take it for the six months, and that he would have to be released by the company or its agents. He desired to be released, because he wanted to substitute for his insurance in the Travelers' Insurance Company a policy in the Fidelity Accident Insurance Company.

Now it is perfectly clear that the agents of the insurance company, by sending the renewal receipt on September 2d to George Richmond, could not force the contract upon him, no matter how much they thought the company was bound by the language of the offer. It was, indeed, bound; but that was subject to the acceptance of George Richmond. He certainly did not accept it in terms, and the only reason there could be for holding that the contract was completed would be that George Richmond, by delaying to either accept or reject from September 2d to September 18th, had thereby become bound; that is, that the delay had amounted to an acceptance. No authority has been cited by counsel, and we have discovered none, indicating that such delay would amount to evidence of acceptance.

The nearest approach we have found to it is the case of Adams v. Eidam, 42 Minn. 53, 43 N. W. 690, referred to in § 58 of Joyce on Insurance. In that case it was held that a finding that an applicant received and retained without objection policies made out and sent to him was equivalent to finding that he had accepted them; but there, it is seen, there was an application by him for insurance, and the sending of policies to him. By his retaining them an unreasonable length of time, there was an inference that they were satisfactory to him, and that he had accepted them. In the present case, however, there was no application for insurance at all, but simply an offer or solicitation on the part of the insurance company, on September 2d, to renew an insurance policy which would expire on September 4th if not renewed. This was an offer which was not accepted. As to the matter of delay the

authorities are very numerous that an application for insurance will not, even though accompanied by a premium, be treated as accepted, although the company should delay to act upon the matter for months. Some of these authorities are referred to in § 57 of Joyce on Insurance. The subsequent authorities since the publication of that book are in entire accord with the text. There are cases to the effect that delay will hold the company where the party making the application has been misled into believing that the insurance would be accepted, and, relying thereon, has refrained from obtaining other insurance. Here, it is observed, arises the element of injury and the consequent estoppel. On the other hand, it was held in one case that where a certain slip was sent the insured, to be pasted on his policy, and he kept it without making any reply for a considerable time, he could not be held to have accepted the slip modifying the contract by reason of the mere delay, unless it could be made to appear that the company had suffered some injury by reason of the delay. *Shakman v. United States Credit System Co.* 92 Wis. 366, 32 L.R.A. 383, 387, 53 Am. St. Rep. 920, 66 N. W. 528. The fact that the insurance agents entertained the mistaken view of law that the policy was in force, pending the offer of September 2d, until they received George Richmond's letter of September 18th, and that Richmond entertained the same mistaken view, and supposed that he would be held on the premium unless released by the company, did not change the rule of law that there can be no contract without mutual assent, and did not substitute for the ineffectiveness of that delay, in law, the opinions of these persons, or add to that delay an efficiency which the law did not attach to it.

We are referred by complainant's counsel to two cases as being conclusive of the present controversy. The first of these is *Travelers' Ins. Co. v. Jones*, 32 Tex. Civ. App. 146, 73 S. W. 978. In that case it appeared that an agent took the application of Jones for insurance, and this application was accepted by the company, and the policy sent to him pursuant to the terms of the contract. The facts just stated made such a contract. On receiving the policy, Jones attempted to return it because he supposed that the amount of the premium that was to be paid in such instalments was larger than he had contracted to pay, in which he was mistaken; however, he returned the policy to the company, and they sent it back to him. That is, after the contract was completed, they refused to agree to a cancellation. The difference between that case and the one before us is that here there was no

contract made at all, but simply an offer of a contract, a tender. In the *Jones Case*, of course, the company had the right to refuse to cancel the contract after it was already complete; and it was liable thereon, Jones having died pending the attempted cancellation. The other case is *Waters v. Security Life & Annuity Co.* 144 N. C. 663, 13 L.R.A. (N.S.) 805, 57 S. E. 437. In that case it appeared that in February, 1906, the insured made an application for a policy of insurance, and executed two notes as payment of premium, each for \$107.30, payable at certain dates. The policy was delivered on February 25, 1906. On the next day the insured wrote to the company that it was not the kind of policy he had bought, and he would not accept it. On March 2d the company wrote to him that the policy was all right as it was, but that an agent of the company would take the subject up with him and make the matter satisfactory to him. While matters were in this situation the insured died. Upon these facts the trial court directed a verdict in favor of the plaintiff. The court held: "If, therefore, the intestate, acting under an erroneous impression, sent the contract back to the company with the statement that it was not the policy he ordered, and he did not intend to pay the notes, the company could have made this proposition a binding contract by an unconditional acceptance signified in some definite manner; but, until they did this, the act of the intestate in sending back the policy was nothing more than a proposal to cancel, and, if he died before acceptance, the negotiation was off, and the contract of insurance remained."

Here there was an application, and a transmission of the policy pursuant to the application, effecting the contract. If the policy was in accord with the application, the letter of the insured would not be effective to prevent the operation of the contract, because that would take place as soon as the policy was placed in the mail for transmission to the insured. It then became a question whether the company would cancel or modify. Pending negotiations for such cancellation or modification, the insured died, leaving the contract, of course, in its original state.

Now, the radical difference between these two cases and the one before us is that in each of these cited cases there was a completed contract before the attempted cancellation, and the party died pending the negotiations for cancellation. In the case at bar there was no completed contract at all, but simply an offer on the one side, and a delay to respond for about two weeks on the other side, and a final rejection. Surely, under

such state of facts, there ought not to be any recovery.

Therefore the decree of the chancellor must be reversed, and the bill dismissed, with costs.

DISTRICT OF COLUMBIA COURT OF APPEALS.

DISTRICT OF COLUMBIA, Plff. in Err.,
v.

WILLIAM B. KRAFT.

(35 App. D. C. 253.)

Lottery — gift enterprise — trading stamps.

1. A scheme by which a corporation organizes a co-operative society to which it admits members upon payment of a nominal fee which entitles them to stamps from merchants under contract with the corporation, which it redeems in cash or merchandise, is a gift enterprise within the meaning of a statute providing that every person who shall sell any article with the promise to give or hold out the promise of gift of, anything in consideration of the purchase of an article, shall be regarded as conducting a gift enterprise.

Same — police power — advertising.

2. The business of a trading stamp company is not a process of advertising the merchants with whom contracts are made which will take it out of the operation of the police power.

Constitutional law — trading stamps — prohibition.

3. Freedom of contract is not unconstitutionally interfered with by the prohibition of the use of trading stamps.

(Van Orsdel, J., dissents.)

(May 10, 1910.)

ERROR to the Police Court of the District of Columbia to review a judgment quashing an information charging defendant with engaging in a gift enterprise in violation of law. Reversed.

The facts are stated in the opinion.

Messrs. Edward H. Thomas and William Henry White, for plaintiff in error:

The business of the defendant, commonly known as the trading stamp business, constitutes a gift enterprise under the act of 1871, which is constitutional.

Lansburgh v. District of Columbia, 11 App. D. C. 512; Humes v. Ft. Smith, 93 Fed. 857; State v. Hawkins, 95 Md. 146, 93 Am. St. Rep. 328, 51 Atl. 850; Fleetwood v. Read, 21 Wash. 547, 47 L.R.A. 205, 58 Pac. 665; Humes v. Little Rock, 138 Fed. 929; State v. Ramseyer, 73 N. H. 37, 58 Atl. 958, 6 A. & E. Ann. Cas. 445; State v. Dal-

ton, 22 R. I. 91, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 A. & E. Ann. Cas. 47; Young v. Com. 101 Va. 853, 45 S. E. 327.

If one of the elements of the consideration is immoral or against public policy, the entire contract will be held illegal.

14 Am. & Eng. Enc. Law, 2d ed. p. 601; 19 Am. & Eng. Enc. Law, 2d ed. p. 589; Horner v. United States, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409; 15 Am. & Eng. Enc. Law, pp. 988, 989; Williams v. Hastings, 59 N. H. 373; Robinson v. Green, 3

Note. — Forbidding use of trading stamps.

The earlier cases on this subject are included in the notes to Ex parte Drexel, 2 L.R.A.(N.S.) 588, and Denver v. Frueauff, 7 L.R.A.(N.S.) 1131.

Since the preparation of those notes the Washington supreme court in Leonard v. Bassindale, 46 Wash. 301, 89 Pac. 879, upon authority of the cases cited in the earlier notes, has held that the "Washington anti-trading stamp act" (Laws 1905, page 374, chap. 179) was in violation of due process of law, and therefore unconstitutional. The court said that if the question were one of first impression in the courts it might entertain a different opinion, but it had been compelled to follow the great weight of authority and hold the statute unconstitutional, especially in view of the fact that the Federal courts have shown an inclination to hold the statute in contravention of the Constitution of the United States (referring to Ex parte Hutchinson, 137 Fed. 950, and Sperry & H. Co. v. Temple, 137 Fed. 992).

The exact character of the scheme involved in that case does not appear; and it is therefore impossible to determine from the opinion whether the decision may properly be limited, as suggested in DISTRICT OF COLUMBIA v. KRAFT, to a mere holding that statutes prohibiting merchants giving premiums, vouchers, gifts, etc., to purchasers of goods are in excess of legislative power, or whether the facts of the case call for a decision that the statute would be unconstitutional even as applied to a scheme essentially like that involved in the KRAFT CASE. The statute itself is apparently broad enough to cover all forms of trading stamp enterprises, and it may be that the court was not called upon to go any further than the point just suggested; but there is no intimation, in the opinion, of any intention to so limit the decision.

As stated in the opinion in the KRAFT CASE the decision in that case is opposed to the view taken by the Minnesota supreme court in State ex rel. Simpson v. Sperry-Hutchinson Co. post, 966, as applied to a scheme not involving the element of chance or uncertainty, though that case upholds the constitutionality of the act so far as it prohibits the issuing of trading stamps or tickets to be redeemed in articles of mer-

Met. 159; 9 Cyc. Law & Proc. p. 566; Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; Braitch v. Guelick, 37 Iowa, 212; Sanderson v. Goodrich, 46 Barb. 616.

It is not until the unconstitutionality of a given act is plainly made to appear that the court is called upon to declare it void.

Powell v. Pennsylvania, 127 U. S. 678-685, 32 L. ed. 253-256, 8 Sup. Ct. Rep. 992, 1257; State v. Narragansett, 16 R. I. 424, 3 L.R.A. 295, 16 Atl. 901.

Mr. Frank J. Hogan, for defendant in error:

Courts of this country, Federal and state, that have passed upon laws which sought to prohibit the carrying on of a business similar to that of the Economy Co-operative

chandise in any manner which depends upon any chance, uncertainty or contingency.

Upon the authority of the opinion in the KRAFT CASE the validity of the statute was upheld in the case of District of Columbia v. Gregory, 35 App. D. C. 271 (heard at the same time as the KRAFT CASE), the defendant in the latter case being the representative of the Sperry & Hutchinson Company, the same concern that was involved in Lansburgh v. District of Columbia, 11 App. D. C. 512 (cited in the note in 2 L.R.A.(N.S.) 588). The court noted that the company had not the so-called co-operative feature of the Economy Company involved in the KRAFT CASE; that the receivers of stamps paid nothing to the company to be entitled to receive them, and that the terms of redemption differed slightly from those of the KRAFT concern.

Applications for writs of certiorari in both the KRAFT and the Gregory Cases were denied by the United States Supreme Court. It appears that after the Gregory Case had been remanded, and the defendant found guilty in the police court, he obtained leave of the Supreme Court to file a petition for a writ of habeas corpus. Upon the hearing of that petition (Re Gregory, 219 U. S. 143, 55 L. ed. —, 31 Sup. Ct. Rep. 143) the rule was discharged and the petition dismissed upon the ground that the police court had jurisdiction. The Supreme Court, however, did not expressly pass upon the constitutionality of the statute as applied to a case like that before the court of appeals in the KRAFT CASE and the Gregory Case. The Supreme Court took the position that even if it were to be assumed that the condemnation of gift enterprises contained in § 1176 of the Revised Statutes relating to the District of Columbia was too sweeping, and that Congress went beyond its power in giving the prohibition so wide a scope, that would not affect the provision of § 1177 (under which the defendant was prosecuted) relating to a recognized category of offenses for which it was within the power of Congress to prescribe a punishment. In reply to the argu-

Society, have held those laws unconstitutional.

Humes v. Little Rock, 138 Fed. 929; Ex parte Hutchinson, 137 Fed. 949; Sperry & H. Co. v. Temple, 137 Fed. 993; State v. Dodge, 76 Vt. 197, 56 Atl. 983, 1 A. & E. Ann. Cas. 47; Com. v. Sisson, 178 Mass. 578, 60 N. E. 385; Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; O'Keeffe v. Somerville, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684; State v. Ramseyer, 73 N. H. 40, 58 Atl. 958, 6 A. & E. Ann. Cas. 445; Denver v. Frueauff, 39 Colo. 20, 7 L.R.A.(N.S.) 1131, 88 Pac. 389, 12 A. & E. Ann. Cas. 521; State v. Dalton, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; State v. Shugart, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; Ex

ment that the facts did not support the conviction, the court said it was by no means manifest that the scheme or enterprise in which the petitioner was engaged lay outside of the range of judicial consideration under the statute.

It is held in Com. v. Gibson Co. 125 Ky. 440, 101 S. W. 385, that the statute requiring "all resident trading stamp companies or corporations doing business in this state to pay an annual license tax" applies only to "all resident or foreign trading stamp companies or corporations" doing business in this state, and was not designed to prohibit bona fide merchants from offering discounts or rebates to cash purchasers of their goods.

In Oilure Mfg. Co. v. Pidduck-Ross Co. 38 Wash. 137, 80 Pac. 276, it is held that a municipal ordinance imposing a license fee upon persons transacting or soliciting business through the use of trading stamps, is a valid exercise of the police power, and that such an ordinance as applied to a nonresident's contract to solicit business in a city of the state for a resident business man is not void as an interference with interstate commerce.

According to a Canadian case, Wilder v. Montreal, Rap. Jud. Quebec, 26 C. S. 504, an act of the legislature authorizing municipalities to pass by-laws prohibiting the use of trading stamps, unless the manufacturer or trader who issues them also redeem them, does not infringe upon the exclusive power of the Parliament of Canada to make laws for the regulation of trade and commerce, nor upon the exclusive power of Parliament over criminal law, and is not unconstitutional, illegal, or *ultra vires*. But in a note to this case it is stated that on appeal to the court or King's bench this decision was reversed, on the ground that the act of the provincial legislature was *ultra vires*.

Also that "the Parliament of Canada, at its last session, passed an act amending the criminal law, and declaring the trading stamp business illegal."

J. D. C.

parte McKenna, 126 Cal. 429, 58 Pac. 916; Ex parte Drexel, 147 Cal. 763, 2 L.R.A. (N.S.) 588, 82 Pac. 429, 3 A. & E. Ann. Cas. 878; People ex rel. Madden v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Montgomery v. Kelly, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67; Hewin v. Atlanta, 121 Ga. 731, 67 L.R.A. 795, 49 S. E. 765, 2 A. & E. Ann. Cas. 296; Territory v. M. A. Gunst & Co. 18 Haw. 196; Winston v. Beeson, 135 N. C. 271, 65 L. R. A. 167, 47 S. E. 457; Long v. State, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4; Leonard v. Bassindale, 46 Wash. 301, 89 Pac. 879; State v. Walker, 105 La. 492, 29 So. 973; Young v. C. v. 101 Va. 853, 45 S. E. 327.

Shepard, Ch. J., delivered the opinion of the court:

The defendant in error, William B. Kraft, was charged by information in the police court with engaging in a gift enterprise in violation of an act of Congress. He moved to quash the information on the following grounds: First, it does not set forth an offense against any law or regulation; second, so far as the act attempts to prohibit the acts charged, it is unconstitutional.

The motion was sustained, and a writ of error applied for by the District of Columbia has been granted.

The business in which Kraft was engaged is that of issuing and redeeming what are called "trading stamps," in the same general manner described in the report of the case of Lansburgh v. District of Columbia, 11 App. D. C. 512, decided December 7th, 1897. Lansburgh, a retail merchant of the District, and Joseph A. Sperry, managing officer of a trading stamp company, a corporation of New York, were jointly charged with engaging in a gift enterprise, in violation of the same statute under which Kraft has been prosecuted. On August 23d, 1871, the then legislative assembly of the District made the following enactment:

"The proprietors of gift enterprises shall pay one thousand dollars (\$1,000) annually. Every person who shall sell or offer for sale any real estate, or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with the promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal of, any article or thing, for and in consideration of the purchase by any person of an article or thing, whether the object shall be for individual gain, or for the benefit of any institution of whatever character, or for any purpose whatever, shall be re-

garded as a gift enterprise: Provided, that no such proprietor, in consequence of being thus taxed, shall be exempt from paying any other taxes imposed by law, and the license herein required shall be in addition thereto."

After less than two years of experience of license, Congress, on February 17th, 1873, repealed the license clause of the aforesaid enactment, and prohibited the business under a penalty (17 Stat. at L. 464, chap. 148). Subsequently, said act was embodied in the Revised Statutes of the District of Columbia in §§ 1176 and 1177 thereof. These read as follows:

"Sec. 1176. So much of the act of the legislative assembly of the District of Columbia entitled, 'An Act Imposing a License on Trades, Business, and Professions Practised or Carried on in the District of Columbia,' approved August 23d, 1871, as authorizes gift enterprises therein, and licenses to be issued therefor, is disapproved and repealed, and hereafter it shall be unlawful for any person or persons to engage in said business in any manner, as defined in said act or otherwise."

"Sec. 1177. Every person who shall in any manner engage in any gift enterprise business in the District shall, on conviction thereof in the police court on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars (\$1,000), or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the court."

In Lansburgh v. District of Columbia, supra, it was held: (1) That this statute was within the police power of Congress, under its exclusive jurisdiction over the District of Columbia; (2) that it was not too broad in its scope of inclusion of prohibited acts to constitute a valid exercise of the power of Congress; (3) that the acts charged constituted engaging in the business of a gift enterprise, within the meaning of §§ 1176 and 1177, D. C. Rev. Stat. In respect of this last conclusion, it was said (p. 530): "Without the necessity of declaring that the acts proved in this case constitute the conduct of a lottery or gift enterprise, as those words are commonly understood, or even of finding that the element of chance operates intentionally and distinctively in the scheme of the trading stamp company, we think, nevertheless, that they come within the prohibition of the statute, which, as before said, furnishes its own definition of 'gift enterprise.' Although one of the most shrewdly planned of the many devices to obtain something for nothing, and one entirely novel, it could hardly have come more clearly within the scope of

the statute had it been well known and expressly in the contemplation of Congress at the time of the enactment."

The scheme denounced in that case was substantially this: The trading stamp company entered into a contract with a retail dealer in merchandise to print in the directory of their subscribers' book the name, business, and address of the merchant; to distribute 100,000 copies of said book to the people of Washington, and to explain the use of the same; the merchant to take from the company sufficient stamps to supply all demands for the same, to issue one to the purchaser for each 10 cents' worth purchased, and to display the sign. "We give trading stamps," in a conspicuous place in his store. The merchant was to pay \$5 per thousand for said stamps.

Purchasers receiving stamps from the merchant were required to paste the same in places provided in said books. When 990 stamps had been received and entered in a book, the trading stamp company obligated itself to exchange therefor any one of a great variety of articles kept by it on exhibition in a store for the purpose. No articles were kept for sale, but only for exchange for tickets when presented in the manner and to the number aforesaid. No stamps were redeemed in cash, or in quantity less than 990.

The first contention of Kraft is that his business is different from that described above, by reason of which differences he is not within the inclusion of the decision in that case.

The differences alleged are these: (1) Kraft's company is a co-operative association; (2) stamps are redeemable at the option of the purchasing member of the association, in cash at the rate of 10 cents for five—five bringing 1 cent.

The agreed statement of facts shows that David Rothschild, Wallace J. Hill, and William B. Kraft obtained a charter in the state of Virginia, under the name of the Economy Co-operative Society, authorizing them to engage in said business. The authorized capital stock was \$10,000, divided into 100 shares. The incorporators were named as directors for the first year, and Rothschild was made president, Hill, vice president, and Kraft, secretary and treasurer. These and one Berliner are the only stockholders of the corporation.

The so-called co-operative feature was provided for in the by-laws of the corporation. A co-operative society was to be organized, the corporation officers to be officers thereof. Any person may become a member by paying annually in advance a fee of 25 cents. Members are entitled to receive a discount of a certain per cent on 30 L.R.A. (N.S.)

all cash purchases from merchants under contract with the corporation to purchase and distribute the discount vouchers. Members are entitled to exchange discount vouchers (stamps) for merchandise displayed at the corporation office, on the basis of the actual cost price of such merchandise to the corporation. Membership fees shall be kept separate from other income of the corporation, and, on the first Monday of January of each year, a dividend shall be declared and paid to members from any surplus thereof that may remain after payment or expenses necessarily incidental to the procurement of new members, "and nothing more,"—no part of the salaries of officers to be charged to this fund. The fund is to be charged only with commissions paid to agents for procuring new members. Members have no right to dividends received from the sale of vouchers (stamps) to merchandise. These go to the stockholders of the corporation only.

The contracting merchants receive the stamps or vouchers from the corporation at the rate of \$3.50 per thousand. These are to be issued to members making purchases, who are required to produce their membership cards when demanded. Members only can have the stamps redeemed. One stamp is to be given with each 10-cent purchase. Members are entitled to purchase the displayed articles with their stamps, or to have them redeemed in cash at the office of the corporation "in any quantity from five upward, in actual cash, and at their face value, viz., 2 mills each." As regards the issue of the stamp books, directories of contracting merchants, etc., the scheme is of the same general character as that described in the Lansburgh Case. The statement of facts further shows that the corporation has been engaged in business since July 10th, 1908. Between that date and October 1, 1909,—8,095,000 discount vouchers, or stamps, have been sold to merchants at \$3.50 per thousand. 344,000 have been redeemed in cash, and 5,372,000 in exchange for articles of merchandise on display at the corporation's office. Counsel for Kraft stated on the argument that the charter and by-laws of the corporation had been written "with pen in one hand and the Lansburgh decision in the other." so as to bring the scheme within lines declared therein not to be prohibited by the statute. The part of the opinion referred to reads as follows: "We do not feel called upon at this time to undertake a specification of the particular conditions in which the act under consideration might or might not apply to actual merchants in the ordinary course and practice of competitive business, or to determine just what character of in-

duements by way of gift or premium may and may not be held out to purchasers at the time, and as a part of their purchases. That it was not intended to apply to ordinary discounts for cash or in proportion to amounts of purchases, when made by the merchant himself to his customers, may be regarded as certain, and the exercise of such power would doubtless be denied if expressly attempted. Nor can it with reason be said to apply to bona fide co-operative associations and the like. It is possible, also, that it might not be operative in a case where the sale of a lawful article is accompanied by a gift of something specific and certain, not attended with any element of chance, and where the gift is not the real object of the sale, in an attempt to evade acts regulating or prohibiting a particular traffic, as, for example, in the case of *Lauer v. District of Columbia*, 11 App. D. C. 453."

Assuming that the statute does not apply in the case of bona fide co-operative associations, or of merchants making discounts or presenting actual articles directly to their customers, we fail to see that the co-operative association belongs in either class. We will consider, first, the co-operative feature. In a general sense a co-operative society or corporation is one organized on the principle of a joint-stock company, where the members share in the profits in proportion to their contributions, and may or may not obtain a discount on their individual purchases. This society is clearly not one of that kind. The admitted members pay a fee of 25 cents annually for the privilege of receiving stamps on their purchases,—a privilege which the other corporations whose case has been heard with this extends to all persons without charge. But these members are rigidly excluded from any participation in the profits of the corporation; that goes to its stockholders exclusively. These profits accrue from the sale of stamps to the merchants. A rough estimate of these profits, according to the statement of the stamps sold and redeemed during a little more than one year since the organization of the corporation, shows that they amount to about \$12,000. All that a member of this so-called co-operative society gets back is his membership fee, less its proportion of the cost of obtaining members. The only benefit they are supposed to obtain is the redemption price of the stamps received on their several purchases from merchants dealing in the stamps, which benefit is extended, without charge, by other stamp companies, as we have seen, to all purchasers from merchants handling their stamps. This system falls far short of constituting a bona fide co-operative society. 30 L.R.A. (N.S.)

The only other substantial difference between this scheme and that declared unlawful in the *Lansburgh Case* is this: In that case there was no redemption of stamps in cash, or in less quantities than 990; in this the stamps sold for \$3.50 per thousand are redeemable in cash at the option of the holders at the rate of \$2 per thousand, and in any quantity not less than five. This feature makes the scheme more advantageous than the other, but does not differentiate it. In substance they are the same.

A vigorous attack has been made on the act as unconstitutional, because it is an unreasonable interference with the freedom of trade and contract. While that question was decided in the *Lansburgh Case*, we are asked to reconsider it, on the ground that the soundness of that decision has been denied in many cases in other jurisdictions. We have carefully examined those decisions, and find that very few of them go to the extent claimed for them. They may be separated into the following classes: (1) Those in which the statute involved prohibited lotteries and gift enterprises without defining the acts constituting the same; and it was held that the giving of trading stamps was neither a lottery nor a gift enterprise, within the ordinary meaning of the terms. *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28; *Humes v. Little Rock*, 138 Fed. 929.

(2) Cases holding that statutes prohibiting merchants from giving premiums, vouchers, gifts, etc., to purchasers of their goods, are in excess of legislative power. *State v. Dalton*, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *State v. Dodge*, 76 Vt. 197, 56 Atl. 983, 1 A. & E. Ann. Cas. 47; *Ex part Drexel*, 147 Cal. 763, 2 L.R.A. (N.S.) 588, 82 Pac. 429, 3 A. & E. Ann. Cas. 878; *State v. Ramseyer*, 73 N. H. 31, 58 Atl. 958, 6 A. & E. Ann. Cas. 445; *Leonard v. Bassindale*, 46 Wash. 301, 89 Pac. 879; *Young v. Com.* 101 Va. 853, 45 S. E. 327.

In some of those cases the court went beyond the question actually involved, and declared that the trading stamp business of third parties could not be lawfully prohibited. In others, as in *State v. Dalton*, the court expressly limited its decision to the case of the merchant giving premiums, and declined to say that the legislature might not prohibit the business of trading stamp companies.

(3) Cases analogous to those in class 1, which hold that the statute did not apply to the giving of premiums, simply because it was limited to those which embraced a

gambling feature. *Com. v. Emerson*, 165 Mass. 146, 42 N. E. 559; *Com. v. Sisson*, 178 Mass. 578, 60 N. E. 385.

(4) Cases in which the statute or municipal ordinance imposed a license tax; some holding that the power to license had not been conferred on the municipality; some that the exercise of the power in the particular case was unreasonable and oppressive; others, that, as applied to a licensed merchant, the license requirement was inapplicable, because the giving of premiums by such merchants was but an incident of their regular business, and not a separate business as such. *Winston v. Beeson*, 135 N. C. 271, 65 L.R.A. 167, 47 S. E. 457; *Hewin v. Atlanta*, 121 Ga. 723-729, 67 L.R.A. 795, 49 S. E. 765, 2 A. & E. Ann. Cas. 296; *Ex parte Hutchinson*, 137 Fed. 949; *Ex parte Hutchinson*, 137 Fed. 950; *Com. v. Gibson Co.* 125 Ky. 440, 101 S. W. 385; *Montgomery v. Kelly*, 142 Ala. 552, 70 L.R.A. 209, 110 Am. St. Rep. 43, 38 So. 67.

In some of these the courts expressly declined to pass upon the legality of the trading stamp business, which question was not involved (121 Ga. 729). The case of *O'Keeffe v. Somerville*, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684, may be put in this class, but there the license tax was held unconstitutional, because the trading stamps were not "goods, wares, merchandise, or commodities," to which the special taxing power was limited by the Constitution of Massachusetts. See also *State v. Walker*, 105 La. 492, 29 So. 973, in which a statute prohibiting trading stamps, etc., was held unconstitutional, because the object of the act was not expressed in the title, as required by a provision of the state Constitution.

(5) Cases of injunction by trading stamp companies against others interfering with their business. *Sperry & H. Co. v. Brady*, 134 Fed. 691; *Sperry & H. Co. v. Temple*, 137 Fed. 992; *Sperry & H. Co. v. Louis Weber & Co.* 161 Fed. 219. No prohibitory statute was involved.

(6) Cases in which the validity of legislation prohibiting the trading stamp business was discussed and involved and expressly denied. *Ex parte Drexel and Leonard v. Bassindale*, supra; *Denver v. Frueauff*, 39 Colo. 20, 7 L.R.A. (N.S.) 1131, 88 Pac. 389, 12 A. & E. Ann. Cas. 521. The California and Washington cases appear to us to involve nothing more than the particular question stated in class 2, supra, and for that reason are ranged thereunder. The general question of the power to prohibit trading stamp concerns, as such, was not necessarily involved. In the Colorado case, the city ordinance went beyond the 30 L.R.A. (N.S.)

power conferred by the Constitution and an act of the legislature, which were limited to "lotteries" and "gift enterprises," neither of which terms embraced the giving of trading stamps as premiums on purchases. This point was the only one necessarily involved, and the case is in fact identical with that of *Winston v. Beeson* (Class 4, supra). A recent decision of the supreme court of Minnesota seems to decide the question directly. *State ex rel. Simpson v. Sperry & H. Co.* 110 Minn. 378, post, 966, 126 N. W. 120.

Of the cases cited on behalf of the District of Columbia, but one directly upholds the doctrine of the *Lansburgh Case*, which is quoted from and approved. *Humes v. Ft. Smith*, 93 Fed. 857; *State v. Hawkins*, 95 Md. 133, 93 Am. St. Rep. 328, 51 Atl. 850, does not involve the direct question presented here.

Before proceeding to consider the question necessarily involved in this case, in the light of some applicable decisions of the Supreme Court of the United States relating to the exercise of the police power limiting the freedom of contract, we will briefly consider a point that has been relied on as showing the legitimate character of the trading stamp business. It has been argued, and in some of the cases cited it has been suggested, that the trading stamp companies are engaged in advertising the merchants contracting with them; and it is contended that this business, in that respect, is similar to that of the ordinary newspaper. Certainly, the right of the advertiser and the newspaper to contract for this purpose has never been questioned. The newspaper is a time-honored institution, indispensable in civilized society. It gives the current news on all subjects of public interest, and in addition opens its pages to advertisers. The merchant purchases his space and presents the advantages of his business. Undoubtedly the cost of this advertising is an expense that must be added to the cost of carrying on the business, and borne along with other incidental expenses. No way can be devised by which the cost of transportation and the legitimate handling of produce or goods in the transfer from producer to consumer can be entirely eliminated.

In the case at bar the advertising feature is a mere pretense; it is of the stamp dealer rather than of the merchant. To induce the purchase of stamps, the stamp company circulates many copies of its books, which contain a directory of the names and locations of the merchants under contract with it to deliver its stamps with purchases. It is a notice to these persons where they can procure stamps, and where and how they

can procure the redemption of the same when obtained. This is of prime importance to the stamp company. The trading stamp concerns are not engaged in the advertising business, or as agents for advertisers. As said in the *Lansburgh Case*, they "are not merchants engaged in business, as that term is commonly understood. They are not dealers in ordinary merchandise, engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is the exploitation of nothing more or less than a cunning device. With no stock in trade, but that device and the necessary books and stamps and so-called premiums with which to operate it successfully, they have intervened in the legitimate business carried on in the District of Columbia, between seller and buyer, not for the advantage of either, but to prey upon both. They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit and advantage by forcing their stamps upon a perhaps unwilling merchant. . . . The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of others, and partly through fear of losing his own, if he declines." We see no reason for withdrawing or qualifying the foregoing observations in the light of the evidence in this case, for, as said before, the businesses are the same, notwithstanding some immaterial differences. It has been argued that there was no evidence to show that the stamps were forced upon perhaps unwilling merchants. That is true, but the courts may take notice of evident conditions and results of trades and business. That merchants are unwilling to enter into the scheme, and regard the same as unjustifiable imposition, is borne out by the charge made in the same argument, that certain merchants of the District had employed counsel who had aided the corporation counsel in the preparation of these cases. This charge would not have been made, if unsupported by the facts, and it was not denied. The police power of Congress in the District of Columbia, upon the exercise of which this statute rests, is substantially the same under the 5th Amendment as that which may be exercised by the states under the limitations of the 14th Amendment. As was said in the *Lansburgh Case*: "The comprehensive scope of the police power, as exercised in our day, and under our form of constitutional government, has been developed by the process of evolution. Rapid increase in population, wonderful inventions, from time to time, followed by vast material development and advances in the arts of civilization, have

introduced novel situations and begotten difficulties for the solution of one generation, that were unanticipated, and often undreamed of even, by the most advanced minds of the generation next preceding. As a necessary consequence, the boundaries of the police power in its application to the property, business, and personal liberty of the individual citizen have never been definitely settled, so as to furnish a certain guide for all cases that may present themselves for legislative or judicial determination." This idea has been better expressed by Maeterlinck in "*The Life of the Bee*," in the form of a fundamental principle of social development. He says: "In proportion as society organizes itself and rises in the scale, so does a shrinkage enter the private life of each one of its members. Where there is progress, it is the result only of a more and more complete sacrifice of the individual to the general interest." See *Otis v. Parker*, 187 U. S. 600-609, 47 L. ed. 323-328, 23 Sup. Ct. Rep. 168; *McGuire v. Chicago, B. & Q. R. Co.* 131 Iowa, 340-354, — L.R.A.(N.S.) —, 108 N. W. 902.

Hence, "it is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself, which will be in all respects accurate." *Stone v. Mississippi*, 101 U. S. 818, 25 L. ed. 1079. In a later case it was said: "It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex, and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. . . . The right to acquire, enjoy, and dispose of property is declared in the Constitutions of the several states to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any state from passing laws respecting the acquisition, enjoyment, and disposition of property. What contracts respecting its acquisition and disposition shall be valid, and what void or voidable; when they shall be in writing, and when they may be made orally; and by what instruments it may be conveyed or mortgaged,—are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limita-

tions as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non laedes* is a maxim of universal application. For the pursuit of any lawful trade or business the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business." *Crowley v. Christensen*, 137 U. S. 86-89, 34 L. ed. 620-623, 11 Sup. Ct. Rep. 13.

That there are bounds to forced individual "shrinkage," in order to prevent its development into sheer arbitrary oppression and tyranny, under our system of government, all must admit. The difficulty lies in the practical ascertainment of those boundaries. The legislature is the judge in the first instance, but when its act is an unmistakable invasion of individual liberty and right, the courts will intervene to arrest its enforcement. In a recent case, a statute of a state was upheld which made it unlawful to screen coal dug by miners before weighing the same for determining their compensation, and prohibiting them from waiving the benefit of the act by contract with the mining company. *McLean v. Arkansas*, 211 U. S. 539, 5 L. ed. 315, 29 Sup. Ct. Rep. 206. After referring to *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427,—a case strongly relied on by the defendant in error,—it was said by Mr. Justice Day, who delivered the opinion of the majority of the court (p. 545): "But in many cases in this court the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the state, enacted for the protection of the public health, safety, or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract. It would extend this opinion beyond reasonable limits to make reference to all the cases in this court in which qualifications of the right of freedom of contract have been applied and enforced." Some of those cases will be mentioned later. He then quotes the following extract from *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose, that the 30 L.R.A. (N.S.)

property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference." The learned justice then proceeds with the discussion as follows: "It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health, and welfare of the people. It is also true that the police power of the state is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner, such laws may be annulled, as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself. The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power." See also *Williams v. Arkansas*, April 4th, 1910, 217 U. S. 73, 54 L. ed. 673, 30 Sup. Ct. Rep. 493. One of the cases reviewed in *McLean v. Arkansas* is not distinguishable in principle from the case at bar. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1. In that it was held that an act of the legislature of Tennessee, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due employees, did not conflict with any provision of the Constitution of the United States protecting the right of contract. Had the statute in this case, instead of prohibiting the business, required redemption to be made in cash at the rate of the purchase price of the stamps, it would have been practically identical with the state statute upheld in that case; and yet its effect, by destroying the profits of the trading stamp associations, would necessarily be to put an end to the business.

The whole country is now agitated by the increased cost of living that has grown to alarming proportions, and legislative bodies are inquiring into its causes with a view, if possible, of providing remedies for the mischief. While there is difference of

opinion as regards the chief source, all concur in the opinion that every introduction of superfluous middlemen, and consequent unnecessary charges between producer and consumer, undoubtedly contribute to swell the stream to overflowing. Had the statute under consideration been passed at the present session of Congress, it would be regarded as intended to promote the public welfare in this respect. Though enacted many years ago, when the mischief was not great, it answers the purpose of to-day.

Now, what are the conditions presented by the facts in this case? An entirely unnecessary middleman, for his own profit solely, has injected himself between the regular merchant on the one hand, and his customers on the other. He receives \$3.50 for every thousand stamps issued to the customers, and redeems such as may be presented, in goods or in cash at \$2 per thousand. By this means the corporation represented by the defendant in error has in the first year of its intervention received about \$12,000, which should have either been retained by the merchant or received by his customers.

Several other concerns being engaged in the same business, their profits are probably as great, if not greater. We have then this large sum of money annually taken from the merchant and his customers, and added to the gross cost of living of all of the people of the District, without return. Is it not for the public welfare, in the juridical sense of the term, to prohibit such an undertaking? We think that it is. Must this public welfare be sacrificed to the unlimited freedom of contract invoked in this case, to protect the right to prey upon local commerce? We think not.

With this we will close a discussion that has been carried to an unusual length. Our excuse is the importance of the principle involved, and the great conflict of authority relating to it, which may furnish ground for a writ of certiorari to remove the case to the Supreme Court of the United States, where alone the vexed question may be settled.

It follows that the Police Court erred in sustaining the motion to quash the information, and its judgment must therefore be reversed, with costs, and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

Van Orsdel, J. dissenting:

I cannot agree with my associates that the business here under investigation is embraced within the terms of the statute. I am of opinion that the transaction between the merchant and the customer merely

amounts to a discount allowed the purchaser on account of the purchase made. The purchaser receives an order, on presentation of which, according to its terms, he can receive his discount, either in cash or merchandise. Between the merchant and the stamp company, the contract is clearly one for advertising. I agree with what is said by my associates in regard to the ancient and legitimate method of advertising through the medium of the newspaper, but I am unable to distinguish it from many other equally legitimate methods of advertising,—the bill board, the distribution of circulars, the various methods adopted through the different kinds of directories, and the numerous other agencies, all alike conducted and solicited through the agency of third parties intervening between the merchant and his customers. It is true that competition compels the merchant to patronize these agencies, and the public to pay the expense. Deception is at times practised through these methods. It is not apparent, however, from the record before us, that any fraud has been practised or misrepresentation made by the Economy Co-operative Society. The public need not be deceived nor defrauded by this system of discount. The purchaser has his option of taking either cash or merchandise, or refusing both. Neither inconvenience nor delay in securing the discount are in themselves sufficient to bring the transaction within the limitations of the statute.

The system detailed by the record discloses neither a gift enterprise nor a lottery. Every stamp exchanged has a fixed value; and the mere fact that the transaction is conducted through the medium of a third party does not make it different from a direct payment of the discount by the merchant, or the giving of a stamp redeemable by him on presentation. It is conceded that the merchant himself could legally issue the stamps, redeemable by him in cash or merchandise, as an inducement to secure the patronage of the public. Such a transaction would be perfectly legitimate. Exactly the same result is here accomplished. The same discount is paid, and the customer is accorded the same rights. The advertising is conducted, as is customary, through the medium of a third party. The right of the merchant to so advertise cannot be controverted. With this neither the customer nor the public is concerned. The customer receives the exact inducement offered,—an inducement which, so far as the transaction between the merchant and the customer is concerned, is not condemned by the statute. The mere fact that the purchaser is required to take the,

stamps for redemption to another point in no way affects the legality of the transaction.

In my opinion, the question of the constitutionality of the statute is not before us, as the matter here involved cannot be brought within its provisions. Such statutes are to be strictly construed, and no reasonable construction of this statute can bring the transaction here involved within its provisions. It is unnecessary to discuss in this connection the power of Congress, under the exercise of the police power, to regulate or suppress these stamp enterprises, since that question, in my judgment, is not here presented. The mere fact that the profits of the business have been large, or that a middleman is involved, is not sufficient to bring it by implication within the terms of the statute.

In view of the importance of the question involved, and the wide diversity of opinion among the courts of the country, as to the effect of the statute and the power of the legislature to regulate the business in question, I join with my associates in inviting the allowance of a writ of certiorari by the Supreme Court.

Petition for writ of certiorari denied by Supreme Court of the United States October 24, 1910.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL.
GEORGE T. SIMPSON, Attorney General,

v.

SPERRY & HUTCHINSON COMPANY.

(110 Minn. 378, 126 N. W. 120.)

Trading stamps — regulation — police power — lottery.

Chapter 142, Laws 1909 (Rev. Laws Supp. 1909, §§ 5170-5 to 5170-8), declares that any contract or arrangement between two parties, by which one of them shall issue and redeem trading stamps or tickets which are given in connection with the sale of merchandise by the other, shall constitute a gift enterprise, unless the articles promised to be given as such gift or premium shall be definitely described on the stamp or ticket, and the character and value of the articles are made known to the purchaser of the merchandise at the time of the purchase, and unless the right of the holder of such stamp or ticket, to the gift or article so promised for its redemption,

Headnote by LEWIS, J.

Note. — See note to District of Columbia v. Kraft, ante, 957.
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becomes absolute upon the completion of the delivery thereof, without the holder being required to collect any specific number of similar stamps or tickets and present them collectively for redemption, and unless the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on any chance, uncertainty, or contingency whatever. Held:

1. The act is a constitutional exercise of the police power, in so far as it prohibits the issuing of trading stamps or tickets to be redeemed in articles of merchandise in any manner which depends upon any chance, uncertainty, or contingency.

2. The issuing and redemption of trading stamps, as carried on by respondent company, is not attended with such elements of chance, uncertainty, and contingency as to justify the restrictions imposed by the act. The enforcement of those conditions against the company would operate not as a reasonable regulation of its business, but practically as an absolute prohibition thereof.

(Jaggard, J., dissents.)

(April 15, 1910.)

PETITION for a writ of quo warranto to oust respondent from doing business in the state of Minnesota. Writ discharged.

The facts are stated in the opinion.

Messrs. George T. Simpson, Attorney General, and Young & Stone for relator.

Messrs. Morton Barrows and John Hall Jones for respondent.

Lewis, J., delivered the opinion of the court:

On the petition of the attorney general a writ of quo warranto issued from this court directing respondent to show cause by what warrant it claimed the right to continue the enjoyment of its corporate rights, franchises, and privileges in the state of Minnesota. Respondent demurred to the petition upon the ground that the facts stated therein did not constitute a cause of action, for the reason that chapter 142, p. 155, Laws 1909 (Rev. Laws Supp. 1909 §§ 5170-5 to 5170-8), upon which the petition is based, violates article 1, § 7, of the Constitution of Minnesota, and the 14th Amendment of the Constitution of the United States. That portion of chapter 142, necessary to set out in detail, reads:

"Sec. 2. Whenever two or more persons enter into any contract, arrangement, or scheme whereby, for the purpose of inducing the public to purchase merchandise or other property of one of the parties to said scheme, any other party thereto, for a valuable consideration and as a part of such scheme, advertises, and induces or

attempts to induce the public to believe, that he will give gifts, premiums, or prizes to persons purchasing such merchandise or other property of such other party to be said scheme, and that stamps or tickets will be given by the seller in connection with such sales, entitling the purchaser of such property to receive such prizes or gifts from any other party to such scheme, the parties so undertaking and carrying out such scheme shall be deemed to be engaged in a 'gift enterprise,' unless the articles or things so promised to be given as gifts or premiums with or on account of such purchases shall be definitely described on such stamp or ticket, and the character and value of such promised prize or gift fully made known to the purchaser of such merchandise or other property at the time of the sale thereof, and unless the right of the holder of such stamp or ticket to the gift or premium so promised becomes absolute upon the completion of the delivery thereof, without the holder being required to collect any specified number of other similar stamps or tickets, and to present them for redemption together; and the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on any chance, uncertainty, or contingency whatever.

"Sec. 3. Any person who engages in a gift enterprise such as is defined in this act, or who advertises the same in any manner, or who in furtherance of such scheme, as an inducement to purchasers, issues in connection with the sale of any merchandise or other property any such ticket or stamp purporting to be redeemable in some indefinite article not described thereon, only when presented with a collection of other stamps or tickets of like kind, by some other party to such scheme, and which, unless presented in the manner aforesaid is not redeemable at all, shall each and all be guilty of a misdemeanor."

According to the petition, respondent is a corporation organized and existing under and by virtue of the laws of the state of New Jersey, and, having complied with the provisions of chapter 69, p. 68, Gen. Laws 1899, is authorized to do business within the state of Minnesota. Its only business consists in the sale, issue, redemption of what are commonly known as "trading stamps." It issues and sells its trading stamps pursuant to contracts entered into with retail merchants in the state, by the terms of which the company agrees to deliver its stamps to the merchant at a stated price, and the merchant agrees to offer these stamps to his customers as an inducement for cash trade. The stamps are redeemed by the L.R.A. (N.S.)

company with merchandise only, and when presented by the merchant's customers in trading stamp books containing 990 stamps. The company agrees to advertise the name and business of the merchant in its S. & H. green trading stamp books; distribute them among the people of the city or town where the merchant resides, and to furnish the merchant signs advertising the fact that he distributes S. & H. green trading stamps. The merchant agrees that he will not use or give away any other coupons or stamps issued by either himself or any other firm, while under contract with the company. The title to the stamps remains in the company until redeemed, and the contract for their use covers the period of one year. The petition does not disclose whether the stamps are universally sold to merchants upon the same basis, but there is a provision which reads as follows: "Unless spot cash is paid upon delivery, the subscriber agrees to pay the Sperry & Hutchinson Company 50 cents per hundred for the use of all stamps disposed of by him, making weekly settlements for the same." From this provision we shall assume that the general price charged merchants for the use of the stamps was \$5 per thousand. The petition alleges that the company has entered into a great many contracts with various merchants throughout the state; that none of the trading stamps are redeemed singly, but only in numbers of 990, when that number has been collected and pasted into the book furnished for that purpose. The petition also states that the company advertises in its trading stamp books that it will receive in exchange for stamps the wrappers, trademarks, coupons, tags, labels, etc., collected from articles in the trade, such as coffee, condensed milk, tobacco, etc., and that the trading stamp book also contains the statements that customers could only appreciate the variety and value of the merchandise given as premiums by visiting the company's premium parlor, where they would find practically everything, and the best of everything, required in any home. The petition states that the company never redeems any of its trading stamps in cash, or by exchanging a pen or pens therefor, although, since the act in question went into effect, respondent has caused to be printed across the face of its stamps the words: "One pen value one mill." It is also stated that respondent pursues a regular system of advertising its trading stamp books, through the newspapers and otherwise, for the purpose of inducing the public to deal with the merchants who are under contract to furnish stamps. and that such inducement consists in the promise

to redeem the same in valuable articles of household goods and other merchandise.

The legal status of trading stamp companies has been under consideration by many of the courts of this country, involving statutes varying more or less in the details and scope of the regulation. The question being new in this court, it seems advisable to review, as briefly as possible, the more important cases on the subject.

A case frequently cited as authority on the principles involved in all such cases is that of *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343. The New York statute prohibited the giving of any gift or prize in connection with the sale of any article of food, and made a person violating it guilty of a misdemeanor. Gillson was arrested for giving away a cup and saucer in connection with the sale of 2 pounds of coffee, and the court held that the statute violated the 14th Amendment of the Federal Constitution. In a very able opinion Judge Peckham defined the term "liberty" as used in the Constitution, and the court held that there was no basis for legislative interference, for the reason that the act of giving away the article in connection with the purchase of any food contained none of the elements of chance or lottery, did not involve the question of public health, contained none of the elements of fraud or crime, and that the statute was an unwarranted interference with the natural right of the defendant to attract custom in the manner stated. This case was made the basis of *People ex rel. Madden v. Dycker*, 72 App. Div. 308, 76 N. Y. Supp. 111, wherein the supreme court of New York had under consideration a trading stamp law which prohibited the issuing and distribution of trading stamps or other devices, in connection with the sale of goods and merchandise, to be redeemed by a third party, expressly exempting manufacturers and merchants from the provisions of the act, and permitting them to issue and redeem their own coupons and tickets. On the authority of *People v. Gillson*, and other cases, the court held the act to be unconstitutional, for the reason that there appeared to be no distinction between the business or method of issuing and redeeming such tickets or coupons by a manufacturer or merchant, as in the Gillson Case, and the method of issuing and redeeming trading stamps by a third party; that is, that the elements of lottery and public welfare were not involved in the transaction, so as to form the basis of legislative interference. After that decision the legislature of New York amended the law, making it applicable to the issue and redemption of stamps by

third parties only, and providing that each stamp should have legibly written upon its face the redeemable value thereof in money, and that such stamps should be redeemed when presented in a quantity aggregating in money value not less than 5 cents each lot, and that upon failure to redeem, the party issuing such stamps should be liable for the face value thereof. The court held the law unconstitutional upon the authority of the Gillson Case, and declared that no moral or lottery question was involved, and also held that the law was invalid because the business of dealing in trading stamps was reserved for merchants and manufacturers, which created a preferential class. In this respect the court said: The vice, it seems, is not in allowing one to buy by promise of a gift, but in permitting the promise to be fulfilled by another than the seller. It is a narrow ledge for the distinction to rest upon, when in one instance the transaction is subject to legislative control to the extent of confiscation, and in the other it goes without let or hindrance.

Another leading case on the subject is that of *State v. Dalton*, 22 R. I. 77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234, decided in 1900. The act of the legislature prohibited the redemption by a third party of coupons or stamps, issued by a merchant connected with the sale of merchandise, and a merchant was arrested for dealing with a trading stamp company. The company involved in that case was respondent, and the contract was similar to the one involved in the case now under consideration. The court upheld the contention that the law deprived the merchant of his liberty and property without due process of law, and that the prohibited act did not in any manner concern the public health, public safety, or welfare, and did not contain any of the elements of lottery or chance. The court remarked that the scheme was simply one of a variety of devices resorted to by tradespeople in these days of sharp competition, to promote the sale of their goods. Notwithstanding its decision, however, the court took occasion to define its position on the trading stamp business in the following language: "In order that we may not be misunderstood in the position which we feel compelled to take regarding the case before us, we deem it proper to say that we do not approve of the trading stamp business as some of the cases above referred to inform us it is conducted, although there is no evidence before us concerning it; nor do we decide that it was not competent for the general assembly to prohibit it. What we do decide is that the statute in question is so

broad as to interfere with the right of an individual to deal with his own property in his own way; that is to say, to make such contracts regarding the sale and disposition thereof as he shall see fit, so long as he observes the rule that each one shall so use and enjoy his own property as not to injure that of another person, and also the further rule that his use of it shall not be injurious to the community." The court thus intimated that it would be within the power of the legislature to regulate, or prohibit entirely, the trading stamp business, but left us in the dark as to what it considered such abuses as would justify the legislature to interfere, within the doctrine of the police power. There are other decisions to the same effect under similar statutes, among which may be mentioned *State v. Dodge*, 76 Vt. 197, 56 Atl. 983, 1 A. & E. Ann. Cas. 47.

Another case often referred to is *Young v. Com.* 101 Va. 853, 45 S. E. 327, decided in 1903. The respondent was the trading stamp company in that case, and the contract was similar. As in New York, the law was directed to the issuing and redeeming of trading stamps by third parties, and expressly exempted merchants and manufacturers from its operation. The court reviewed many of the authorities, including *People v. Gillson* and *State v. Dalton*, and reached the conclusion that the transaction was free from any element of gambling or lottery, did not affect the public welfare, safety, health, or morals, and that there was no foundation for legislative interference under the doctrine of police power. There is another line of cases, notably that of *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17, 35 So. 28, where the statute simply prohibited lottery or gaming devices, and made no reference to the trading stamp business. Under such statutes it has universally been held that the scheme of issuing and redeeming trading stamps was not a lottery or gambling device; hence those decisions have no particular value here.

The supreme court of California in 1905 had the subject under consideration in *Ex parte Drexler*, 147 Cal. 763, 2 L.R.A. (N.S.) 588, 82 Pac. 429, 3 A. & E. Ann. Cas. 878. There the statute was sweeping, and prohibited the issuing and redemption of trading stamps, not only by other parties, but also by merchants themselves. The act was held unconstitutional in all respects. The court adopted the reasoning of *People v. Gillson* and the other New York cases above cited,—*State v. Dalton*, *State v. Shugart*, *Young v. Com.*,—*supra*, and others, and referred to *Lansburgh v. District of Columbia*, 11 App. D. C. 512; *Humes v. Ft.* 30 L.R.A. (N.S.)

Smith (C. C.) 93 Fed. 857; and *State v. Hawkins*, 95 Md. 146, 93 Am. St. Rep. 328, 51 Atl. 850,—as follows: "With respect to these cases, we do not deem it necessary to consider the suggestion of petitioners that they are distinguishable from the mass of cases above cited. Whatever they may hold, they are not of sufficient consequence to ruffle the great current of authority which runs the other way."

The Massachusetts supreme court decided, in *Com. v. Emerson*, 165 Mass. 146, 42 N. E. 559, that an act preventing the sale or exchange of property under the inducement that a gift or prize was to be part of the transaction had no application, and did not forbid a sale of two things at once by a merchant, even if one of them was the principal object of desire, and the other an additional inducement which turns the scale. After that decision was rendered, the legislature amended the act to provide that no person should sell, exchange, or dispose of any property, or offer or attempt to do so, upon any representation, advertisement, notice, or inducement concerning any other property than that which was specifically stated to be the subject of the sale or exchange. In *Com. v. Sisson* (1901) 178 Mass. 578, 60 N. E. 385, the same court held that the delivery of trading stamps with articles sold for cash, redeemable at the store of an independent corporation issuing the stamps, was not a violation of the act, for the reason that it did not contain any of the elements of gambling or lottery. In *O'Keefe v. Somerville*, 190 Mass. 110, 112 Am. St. Rep. 316, 76 N. E. 457, 5 A. & E. Ann. Cas. 684, it was held that an act was unconstitutional which attempted to impose an excise tax on the business of selling or giving trading stamps or similar devices, by a merchant in connection with the sale of articles.

The leading case which presents a different view of the subject is *Lansburgh v. District of Columbia*, *supra*, decided in 1897. The act of Congress was a sweeping prohibition against the issuing of any ticket, stamp, or coupon by a vendor or by any other person or party under contract with the vendor, redeemable in any merchandise which was not identified or selected by the purchaser at or prior to the time of the purchase. The court stated its position as follows: "Without the necessity of declaring that the acts proved in this case constitute the conduct of a lottery or gift enterprise, as those words are commonly understood, or even of finding that the element of chance operates intentionally and distinctively in the scheme of the trading stamp company, we think, nevertheless, that they come within the

prohibition of the statute which, as before said, furnishes its own definition of 'gift enterprise.'" This decision is based on the fact that trading stamp companies are not dealers or ordinary merchants engaged in the legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to encourage trade, but are organized for the purpose of intervening between the merchant and his customers, and the position they occupy enables them to force their stamps on unwilling merchants by use of the argument that they thereby secure an advantage over other merchants who are not taken into the scheme. The court also expressed the opinion that the premiums were grossly overvalued, and that the corporation maintained itself upon the vast difference between the cost of carrying on the business and the amount received by the merchant. Or, if there was any substantial value in the premiums, as compared with the amount of the tickets for redemption, then the profit, or part at least, was secured by reason of the fact that many of the merchant's customers failed to redeem their tickets or stamps, because unable to complete the book. The court took occasion to express in vigorous language that the whole scheme was a cunning device created for the purpose of taking advantage of the weakness of human nature.

The Federal circuit court for the western district of Arkansas, in the case of *Humes v. Ft. Smith*, supra, sustained an act of the Arkansas legislature regulating gift enterprises by imposing a license tax not exceeding \$1,000 per year upon any person, firm, or corporation engaged in such enterprise. The act defined gift enterprises to include premium stamps, trading stamps, and similar schemes and devices, by means of which merchants, manufacturers, and other persons engaged in lawful callings are advertised, exploited, and patronized to the exclusion of others on like terms. The court followed the *Lansburgh Case*, and held that the issuing of stamps for the purpose of redemption in merchandise might fairly be deemed against public policy, detrimental to the public welfare, and, under the police power, the legislature might exercise its discretion in regulating or prohibiting it.

The supreme court of Washington, in *Fleetwood v. Read*, 21 Wash. 547, 47 L. R.A. 205, 58 Pac. 665, decided in 1899, upheld an ordinance of the city of Tacoma which imposed a license tax upon all business houses which employed trading stamps for the sale of goods, under a statute which authorized cities of the first class to grant licenses for any lawful purposes. 30 L.R.A. (N.S.)

In a later case, however (*Leonard v. Basindale*, 46 Wash. 301, 89 Pac. 879, 65 Cent. L. J. 303), decided in 1907, the court declared an act passed in 1905 unconstitutional which made it a misdemeanor to issue and redeem trading stamps in connection with mercantile transactions. In the opinion the court state that the cases of *Lansburgh v. District of Columbia* and *Humes v. Ft. Smith* did not seem to have been able to withstand the overwhelming trend of opinion to the opposite view, and that the court felt impelled to follow the great weight of authority, and held the statute was in violation of the state Constitution, which provided that no person should be deprived of life, liberty, or property without due process of law.

In 1891 the statute of Maryland contained a sweeping prohibition against the use of any form of gift enterprise as an inducement for the sale of all kinds of merchandise, and the supreme court of that state held, in *Long v. State*, 74 Md. 565, 12 L.R.A. 425, 28 Am. St. Rep. 268, 22 Atl. 4, that the statute was invalid in so far as it related to gift enterprises not involving any element of chance. The statute was then amended so as to prohibit the issuing of stamps, tickets, etc., in connection with the sale of merchandise, the same to be redeemed by some person or association of persons other than those making the sale, the holder receiving in exchange therefor any gift, prize, or gratuity, or anything uncertain, undetermined, or unknown to the purchaser of the goods at the time of the purchase thereof. This statute came before the supreme court for consideration in the case of *State v. Hawkins*, 95 Md. 133, 93 Am. St. Rep. 328, 51 Atl. 850, and it was upheld as a constitutional exercise of the police power. The court held, however, that the fact that the stamps were redeemed by another party than the merchant, or that they were to be redeemed at a place other than where the sale was made, did not introduce any element of chance.

From this review of the cases we think it manifest that the apparent differences in judicial expression may be generally accounted for by the differences in the statutory provisions under consideration. In some states the statute prohibited the issuing of stamps or tokens which enabled either the merchant or a third party to redeem the same in merchandise. In other states the legislation was directed merely to the issuing and redemption of such stamps or coupons by third parties, making no attempt to regulate the business as conducted by merchants. In yet other states the statute involved was a general prohibi-

tion against engaging in lottery, chance, or gaming operations.

Although there is some conflict in the decisions, a few principles are recognized as the settled law upon this subject. It is beyond the province of the legislature to prohibit a merchant from issuing coupons, tickets, stamps, or tokens representing a certain value, which entitle the holder to a redemption of the same in merchandise. In pursuance of this scheme of advertising to excite the interest of his customers, the merchant is not required to redeem these tickets or coupons singly. They may be issued in any amount, and redemption may be made to depend upon their being presented collectively. No feature of lottery is involved from the fact that the articles were not exposed and examined by the purchaser at the time the coupons were issued to him. There is no tangible difference between the selection of an article at the time of receiving the coupons, and the selection thereof at a subsequent time when coupons representing a certain sum shall have been collected. There is no distinction between making the selection of a premium from merchandise on exhibition at the store, or from a catalogue furnished by the merchant. The fact that the particular article desired by the purchaser is not described in the coupon or ticket does not invest the transaction with the element of chance, uncertainty, or hazard. These and similar methods of advertising by merchants have been followed so long, and have become so thoroughly recognized as the legitimate exercise of personal rights and privileges under the Constitution, that they are no longer the subject of legislation.

If we shall find that there are no different elements of chance and uncertainty, or no greater tendency to fraud, as the business of issuing and redeeming stamps is conducted by respondent, than attends their issue and redemption by the merchant making sales of merchandise, then we know of no legal ground for sustaining the writ. The main differences in the method of transacting the business are as follows: A variety of merchandise is kept on exhibit at the company's store in the village or city where the merchant does business, and the customer may make a selection from such articles as are designated for the redemption of one or more stamp books, as the case may be. The customer may not know at the time he receives the stamps from the merchant, what particular article he will select; but he has the opportunity to examine the stock at the company's store, and may make his collection of

stamps with reference to some particular article.

We recognize the fact that legislative regulation is not necessarily dependent upon whether the business, as conducted by respondent, affects the public health, or is attended with features of a lottery. It has long been settled that any business, although legitimate in itself, is subject to regulation by the police power, whenever so conducted that it may fairly be said that it affects the public interest or welfare. Public interest may be affected when a business is conducted on such a scale and under such conditions as to lead to an abuse of the confidence of those who have occasion to transact business in that line. The rates of interest, insurance business, the regulation of grain elevators and warehouses, hawking and peddling, bakeries, butcher shops, etc., have been recognized as proper subjects for police regulation, not because of anything naturally wrong in these vocations, but because, from the character of the business, opportunities are present for deception on account of the difficulty the customer has to obtain knowledge of the character of the contract or the merchandise. So with reference to certain lines connected with the handling of agricultural products. Where the producer is located at a distance from the commission house, the law may properly regulate the conditions upon which commission and brokerage houses shall do business with the public. This is illustrated by the cases of *State ex rel. Beek v. Wagener*, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134, and *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1. In the latter case an act of the legislature of Tennessee was upheld, which required the redemption in cash of store orders or other evidences of indebtedness issued to employees in payment of wages.

If, in dealing with the merchant and his customers there is an opportunity to take advantage of them by a persistent system of attractive advertising and other inducements, then reasonable safeguards and limitations may be provided to prevent such abuses. But the difficulty with the present law is that it is not designed to regulate a legitimate business. It condemns the business conducted by respondents as illegitimate, because the public is induced to engage in lottery transactions, and places such restrictions about the issue and redemption of stamps as to make that business impossible. In *State v. Hawkins*, supra, the Maryland statute was held valid in so far as it was directed to prevent the holder of stamps from receiving in ex-

change therefor anything uncertain, undetermined, or unknown to the purchaser of the goods at the time of the purchase. But this law does not stop at that point. It requires that each stamp or ticket shall have described thereon the character and value of the gift which redeems it, or that such fact shall be made known to the customer at the time of the purchase. Each separate stamp must be treated independently, and redemption collectively is prohibited. It is apparent that it would not be practicable to redeem stamps of the value of 1 mill or 1 cent, nor to print on each stamp the character of the article offered for its redemption. To make such a provision practicable would require each stamp to be issued in denominations to correspond with each purchase. Most cash purchases are in small amounts, and the restrictions imposed by chapter 142 necessarily limit the articles offered for redemption to those of practically no value.

Our attention is called to the language of the court in the *Lansburgh Case*, by which the business of issuing and redeeming trading stamps is condemned as a cunning device which confers no benefit on anybody, and that merchants are persuaded to invest in stamps, partly in the hope of obtaining the customers of other merchants, and partly through fear of losing their own. We assume that the court was referring to the practice of selling the stamps to one merchant only in the same line of business, thus attempting to give him an advantage over his competitors. Why this exclusive right to deal in stamps by the merchant who enters into a contract with the company should be considered as detrimental to his or to the public interest, we are unable to understand, unless the practice is attended with some tendency to deceive. Many merchants prefer to conduct such schemes of advertising by issuing and redeeming their own coupons. Others prefer to place the entire matter in the hands of a third party, and be relieved of the trouble and responsibility. But so far as the petition informs us, the merchants in this state have not been induced to enter into the contracts by reason of deceptive representations. Such contracts are made for the period of one year, and there is no compulsion about renewing them. The stamps cost the merchants at the rate of half a cent each, or 5 cents for ten stamps. He gives his cash customers, if they call for them, ten stamps for every dollar's worth of merchandise purchased. The effect is that the merchant receives 95 cents for every dollar's worth of goods sold for cash. The object, no doubt, is to secure additional customers, if possible, and

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build up his trade, and to induce payment in cash for the purpose of getting the money to use. Merchants who enter into contracts with respondent company agree to make this discount, and presumably they so obligate themselves because they consider it a paying investment.

The profit in respondent's business is the difference between the amount received from the merchants for the stamps and the cost of the articles offered in redemption, less the cost of running the business. The profits may be large; but that alone does not furnish ground for the prohibition of the business. No doubt some stamps are lost, some books are not filled out, and hence never presented for redemption. To that extent the company is the gainer. The same advantage exists when the scheme is conducted by the merchant; but even if there is a distinction in this feature between the merchant and the company, it has not been made to appear from the petition that the collectors of stamps pay any additional value for them. They are at liberty to take them, if they so desire; but we discover no element of deception or compulsion. Without deciding that a business of this character may not be conducted in such manner and on such a scale as to make it subject to regulation or prohibition, because of this so-called tontine feature of uncertainty of redemption of stamps, we find no basis for the application of this principle in the present case.

Our conclusion is that, in so far as chapter 142, Laws 1909, prohibits companies or parties from issuing and redeeming trading stamps under contracts which in practice depend on chance, uncertainty, or contingency, the law is a proper exercise of the police power; that the business of issuing and redeeming trading stamps as conducted by respondents is not attended with such elements of chance, uncertainty, and contingency as to come within that provision of the act; that the provisions requiring each stamp to be valued and redeemed independently of other stamps, and to have printed thereon its value and character of the article offered for redemption, constitute unnecessary restrictions amounting to practical prohibition of the business as conducted by respondents, and are not a proper exercise of the police power of regulation.

Writ discharged.

O'Brien, J., took no part.

Jaggard, J., dissenting:

I respectfully dissent. The presumption in favor of the constitutionality of legislative action is strong. A statute should not

be avoided, unless clearly necessary. The authorities do not impress me as compelling the decision that the law here in issue is unconstitutional, although not all of them can be so substantially distinguished as to show that they do not hold it invalid.

Moreover, I am unable to perceive why the statute should not be upheld, because it excludes an illegitimate business. In effect it regards the defendant as a commercial parasite, and prohibits existence. The facts justify that definition and prohibition.

Petition for rehearing denied.

KENTUCKY COURT OF APPEALS.

MERCHANTS' ICE & COLD STORAGE COMPANY, Appt.,

v.

JOHN ROHRMAN.

(138 Ky. 530, 128 S. W. 599.)

Monopoly — consolidation of business — validity of contract.

1. Contracts by which a corporation which buys up and consolidates all but a small percentage of the ice manufacturing plants of the city, in order to control the market and suppress competition, requires stockholders of the absorbed plants to refrain from re-engaging in the business for a period of ten years, are void as a restraint of trade, and are within a statute declaring guilty of conspiracy any corporation or individual which shall enter into any contract having for its object the limiting of the quantity of any commodity to be produced, and cannot be enforced by a corporation organized to take over the business, property, and contracts of the one which effected the consolidation.

Same — failure to raise prices — effect.

2. That no effort is made to control, fix, or raise the price of the product of certain plants which have been bought in by one concern to control the market and suppress

competition, does not render enforceable a contract by which holders of stock in such concern agreed not to enter into the business within the city for a series of years.

(May 18, 1910.)

A PPEAL by plaintiff from a judgment of the Chancery Branch, Second Division, of the Circuit Court for Jefferson County in defendant's favor in an action brought to restrain defendant from engaging in the ice business in violation of his contract not to do so. Affirmed.

The facts are stated in the opinion.

Messrs. Gibson, Marshall, & Gibson and Dodd & Dodd, for appellant:

The contract is not only valid and enforceable on its face, but its validity is strengthened by the evidence.

Western Dist. Warehouse Co. v. Hobson, 96 Ky. 550, 29 S. W. 308; Sutton v. Head, 86 Ky. 157, 9 Am. St. Rep. 274, 5 S. W. 410; Stovall v. McCutchen, 107 Ky. 577, 47 L.R.A. 287, 92 Am. St. Rep. 373, 54 S. W. 969; Clemons v. Meadows, 123 Ky. 181, 6 L.R.A.(N.S.) 847, 124 Am. St. Rep. 339, 94 S. W. 13; Dickey v. Dickinson, 105 Ky. 748, 88 Am. St. Rep. 337, 49 S. W. 761; Pike v. Thomas, 4 Bibb, 486, 7 Am. Dec. 741; Grundy v. Edwards, 7 J. J. Marsh. 368, 23 Am. Dec. 489; Turner v. Johnson, 7 Dana, 439; Davis v. Brown, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534; Louisville Bd. of Fire Underwriters v. Johnson, 133 Ky. 797, 24 L.R.A.(N.S.) 153, '19 S. W. 158.

The contract is valid and enforceable at common law, and does not contravene any statute.

Sutton v. Head, supra; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 129, 20 C. C. A. 141, 54 U. S. App. '23, 85 Fed. 271, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; Diamond Match Co. v. Roeber, 106 N. Y. 487, 60 Am. Rep. 464, 13 N. E. 419; 24 Am. & Eng. Enc. Law, 2d ed. p. 856; A. Booth & Co. v. Davis, 127 Fed. 875; Harrison v. Glucose Sugar Ref. Co.

Note.—The validity of an agreement not to compete, ancillary to a sale or lease of property, as affected by the covenantee's purpose to procure a monopoly, is discussed in a note to *Anderson v. Shawnee Compress Co.* 15 L.R.A. (N.S.) 846.

As to the bearing upon the validity of such an agreement, of the circumstance that it is one of a number of similar contracts, what is said with reference thereto in a note to *Grogan v. Chaffee*, 27 L.R.A.(N.S.) 395, on "Validity of contract provision seeking to control price at which an article shall be resold," is equally applicable in the case of other stipulations ancillary to lawful contracts. It is there stated in substance in the course of the general discussion (on page 397) that while the numer-

ousness of such contracts cannot affect their nature, and while the test to be applied cannot be affected by the circumstance that a particular contract is part of a general system, yet, such test being whether such a stipulation is upon the whole against the public interest, so that it is not the fact of restraint, but the degree of the restriction, which controls,—the result of such test may be considerably affected by the fact that the particular contract in question is one of a number.

In connection with the case reported, reference may also be made to a note in 9 L.R.A.(N.S.) 446, on "Contracts in partial restraint of trade, as affected by modern anti-trust acts."

58 L.R.A. 915, 53 C. C. A. 484, 116 Fed. 304; *Anchor Electric Co. v. Hawkes*, 171 Mass. 101, 41 L.R.A. 189, 68 Am. St. Rep. 403, 50 N. E. 509; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 23 L.R.A. 639, 49 Am. St. Rep. 784, 28 Atl. 973; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315; *Western Woodenware Assn. v. Starkey*, 84 Mich. 76, 11 L.R.A. 503, 22 Am. St. Rep. 686, 47 N. W. 604; *Handforth v. Jackson*, 150 Mass. 149, 22 N. E. 634; *Whitney v. Slayton*, 40 Me. 224; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Simms v. Burnette*, 16 L.R.A.(N.S.) 389, and note, 55 Fla. 702, 127 Am. St. Rep. 201, 46 So. 90, 15 A. & E. Ann. Cas. 690; *Osius v. Hinchman*, 150 Mich. 603, 16 L.R.A.(N.S.) 395, 114 N. W. 402; *Cowan v. Fairbrother*, 118 N. C. 412, 32 L.R.A. 835, 54 Am. St. Rep. 733, 24 S. E. 212; *Palmer v. Toms*, 96 Wis. 369, 71 N. W. 654; *Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co.* 14 C. C. A. 14, 35 U. S. App. 16, 66 Fed. 643; *Robinson v. Suburban Brick Co.* 62 C. C. A. 484, 127 Fed. 807.

Mr. Lawrence S. Leopold, for appellee:

The controlling of from 90 to 95 per cent of any given commodity by one concern constitutes a monopoly.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *United States v. American Tobacco Co.* 164 Fed. 700.

In order for a monopoly to operate illegally, it is unnecessary for it to make an evil use of its power.

Ibid., and Page, Contr. § 433.

An instrument preventing a person from engaging in the manufacture or sale of ice for a period of ten years, executed to an ice company at a time when said ice company was actively engaged in buying up every ice plant in Louisville which could be bought, is unenforceable, because it is an agreement in furtherance of the formation of a monopoly and is an unlawful restraint upon trade.

International Harvester Co. v. Com. 124 Ky. 543, 99 S. W. 627; *Anderson v. Jett*, 59 Ky. 375, 6 L.R.A. 390, 12 S. W. 670; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; *More v. Bennett*, 140 Ill. 69, 15 L.R.A. 361, 33 Am. St. Rep. 216, 29 N. E. 888; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 110, 50 L.R.A. 175, 85 Am. St. Rep. 125, 28 So. 669; Page, Contr. § 433; *Addyston Pipe & Steel Co. v. United States and United States v. American Tobacco Co.* supra.

Whether or not the price of the article was enhanced or depressed above or below its real value is immaterial.
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International Harvester Co. v. Com. supra.

Messrs. Kohn, Baird, Sloss, & Kohn also for appellee.

Carroll, J., delivered the opinion of the court:

This action was brought by the appellant ice company to restrain the appellee, Rohrman, from violating a contract entered into by him, in which he obligated himself not to engage for a period of ten years in the business of manufacturing or selling ice in Jefferson county, Kentucky. Rohrman in his answer set up several defenses, but we deem it necessary only to notice the one pleading that the contract was illegal, in restraint of trade, and against public policy. Upon hearing the case, the chancellor dismissed the petition, and this appeal is prosecuted from the judgment.

To understand fully the nature of the case, it will be necessary to relate somewhat in detail the facts disclosed by the record. On the 1st day of March, 1905, the National Ice & Cold Storage Company, a corporation engaged in the manufacture and sale of ice, sold its plant, good will, and business to the Merchants' Refrigerating Company, a corporation organized under the laws of this state in April, 1904, for the purpose of manufacturing and selling ice and carrying on a cold storage business. On the 25th of March, 1905, a few days after its purchase of the National Ice & Cold Storage Company, the Merchants' Refrigerating Company, by amended articles of incorporation, increased its capital stock from \$200,000 to \$1,000,000. On January 2, 1906, the appellant Merchants' Ice & Cold Storage Company was incorporated with a capital stock of \$1,500,000. It may here be noted that the principal stockholders in each of these companies were the same persons, and that Charles H. Inman was the president of each of them.

It is averred in the petition that prior to the said "1st day of March, 1905, the Merchants' Refrigerating Company had been incorporated and organized at the instigation of and for the benefit of the persons interested in the National Ice & Cold Storage Company, including the defendant, Rohrman, and others, for the purpose of acquiring the plant, good will, and business of the said National Ice & Cold Storage Company, and the plants, business, and good will of other ice manufacturers of Louisville, with a view to consolidating them under one management and control through and by the said Merchants' Refrigerating Company." And, further, that "the Merchants' Ice & Cold Storage Company was incorporated in January, 1906, at the

instigation of and for the benefit of the persons interested as stockholders in the Merchants' Refrigerating Company, for the purpose of having the said Merchants' Ice & Cold Storage Company acquire the assets and contracts of the Merchants' Refrigerating Company and other manufacturers of ice, and continue their business. . . . And that the Merchants' Ice & Cold Storage Company on the 9th of January, 1906, acquired and had conveyed to it all of the real estate of the Merchants' Refrigerating Company, and paid a large consideration therefor, of which the defendant, Rohrman, received his due proportion."

The Merchants' Refrigerating Company, in pursuance of the plan for which it was organized, purchased the plant, business, assets, and good will of the National Ice & Cold Storage Company under the following contract, which was signed by all of the stockholders, including the appellee, Rohrman:

This article of agreement, made and entered into by and between the National Ice & Cold Storage Company, and the undersigned stockholders thereof, parties to the first part, and the Merchants' Refrigerating Company, party of the second part, of the city of Louisville, Jefferson county, Kentucky, Witnesseth: That whereas the said National Ice & Cold Storage Company has sold, transferred, and delivered to the second party its certain real estate, with the improvements thereon, situated in the city of Louisville, Jefferson county, state of Kentucky, and all the machinery, fixtures, furniture, wagons, horses, harness, and all other property of every kind or description, connected with or used in its business of dealing in, manufacturing, and delivering of ice, together with the good will and business of the said first parties as dealers in and manufacturers of ice, for the sum of one hundred and sixty-six thousand four hundred sixty-four and 66-100 dollars. Now, therefore, in consideration of said sale to and purchase by said second party, and in order that the said second party may be secure in the full enjoyment of the good will of said first parties, said first parties do severally agree that they will not, nor will either of them, for a period of ten years from the first day of April, 1905, without the consent of the said second party directly or indirectly, as principal, agent, or employee, engage in the business of manufacturing or selling ice within Jefferson county, Kentucky, except in the service of said second party.

30 L.R.A. (N.S.)

Executed at Louisville, Kentucky, this 1st day of March, 1905.

Henry Vogt.

Adam Vogt.

National Ice & Cold Storage Co.,

By Chas. W. Inman, Pres. & Treas.

Chas. W. Inman.

John Rohrman.

Sam Ouerbacker.

John Ouerbacker.

Jos. P. Ouerbacker.

John Rohrman.

Merchants' Refrigerating Co.,

By Chas. W. Inman, Pres. & Tr.

In the contract by which the Merchants' Ice & Cold Storage Company purchased the property and assets of the Merchants' Refrigerating Company, it is stipulated that the Merchants' Refrigerating Company transfers to it, "all its good will and the good will of others acquired by it, including all contracts pertaining to and taken in connection with the acquisition of the good will of others, with the right in the buyer to enforce in its behalf all such contracts to the same extent as the seller could do had it continued in business, it being understood that the said contracts are a material part of the consideration received by the buyer under its contract with the seller."

It will thus be observed that in March, 1905, the Merchants' Refrigerating Company purchased the plant, business, assets, and good will of the National Ice & Cold Storage Company, and that in January, 1906, the Merchants' Ice & Cold Storage Company purchased the property, assets, and good will of the Merchants' Refrigerating Company. It may here be mentioned that Rohrman was a stockholder in each of these companies, and owned in 1908 some \$30,000 worth of the stock in the Merchants' Ice & Cold Storage Company. In addition to what may be termed the consolidation of the three plants mentioned, the Merchants' Refrigerating Company, between the time of its absorption of the National Ice & Cold Storage Company, in 1905, and the sale of its plant to the Merchants' Ice & Cold Storage Company, in January, 1906, had purchased the property of all the ice plants in Louisville, engaged exclusively in the manufacture of ice, except the Inman Ice Company, that had a capacity of 35 tons. In addition to this, it arranged to and did purchase the output of nearly all the concerns that manufactured ice in connection with their business and sold the surplus. These various plants purchased, as well as the contracts for the output, were turned over to the Merchants'

Ice & Cold Storage Company, when it took over the Merchants' Refrigerating Company. The result of all this was that the Merchants' Ice & Cold Storage Company owned and controlled all the ice manufactured in Louisville, except 5 or 10 per cent thereof, which was manufactured by a few small plants; and it is also shown that an unsuccessful effort was made to purchase some of these small plants or their output. The persons selling plants that were purchased by the refrigerating company were required to execute a contract similar to the one signed by Rohrman. There is also some evidence that the price at which peddlers or distributors of ice sold the same was fixed by the appellant company; and they were notified that unless the prices so fixed were maintained they would be charged a higher rate for ice than they had been paying. It does not appear, however, that any attempt was made to increase the price above its fair value, or to dictate to the independent companies the price at which ice should be sold by them. The officers of the appellant company deny that they had any intention of controlling the manufacture or price of ice in Louisville, and insist that the only purpose in buying up some plants and the product of others was to organize the business upon a satisfactory and paying basis, and cut down the expense of carrying it on.

Without stating further in detail the evidence, we may summarize as follows the facts as we gather them from the record: (1) At the time the Merchants' Refrigerating Company commenced to purchase ice plants and the output of ice, there were in operation in the city some fifteen independent ice factories, and in addition some seven other concerns that sold a large part of their product to the public, and between these various factories there was active competition. (2) After the absorption of all the plants it could purchase or control, the Merchants' Refrigerating Company owned or controlled all the ice manufactured in Louisville for the use of the public, except 5 or 10 per cent thereof. (3) The absorption of these various plants was accomplished in behalf of the Merchants' Refrigerating Company by Webber and Cox, who each received for their services \$5,000 worth of stock in this company. (4) These various plants were purchased under a contract similar to the one made with Rohrman. (5) The principal stockholders in the National Ice & Cold Storage Company, the Merchants' Refrigerating Company, and the Merchants' Ice & Cold Storage Company were the same persons; and Charles W. Inman was the president and controlling spirit in each of them. (6) 30 L.R.A. (N.S.)

The Merchants' Refrigerating Company was organized to take over all the ice plants in Louisville that it could purchase or control. (7) The Merchants' Ice & Cold Storage Company was organized for the purpose of taking over the Merchants' Refrigerating Company, and all of the factories and product that it had purchased, as well as other factories engaged in the ice business; and although this last-named company was not organized until January, 1906, it is yet manifest that the purpose of its organization was to control the ice business in Louisville. (8) The purchase of the National Ice & Cold Storage Company was merely a part of the plan and scheme conceived by Inman and his associates to obtain, by purchase or otherwise, control of all the plants in the city, and thereby fix and regulate the price as well as the output of ice. (9) The price of ice was not raised above its fair or reasonable value by either the Merchants' Refrigerating Company or the Merchants' Ice & Cold Storage Company; nor was it attempted to control the output of the few independent factories or the price at which they sold their product.

From these facts, our conclusion is that the contract was not only unenforceable, because in violation of the statute before its amendment by the act of 1906 (Laws 1906, chap. 117), held to amend in *Com. v. International Harvester Co.* 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703, but it was void as an unreasonable restraint of trade, independent of the statute. The statute, which is § 3915 of the Kentucky Statutes (Russell's Stat. § 3717), reads as follows: "That if any corporation under the laws of Kentucky, or under the laws of any other state or country, for transacting or conducting any kind of business in this state, or any partnership, company, firm, or individual, or other association of persons, shall create, establish, organize, or enter into, or become a member of, or a party to, or in any way interested in, any pool, trust, combine, agreement, confederation, or understanding, with any other corporation, partnership, individual, or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured article, or property of any kind, or shall enter into, become a member of, or party to, or in any way interested in, any pool, agreement, contract, understanding, combination, or confederation, having for its object the fixing, or in any way limiting, the amount or quantity of any article of property, commodity, or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of

conspiracy, and punished therefor as provided in the subsequent sections of this act."

The learned judge of the lower court, in a well-written opinion, holding that the contract was in violation of this statute, said: "It was the rule of the common law that any scheme to corner the market by getting control of the available supply is illegal, and so all contracts made in promotion of such scheme are unenforceable. If the common-law rule, as thus announced, is not sufficient to dispose of the question at bar, it would seem that the Kentucky statute is violated, and renders the contract sought to be enforced by the plaintiffs void. Corporations in this country are simply aggregations of men for the purpose of conducting business, and, for the convenience of those interested in the business, are substituted for partnerships. There is a marked distinction between a corporation created under the laws of the state and the old corporation created by act of the legislature. Under the laws of this state any small number of men otherwise engaged in a partnership enterprise may, by proceeding under the statute, incorporate themselves. The ease and facility with which corporations are created in this age have made them a shield and a blind for many purposes, and the rule of the courts throughout the country is not to look at the form of such transaction, but to the substance. Thus the motives which inspire the incorporators or the stockholders of a corporation will be inquired into, and the court will act upon the facts as found, without regard to the form of the transaction. Where, therefore, one corporation is created for the purpose of taking over a number of other corporations, issuing stock, or even paying for the property, with a view of establishing a monopoly, trust, or combination, the form of the transaction will be disregarded and the intent of the parties will be looked to.

Thus the Merchants' Refrigerating Company and the Merchants' Ice & Cold Storage Company were created for the purpose of taking over all other ice concerns which would sell to them, and did take over all which they could possibly buy, and, pursuant to the general intent, it did arrange to take the surplus output of other concerns. It will be noted that the statute in Kentucky denounces any 'agreement' for the purpose of regulating, controlling, or 'fixing the price' of any merchandise, etc. The taking over of the several corporations, the making of contracts, such as the one declared upon by plaintiffs, are all in the nature of agreements, and the ultimate result was the 'fixing of the price' at which

the ice output was to be sold. It is not necessary that the combination shall have increased the price beyond its real value, or have depreciated the price below its value. For the vice in the contract, not as shown by the contract itself, but by all the attendant circumstances, it seems to me, the defendant who is equally in fault with the plaintiffs, and indeed places himself beyond the sympathy of the court, cannot be enjoined from violating the contract. Applying the well-established principles of law, the court must leave the parties where it finds them, without giving either relief. The contract could not be enforced by Rohrman, nor should it be enforced by the plaintiffs, and the fact that he has profited largely by the contract, having sold interest in the National Ice & Cold Storage Company, and otherwise profited by their manipulations, cannot avail the plaintiffs."

In addition to this the contract had for its purpose an unreasonable restraint of trade, and hence the courts will not enforce it at the instance of either party. It is too well settled to need more than the mere citation of authority, that a contract in reasonable restraint of trade is valid. *Pike v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741; *Turner v. Johnson*, 7 Dana, 435; *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; *Western Dist. Warehouse Co. v. Hobson*, 96 Ky. 550, 29 S. W. 308; *Stovall v. McCutchen*, 107 Ky. 577, 47 L.R.A. 287, 92 Am. St. Rep. 373, 54 S. W. 969; *Louisville Bd. of Fire Underwriters v. Johnson*, 133 Ky. 797, 24 L.R.A.(N.S.) 153, 119 S. W. 153. Or as said in *Beach on Modern Law of Contracts*, vol. 2, § 1602: "It is a well-settled doctrine that any agreement in restraint of trade is void as being against public policy, unless founded upon a valuable consideration, and as regards time, space, and the extent of the trade limited to what is reasonable under the circumstances of the case, for the reason that such contracts tend to deprive the public of the services of the parties in the employments and capacities in which they are most useful, and so tend to expose the public to the evils of monopoly. Many authorities declare, in substance, that all restraints are presumed to be bad, but if the circumstances are set forth that presumption may be excluded, and the court judge of these circumstances, whether the contract be valid or not." Therefore, if the contract in question was in reasonable restraint of trade, and there was no other objection, it follows that the courts would enforce it as a valid contract. But, in our opinion, this contract was not in reasonable restraint of trade, and we will proceed to state the reasons for this conclusion.

At the outset, it may be observed that it is difficult to draw the line between contracts in partial restraint of trade, that are recognized as legitimate by all the courts, and contracts having for their purpose the control of the market for an article or commodity, and consequently the suppression of competition, which are condemned by the courts as either monopolies, trusts, or conspiracies, or as being in restraint of trade. Every purchase of a competitor in any trade or business under an agreement that the seller will not for a specified time engage in the same trade or business in that territory is at least the partial suppression of competition, and gives to the purchaser a larger control of the market for the article or commodity involved in the transaction than he had before. And it is fair to assume that, in all transactions like this, one of the reasons for the purchase is to remove competition. But although this may be so, it will not of itself render the contract invalid. If this feature or fact would invalidate such contracts, then all of them would be void. To render a contract invalid, there must be some other object in view than the mere purchase of a competing business; and the natural consequence of the purchase must be to control the market or suppress competition. But, even if this should be the natural result of the purchase from a business or trade standpoint, it would not in every case or under all conditions render the contract of purchase invalid. There are, and must in the necessity of the case be, exceptions to the rule, and these exceptions must be dealt with as they come up. For instance, if there were only two merchants in a town, and one of them should buy the other out, it might result in a condition of affairs in that particular community that would leave only one person engaged in the mercantile business and give him control of the immediate market, and yet the circumstances and conditions surrounding the transaction might be such as to exempt it from the operation of the rule condemning contracts that have the effect of placing in the hands of one person control of an article, trade, or business. In other places, and in reference to other things, the purchase by one concern of a half-dozen plants or establishments might not, except in a measure, affect competition, and would not enable the purchaser to control the market, and this would not be the purpose in view in making the purchase. It can therefore be seen that it is easy enough to suppose or even describe conditions in which the purchase of a competing plant or business would not have the effect of creating a situation that would come within the con-

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demnation of the law, and also that it would not be difficult to set down conditions that would make the transaction illegal without reference to the number of competitors that were purchased. The textbooks on contracts are full of cases in which this question, in one form or another, has come before the courts, but it would not accomplish any useful purpose to undertake to differentiate them in this opinion. In the able and elaborate opinion rendered by Judge Taft in *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, as well as in the full note to *Harding v. American Glucose Co.* 64 L.R.A. 738, 74 Am. St. Rep. 189, a discussion of the principles underlying this question may be found. The safe and just plan is to deal with each particular case as the facts and conditions presented seem to demand, protecting the good while punishing the bad. The question is too delicate, and involves too many important rights, to attempt an accurate statement of principles that might be applied to each case. On the one side, we have the inalienable right of the citizen to contract, and buy and sell, in the open market that which is the legitimate subject of barter and sale; and this privilege should not be abridged without good reason. On the other side, we have the interest of the public that must be protected, even though it cost a part of the liberty of the individual. It is not the purpose of the law to control or hinder enterprising, energetic men, with brains or capital, from developing an industry or building up a great trade or business. The largest freedom in commercial enterprises compatible with the public good should be allowed. And so there should be no interference with the right to contract or to buy or sell, unless it is apparent that the main purpose and reasonable effect of the contract is to create a condition of affairs that will enable the purchaser to control the market, destroy competition, and create a condition incompatible with the public good. As well said by the supreme court of Indiana in *Knight & J. Co. v. Miller*, 172 Ind. 27, 87 N. E. 823: "The true test is whether the contract or combination in its apparent purpose or natural consequence places a restriction upon competition, or tends to create a monopoly, or is inimical to trade or commerce; and it is not necessary that a pure monopoly is effected, or that the restraint is a complete one. . . . But the control of commodities which are necessities of life, or of material necessary or essential to building, or to sanitary regulations, or of subjects of legitimate trade affecting the interests of the public or the

interests of any particular class of citizens, either as producers, dealers, or consumers, to the extent that it either does or tends to prevent or restrain competition, cannot be justified." To the same effect is *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L.R.A. 598, 29 Am. St. Rep. 690, 19 S. W. 274.

Monopolies since the earliest times have been condemned by the courts; and contracts such as the one we are considering, having for their purpose the control of the market and the suppression of competition, are nothing more nor less than an effort to create a monopoly, and at the same time place an unlawful restraint upon trade. How to deal with the ever-growing problem involved in the attempt to suppress monopolies and combinations that have for their purpose the control of various lines of trade and industry that are close to the material needs and welfare of the people has become a matter of great public concern. Many attempts have been made by legislatures and courts to prevent and put down efforts to get possession of a useful article or commodity, but all of them have apparently proved unavailing. These illegal combinations appear in so many forms and in so many different guises that it is a difficult task to keep them under the surveillance of the law. When driven from one place of vantage by vigilance of legislatures, with the assistance of the courts, they at once seek another that seems to offer security from prosecution. As an illustration of the ingenuity in devising plans to evade the law against monopolies and combinations, this case is a fair example. Here an effort is made to accomplish by indirect methods what would be in another shape easily marked for condemnation,—the contention being that as the appellant Merchants' Ice & Cold Storage Company was not incorporated until 1906, about a year after the contract between Rohrman and the Merchants' Refrigerating Company was entered into, and was not a party to the contract, it should not be charged with or held responsible for the vice in it. It is said it only took over the Merchants' Refrigerating Company and all the properties owned by it, and so should not be made to bear the burden of the wrongdoing of that concern. There would be more force in this argument if the Merchants' Ice & Cold Storage Company occupied the position of what we may call an innocent purchaser. But it does not hold this place of advantage. It was organized by, and is substantially owned by, the persons who owned the Merchants' Refrigerating Company. Its creation was merely the last step in the

plan conceived by the Merchants' Refrigerating Company to control the ice market. As it took over the Merchants' Refrigerating Company, with full knowledge of what it had done in this direction, it will not be heard to say that its hands are clean of any complicity in the scheme partially perfected by the Merchants' Refrigerating Company, and then delivered with all the vice connected with the transaction to its successors, the Merchants' Ice & Cold Storage Company, to put it into full execution. If this kind of subterfuge were allowed there would be little use in trying to check monopolies or put the seal of condemnation upon contracts to control the market. It would only be necessary when any corporation or concern had obtained control of the market to dispose of its holdings to another and new corporation, thus evading the law, and making legal an obnoxious transaction. There is no merit in this contention, and we will treat the case as if the contract with Rohrman had been made with the Merchants' Ice & Cold Storage Company in place of its predecessor, the Merchants' Refrigerating Company. Considered from this standpoint, let us look into this contract. As an independent transaction, distinct from the plan of which it was a part, we see no objection to it. On its face it only provides for a reasonable restraint of trade. It was merely one business concern selling out to another, and so, if this was all, the contract would be free from objection, and we would grant the relief sought. But the validity of this particular contract cannot be determined by looking at it alone. It must be considered in connection with the others of which it was and is a part, and when so considered in connection with the circumstances under which it was entered into and the conditions that gave rise to its execution, we find that it was only one of a number of like contracts secured about the same time by the Merchants' Refrigerating Company, in furtherance of the purpose to obtain control of the ice market and effectually destroy substantial competition. In short, we think it is plain that the purpose in the minds of the parties to this transaction was to purchase the National Ice & Cold Storage Company and Rohrman's interest therein, as a link in the chain that would finally bind all the consumers of ice in Louisville to the wheels of a single concern, thereby creating a condition that would enable the purchaser to control the market and stifle, if not suppress, competition.

If the owners of all the ice plants in Louisville that were purchased by the Merchants' Refrigerating Company had,

while each was owning and operating his plant, entered into a trust agreement among themselves to control the market and fix the price, although the price might be reasonable, there would be little doubt about the invalidity of the contract. And the fact that this condition is brought about by the employment of other methods cannot exempt the purchaser from the operation of the rule of invalidity that would be applied if merely a trust agreement between these independent concerns had been entered into. In both instances the purpose would be the same,—the object in the minds of the promoters identical,—the only difference being in the means employed by which the same end was to be accomplished. If a contract is made that suppresses competition, and controls the market, and that contract is entered into between those who have theretofore engaged in competition in the market sought to be controlled, it is a contract in restraint of trade. It may be more. It may amount to a trust or conspiracy or a monopoly, but it is nevertheless a contract in restraint of trade. To restrain trade is the essential feature of the contract,—the reason why it was made. If trade that is in competition could not be restrained, the promoters would not go into the scheme; and when such a contract is made, whatever form it may assume, or by whatever name it may be called, and although it may be reached under the law of monopolies, trusts, and conspiracies, it will be declared void as being in unreasonable restraint of trade. Said the United States Supreme Court in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96: "We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in limiting and restricting the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded."

Some law writers have attempted to make nice distinctions between these different classes of illegal schemes, and in 30 L.R.A. (N.S.)

sist that each class should be kept in a separate column and treated apart from the others. And so there has been some criticism of the modern tendency to bring cases like this within the doctrine governing contracts in restraint of trade, upon the ground that the offense partakes of the nature of a trust, monopoly, or conspiracy, rather than a restraint upon trade as the law in reference to restraint is generally understood. But, in our opinion there seems no good reason why a case should not be treated as an illegal restraint of trade when such is its effect. And so it is not important how this control of the market or suppression of competition is effected. It is the result that the law looks at and seeks to correct, and not the means by which it is accomplished. It is not worth while to make any nice distinctions in matters like this. At last and in all events, the question in so far as it relates to restraint upon trade comes down to the proposition whether the restraint is reasonable or not. If it is, it is legal; if it is not, it is illegal.

The views we have expressed are directly at variance with the opinion of the New Jersey supreme court in *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723, strongly relied on by counsel for the appellants. In that case the court upheld a contract identical, in the circumstances and conditions surrounding it, with the one involved in this case, and, in the course of the opinion, said: "A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But in the absence of legislative restrictions (if such could be imposed), upon the acquisition of such property, and its use when so acquired, courts could impose no limitations. They would be obliged to enforce such contracts, notwithstanding the effect was to diminish, or even to exclude, competition. . . . Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade. Such corporations are empowered to purchase, hold, and use property appropriate to their business. They may also purchase

and hold the stock of other corporations. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. The legislature might have withheld such powers, or imposed limitations upon their use. In the absence of prohibition or limitation on their powers in this respect, it is impossible for the courts to pronounce acts done under legislative grant to be inimical to public policy. The grant of the legislature authorizing and permitting such acts must fix for the courts the character and limit of public policy in that regard. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish, or, for a time at least, destroy, competition. Contracts for such purchases cannot be refused enforcement. Since contracts by individuals, and by corporations having legislative authority, for the purchase of competing plants and business, may be made, and are enforceable, although, as a result thereof, competition is diminished or temporarily destroyed, it further follows that contracts reasonably required to make such purchases effective by protecting the purchaser in the use and enjoyment of the thing purchased cannot be declared by the courts to be repugnant to public policy."

And it must be admitted that this case fully sustains the contention of counsel, and if recognized as authority by us would uphold the contract here sought to be enforced. But we cannot give our approval to the doctrine announced by the New Jersey court. It is not only entirely at variance with our public policy as often declared both by the legislative and judicial departments of the state, but is contrary to the great weight of authority. Indeed we have not found any case that goes so far in an effort to promote trusts and encourage monopolies; the true and prevailing doctrine on this subject being well expressed by the Michigan supreme court in *Richardson v. Buhl*, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102, where it is said: "Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution, and is not allowed to exist under express provision in several of our state Constitutions. . . . It is always destruc-

tive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it." And by our court, in *Anderson v. Jett*, 89 Ky. 375, 6 L.R.A. 390, 12 S. W. 670, where it is said: "Rivalry is the life of trade; the thrift and welfare of the people depend upon it; monopoly is opposed to it all along the line; the accumulation of wealth out of the brow sweat of honest toilers by means of combinations is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift, and enterprise among all the citizens of the commonwealth, and is opposed to monopolies and combinations, because unfriendly to such fair dealing, thrift, and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in utterly void."

The argument is further made that the contract should be upheld because the purpose of the purchase was only to economize in the cost of producing and selling ice, and prevent competition that was destructive to the conduct of the business, and not to fix, regulate, or raise the price of the article. And it is true there is no evidence that any attempt was made to raise the price of ice. But the mere fact that no effort was made to control or fix or raise the price has little to do with the question. It is the purpose to control the market and suppress competition that constitutes the essential vice in the contract. It would not, however, be out of place to observe that the probability of an advance in the price of an article of necessity is always eminent when there is no competition and the market is controlled by one person. It is an easy step from the point at which the control of a product is accomplished to the place at which the making of an increase in the price begins. When the unrestricted control of an article or commodity is placed in the hands of an individual or corporation, there are few who can or will resist the temptation to avail themselves of the opportunity afforded to make as much profit out of the enterprise as the business will stand. That it would be inimical to the public good to have the ice business in a city the size of Louisville in the hands of one concern is, we think, a proposition so plain as not to need argument in sup-

port of it. Ice in large cities is one of the common necessities of life. It is an article which on account of its perishable qualities and the loss and expense attending its shipment affords exceptional opportunities for creating a monopoly in its manufacture and sale at the place it is used. It is easier to obtain control of the market and suppress competition in the sale of ice than almost any other article in general use. It would be almost impractical for one concern to control the dry goods, the grocery, the boot and shoe, or the hardware, or other like businesses in a large city, as goods of this character can easily be obtained at any time from other places by persons who need them, and the character of the business is such that any person with a small capital can soon set himself up in business. But the manufacture of ice requires the investment of a large sum of money to establish even a small plant. It cannot, without great deterioration, as well as expense, be imported from outside points to the place at which it is to be used. And so if it was permissible to make any discrimination between attempts to monopolize a trade or industry, it would not be amiss to single out ice as one of the articles to which the discrimination might well be applied, and the most stringent rule adopted to prevent monopoly.

The case for the appellant, tested by every rule applicable in cases of this character, falls well within the condemnation of the law, and the judgment denying it any relief must be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

RE NATIONAL GROCERY COMPANY,
Claimant, Petitioner.

RE THOMAS HASTINGS, Bankrupt.

(— C. C. A. —, 181 Fed. 33.)

Mortgage — execution exemptions — validity.

1. Where, under the local law, it is not against public policy to permit the transfer of exemptions from execution, and mortgages may cover after-acquired property, a mortgage by one of his exemptions, to apply when it is sought to be enforced, will be enforced against the claim of his trustee in bankruptcy.

Same — definiteness — sufficiency.

2. The mortgage of the statutory exemptions from execution to which a merchant is entitled out of his stock in trade is sufficiently specific to be upheld where by statute he is entitled to claim as exempt mer-

chandise to a specified value out of the stock.

Bankruptcy — mortgage of exemptions — validity.

3. The provision of the bankruptcy act empowering courts to set off to bankrupts their exemptions does not prevent the enforcement of a mortgage of such exemptions, which confers upon the mortgagee the right to select them.

Same — waiver of claim.

4. One who has mortgaged his statutory exemptions from execution cannot, by failing to claim them in bankruptcy proceedings, effect a waiver of the claim, which will prevent their enforcement by the mortgagee.

Mortgage — execution exemptions — public policy.

5. Under a statute permitting the selection of statutory exemptions to be made by the debtor or his "authorized agent," a mortgage of such exemptions, giving the mortgagee the right to make the selection, is not against public policy.

(June 7, 1910.)

Note. — Right of debtor to assign exemptions, or delegate to another the right to select exempt property.

This note is confined strictly to cases like RE NATIONAL GROCERY Co., to the exclusion of cases in which the attack is made upon the assignment by the debtor himself. This narrows the question down to the point whether the policy of the exemption laws forbids the debtor to assign the right to claim or select exempt property at a time when third persons shall seek to assert liens against the property, and when, but for the attempted assignment, and if not estopped by it, the debtor would have been entitled to make the claim or selection. An other line of cases that as a whole may fairly be said to contain nothing that is of much value in the discussion of the question in RE NATIONAL GROCERY Co. involves the power to waive the benefit of the exemption laws by executory contract, or, as it is sometimes put, to waive prospective exemptions. It will be noted that, whereas an assignment is an act whereby it is sought to convey an affirmative right of claim or selection to the assignee, the waiver is merely a means of imposing upon the debtor a negative duty, when the waiver creditor shall seek to enforce affirmative rights that may arise in his favor from other sources. There are numerous cases passing upon the power to waive, but the great majority of them seem to have arisen where debtors have sought to claim exemptions as against creditors in whose favor such debtors had previously executed waivers. It would also seem that little benefit is to be derived from a discussion of cases involving statutes exempting property by specific enumeration.

The case of Re Sloan, 135 Fed. 873 throws some light upon the distinction between an assignment and a waiver of ex-

PETITION by the National Grocery Company, claimant, to review an order of the District Court of the United States for the Eastern District of Michigan disallowing its claim to certain exempt property of Thomas Hastings, bankrupt. Reversed.

The facts are stated in the opinion.

Argued before Severens, Warrington, and Knappen, Circuit Judges.

Messrs. Bundy, Travis, & Merrick, with Mr. C. L. Benedict, for petitioner:

The lien is on exempt property, and no creditor can complain of the disposition of exempt property, because no creditor can complain of the disposition of property which he cannot reach.

Dart v. Woodhouse, 40 Mich. 399, 29

Am. Rep. 544; Emerson v. Bacon, 58 Mich. 526, 25 N. W. 503; Bresnahan v. Nugent, 92 Mich. 76, 52 N. W. 735; Root v. Harl, 62 Mich. 420, 29 N. W. 29; Fischer v. McIntyre, 66 Mich. 681, 33 N. W. 762; Rosenthal v. Scott, 41 Mich. 632, 2 N. W. 909; Anderson v. Odell, 51 Mich. 492, 16 N. W. 870; Dull v. Merrill, 69 Mich. 49, 36 N. W. 677.

A trustee in bankruptcy cannot complain of the disposition by sale or mortgage of exempt property.

Loveland, Bankr. pp. 438, 439, 514.

There is no rule of public policy violated by the giving of a mortgage upon exempt property.

Betz v. Brenner, 106 Mich. 87, 63 N. W. 970; Charpentier v. Bresnahan, 62 Mich.

emptions. There the exemptions were claimed by one to whom a bankrupt attempted to assign his right under the Pennsylvania statute, and also by the lessor of the bankrupt, who was seeking to assert his claim for rent under a lease containing a waiver of exemptions. The court said: "1. As the bankrupt's property in this case was sold by order of court, by a receiver appointed the day after the petition in bankruptcy was filed, and prior to the filing of the schedule by the bankrupt, and in view of the fact that he notified the receiver that he claimed his exemption, and specified the property at the day of sale, he would be entitled to claim his exemption from the proceeds, . . . but instead of insisting upon his claim he subsequently assigned it to another, who was not a creditor of his estate. A claim of exemption under the act of 1849 (Pa. Laws, 533) was meant only for the insolvent debtor, to keep a shelter and the means of living for himself and his family (Bowyer's Appeal, 21 Pa. 210), and it is therefore not a vendible or assignable thing (Eberhart's Appeal, 39 Pa. 513, 80 Am. Dec. 536). What he does not claim for himself and his family he leaves in the general fund and under the control of the court for distribution. Bowyer's Appeal, supra. It would seem, therefore, that the bankrupt in this case abandoned his right to claim the exemption by the execution of the assignment to Byron, and the only effect of the attempted transfer is to leave the proceeds of the sale of the articles he claimed in the general fund for distribution. A debtor cannot waive his right to the \$300 in favor of a junior creditor or assign it to a third person. Bowyer's Appeal, supra. 2. As these articles were such property as could have been taken by the landlord upon a distress for rent under his lease with the waiver of exemption, he is entitled to receive his rent as a prior claim out of the proceeds of the fixtures, notwithstanding his failure to have made a levy either before or after the filing of the petition in bankruptcy, he having proved his claim before the referee."

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And it was held in Re Pfeiffer, 155 Fed. 892, that where a debtor had, in bankruptcy proceedings against him, waived the benefits of the Pennsylvania exemption act, he could not thereafter withdraw his waiver in favor of a creditor to whom he had made an assignment of his claim. This decision seemed to be based upon the theory that the assignment of the claim of exemptions was void.

Many cases (some of them are cited in Re Sloan, supra) have been decided under the Pennsylvania act of 1849, which was construed to exempt to a debtor \$300 worth of property, provided he so elected and requested an appraisal before inquisition. It was said in Bowyer's Appeal, supra: "It is easy to see how this statute might be perverted to purposes as far as possible from the intention of the legislature, if the courts would maintain the right of the debtor to claim its benefit against one creditor, and relinquish it in favor of another; or to assign his interest under it to other parties who may or may not have paid him a consideration for it. The debtor in this case seems to have thought that the law was made, not to protect his family from want, but to give him the power of preferring those whom he chose to favor, at the expense of others whom he liked less, but whose legal rights were superior. He used it to subvert the maxims of the law, by giving to the sleepy what none but the vigilant were entitled to. We are clearly of opinion that all stipulations not to claim the \$300, made in favor of a particular creditor, are void, so far as they are intended to affect others; and that an assignment of a debtor's right is, *pro tanto*, an abandonment of it. He must make his claim, if he makes it at all, in good faith, to carry out the very purpose of the law, and no other. All transfers and all waivers of his right, whether express or implied, inure to the benefit of his creditors in the proper order of their liens. Whatever he does not claim for himself or his family, he leaves in the general fund under the control of the court, to be distributed among those who are legally entitled to it; and

360, 28 N. W. 916; Buckley v. Wheeler, 52 Mich. 1, 17 N. W. 216; Anderson v. Odell; Rosenthal v. Scott; and Fischer v. McIntyre,—*supra*; Robards v. Waterman, 96 Mich. 233, 55 N. W. 662; Harvey v. Ford, 83 Mich. 506, 47 N. W. 242; Miller v. Miller, 97 Mich. 151, 56 N. W. 348; 12 Am. & Eng. Enc. Law, 2d ed. p. 193; 18 Cyc. Law & Proc. p. 1446; Loveland Bankr. 592; Carter v. Carter, 20 Fla. 570, 51 Am. Rep. 618.

The goods were sufficiently identified.

Jones, Chat. Mortg. 4th ed. §§ 53 et seq; Loudon v. Vinton, 108 Mich. 318, 66 N. W. 222; Willey v. Snyder, 34 Mich. 60; Wilson v. Perrin, 11 C. C. A. 66, 22 U. S. App. 514, 62 Fed. 629.

If the company could have enforced its lien before any assignment by Hastings,

by entering and taking \$250 worth of property, it could enter and take such property at any time before Hastings made any such transfer, because a mortgage upon future-acquired property is valid in Michigan.

American Cigar Co. v. Foster, 36 Mich. 368; Robson v. Michigan C. R. Co. 37 Mich. 70; Eddy v. McCall, 71 Mich. 497, 39 N. W. 734; Loudon v. Vinton, 108 Mich. 313, 66 N. W. 222; Fuller v. Rhodes, 78 Mich. 36, 43 N. W. 1085; Ferguson v. Wilson, 122 Mich. 100, 80 Am. St. Rep. 543, 80 N. W. 1006.

The bankruptcy court will look to the laws of the state in which the questions arise, not only on the subject of mortgaging exempt property, but also as to the person or persons who may select such exemptions

such distribution is not to be regulated by any wish of his, no matter in what form he may choose to express it. We are not now deciding whether or not a waiver of the debtor's claim to the \$300 before execution is binding as between him and the party he agrees with, if he repents him afterwards and gives notice in time. We do not say whether he may or may not, when he creates a debt, irrevocably bind himself to defeat the object of the law with reference to his family. However this may be, he cannot, by means of a transfer or waiver, put one who has no legal right to the fund in the place of one who has."

In Yeager v. Nicholls, 7 Phila. 91, where exempt goods to the value of \$300 were set apart to the debtor, who gave them to his mother, it was held that she could not set up the claim of exemption to avoid a subsequent levy, subsequently sought to be made upon the ground that the transfer was in fraud of creditors.

The Pennsylvania courts have denied the power of a debtor to waive the benefit of the exemption in favor of a junior execution creditor, so as to give him a preference over a prior levy on the same property. Garrett's Appeal, 32 Pa. 160, 72 Am. Dec. 779; Collins's Appeal, 35 Pa. 83; Lauck's Appeal, 44 Pa. 395; Knoll's Appeal, 11 W. N. C. 511; Denlinger v. Burkey, 18 Lanc. L. Rev. 94.

On this point it was said in Shelly's Appeal, 36 Pa. 373: "Our position is taken; we have recognized in all the cases the capacity of the debtor to make the waiver, and have held it a binding contract betwixt him and the creditor in whose favor it was made; but we are admonished to go no farther by way of enabling debtors to defeat the operation of statutes. If, by waiving his rights in behalf of the last creditor on record, he may make him the first, he defeats not only the beneficent purposes of the exemption law, but all those statutes which recognize priority of lien and forbid assignments to preferred creditors. To illustrate this, suppose a debtor's land produces just \$300, and he has several judgment creditors. As between them-

selves, the first creditors in point of lien are legally entitled to be first paid; but as between all of them and the debtor, he is entitled to the fund. Such are the relations which the law establishes. But by waiving his rights in favor of the last of his creditors, the debtor virtually assigns his estate to that creditor, and reverses the relations which the law has established. It may be said that the prior creditors are not injured, since the estate would have gone to the debtor, and not to them, if the preferred creditor had not taken it; but the question is, Who gave the debtor power to control the distribution of his estate among his lien creditors? Primarily, the whole of his estate belonged to his creditors, to be distributed among them according to priority of lien. The legislature, from motives of humanity, permitted him to take \$300 of it to himself. Refusing the proffered bounty, he leaves it to be distributed as if there was no exemption law. The legislature did not mean to give him the privilege of saying which of his creditors should have his estate. The exemption is to be of a specific portion of the land, if possible, and therefore it is not to come into the distribution at all: but if it cannot be set off *in specie*, the distribution of proceeds is to be made on the same principle,—to the debtor himself, if entitled, and, if not, to the creditors in their record order. Such, and only such, is the legitimate operation of the exemption law; and therefore what was thrown out in Bowyer's Appeal is worthy to be followed."

Again discussing this question in Thomas's Appeal, 69 Pa. 120, the Pennsylvania court throws light upon the distinction between the question merely of estoppel of the debtor, and the question of the rights as between creditors. The court said: "Expressions such as used in Bowyer's Appeal, 21 Pa. 214, that 'the law does not give the debtor the power of preferring those whom he chooses to favor at the expense of those whom he liked less, but whose legal rights are superior;' and that 'whatever he does not claim for himself or his family, he leaves in the general fund under the con-

and the kinds of property which may be selected.

Loveland, Bankr. pp. 514, 516; Richardson v. Woodward, 44 C. C. A. 235, 104 Fed. 873; Re Meriwether, 107 Fed. 102; Steele v. Buel, 44 C. C. A. 287, 104 Fed. 968; Re Head, 114 Fed. 489.

Hastings received valuable consideration for his transfer, and he cannot now be heard to repudiate that portion of the contract which he does not think is beneficial to him, while he has had and retained all the benefits that accrued from its making.

Heyn v. O'Hagen, 60 Mich. 150, 28 N. W. 861; Alpena Lumber Co. v. Fletcher, 48 Mich. 555, 12 N. W. 849; Richardson v. Welch, 47 Mich. 309, 11 N. W. 172;

trol of the court, to be distributed to those who are legally entitled to it; and such distribution is not to be regulated by any wish of his,—are not applicable to this case, however they may furnish a key to the decision in that and other cases of existing liens. . . . Here is no question of lien. No creditor has levied upon the goods but the one against whom the debtor claims his exemption. The court is called upon to make no distribution among lien creditors, and the right of the debtor to his exemption is superior to the right of the execution creditor. The exemption must therefore prevail if demanded in proper time."

The question of waiver of exemptions has been discussed in many aspects in the Pennsylvania courts, but none of them seem really to involve the precise question considered in this note. The foregoing cases have been cited purely for purposes of illustration, and attention is especially called to this fact, and to the fact that other Pennsylvania cases having nearly as much actual claim to a place in this note as those cited have been deliberately excluded. It has, however, been thought best to refer to the case of Hallman v. Hallman, 124 Pa. 347, 16 Atl. 871, not because it contains matter of much relevancy to the foregoing title but because it contains a general review of the cases from a general view point, and a statement of what the court regards as the resultant rules of law. It was therein said: "The result of this somewhat prolonged discussion of the authorities may be summed up finally in the following rules, with which no authority carefully examined on its facts is in conflict, and which are believed to rest on sound reasoning and settled principles of law: First, a waiver as to any lien will inure to the benefit of all prior liens; on the principle that a debtor cannot alter the precedents settled by law. Secondly, a waiver as to any lien will inure to the benefit of subsequent liens, so far as to compel the waiver creditor to resort first to the exempted fund; on the principle of the equity of creditors having one and two funds, respectively, under their control. 30 L.R.A. (N.S.)

Holloway v. School Dist. No. 9, 62 Mich. 153, 28 N. W. 764; Crane v. School Dist. No. 6, 61 Mich. 299, 28 N. W. 105; Jones v. School Dist. No. 3, 110 Mich. 363, 68 N. W. 222; Marquette v. Wilkinson, 119 Mich. 413, 43 L.R.A. 840, 78 N. W. 474.

If there was and is an estoppel as to Hastings, then the trustee is likewise estopped.

Re Standard Laundry Co. 112 Fed. 126; Cook v. Tullis, 18 Wall. 332, 21 L. ed. 933; Re McKenna, 9 Fed. 27.

Messrs. Moore & Wilson and James A. Muir, for bankrupt:

The instrument in question is an attempt to assign the right to exercise a personal privilege, as security for the payment of

Thirdly, a waiver will not inure to the benefit of subsequent liens, beyond its own amount; so that if the waiver judgment is less than \$300, the balance will go to the debtor claiming his exemption, and this on the broad ground that men may do what they will with their own, provided they do not contravene the settled rules of law, or impair the rights of others." This case was followed in respect of the first rule, in Miller v. Getz, 135 Pa. 558, 20 Am. St. Rep. 887, 19 Atl. 955; Keetley v. Campbell, 15 Pa. Super. Ct. 415; Steininger v. Butler, 17 Pa. Co. Ct. 97.

In considering the matter of the selection of the exempt property by third persons, it should be kept in mind there is ample room for a distinction between cases in which the third person seeks to make the selection as agent for, and on behalf of, the debtor, and cases in which a person other than the debtor acts in his own behalf. This distinction is met in RE NATIONAL GROCERY Co. by the statement that since in Michigan the exemptions may be selected by the debtor or his "authorized agent," they may be selected by a transferee of the claim of exemptions, who is given express authority to make the selection, because, in such circumstances, there is an agency coupled with an interest. While it may, in some sense, be true that an agency exists, it is also true that the so-called agent acts on his own behalf, and not on behalf of the transferor.

Language bearing upon the right of a transferee to make the selection is to be found in Hombs v. Corbin, 20 Mo. App. 497, and although its tenor is to the effect that the right of selection cannot be transferred, it should be pointed out that there seems to have been no attempt expressly to delegate the power of exemption. The case arose over the right of one from whom property was sought to be recovered upon the ground that the transfer to him was in fraud of the transferor's creditors, to insist upon the transferor's right of exemption and selection under a statute permitting a debtor to select as exempt property to the value of \$300. So the question really

a past-due indebtedness, and this cannot be done.

Re Friedrich, 3 Am. Bankr. Rep. 801; Re Groves, 6 Am. Bankr. Rep. 728; Re Lucius, 10 Am. Bankr. Rep. 653.

While the state statutes control in amount and kind of exemptions, the bankruptcy act points out and governs the time and manner of claiming them.

Re Sharr, 15 Am. Bankr. Rep. 491.

The right of the bankrupt to his exemptions is determined as of the time of his adjudication.

Re Fletcher, 16 Am. Bankr. Rep. 491.

The right to exemptions is personal to debtor, and not assignable.

Smith v. Blood, 106 App. Div. 317, 94 N. Y. Supp. 667; Howland v. Fuller, 8 Minn. 50, Gil. 30; Guest v. Opdyke, 31 N. J. L. 552.

The law exempting property from execution being remedial, and resting upon

wise policy, should, so far as practicable, be construed beneficially for the debtor.

Alvord v. Lent, 23 Mich. 371.

It is designed to give him absolutely and unqualifiedly such a remnant or portion of the property used in his business as to enable him to get a new start or to keep on in his old occupation, if it is such as to be available.

Rosenthal v. Scott, 41 Mich. 634, 2 N. W. 909.

The exemption from execution is a right or privilege given to the debtor and bankrupt. He may waive it by not claiming the exemption, and if he does not choose to assert any claim to it, the mortgagee cannot claim it as against the trustee.

Edmondson v. Hyde, 2 Sawy. 205, Fed. Cas. No. 4,285; Re Lucius, 10 Am. Bankr. Rep. 654; Re Sloan, 14 Am. Bankr. Rep. 435; Bowyer's Appeal, 21 Pa. 210; Eberhart's Appeal, 39 Pa. 513, 80 Am. Dec.

was as to the right of the vendee of specific property to claim and select the vendor's exemptions, and not as to the validity of an attempt to confer upon him that right. The court said: "The right to the exemption is a personal privilege belonging to the debtor, which he may or may not claim.

. . . The debtor's right to the exemption is a privilege, but not a restraint. He may sell his exempt property, notwithstanding judgment or execution liens. Freeman, Executions, § 218. In a case of sale of exempt property, the purchaser would stand in the place of the debtor, and could assert the latter's right to the exemption. . . .

A levy upon property, therefore, made exempt by specific provisions of the statutes, may be avoided by the defendant in the execution, or by a purchaser of the exempt property. But this is true only as to property which is thus specifically made exempt, and not as to property which the defendant may select in lieu of the specified property exempt under the statute. Because, as to the right of selection, it is purely a personal privilege conferred upon the debtor, which he alone can exercise, and which he cannot transfer to another. Exempt property the debtor can sell, and it remains exempt after the sale, as it was before, unaffected thereby. Or if the property be not exempt, the debtor may select it in lieu of that which is exempt, and after the selection, sell it as he may sell the exempt property. But the right to make the selection the debtor cannot sell; he alone can exercise it. As the debtor can alone make such selection, he alone can avoid a levy on account of a failure of the officer to give him an opportunity to make it. The right to make the selection the debtor may waive just as he may waive his right to all exemptions." This language well states the considerations that led to the exclusion from this note of the cases involving provisions exempting specified property.

Substantially the same question was pre-30 L.R.A.(N.S.)

sented in Stotesbury v. Kirtland, 35 Mo. App. 148, which involved the assignment of property by a debtor to his children. The language of the foregoing case was quoted with approval, and the court in this case said: "He [the debtor] might have retained his right of exemption in the fund by assigning to his children all of it in excess of \$300, reserving that amount to himself in virtue of his rights under the statute. But he did not do this; he elected to give it all away to his children, and having given it away, it is not perceived upon what principle he can get it back through the agency of the statute of exemptions. The theory upon which his answer, the answer of the children, and the decree of the court, proceeded, is that, to the extent of \$300, his interest in the income accruing to him under his mother's will was impressed with the quality of exemption from his creditors by operation of law, and that when he assigned the whole fund to his children, it went into their hands to the extent of \$300, impressed with this exemption; so that they could hold as against his creditors this \$300, because he might have selected it, although he had not done so. The right of exemption, as we have seen, cannot, except in the case of specific chattels, be asserted by anyone save the debtor himself."

While it must be confessed that the foregoing cases do not squarely decide the precise question here considered, it would seem safe to say that the obvious leaning of the courts is toward a position from which they might be expected to declare in opposition to RE NATIONAL GROCERY Co., and the declaration in that case, that the circumstances therein disclosed were within the meaning of the Michigan statute permitting the selection to be made by the debtor or his "authorized agent," was made with a summariness that fails to pay due respect to the doubt that may well be entertained in the premises.

L. A. W.

536; *Mitchell v. Mitchell*, 17 Am. Bankr. Rep. 386; *Wilson v. Montague*, 57 Mich. 642, 24 N. W. 851; *Re Service*, 155 Mich. 179, 118 N. W. 948; *Re Schuller*, 6 Am. Bankr. Rep. 278.

The instrument is of no effect because of its inadequacy of description.

Re Schuller, 6 Am. Bankr. Rep. 279; *Knack v. Berlin*, 150 Mich. 550, 114 N. W. 342; *Re Duffy*, 9 Am. Bankr. Rep. 358; *Friedman Bros. v. Sullivan*, 48 Ark. 213, 2 S. W. 785.

Selection is a necessary element in creating exemptions.

Gass v. Van Wagner, 63 Mich. 610, 30 N. W. 198; 12 Am. & Eng. Enc. Law, p. 239; *Stotesbury v. Kirkland*, 35 Mo. App. 148; *Chapin v. Hoel*, 11 Ill. App. 309; *Miller v. Miller*, 97 Mich. 152, 56 N. W. 348; *Galbraith v. Fleming*, 60 Mich. 412, 27 N. W. 583.

Knappen, Circuit Judge, delivered the opinion of the court:

The matter here under review was heard below on the following statement of agreed facts

"First. Hastings for upwards of three years previous to filing his petition was engaged solely and principally in the retail grocery business in the city of Port Huron, in one location. At the time of the delivering of the instrument hereinafter set forth, Thomas Hastings, the bankrupt, owed the National Grocer Company \$250 and upwards.

"Second. In June, 1908, the National Grocer Company refused further credit unless Hastings gave some security, and Hastings then executed and delivered the following instrument:

"For a valuable consideration to me in hand paid, and as security for any sum that I now owe, or may hereafter owe, to the National Grocer Company, I hereby bargain, sell, assign, and transfer to said company all the goods and chattels now belonging to me in my business, that are now, or may be at any time hereafter, exempt from levy and sale on execution against me, and I hereby authorize the said company to demand, select, and receive such exemptions in my name, or otherwise, at any time and from any person from whom I might have demanded them, had this instrument not been made, or to sue for said exemptions and for damages for the detention thereof.

"Dated this 4th day of June, 1908.

[Signed] Thomas Hastings.

"Witness: E. E. Carson.

"And the National Grocer Company substituted L.R.A. (N.S.)

sequently sold him goods amounting to about \$700, and received about the same amount in cash.

"Third. In December, 1908, Hastings filed a voluntary petition in bankruptcy, in which he made no claim for his exemptions, but specifically waived them.

"Fourth. At the first meeting of the creditors, the claimant asserted its rights under the instrument, and, from the inventory compiled by the trustees, claimant selected from stock of goods certain goods in the appraised value of \$250, and of the specie and kind exempt under the statute, had the bankrupt seen fit to claim them.

"Fifth. Demand was made upon the trustee for the same, and it was agreed that the trustee should sell the goods so selected, and the funds should be held intact to await the decision of the courts."

The referee allowed the claim of the petitioner to the funds derived from the sale of the goods so selected. The district court entered an order overruling the referee, and disallowing petitioner's claim to the proceeds of the property in question. The reasons for the conclusion reached by the judge who heard the matter are thus stated in his opinion: "By this instrument the debtor did not exercise his own discretion in selecting exempt property, or attempt to execute a mortgage on any specified property, but, on the contrary, attempted to mortgage generally all of his exempt property then owned or thereafter acquired, and to vest in the mortgagee, when action might be required, the privilege of selecting the exempt property to be covered by the mortgage. I am of the opinion that this attempted delegation of the right of selection of the exempt property was against public policy and void; and that the instrument attempting to delegate this power of selection created no estoppel against the debtor himself, and is therefore ineffective as against the trustee in bankruptcy, who takes the title of the debtor." The correctness of this conclusion is the sole question presented to us.

In our opinion the learned judge erred in denying petitioner's lien. The right of exemption depends upon the Michigan statute. Section 6a of the bankruptcy act (Act July 1, 1898, chap. 541, 30 Stat. at L. 548 U. S. Comp. Stat. 1901, p. 3424) provides that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

By § 70a the title to the bankrupt's

property is vested in the trustee "except in so far as it is to property which is exempt;" and by § 47, subd. 11, it is made the duty of the trustee to "set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court as soon as practicable after their appointment." The title, therefore, to property of a bankrupt which is generally exempt by the law of the state in which the bankrupt resides remains in the bankrupt, and does not pass to the trustee. *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 L. ed. 1061, 23 Sup. Ct. Rep. 751. The Michigan statute exempts from levy and sale under execution or other final process "stock . . . to enable any person to carry on the profession, trade occupation, or business in which he is wholly or principally engaged, not exceeding in value \$250." 3 Comp. Laws (Mich.) § 10,322, subd. 8. In applying exemption laws, the bankruptcy courts are bound to follow the construction of such laws announced by the highest court of the state whose statute is involved. *Loveland Bankr.* p. 514; *Re Irvin* (8th Circuit) 57 C. C. A. 147, 120 Fed. 733; *Re Nye* (8th Circuit) 66 C. C. A. 139, 133 Fed. 33. See also *Re Baker*, 182 Fed. 392. And on the question of the validity of an instrument reserving the mortgagor's exemptions under the laws of the state, the settled local law controls. *Wilson v. Perrin* (6th Circuit) 11 C. C. A. 66, 22 U. S. App. 514, 62 Fed. 629, 631. See also *Three States Lumber Co. v. Blanks* (6th Circuit) 69 L.R.A. 283, 66 C. C. A. 353, 133 Fed. 479, 482; *Re First Nat. Bank*, 67 C. C. A. 536, 135 Fed. 62. The mortgaging or conveying of exempt property to a creditor is not against the public policy of the state of Michigan. A mortgage of exemptions of the class here in question is not required to be signed by the wife. *Charpentier v. Bresnahan*, 62 Mich. 360, 28 N. W. 916; *Miller v. Miller*, 97 Mich. 151, 56 N. W. 348; *Betz v. Brenner*, 106 Mich. 87, 63 N. W. 970. Creditors cannot complain of transfers of exempt property. *Buckley v. Wheeler*, 52 Mich. 1, 17 N. W. 216; *Fischer v. McIntyre*, 66 Mich. 681, 33 N. W. 762; *Bresnahan v. Nugent*, 92 Mich. 76, 52 N. W. 735. As the trustee in bankruptcy stands in the shoes of the bankrupt, he can take no better title than the latter had at the time the bankruptcy occurred (*York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; *Re Cincinnati Iron Store Co.* [6th Circuit] 93 C. C. A. 122, 167 Fed. 486, 488), and a transfer which is good as against the transferor is equally valid as against the trustee.

It is clear, under the foregoing decisions, 30 L.R.A. (N.S.)

that the bankrupt had the power to convey to petitioner his existing exemptions; and, as under the laws of Michigan, one may lawfully mortgage or convey property thereafter to be acquired (*Curtis v. Wilcox*, 49 Mich. 425, 13 N. W. 803; *Louden v. Vinton*, 108 Mich. 313, 318, 319, 66 N. W. 222), it is plain that the lien in question was not rendered invalid from the fact that it was made to apply to the stock as it should exist at the time the lien was sought to be enforced.

It is urged by the trustee that the description of the exemptions transferred is inadequate, in that exact property so intended to be exempted was not specified, and authorities are cited lending more or less support to this contention. In our judgment, however, the case is ruled, with respect to this proposition, by the decision of this court in *Wilson v. Perrin*, supra. In that case the mortgage, which contained a specific description of the property covered, was by its terms expressly made "subject to all exemptions from execution to which said first party may be entitled under the laws of the state of Michigan, and that his exempt interest is not covered by this mortgage." It was urged as invalidating the mortgage that, inasmuch as the mortgagee was garnished before a separation of the exempt portion had been made, there was no means to determine which portion of the stock of goods was conveyed and which was not. This court, speaking through Judge Lurton, disposed of the contention referred to in this language: "We attach no particular importance to the suggestion that the conveyance is limited to what would be left after the exemptions should be set apart. The conveyance is of the entire stock of merchandise, subject to the mortgagor's right of exemption. This is the plain and obvious meaning. As to the exemptions, it would seem that the mortgagee would take a defeasible title, subject to be defeated upon separation of the statutory amount of exemptions from the stock."

We can see no difference in principle between the validity of a description which excepts from it in general terms exemptions to be thereafter determined and a conveyance in terms of statutory exemptions which must be determined in the same way.

It is urged, however, that even if it be conceded that the assignment of the exemptions in question was originally valid, it was defeated by the failure of the bankrupt to select his exemptions under the bankruptcy proceedings, and especially by his express waiver thereof in his petition for adjudication in bankruptcy. It is ar-

gued, first, that the provisions of the bankruptcy act, impliedly at least, forbid recognition of any right to exemptions except upon the specific claim thereto presented by the bankrupt himself. The provisions of the act which are thought to produce this result are § 2, subd. 11, which authorizes courts of bankruptcy to "determine all claims of bankrupts to their exemptions," and general order No. 17 (32 C. C. A. XIX. 89 Fed. viii.), which requires a trustee to report to the court "the articles set off to the bankrupt by him." In our opinion, the sections invoked cannot be construed as denying the power of the court to recognize the right of a party other than the bankrupt, holding under a valid and effective assignment, conferring in express terms authority to make the selection in the name of the assignor. If the exemptions in question were lawfully assigned by the bankrupt, the trustee obtained no title thereto; and, as the selection was made according to an appraisal had under the direction of the trustee, there is no apparent difficulty in allowing the selection to be made by anyone representing the bankrupt.

We are thus brought to determine the second objection to the enforceability of the assignment, and upon which the court below held the petitioner not entitled to enforce the attempted lien, *viz.*, that the attempted delegation of the right to select exempt property is against public policy and void. It is true, as contended by the trustee, that the right to exemption is a personal privilege, and may be waived by the debtor, and that such privilege cannot be claimed for him by another. But this proposition is not decisive of the question before us, because the debtor did not in this case waive his privilege, but, on the contrary, took advantage of it in making the assignment in question. The assignment was based upon a valuable consideration, *viz.*, the giving of future credit; and the authority to the assignee to make the selection, if originally valid, was irrevocable, as being coupled with an interest. *Baker v. Baird*, 79 Mich. 255, 259, 44 N. W. 604.

Several decisions in other jurisdictions are relied upon by the trustee in support of his contention that the assignment of the right to select exemptions is against public policy. None of these decisions are persuasive. Three decisions of the supreme court of Michigan, invoked by the trustee, require attention. These cases are *Wilson v. Montague*, 57 Mich. 638, 24 N. W. 851; *Galbraith v. Fleming*, 60 Mich. 408, 412, 27 N. W. 583, and *Re Service*, 155 Mich. 179, 186, 118 N. W. 948. In the first of these cases it was held that a mortgage of chattels upon which a subsequent execu-

tion had been levied is not affected by the levying officer's omission to appraise the property and set off to the debtor the amount of his exemptions; that the exemption is a personal privilege which a judgment debtor can waive. This case did not in any way involve the power of a debtor to assign the right to select exemptions, nor even the right to assign the exemptions themselves. In *Galbraith v. Fleming*, it was held that the statutory right of action by ejectment, to recover unassigned dower, is vested solely in the widow, and is not conveyable to her assignee. This was put upon the ground that the authority for bringing such action must rest entirely upon statute; that the Michigan statutes confer no express authority upon an assignee to recover dower previous to assignment; that while, before assignment, the widow may release her dower to the owner of the fee so as to unite it with the fee, she cannot alien or transfer it to a stranger to the title. This is but a statement of the general rule recently applied by this court in the case of *Re Lingafelter* — L.R.A.(N.S.) —, 181 Fed. 24. Neither of the Michigan cases just referred to bears any analogy to the case we are considering. In the case of *Re Service*, it was held that the statutory right of the widow to elect to take under the provisions the statute, in lieu of the terms of the will, is a personal right, and not assignable. This case seems to have been to some extent relied upon by the judge below. Setting to one side the consideration that the holding just referred to was not necessary to a decision of the case, and assuming that the settled law of Michigan is as there stated, we are unable to recognize that case as authority for the proposition contended for here. The right of a wife to elect to waive the provisions of her husband's will, and to take under the statute of distributions, involves a personal discretion, the exercise of which by anyone other than the one for whose benefit the right is given may well be held to offend against public policy. Conceding that there is an analogy between an election to waive the terms of a will and an election to waive the benefit of a statute pertaining to exemptions, we can recognize no such analogy between the first-mentioned right of election and the right to select exemptions which have not been waived, but which, on the contrary, have been expressly claimed, by a lawful assignment and transfer. The case before us does not involve the right of someone other than the bankrupt to insist upon or to waive his claim of exemptions, but only the right of the assignee under a valid assignment to make the selection of

the exemptions so assigned, under an express authority therefor contained in the instrument of assignment. Had the bankrupt personally made the claim under the bankruptcy proceedings, there can be no doubt that the exemptions would have passed to the petitioner here. The assignment in terms authorizes the petitioner to make the selection in the name of the assignor or otherwise, thus constituting petitioner, to say the least, the agent of the assignor for the purpose.

It is to be noted that the Michigan statute in express terms permits the selection of exemptions to be made by the debtor "or his authorized agent." Comp. Laws (Mich.) 1897, § 10,326. This feature plainly distinguishes the case before us from the case of an assignment of a widow's right to elect whether to waive the terms of a will or to take under the statute of distributions, as well as from the case of a conveyance of unassigned dower, for neither of which acts is there any statutory authority. The personal discretion involved in the selection by an assignee, under power of attorney from a debtor, is of no more importance than in the case of a selection by an agent in the absence of an assignment. It is clear that this lawful authority to select exemptions, given upon a valuable consideration and coupled with an interest, could not be revoked by the failure of the bankrupt to claim the exemptions in his own name, or even by his express waiver thereof; and that the assignor was estopped so to do.

The order of the District Court is reversed, with directions to enter an order allowing petitioner's lien.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

RE CELSUS OREAR. Trustee in Bankruptcy of Jacob W. Derr et al., Petitioner.

(102 C. C. A. 78, 178 Fed. 632.)

Bankruptcy — life insurance — right of trustee.

The proviso in § 70 of the bankruptcy act, that when a bankrupt shall have an insurance policy with a cash surrender value payable to himself or his estate, he may, under certain circumstances, pay such value to the trustee and retain the policy, does not interfere with the operation of the provision in the section that the trustee shall be vested by operation of law with any property which the bankrupt could by any means have transferred, and therefore a policy the beneficiary in which may be

changed by the bankrupt at pleasure will pass to the trustee.

(Pollock, District Judge, dissents.)

(February 23, 1910.)

Note. — Life insurance as assets of bankrupt.

This question having been treated in the notes to *Morris v. Dodd*, 50 L.R.A. 43, and *Re White*, 26 L.R.A. (N.S.) 451, only the cases decided since the preparation of the latter note are considered in this note.

This question is governed by the provisions of § 70a of the bankruptcy act of 1898, and so much of this section as is necessary for the purposes of this note is set out in *RE OREAR*. The note in 26 L.R.A. (N.S.) shows that it is now settled that the proviso to § 70a does not operate to invest the trustee with the right to claim the cash surrender value of a policy as to which he has no right under other provisions of the section, but that its purpose is to confer a benefit upon an insured bankrupt by way of giving him the right to tender the cash surrender value and retain the policy where otherwise it would irredeemably pass to the trustee. This was determined in controversies over the construction of the exemption clause of § 70a in connection with the proviso.

There can be no question but that the operation of the proviso in connection with clause 5 of § 70a is not to require the bankrupt to tender to the trustee the cash surrender value of policies which he could not "by any means have transferred," but is to give him the privilege of doing so, and of retaining the policy, when that policy is one which he could "by any means have transferred," and which therefore is one that the trustee may claim. There is nothing in *RE OREAR* which conflicts with this statement. That case holds merely that the policy passes to the trustee in the first instance, and the question of the bankrupt's right to redeem by paying in the cash surrender value seems not to have been contested in the circuit court of appeals. And it should be noted that that court affirmed the referee's order conferring the privilege of redemption upon the bankrupt. The court of appeals heard the case upon appeal by the trustee upon the ground that the district court reversed the referee, and held that the policies did not pass to the trustee at all.

In some of the later cases, including *RE OREAR*, considerable attention has been devoted to the effect of the fact that a policy gives to the insured the right to change the beneficiary. This fact may operate to deprive a present beneficiary of the right to claim an exemption, or to place within the operation of other clauses of § 70a policies that otherwise might not pass to the trustee under such clauses.

The case of *Re Herr*, 182 Fed. 716, 25 Am. Bankr. Rep. 142, involved a policy on the

PETITION by the trustee in bankruptcy of Derr Brothers, a partnership composed of Jacob W. Derr and Charles C. Derr, and as individuals, bankrupts, to review in matter of law an order of the District Court of the United States for the Eastern District of Missouri reversing an order of a referee in bankruptcy directing that certain policies of insurance on the life of Jacob W. Derr be turned over to the trustee. Reversed.

The facts are stated in the opinion.

Argued before Van Devanter, Circuit Judge, and Carland and Pollock, District Judges.

Messrs. Joseph A. Wright and Warren D. Harris, for petitioner:

The insurance policies in suit give an

endowment plan, payable to the husband in 1916, or in case he died before that date, to his wife if she survived him, otherwise to his executors, administrators, or assigns. The policy had a cash surrender value, and contained a provision authorizing the bankrupt to change the beneficiary at any time. It was held that while the wife was the contingent beneficiary, the policy was under the complete control of the bankrupt, and it therefore passed to the trustee, subject to the right to redeem on paying the surrender value. The court said: "It is true that if the bankrupt died to-day, the money due on the policy would belong to his wife. But it is also true that at once, upon the discharge of the present rule, the bankrupt could eliminate her, by the designation of a new beneficiary, and get the surrender value of the policy, which the trustee therefore, by the terms of the statute, is entitled to claim. It is the uncertainty of her interest that makes it of no concern. It is only to policies where she has something dependable that the exemption applies. Because of the bankrupt's absolute command over it, the surrender value is to be regarded as payable to him, within the meaning of the law."

So, it was held in *Re Dolan*, 182 Fed. 949, 25 Am. Bankr. Rep. 145, citing *RE OREAR*, that the power of the bankrupt to change the beneficiary in an endowment policy payable to the former if she should survive the expiration of the tontine period, otherwise to the latter, rendered it property which she could have transferred within the meaning of § 70a, and therefore entitled the trustee to claim the cash surrender value.

The case of *Allen v. Central Wisconsin Trust Co.* (Wis.) 127 N. W. 1003, 25 Am. Bankr. Rep. 126, differs considerably from those just cited. In this case it appeared that before the adjudication the bankrupt had elected to withdraw the accumulated surplus of a twenty-year policy, which was then continued as a fully paid-up policy, and made payable at the insured's death to his wife, subject to his right to change the beneficiary, and payable, if no beneficiary

absolute power of disposition of the funds by the insured, enabling the insured to realize the surrender value of the policy for his own benefit, and of necessity give him as full control of the proceeds as if the money was in deposit to his credit in a bank, and therefore pass to him under § 70 of the bankruptcy act.

Loveland Bankr. 3d ed. ¶¶ 156, 464-466; *Baldwin Bankr.* 8th ed. pp. 302-304; *Cornwell v. Wulff*, 148 Mo. 542, 45 L.R.A. 53, 50 S. W. 439.

The trustee may pay the premiums upon insurance policies when policies can be rendered valuable to the estate.

Re Slingluff, 106 Fed. 154, 5 Am. Bankr. Rep. 76.

The provisions of § 70 do not conflict so

should survive, to his executors, etc. As thus converted, the policy drew annual dividends, and had a certain cash surrender value. The trustee in bankruptcy of the insured claimed the policy, but the court held that since the investment feature of the policy in behalf of the insured was entirely eliminated when the surplus was paid to the insured, the policy thereupon became and remained strictly a life insurance policy payable to the wife, and, as such, was exempt from the claims of the husband's creditors. In disposing of the contention that as the insured reserved the right to change the beneficiary, he might still convert the policy into property that would pass to the trustee, the court said: "Conceding, but not deciding, that he still has the right to change the beneficiary, and assuming that he may do so, yet it is not easy to perceive upon what ground it can be claimed that the trustee is at all concerned with what may afterward become of exempt property. The trustee is vested with the title to the property of the bankrupt, if at all, as of the date he was adjudged a bankrupt. At that time this policy was exempt, and did not pass to the trustee. It cannot pass later, no matter what the bankrupt may do."

In *Burlingham v. Crouse*, 181 Fed. 479, 24 Am. Bankr. Rep. 632, it appeared that the bankrupt had assigned absolutely to a firm of which he was a member policies on his life, payable to his executors, etc., and that the firm, after obtaining from the insurance company loans to the extent of the full surrender value of the policies, assigned them to one as security for the return of certain stocks and bonds loaned on a special account, and to secure other indebtedness. Within four months after the assignment, the firm and all members were adjudged bankrupts. Subsequently the assignee of the policies paid the premiums, and thereafter the insured bankrupt died, and the right to the proceeds of the policies was contested as between the trustee and assignee. It was held that the assignee was entitled to the proceeds, and that after deducting the amount paid by him for pre-

as to prevent the trustees taking policies over which the bankrupt retained the right to transfer.

Re Coleman, 69 C. C. A. 496, 136 Fed. 818, 14 Am. Bankr. Rep. 461; Re Welling, 51 C. C. A. 151, 113 Fed. 189, 7 Am. Bankr. Rep. 340.

Policies of life insurance which have no cash surrender value, but have an actual value, pass to the trustee.

Re Coleman, supra; Re Mertens (D. C.) 131 Fed. 972; Clark v. Equitable Life Assur. Soc. 143 Fed. 175; Re Slingsluff and Re Welling, supra; Re Holden, 51 C. C. A. 97, 113 Fed. 141.

Mr. David Goldsmith, for respondent:

No policy of life insurance passes to the trustee in bankruptcy, unless it has a cash surrender value.

miums, he was bound to apply the balance first to the payment of the special account, and then, so far as the sum would go, to the payment of other claims. Dealing with the effect upon the operation of the proviso, of the fact that the insurance company had already loaned a sum equal to the surrender value, the court said: "It is the object of the statute to place in the hands of the trustee, for distribution among the creditors, every dollar which the bankrupt could collect. Therefore, if he has a policy on which money could be collected by surrendering it, he must turn over such policy to the trustee, who may thereupon surrender and collect. Having done this, there can be, of course, no possible objection to the bankrupt effecting new insurance on his own life, if some friend or relative chooses to assist him to pay the premiums. But his doing so would involve one element of hardship. The old policy may have been taken out many years before, when the assured was a young man and the annual premium low; for the new policy a much higher premium may have to be paid. Indeed his condition of health might be such that he could not pass the examination and secure a new policy at all, and thus be unable to secure something for his family in the event of his death. It seems quite apparent from the language of the proviso that Congress was not solicitous to subject the unfortunate bankrupt to any such unnecessary hardship, and so has provided that if there is paid or secured to the trustee, for the creditors, all that the bankrupt could obtain by surrendering the old policy, he may hold and carry such policy. The policies in this case are of the kind referred to as having a cash surrender value; that value at the date when trustees qualified was somewhat less than \$15,000. Had the insurance company not made a loan to the bankrupts and secured itself by an assignment of the policies, the bankrupt or the trustees could have collected that amount upon surrendering them. But 30 L.R.A. (N.S.)

Re Buelow, 98 Fed. 86; Morris v. Dodd, 110 Ga. 606, 50 L.R.A. 33, 78 Am. St. Rep. 129, 36 S. E. 83; Barbour v. Larue, 106 Ky. 546, 51 S. W. 5; Re Mertens, 131 Fed. 972, 12 Am. Bankr. Rep. 712; Hiscok v. Mertens, 205 U. S. 202, 51 L. ed. 771, 27 Sup. Ct. Rep. 488; Re McKinney, 15 Fed. 535; Re Newland, 6 Ben. 342, Fed. Cas. No. 10,170; Barbour v. Connecticut Mut. L. Ins. Co. 61 Conn. 240, 23 Atl. 154; Holt v. Everall, L. R. 2 Ch. Div. 266; Burnside v. National Bank, 23 Ky. L. Rep. 880, 64 S. W. 520.

The right of an insured to change the beneficiary designated in a policy of life insurance is as much in the nature of a power of revocation as of a power of appointment. It does not come within the spirit or provision of subd. 3 in regard to the exercise of powers.

the company did make a loan of \$15,370 on the security of the policies, and the propriety of that loan and the validity of the company's lien on the policies are not questioned. Therefore, on the day the title vested in the trustees, the cash which the company had agreed to pay on surrender would, if surrender were claimed, have been entirely absorbed in releasing the lien of the company, whether the privilege of surrender were exercised by the bankrupt or by the trustees. There was therefore nothing to pay or secure to the trustees to take the place of the money the bankrupt might obtain by surrendering, because he could not obtain anything himself by such surrender, although the policy had a cash surrender value. To hold upon such a state of facts that the policies passed to the trustee as assets, unless the individual insured bankrupt or the bankrupt firm or somebody paid the trustees \$15,000 in addition to the \$15,000 which the insurance company would take in satisfaction of the lien, would, in our opinion, be a clear violation of the intent of Congress as expressed in the section quoted supra."

In Re Davison, 179 Fed. 750, 24 Am. Bankr. Rep. 460, after determining that a bank to whom one, more than four months before his bankruptcy, had assigned policies having no cash surrender value, as security for debts due the bank, was entitled to have their present value determined, where the bank and the trustee could not agree upon a valuation, and was authorized to convert the policies into money, credit the same upon the debts, and thereafter come in for dividends upon the unpaid balance, the court went on to determine whether the trustee could, after that, require the bank to surrender the policies to him. In arriving at a negative answer the court said: "The contention seems to be that having procured the present value of the securities to be determined, and having received that value to apply on the debt, and having also taken a dividend, *pro rata*, with

Re Rose [1904] 2 Ch. 348; *Simpson v. Bathurst*, L. R. 5 Ch. 202; *Re Guedalla* [1905] 2 Ch. 331; 1 *Sugden*, Powers, 3d Am. ed. 276, 277, pp. 225, 226; *Nichols v. Nixey*, L. R. 29 Ch. Div. 1000; *Re McKinney*, supra.

The only right which Mr. Derr possessed with regard to the policies was a bare power of appointment, and it could have been exercised by him, and, if it is not personal and passes under the bankrupt law, can be exercised by the trustee only in the manner prescribed in the policy.

Sullivan v. Maroney (N. J. Eq.) 73 Atl. 844; *Metropolitan Ins. Co. v. Clanton* (N. J. Eq.) 73 Atl. 1052; *Freund v. Freund*, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925; *Nichols v. Nixey*, supra; *Holder v. Prudential Ins. Co.* 77 S. C. 299, 57 S. E. 853.

the others, on the balance of the debt, the interest of the bank in such securities had ceased, and the equity, if any, belongs to the estate. But the bank has the policies as securities for the entire debt, and must pay therefor their present value by crediting the amount on the debt before having a dividend on the balance. §§ 57a, 57e, 57h. The law does not provide that, on crediting the value of the security on the debt and being allowed a dividend on the balance, the secured creditor is to surrender the security, even if tendered the value thereof as fixed by the court. The secured creditor has the right to retain the policies as security for any balance and any premiums it may pay to keep them alive. . . . The policies belong to the bank as security until the debt is paid, but for purposes of a dividend as well as ultimate payment it is compelled to credit now the value of such security. It does not follow that the policies and all sums received thereon at maturity will become or now become the property of the bank absolutely, for the ownership is a qualified one, I think, but the bank cannot be deprived of them until the notes are fully paid. . . . These policies were assigned to the bank in good faith more than four months before the bankruptcy, and the rights of the bank therein and thereto are in no way affected by the bankruptcy, except that it is compelled, if it elects to prove its claim, to credit the present value, as fixed in the mode provided by the act, on the debt, and I do not think this operates as an absolute sale and transfer to the bank. It is useless to speculate as to what the rights of the parties might have been or would be had the trustee or creditors offered to purchase the policies at a greater sum than the court or referee fixed as their value. Probably such offer or offers would have determined that their value was at least that sum, but, even then, the bank was not under obligation to let the policies go, except to some one willing to pay more than 30 L.R.A. (N.S.)

Carland, District Judge, delivered the opinion of the court:

This is an original proceeding to review in matter of law an order of the United States district court for the eastern district of Missouri, made January 25, 1909, reversing an order of the referee in bankruptcy made May 27, 1908. The facts upon which the questions of law arise are as follows: On January 28, 1908, Derr Brothers, a partnership composed of Jacob W. Derr and Charles C. Derr, were adjudged bankrupts, individually and as a firm. The petitioner, Celsus Orear, was duly appointed trustee of the estate. At the time of the filing of the petition in bankruptcy and the adjudication thereon, Jacob W. Derr had eight policies of life insurance upon his life for \$2,500 each, issued by the Northwestern Mutual Life

it would. Here, so far as appears, the trustee did not offer to purchase the policies or tender the amount fixed as their value, and demand their surrender. Clearly the bank cannot be compelled to part with its securities for a debt, there being no preference, until its debt is paid in full, except in case the securities are sold or converted into cash, and in such case it is entitled to the proceeds of the sale or conversion to apply on the debt. The bank cannot be compelled to part with or surrender its security for the reason it receives a dividend, or as a condition of receiving a dividend, after crediting the present value of the security as determined by arbitration or by litigation, as the court directs. It is, of course, true that the trustee became the owner of all these policies subject to the rights of the bank. He took them in the same plight and condition and subject to the same equities as the insured held them, and that condition was that the bank had the right to hold them as security for the entire debt, keep them alive by paying the premiums, and collect and apply the proceeds at maturity on such debt, or to dispose of them under the laws relating to pledges. The trustee had the right to redeem these policies on paying the debt due the bank, for the benefit of the estate. But I find no evidence of any offer to do this."

It was held in *Smith v. Mutual L. Ins. Co.* 24 Am. Bankr. Rep. 514, that where in 1901 one contracted with an insurance company for the payment to him of a life annuity to commence in 1916, in consideration of a certain premium paid at the time of the contract, and in fraud of creditors, the contract was wholly executory, and that the trustee in bankruptcy of such person could, five years after such premium was paid, elect to sue for the same for the benefit of creditors, and was not bound to trace the premium to the present possession of the insurance company in the suit against it to avoid the contract.

L. A. W.

Insurance Company, of Milwaukee, Wisconsin. Four of said policies were issued January 27, 1906. Prior to the filing of the petition in bankruptcy Derr had paid the annual premiums on each of the last-mentioned policies for two and one-half years. The next annual premium on each of said policies became due July 27, 1908. The remaining four policies were executed and delivered by the insurance company to Derr May 5, 1906. Prior to the filing of the petition in bankruptcy Derr had paid on these last-mentioned policies the annual premium for two years, and the third annual premium became due on June 5, 1908. All the policies were limited payment life policies. They each provided that after payment of premium thereon for three years or more, and upon a full and valid surrender of the policy, the insurance company would pay cash surrender values of specified amounts. On June 5, 1908, the third annual premium on four policies, amounting to \$198.50 on each policy, became due, and these policies provided for a cash surrender value of \$385 on each policy. By the terms of the four other policies the third annual premium, amounting to \$193.85 on each policy, became due July 27, 1908, and these last-mentioned policies provided for a cash surrender value of \$377 on each policy. These surrender values were payable to Derr, the insured, irrespective of the beneficiary named in the policy. The aggregate amount required to pay the third annual premium on the eight policies was \$1,569.40. The aggregate amount of cash surrender values after the third premiums were paid was \$3,048. The foregoing facts appearing to the referee by the petition of the trustee, the following order was made by the referee:

"That said bankrupt, Jacob W. Derr, forthwith execute and deliver to the trustee of this estate a good and sufficient written assignment conveying, assigning, and transferring to said trustee all his right, title, and interest in and to, and all rights, benefits, privileges, and advantages accruing to him under, eight certain policies of life insurance issued by the Northwestern Mutual Life Insurance Company upon the life of said bankrupt, for the sum of \$2,500 each, being policies numbered 656,496, 656,497, 656,498, 656,499, and 660,328, 660,329, 660,330, 660,331; and it is further ordered that said trustee pay or tender to the said the Northwestern Mutual Life Insurance Company, the annual premiums next accruing on said policies respectively, at and upon the dates when said premiums shall become due and payable upon said policies respectively; and it is further ordered that if, within thirty days after the 30 L.R.A. (N.S.)

date of the payment of said premiums upon said policies respectively, said bankrupt, Jacob W. Derr, or any beneficiary named in any of said policies, shall pay or cause to be paid to the trustee of this estate the sum of money which under the terms of such policy can be realized by said trustee upon a surrender of such policy, then said trustee shall reassign and release such policy, or any policies in respect of which payments are so made, to said bankrupt, and deliver the same to him fully discharged from any and all claims of said trustee; and it is further ordered that in the event said bankrupt or said beneficiaries shall fail or neglect to avail themselves of the right to secure a reassignment of said policies, or any of them, in the manner hereinbefore specified, then said trustee shall thereupon surrender such policy, or policies to the Northwestern Mutual Life Insurance Company, and collect from said company the cash surrender value thereof, as provided in said policies respectively."

The above order on petition of the bankrupt, Jacob W. Derr, was certified by the referee to the district court for review. The district court set aside said order, and its action in so doing is now before us for review. It is conceded that at the time of the filing of the petition in bankruptcy, January 7, 1908, the insurance policies, neither by their terms nor by any concession or practice of the insurance company, had any cash surrender value. The question of law arising upon the record is this: Did the insurance policies pass to the trustee by the adjudication in bankruptcy? If they did, then the trustee held the contracts in the same manner as a receiver, and if the referee, representing the United States district court, should be of the opinion that it would be for the best interests of the bankrupt estate that the contracts be performed in whole or in part he could very properly authorize the trustee to do so. It is to be presumed that if any question should arise in regard to the payment of individual and firm creditors the assets of the bankrupt estate would be marshaled as provided by law.

Section 70 of the bankruptcy act provides that "the trustee of the estate of a bankrupt upon his appointment and qualification . . . shall in turn be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except is so far as it is to property which is exempt, to all (1) documents relating to his property; . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person. . . . (5) property which prior to the

filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." Act July 1, 1898, chap. 541, 30 Stat. at L. 565, U. S. Comp. Stat. 1901, p. 3451.

We think the district court fell into error in holding that the policies of insurance did not pass to the trustee. Its judgment that they did not pass was based upon the erroneous proposition that the proviso in § 70, above quoted, defined and limited what insurance policies should pass. Whereas, the true construction to be given to said proviso requires us to hold that it simply excepts from the property of the bankrupt, which would otherwise pass to the trustee under the other provisions of § 70, policies of insurance which have a cash surrender value, either by the terms of the policy or by the concession of the insurance company. This construction was placed upon the proviso in the following cases: *Re Slingluff*, 69 C. C. A. 496, 106 Fed. 154; *Re Welling*, 51 C. C. A. 151, 113 Fed. 189; *Re Coleman*, 136 Fed. 818; *Re Mertens* (D. C.) 131 Fed. 972. The Supreme Court of the United States in *Hiscock v. Mertens*, 205 U. S. 202, 51 L. ed. 771, 27 Sup. Ct. Rep. 488, decided nothing contrary to the position here taken. The Supreme Court in the case mentioned decided that in order that the bankrupt should have the benefit of the proviso in § 70, it was not necessary that the insurance policy should in terms provide for a cash surrender value, but that it was sufficient to bring the policy within the proviso if, by the concession or practice of the company issuing the same, it had a cash surrender value. Neither is there anything in *Holden v. Stratton*, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656, which in any way conflicts with our views. In that case the Supreme Court held that the proviso in § 70 did not in any way modify or control § 6 of the same act, relating to exemptions. Subdivision 5 of § 70 specifies as property the title to which will vest in the trustee: "Property which prior to 30 L.R.A. (N.S.)

the filing of the petition he [bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him." Subdivision 25, § 1, of the bankruptcy act, provides that the word "transfer" "shall include the sale and every other and different mode of disposing of or parting with property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." All of the policies of insurance in controversy contained the following provision: "The insured may nominate a beneficiary or beneficiaries hereunder, and may also change any beneficiary or beneficiaries nominated by him or named in the policy."

Under this provision the insured was unequivocally given the right and power to change the beneficiary in each policy without the concurrence of the beneficiary named in the policy, and even against the will of such beneficiary. Not only so, but this power was one which he could exercise for his own benefit. To illustrate: He could have borrowed money and have changed the beneficiary so that the lender would have held the policy as security for the repayment of his money. He also could have exercised this power so as to have secured indulgence from an existing creditor. He further could have exercised this power so as to have made the policy payable to his own estate. He still further could have exercised this power by naming as the beneficiary some trustee for all his creditors. See *Atlantic Mut. L. Ins. Co. v. Gannon*, 179 Mass. 291, 60 N. E. 933.

Of the case of *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41, it is enough to say that the policies there in question did not empower the insured to change the beneficiary, but contained provisions to the contrary, as is shown by the statement preceding the opinion. Neither did the policy in *Gordon v. Ware Nat. Bank*, hereinafter cited, so empower the insured.

In the case of *Gordon v. Ware Nat. Bank*, 67 L.R.A. 550, 65 C. C. A. 580, 132 Fed. 444, this court, in an opinion, where all the cases are cited, held that the owner of a policy of insurance may lawfully and in good faith assign the same to a creditor who has no insurable interest in the assignor to secure the payment of a debt, and that on default of payment the creditor may foreclose the pledge and sell the policy at judicial sale. It necessarily results from this state of the law that Jacob W. Derr, prior to the filing of the petition in bankruptcy, could have transferred to one or more of his creditors the insurance policies in question to secure the payment of his debts. This being so, the policies were property which,

under § 70, subd. 5, above mentioned, passed to the trustee upon the adjudication of Derr as a bankrupt. Whether or not policy No. 656,496, which is expressed therein to be for the benefit of the wife of the insured, is to be regarded as exempt under § 7895, Mo. Rev. Stat. 1899 (Anno. Stat. 1906, p. 3749), and whether or not anything has occurred to avoid an exemption of the policy under that statute, are questions which were not in any manner presented before the referee or the district court, and have not been presented in this court; so we leave them undecided. The United States district court for the eastern division of the eastern district of Missouri is therefore directed to vacate its judgment of December 19, 1908, reversing the order of the referee made May 27, 1908, and enter a judgment affirming the same, but without prejudice to the right, if any, of the wife of the bankrupt to claim the policy expressed to be for her benefit, as an exemption under the state statute before mentioned.

Pollock, District Judge, dissenting:

By the foregoing opinion of my associates it is determined each and all of the eight policies of insurance involved herein, which are ten payment life contracts, under the provisions of § 70a of the bankruptcy act, by operation of law, as of the date of the adjudication (January 28, 1908), passed to the trustee in bankruptcy, with like effect as though governed by the terms of the proviso found in the section, and this notwithstanding the admitted fact that neither of said policies at the date of the adjudication had either by virtue of the terms of the contracts themselves, or by reason of a custom of the company issuing them, any surrender value whatever. And the same principles of the law are applied to each and all of the several different contracts, notwithstanding the further fact that in one the wife of the insured is named as beneficiary, and in each of three others a sister of the insured is so named, and in the four remaining no beneficiary is named, but by the terms of the contracts the power is reserved to the assured to appoint or change beneficiaries thereof at will. And this ruling is made in the absence of the beneficiaries, wife and sisters of the insured, from the record, on application of the trustee to the court for instructions as to his duties in reference thereto.

With this determination I do not agree. The statement of a few general principles admitted by all may serve to elucidate my reasons therefor.

It is common knowledge that the rights of all parties in interest in the state of a 30 L.R.A. (N.S.)

bankrupt become fixed, and are determined by the status of such parties at the date of the adjudication. Whatever the bankrupt may thereafter earn, or whatever property rights he may thereafter acquire, do not pass to the trustee, but remain with him. Whatever debts he may thereafter contract may not be liquidated from assets of his estate in the hands of his trustee. The purpose of § 70a of the bankruptcy act is to define what property or rights of property possessed by a bankrupt at the date of the adjudication by operation of law pass to the trustee for the benefit of creditors. By the true construction of this section and its proviso, all property, by the laws of the state in which the bankrupt resided and the proceedings are instituted, exempt from subjection to the claims of the creditors, is exempt from the operations, of the bankruptcy act. Policies of insurance held by the bankrupt having a cash surrender value payable to himself, his estate, or his representatives, but not by the laws of the state exempt, pass to the trustee, unless, within thirty days after the cash surrender value is ascertained by the company issuing them and stated to the trustee, there be paid or secured to him for the estate in his hands the cash surrender value found and stated by the company. *Holden v. Stratton*, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656; *Hiscock v. Mertens*, 205 U. S. 202, 51 L. ed. 771, 27 Sup. Ct. Rep. 488; *Steele v. Buel*, 44 C. C. A. 287, 104 Fed. 972.

As it stands admitted the policies of insurance in dispute did not at the date of the adjudication have any surrender value whatever, it is quite too clear for argument they did not fall within the terms of the proviso found in the section. Therefore, in the light of the principles above stated, of necessity, the policies must be found to have been either such property or property rights of the bankrupt, at the date of the adjudication, as, by operation of law, passed absolutely to and vested in the trustee of the bankrupt estate for the benefit of creditors, or to have been, by virtue of the laws of the state of Missouri, or from their very nature, such contract rights as did not vest in the trustee, but remain outside the operation of the act, to be carried out and performed for the benefit of the beneficiaries according to their terms.

To my mind, the middle ground taken by the referee, and approved in the foregoing opinion, is wholly untenable, for it determines rights of the parties in policies of insurance having no surrender value whatever, and for this reason not touched by the terms of the proviso, to be within its application.

In so far as the exemption laws of the

state of Missouri, where the bankrupt and his beneficiaries in the policies resided prior to the institution of the bankruptcy proceedings, and where the bankruptcy proceeding was instituted, are concerned, § 7895, Rev. Stat. 1899, of the state, in force at the time of the adjudication, provides, as follows: "Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of the wife of the insured, shall inure to her separate benefit, independently of the creditors, executors, and the administrators of the husband: Provided, however, that in the event of the death or divorce of the wife before the decease of the husband, he shall have the right to designate another beneficiary, upon written notice to the company, but such notice shall not be effected unless indorsed upon the policy by the president or vice president and secretary of the company issuing the policy. But when the premiums paid in any year out of the funds or property of the husband shall exceed the sum of five hundred dollars, such exemptions from such claims shall not apply to so much of said premiums so paid as shall be in excess of five hundred dollars, but such excess shall inure to the benefit of his creditors."

As the beneficiary in policy No. 656,496 is the wife of the insured, and as the annual premium paid on this policy is only \$193.85, while such contention is not made on the briefs and in the argument of solicitors for the bankrupt, yet I am at a loss to understand on what ground, in the light of the foregoing authorities, the trustee may claim or take any interest whatever in this policy, and shall therefore leave it out of any further discussion.

As to the remaining policies I find no law of the state by the terms of which they may be claimed as exempt. The question, therefore, is, Are they such property of the bankrupt as by the adjudication passed to the trustee under the provisions of § 70a of the act, and may it be so determined on this application of the trustee in the absence from the record of the sisters of the bankrupt, beneficiaries in policies Nos. 656,497 to 656,499, inclusive? There can be no question but that the sisters of the bankrupt have an insurable interest in his life. *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38. Therefore, in so far as the policies in which the sisters are named as beneficiaries are concerned, the question presented is, Do such contracts, having no surrender value at the date of the adjudication, represent accumulated property rights of the bankrupt, which, by operation of law, passed to the trustee, freed from

any claim thereto by the beneficiaries, or do they represent money expended by the bankrupt to indemnify his sister beneficiaries against loss which may be by them sustained shall they outlive the bankrupt, on the happening of the contingency of his death? The foregoing opinion proceeds on the theory the policies in dispute at the date of the adjudication represent property rights of the bankrupt accumulated by his payment of annual premiums, which, by operation of law, passed to the trustee, because, as held, the bankrupt, prior to the filing of the petition of bankruptcy, might have "transferred" them, as that word is employed in the bankruptcy act, and the case of *Gordon v. Ware Nat. Bank*, 67 L.R.A. 550, 65 C. C. A. 580, 132 Fed. 444, is cited in support of this holding. An examination of that case, however, will disclose the question here presented was not involved therein nor determined thereby. In that case the policy of which the proceeds was in dispute was written on the life of Gordon for the benefit of his wife, if she should survive him, if not, for the benefit of their children. After the premiums required by the terms of the policy to be paid had been paid, both the assured and his wife, as beneficiary, executed an assignment of the policy by way of pledge to the German Bank to secure a debt of the insured. The bank brought suit against the insured and his wife to procure a decree foreclosing the pledge and for sale of the property in satisfaction of the debt due the bank, and secured such decree, under which the policy was sold and delivered. The insured died before his wife. The contest in that case, arising over the proceeds of the policy, was between the administrator of the estate of the wife and an assignee of the purchaser at the foreclosure sale. The question determined was as to the right of such assignee, having no insurable interest in the life of Gordon, to receive the proceeds. Here the sisters as beneficiaries under the policies have executed no transfer of their rights. They have been neither consulted nor brought into this litigation. At the date of the adjudication the insurance company issuing the policies had in its possession no money or property of the bankrupt which, either according to the terms of the contract, or from its customary manner of transacting business with its policy holders, would be returned to anyone. It had the absolute right at that date to retain every dollar theretofore paid it by the bankrupt as its own property. True, the amounts theretofore paid by the bankrupt as premiums represent more than an amount sufficient to indemnify the benefi-

ciaries from loss of their insurable interest during the time the policies had remained in force, and this for two reasons: (1) The policies are ten payment contracts instead of natural life; (2) because the risk insured against increased as the age of the insured increased. Hence, the company having collected more than the amount required to protect it against the risk assumed while the policies had been in force, after payment of the third annual premium, contracted to return to the insured on the surrender of the policies and all claims thereunder, which included the rights of the beneficiary, a portion of the amount theretofore paid by the bankrupt, and thus relieve itself of further risk of liability, but this agreement was, as said in *Hiscock v. Mertens*, supra, "the result of the age of the policy, and cannot be a test of other policies or of the construction of the law." It is this contract right of the bankrupt with the insurance company made for the benefit and protection of his sisters, on which, at the date of the adjudication, the insurance company would not and could not be compelled to pay any amount whatever to any person to which on the happening of the contingency that the insured should live until the date of the third annual payment of premium. and it should be then paid, which is held to constitute an asset of the estate, and by operation of law to have passed to the trustee as against not only the bankrupt, but the beneficiaries in the policies. If this ruling be found the correct one, in reason, it must arise either from the absolute right of the insured by his own act, and without the consent of his beneficiaries, to assign and transfer his property rights in the policies held at the date of the adjudication, or from the exercise of some power reserved by the bankrupt in accordance with the terms of the contracts, which passed to and vested in the trustee, to be exercised by him under the provisions of § 70a of the bankruptcy act. By reference to the contracts it will be found no power of assignment or transfer is reserved to the bankrupt. The form and manner of assignments or transfers of the policies is left to the parties in interest, to be exercised under the general principles of the law. On this subject the contracts provide, as follows: "Assignments. If this policy be assigned a duplicate of the assignment shall, within thirty days, be given to the company and satisfactory proof of assignee's interest be produced on making claim. The company in receiving or filing any assignment will not assume any responsibility for the validity thereof."

As no such power of assignment was re-
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served in the contracts themselves, resort must be had to the principles of the law to ascertain whether the insured might by his own act, without the consent of the beneficiaries, assign or transfer the policies. In *Central Nat. Bank v. Hume*, 128 U. S. 195, 32 L. ed. 370, 9 Sup. Ct. Rep. 41, which was a contest between the beneficiaries in certain policies of insurance and the creditors of the insured, who while insolvent had paid the premiums thereon, Mr. Justice Fuller, delivering the opinion of the court, among other things, said: "Marine and fire insurance is considered as strictly an indemnity; but while this is not so as to life insurance, which is simply a contract, so far as the company is concerned, to pay a certain sum of money upon the occurrence of an event which is sure at some time to happen, in consideration of the payment of the premiums as stipulated, nevertheless the contract is also a contract of indemnity. . . . We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein on which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts which belong to the beneficiaries to whom they are payable. It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the persons or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named. *Bliss, Life Ins.* 2d ed. p. 517; *Glanz v. Gloeckler*, 10 Ill. App. 484, per McAllister, J.; *S. C.* 104 Ill. 573, 44 Am. Rep. 94; *Wilburn v. Wilburn*, 83 Ind. 55; *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771; *Charter Oak L. Ins. Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328; *Gould v. Emerson*, 99 Mass. 154, 96 Am. Dec. 720; *Knickerbocker L. Ins. Co. v. Weitz*, 99 Mass. 157. . . . Conceding, then, in the case in hand, that Hume paid the premiums out of his own money, when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered their insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The in-

terest insured was neither the debtor's nor his creditors'. The contracts were not payable to debtor or his representatives or his creditors. No fraud on the part of the wife or the children or the insurance company is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer. This seems to have been the view of the court below; for the decree awarded to the complainants the premiums paid to the Virginia company from 1874 to 1881, inclusive, and to the other companies from the date of the respective policies, amounting, with interest to January 4, 1883, to the sum of \$2,696.10, which sum was directed to be paid to Hume's administrators out of the money which had been paid into court by the Maryland and Connecticut mutual companies. But, even though Hume paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belonged to the beneficiaries for the reasons already stated. Were the creditors, then, entitled to recover the premiums? These premiums were paid by Hume to the insurance companies, and to recover from them would require proof that the latter participated in the alleged fraudulent intent, which is not claimed. Cases might be imagined of the payment of large premiums, out of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources; but no element of that sort exists here. The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground. Mrs. Hume is not shown to have known of or suspected her husband's insolvency, and if the payments were made at her instance, or with her knowledge and assent, or if, without her knowledge, she afterwards ratified the act, and claimed the benefit, as she might rightfully do (*Thompson v. American Tontine Life & Sav. Ins. Co.* 46 N. Y. 674), and as she does (and the same remarks apply to the children), then has she thereby received money which *ex æquo et bono* she ought to return to her husband's creditors, and can the decree against her be sustained on that ground?"

In that case it was held, notwithstanding the admitted fact that the premiums paid in keeping in force the contracts of insurance were paid by Hume out of his property while insolvent, yet the proceeds

of the policies passed to the beneficiaries, and were not recoverable by the creditors. This case would seem to be conclusive of the right of the bankrupt to have transferred the policies in dispute by his own act without the consent of his beneficiaries, unless such power is reserved to him by the terms of the contracts themselves, the exercise of which power passed to the trustee under the terms of the bankruptcy act. By reference to the contracts found in the record it will be seen the only power reserved by the bankrupt which he might exercise at will was the power of nominating and changing the beneficiaries in the policies. Did such a power reserved by the bankrupt, under the provisions of the bankruptcy act, at the date of the adjudication pass to the trustee, to be by him exercised at will? If so, it is clear he might, as against the beneficiaries and the insurance companies issuing the policies, substitute a representative of the creditors, and thus continue the payment of the annual premiums if permitted by the court, until the death of the insured, or until such time as the policies would have a cash surrender value, then surrender the policies and receive such cash surrender value. Section 70a of the bankruptcy act provides, in substance: "The trustee of the estate of a bankrupt upon his appointment and qualification . . . shall in turn be vested by operation of law . . . as of the date he [the bankrupt] was adjudged a bankrupt . . . (3) powers which he [the bankrupt] might have exercised for his own benefit, but not those which he might have exercised for some other person." [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3451.]

Is the power reserved by the bankrupt in these contracts of insurance, of nominating and changing his beneficiaries, such a power as he might have exercised for his own benefit, but not such as he might have exercised for the benefit of some other person? The policies in dispute are not endowment policies. They are life policies. Therefore, are payable only after the death of the insured. How, therefore, in the very nature of things, could the bankrupt exercise this reserve power for his own benefit, or by its exercise vest himself with an estate in the proceeds payable after his death? However this may be, it is quite clear the bankrupt could have exercised the power reserved, for the benefit of anyone having an insurable interest in his life, and as he could exercise the power for the benefit of another having an insurable interest in his life, under the very terms of the act in question, it is clear such power did not

by operation of law, as of the date of the adjudication, pass to the trustee to be by him exercised. As bearing on this question see 1 Sugden, Powers, 3d Am. ed. pp. 225, 226; *Re Rose* [1904] 2 Ch. 348; *Simpson v. Bathurst*, L. R. 5 Ch. 202.

It follows, I think, the policies in dispute in which the sisters are named as beneficiaries, and which at the date of the adjudication had no cash surrender value whatever, do not represent such accumulated property interests of the bankrupt as he might, prior to the filing of his petition in bankruptcy, by his own act, without the consent of the beneficiaries, by any means, have transferred, or such as might have been seized on process issued out of judicial proceedings brought against him. On the contrary, I am of the opinion all beneficial interest in such policies at the date of the adjudication resided in the sister beneficiaries, and would there continue to reside, until, in accordance with the terms of the contracts, the assured had exercised the power reserved to himself of changing his beneficiaries, or until the contracts, being by the payments of annual premiums kept in force, and having attained such age as to possess a cash surrender value, they should, with the consent of the beneficiaries, be surrendered by the assured in exchange for such cash surrender value. For, it must be thought, the Congress in limiting the character of insurance policies, not by the laws of the state exempt, which pass to the trustee by virtue of the proviso contained in § 70a of the act, not alone to such policies as at the date of the adjudication have a cash surrender value, but to such only as possess a cash surrender value payable to the insured bankrupt, his estate, or his personal representatives, made such limitation in recognition of the settled principles of the law that as to those policies not having such cash surrender value, purchased and carried by the insured as indemnity to those having an insurable interest in the life of the assured bankrupt named as beneficiaries in the policies,—such persons, and not the insured bankrupt, are the parties beneficially interested therein.

The view expressed by the majority of the court, of necessity, must result in passing all contracts of insurance (not exempt by the laws of the state) to the trustee in bankruptcy as of the date of the adjudication, notwithstanding the fact they may possess not a dollar of value to the estate, and the unhappy bankrupt may by operation of natural laws have come into that state of health which absolutely precludes the possibility of his procuring further protection for those dependent upon him.

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A view of the provisions of the bankruptcy act so futile of good, yet so fraught with disastrous results to an honest debtor and his innocent dependents, has not heretofore been taken by the courts of this country. As said by Mr. Justice White in delivering the opinion of the court in *Holden v. Stratton*, 198 U. S. 202, 49 L. ed. 1018, 25 Sup. Ct. Rep. 656: "As § 70a deals only with property which, not being exempt, passes to the trustee, the mission of the proviso was, in the interest of the perpetuation of policies of life insurance, to provide a rule by which, where such policies passed to the trustee because they were not exempt, if they had a surrender value, their future operation could be preserved by vesting the bankrupt with the privilege of paying such surrender value, whereby the policy would be withdrawn out of the category of an asset of the estate; that is to say, the purpose of the proviso was to confer a benefit upon the insured bankrupt by limiting the character of the interest in a non-exempt life insurance policy which should pass to the trustee, and not to cause such a policy when exempt to become an asset of the estate. When the purpose of the proviso is thus ascertained, it becomes apparent that to maintain the construction which the argument seeks to affix to the proviso would cause it to produce a result diametrically opposed to its spirit and to the purpose it was intended to subvert."

I am therefore of the opinion the policies under consideration, payable to the sisters of the bankrupt as beneficiaries, did not, by operation of law, pass to the trustee as assets of the estate in bankruptcy, but remained the property of the beneficiaries therein named. That the power reserved by the bankrupt of nominating and changing beneficiaries in the policies was not such a power as might have been exercised for his own benefit, but might have been exercised for the benefit of another, therefore the exercise of such power did not, under the terms of the act as of the date of the adjudication, pass to the trustee for the benefit of the estate in his hands.

In so far as the four remaining policies, Nos. 660,328 to 660,331, are concerned, in which the bankrupt had not at the date of the adjudication exercised the power reserved of appointing a beneficiary, and as the sums of money expended by the bankrupt in making payment of annual premiums were not expended for the purpose of procuring indemnity to anyone having an insurable interest in his life, and as the interests of no third person have attached, I see no reason why any amount which may be obtained therefrom may not be made available to the estate in bankruptcy from pay-

ment by the trustee of the third annual premium thereon out of the estate in his hands, if such be the better policy, and the interests of the estate will be conserved thereby.

Petition for rehearing denied.

SOUTH CAROLINA SUPREME COURT.

PEARL C. MESSERVY, by Guardian *ad Litem*, Resp't.,
v.

JOHN R. MESSERVY, Appt.

(85 S. C. 189, 67 S. E. 130.)

Divorce — alimony — compelling payment.

The court cannot compel a husband who has no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and, by exercise thereof, derive an income, to comply with the court's order to pay alimony to his wife, in a suit for her separate maintenance.

(March 10, 1910.)

A PPEAL by defendant from an order of the Common Pleas Circuit Court for Charleston County committing him for contempt for failure to pay alimony and suit money according to an order rendered in a suit for divorce. Reversed.

The facts are stated in the opinion.

Mr. W. A. Holman for appellant.

Messrs. Logan & Grace for respondent.

Hydrick, J., delivered the opinion of the court:

This is an appeal from an order of the circuit court committing the appellant to jail for contempt for failing to pay to the plaintiff alimony and suit money, according to a previous order, which was affirmed by this court. 80 S. C. 277, 61 S. E. 442.

The testimony shows that appellant is a young man of limited education, who has no trade, profession, or employment, and no property or income. It does not appear that he has, or ever had, any steady employment, or that he has ever engaged in any business. On the contrary, it does appear that he has always been supported by his father, who is a man of means. In his sworn return to the rule to show cause why he should not be attached for contempt, appellant asserts his inability to comply with the order of the court, and says that he tried to get work, but failed; and that, if he could obtain employment, on account of his lack of skill and training, 30 L.R.A. (N.S.)

he could not earn more than enough to support himself. The circuit court found as facts "that he has no property from which he can derive an income, and that he is without any income, except such as his father sees fit to allow him," and, further, "that his father will not voluntarily allow him anything for plaintiff, and that, were he disposed to share with plaintiff any allowance he might receive from his father, he would have to do so without his father's knowledge, or else such allowance would be discontinued." The circuit court held, however, that he had not made an honest effort to get such work as he was capable of doing, and therefore adjudged him in contempt.

There is no doubt of the obligation, legal and moral, of the appellant to support his

Note. — Inability to pay alimony as defense to contempt.

The general subject of contempt proceedings to compel payment of alimony is discussed at length in the note to *Staples v. Staples*, 24 L.R.A. 433, where the earlier cases upon inability to pay as a defense are considered. For a consideration of the constitutionality of imprisonment for failure to pay alimony, see the notes to *Carr v. State*, 34 L.R.A. 634, and *Ex parte Davis*, 17 L.R.A. (N.S.) 1140. As to husband's prospects as a basis for alimony, see the note to *Muir v. Muir*, 4 L.R.A. (N.S.) 909.

It is a general rule that where an attachment is sought against one who is unable to pay the ordered alimony, he will not be committed if it appears that he is unable to comply with the court's order, and did not voluntarily create the disability for the purpose of avoiding such payment.

It is no contempt not to pay what one is, without fault, unable to pay. *Kadlow sky v. Kadlowsky*, 63 Ill. App. 292. See also to similar effect *Kahlbon v. People*, 101 Ill. App. 567.

"It is neither a crime nor offense to refuse to comply with an order of court when it is not in the power of the party to do so." *Re Cowden*, 139 Cal. 244, 73 Pac. 156.

In *Schuele v. Schuele*, 57 Ill. App. 189, the court, in reversing an order committing the defendant to jail for not paying alimony, said: "It is not a contempt of court to fail to pay money which one neither has nor can obtain, and which he has not causelessly either put out of his hands or failed to receive."

In *Pancost v. State*, 15 Ohio C. C. 246, the court reversed an order committing the appellant to prison for contempt in failing to pay certain moneys for the care of his children, directed to be paid to his wife in a decree of divorce, on the ground that the amount was excessive considering the appellant's means, and that the act directed

wife. This court has held that a judgment may be given against a husband for alimony, when he has neither property nor income, but is able, by the use of his faculties, to provide maintenance for her. In such a case the wife is entitled to the judgment, even though it may be impossible for the court to enforce its payment. The court cannot deny a party the right to a judgment to which he is entitled, on the ground that the judgment debtor is insolvent or unable to pay the amount adjudged to be due, for the debtor may thereafter acquire property which could be subjected to the payment of the judgment. There is therefore no inconsistency in the court decreeing alimony in a case like this, even though it may find itself unable to enforce payment thereof. If a husband has property or an income, or if, by the exercise of his faculties, he does derive an income, the court may, in its discretion, to be exercised according to the facts of the case and the circumstances of the parties, order a part of such property or income, in excess of what is necessary for the support of the husband, devoted to the support of the wife, and obedience to such order may be enforced by attachment for contempt. The remedy, however, is a harsh one, and it should be applied with caution. But where it appears that the husband is able to comply with the order of

the court; and wilfully refuses to do so, or has, in fraud of the rights of his wife and in violation of the order of the court, brought upon himself the inability to do so, he may be punished as for a contempt. But we do not think the court can compel a husband who has no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and, by the exercise thereof, derive an income for the support of his wife. If it could do so to enforce payment of a judgment for alimony, why could it not do so to enforce payment of any other judgment? The moral obligation to pay a judgment for alimony may be greater than the obligation to pay any other, but there is no difference in the legal obligation. The court does not undertake to enforce purely moral obligations; nor can it undertake to make the thriftless thrifty.

The order of the Circuit Court is reversed, but without prejudice to plaintiff to apply for such further orders as may be proper to compel obedience to the orders of the court, if and when appellant is able to comply therewith.

Gary, A. J., and Woods, J., concur.
Jones, Ch. J., concurs in the result.

Petition for rehearing denied.

was not in his power, under the contempt statutes.

In *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653, on an appeal from an order committing the defendant to jail for contempt of court in failing to pay alimony, the court, finding that the defendant was hopelessly insolvent, and that his only income was from his profession and fell far below his office and living expenses, reversed the order.

The principle is also recognized in *Wester v. Martin*, 115 Ga. 776, 42 S. E. 81; *Van Dyke v. Van Dyke*, 125 Ga. 491, 54 S. E. 537; *McSherry v. McSherry*, 49 Ill. App. 90; *Perry v. Pernet*, 165 Ind. 67, 74 N. E. 609, 6 A. & E. Ann. Cas. 533 (suggesting that the court has power to discharge from custody one unable to pay).

Some of the cases are disposed of by failing to find the fact of inability. *Lane v. Lane*, 27 App. D. C. 171; *McSherry v. McSherry*, supra; *State ex rel. Ditmar v. Ditmar*, 19 Wash. 324, 53 Pac. 350.

In general the burden of proof is upon the defaulting party to show his disability. *Deen v. Bloomer*, 191 Ill. 416, 61 N. E. 131, reversing 93 Ill. App. 479; *Shaffner v. Shaffner*, 212 Ill. 492, 72 N. E. 447; *Zippe v. Zippe*, 143 Ill. App. 638; *Hurd v. Hurd*, 63 Minn. 443, 65 N. W. 728; *State ex rel. Smith v. Smith*, 17 Wash. 430, 50 Pac. 52.

Thus, in *State v. Cook*, 66 Ohio St. 506, 58 L.R.A. 625, 64 N. E. 567, it was held that a complaint for attachment for con-

tempt need not state the ability to pay, as that is presumably settled by the decree, and the burden is on the defaulting party to show his inability to pay.

And it has been held that the party in default may not show his inability in answer to an application to commit him, as his remedy is by an application to modify the order or decree for alimony. *Young v. Young*, 35 Misc. 335, 71 N. Y. Supp. 944; *Cahzin v. Cahzin*, 112 N. Y. Supp. 525; *State ex rel. Nixon v. Second Judicial Dist. Ct.* 14 Mont. 396, 40 Pac. 66; *Nixon v. Nixon*, 15 Mont. 6, 37 Pac. 839. See also, as stating the rule, *Delanoy v. Delanoy*, 19 App. Div. 295, 46 N. Y. Supp. 106; *Compton v. Compton*, 125 App. Div. 859, 110 N. Y. Supp. 775.

In *Mowry v. Bliss*, 28 R. I. 114, 65 Atl. 616, it was held that one imprisoned on an execution against his person for failing to pay temporary alimony could not be permitted to take the poor debtor's oath and so escape, as his only course was to pray for a modification of the decree.

In other cases it has been held that inability to pay alimony is a defense which may be set up in reply to an application to punish for contempt. *Schuele v. Schuele* and *Holcomb v. Holcomb*, supra.

And in some jurisdictions a finding of ability is a prerequisite to an imprisonment for nonpayment of alimony. *Ex parte Silvia*, 123 Cal. 293, 69 Am. St. Rep. 58, 55 Pac. 988; *Re Cowden*, 139 Cal. 244, 73

Pac. 156; Lutz v. District Ct. 29 Nev. 152, 86 Pac. 445. See also, as recognizing or assuming the rule, Allen v. Superior Ct. 133 Cal. 504, 65 Pac. 977; Ex parte Houtsen, 154 Cal. 540, 98 Pac. 391.

Work and earnings.

Where the inability proceeds from spending one's earnings or other money, the court have no difficulty in finding this to be a disobedience of its order.

Where the defendant made no effort to pay the alimony out of his earnings, and it appeared that at times they would have enabled him to pay something, the order committing him was affirmed. Deen v. Bloomer, *supra*.

Similarly, the order of commitment was affirmed where it appeared that the delinquent had expended his considerable salary upon the support of himself and his minor son, and in litigation to escape the payment of the separate maintenance of his wife and daughter under the court's decree. Barclay v. Barclay, 184 Ill. 471, 56 N. E. 821.

The fact that a divorced man would have had to exercise the closest economy to pay the alimony from his earnings will not relieve him where, two weeks after the divorce, he marries another woman and has her to support. Hoffman v. Hoffman, 28 Ohio C. C. 658.

Where a man's salary was \$112.50 per month, it was held that a finding that he was not unable to pay \$50 a month to his divorced wife was correct, in spite of the circumstance that it required \$95 a month to support himself and his new wife. State ex rel. Brown v. Brown, 31 Wash. 397, 62 L.R.A. 974, 72 Pac. 86.

The rule sustained in *MESSERVY v. MESSERVY*, that the courts cannot compel a man to work to earn alimony, does not seem to be questioned anywhere, but its application seems to have been attended with difficulty in some of the earlier cases.

Thus, it is not easy to say just where the court meant to leave the matter in *Lester v. Lester*, 63 Ga. 357. In that case the deponent answered on a proceeding to commit him for not paying alimony, that the best wages he could get did not exceed \$150 per year, and the court stated that the attachment would bring the actual resources of the deponent to a practical and decisive test, and said: "If a man, though having health, will not work for the support of his wife and minor children, a court cannot assume direct control of his will and muscle, and compel him to labor. To do this would be to reduce him to a sort of juridical slavery, and would contradict the spirit of our institutions. To be idle (taking the consequences) is one of the privileges of a freeman, unless he is convicted penally of some offense and put to work as a punishment. But, while a civil court cannot order an able-bodied man to go to work, it can, in a proper case for alimony, order him to contribute so much money at 30 L.R.A. (N.S.)

such times to the maintenance of his dependent family, and leave him to provide the money by the free and voluntary exercise of his faculties, mental and physical, or by any other means at his command. If it is not reasonably and fairly within his power to comply with the order, he may disobey it, and the court must and will excuse him. But it is not a sufficient excuse to say, 'I cannot raise the money unless I work for it,' nor, 'Although I can raise money by my labor, I cannot save that much over and above my expenses, unless I practise a more rigid economy than is agreeable to me.'"

And in *Lansing v. Lansing*, 41 How. Pr. 248, the court declined to discharge the defendant, who was in custody for contempt in failing to pay alimony, on the ground that there was no explanation why the defendant, who lived with his father, had not been able to earn \$200 per year, which was the amount of alimony required, but gave him leave to renew his application.

The later cases are clear in support of the rule. In *Ex parte Todd*, 119 Cal. 57, 50 Pac. 1071, the court said, in reversing an order committing a defendant for failing to pay permanent alimony: "The court found, among other facts, that he had no money or other means of payment, and that he had made no disposition of any property in fraud of his creditors. The court found, in other words, that it was not in the power of the petitioner to pay the money, or any part of it. But, at the same time, the court found that petitioner, having been allowed a month or thereabouts to seek employment by which he might have earned money to make the weekly payments of alimony as prescribed in the order, had wholly failed and neglected to make any effort to obtain employment, and therefore ordered him to be imprisoned in the county jail until he paid the \$200 due. This order was clearly in excess of the power of the court, which cannot compel a man to seek employment in order to earn money to pay alimony, and punish him for his failure so to do."

In *Webb v. Webb*, 140 Ala. 262, 103 Am. St. Rep. 30, 37 So. 96, the court, in affirming an order refusing an attachment against a husband for failure to pay temporary alimony in a suit brought by him against his wife for divorce, said: "The only remaining insistence is that he is able to work, and will not work, to earn the money to make the payment, and the court ought to commit him for default in this respect. It is difficult to understand how the desired result was thus to be accomplished, and how the court would go about it. If complainant would not labor, the court was without power to inflict corporeal punishment to compel him. If it imprisoned him till he was willing to work, that would not have produced money, meantime, but would have entailed expense for the imprisonment; and if imprisoned, and he should relent and come in and signify his willingness to labor, employment would have had to be obtained

for him, by the court, by himself, or someone else; and how the court would have proceeded legally to hire him out, or supervise him if he hired himself, and collect the money for application to its decree, has not been made to appear."

B. B. B.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

JAMES R. WOODWARD, Plff. in Err.

(— W. Va. —, 69 S. E. 385.)

Intoxicating liquors — Sunday closing act — constitutionality.

1. Sections 1 and 3 of chapter 14, Acts Ex. Sess. 1908 (Code Supp. 1909, §§ 933a1, 933a3), closing saloons on Sunday, are not unconstitutional as imposing punishment cruel or unusual or disproportionate to the offense, or depriving of property without due process.

Criminal law — crimes — creation — power of legislature.

2. The legislature has power to create and define crimes and fix their punishment, so only that such punishment is not cruel or unusual or disproportionate to the offense.

Intoxicating liquors — regulation of sales — closing place where sold.

3. The legislature has power to regulate and restrict the sale of intoxicating liquor, and to revoke license and close places where sold under it, upon conviction of offense against liquor law.

(October 25, 1910.)

Headnotes by BRANNON, J.

Note. — Constitutionality of statute by which conviction of violation of liquor law entails revocation of license and prohibition of sale of liquor.

The scope of this note excludes a consideration of those statutes which provide that places where liquor is illegally sold shall be deemed public nuisances, and may be abated as such; and it also excludes statutes providing for special proceedings for the revocation of liquor licenses for violations of liquor laws by holders thereof.

For a general consideration of the police power of the state as to intoxicating liquors, see note to *Tragesser v. Gray*, 9 L.R.A. 780.

And as to cruel and unusual punishments in general, including punishment of liquor law offenses, see note to *State ex rel. Garvey v. Whitaker*, 35 L.R.A. 561.

The decisions seem to be almost unanimous that no constitutional provision is violated by statutes by which conviction of violation of liquor laws entails revocation of license and prohibition of the sale of 30 L.R.A. (N.S.)

ERROR to the Circuit Court for Randolph County to review a judgment convicting defendant of keeping open a saloon on Sunday in violation of law. Affirmed.

The facts are stated in the opinion.

Mr. W. B. Maxwell, for plaintiff in error:

The statute is unconstitutional in that punishment forfeiting the license and closing the place of business for a violation is so severe and so out of all proportion to the offense as to shock public sentiment and violate the judgment of reasonable people.

Robinson v. Miner, 68 Mich. 549, 37 N. W. 21; 8 Am. & Eng. Enc. Law, 2d ed. p. 437; 12 Cyc. Law & Proc. p. 963.

Mr. William G. Conley, Attorney General, for the State:

The power to make laws regulating or prohibiting the sale of intoxicating liquors is within the police powers of the state.

Cooley, Const. Lim. 720; *United States v. Nelson*, 29 Fed. 202; *McKinney v. Salem*, 77 Ind. 213.

A state has the right to prohibit, restrict, or regulate all sales and traffic in intoxicating liquors within the state, and to inflict penalties for their manufacture and sale, and for the violation of the laws regulating and prohibiting same, and for the abatement of property used for such forbidden purposes.

Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *License Cases*, 5 How. 504, 12 L. ed. 256; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323.

Under its power to regulate the sale of

liquor on the premises or by the licensee for a specified period.

Thus, in *Re Sarlo*, 76 Ark. 336, 88 S. W. 953, the court said: "The authorities are practically uniform in holding that a liquor license is a mere privilege, revocable at the will of the state. It is not a contract between the state and the licensee, and no property rights inhere in it. Constitutional limitations against impairing obligations, retroactive laws, etc., cannot be invoked in support of rights under it. It is not a vested right for any definite period: in fact, it is not a vested right at all, but is a mere permission temporarily to do what otherwise would be a violation of the criminal laws."

So, in *Com. v. Brothers*, 158 Mass. 200, 33 N. E. 386, it is held that "if a druggist sells intoxicating liquors in violation of his license, it is not unconstitutional to impose upon him a penalty or punishment in addition to providing by statute that his license shall be void."

And in *Campbell v. Thomasville*, 6 Ga.

intoxicants, the legislature may require saloons to be kept closed on certain days and at certain hours, and where a statute requires that saloons shall be closed on Sundays, the offense of keeping open is complete even though no sale be made; it need not be alleged or proved that the defendant sold any liquor.

Sullivan v. District of Columbia, 20 App. D. C. 29; Williams v. State, 100 Ga. 511, 39 L.R.A. 269, 28 S. E. 624; Baldwin v. Chicago, 68 Ill. 418; State v. Heibel, 54 Ohio St. 321, 43 N. E. 328; State v. Binard, 21 Wash. 349, 58 Pac. 210.

The legislature of the state has full power to impose such conditions upon those licensed to sell liquor, as it may deem proper and requisite for the good of the community.

App. 212, 64 S. E. 815, the court, in reviewing *seriatim* the provisions of municipal "near beer" ordinances alleged as a whole to be unconstitutional, said: "The provision for the forfeiture of the license upon the holder's being convicted of violating the provisions of the ordinance or the laws of the state is, of course, reasonable."

"An Act to Prohibit the Sale of Liquor on Sunday," which, in addition to prohibiting Sunday sales and fixing a punishment for violations, provides "that if any person is convicted twice under this act for offenses committed within one year, such person shall also forfeit his license and be debarred from conducting for himself or another the business of a dealer in spirituous, vinous, or malt liquors for a period of two years after such conviction," is not violative of a constitutional provision that "each law shall contain but one subject, which shall be clearly expressed in its title;" such provision of the statute being directed, and plainly and unquestionably germane and referable, to the subject clearly expressed in the title. Borck v. State (Ala.) 39 So. 580.

And the title of an act, "The Better Regulation and Restriction of the Sale of Intoxicating Liquors," clearly covers a provision therein that, for a second conviction for violation of any section of the act, the court may, and upon a third conviction shall, annul the license and all rights thereunder; and such title is not in contravention of a constitutional provision that "every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title." State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469.

As to the constitutional provision against excessive fines and cruel and unusual punishment, discussed at length in STATE v. WOODWARD, the conclusion there reached seems to be sound, that such provision is not violated by a statutory provision that a judgment of conviction of violation of the liquor laws shall also revoke the license granted for the sale of liquor on the prem-

Lodano v. State, 25 Ala. 64; Hoboken v. Greiner, 68 N. J. L. 592, 53 Atl. 693.

One who accepts a license under a statute for the sale of intoxicating liquors must be deemed to consent to all the conditions and restrictions which have been or may be imposed by the legislature in the interest of the public morals and safety, relative to the traffic in the place in which he sells.

Hedderich v. State, 101 Ind. 564, 51 Am. Rep. 768, 1 N. E. 47; State v. Gerhardt, 145 Ind. 439, 33 L.R.A. 313, 44 N. E. 469.

The law takes no record of the purpose for which the place is open. If the saloon was open during that time, the criminality of the act is not obviated by the fact that the purpose was innocent and harmless.

Monsey v. State, 78 Ga. 110; Rosenthal v. Hobson (Iowa) 77 N. W. 488; People v.

ises involved, and that the court shall order that such premises shall not be used for the sale, storage, or manufacturing of liquor for one year from and after conviction.

So, in Borck v. State, *supra*, it is held that a statute providing that, for a second conviction for illegal sales of liquor on Sunday made within one year, a licensee forfeits his license, and is prohibited from engaging in the business for the period of two years, is not offensive to the provisions of either the Federal or State Constitution against cruel and unusual punishment.

Nor is such constitutional provision violated by a statutory provision authorizing a fine and a forfeiture of his license upon conviction of the licensee for violating the law. Dinuzzo v. State, 85 Neb. 351, 29 L.R.A.(N.S.) 417, 123 N. W. 309.

And a statute providing that a liquor license shall be forfeited in addition to other penalties provided by law, for the illegal sale of liquor by the licensee, is not unconstitutional as imposing an excessive penalty. Krueger v. Colville, 49 Wash. 295, 95 Pac. 81.

But in Robinson v. Miner, 68 Mich. 549, 37 N. W. 21, a liquor statute was held unconstitutional, both as to the severity and the inequality of the punishment fixed, as inflicting unusual punishment and denying equal protection of the laws, where it entailed, upon conviction of violation of any of its provisions, in addition to fine and imprisonment, a forfeiture of the tax paid and incapacity to continue business for various specified periods,—in the case of a druggist, after a second offense, for five years; and in the case of others, for the remainder of the year or time for which the tax was paid, and for one year after conviction.

As against allegations of violation of constitutional provisions that no person shall be deprived of life, liberty, or property without due process of law, statutes of the kind under consideration have been upheld both on the ground that due process is

Talbot, 120 Mich. 486, 79 N. W. 688; People v. Waldvogel, 49 Mich. 337, 13 N. W. 620; Croell v. State, 25 Tex. App. 596, 8 S. W. 816; People v. Higgins, 56 Mich. 159, 22 N. W. 309; People v. Gordon, 156 Mich. 237, 21 L.R.A.(N.S.) 136, 120 N. W. 578; State v. Schell, 22 S. D. 340, 117 N. W. 505; State v. Fairchild, 22 S. D. 343, 117 N. W. 506; Black, Intoxicating Liquors, 393; Klug v. State, 77 Ga. 734; Kroer v. People, 78 Ill. 294.

The legislature is the judge of the expediency of creating new crimes, and of prescribing penalties, whether light or severe.

Com. v. Murphy, 165 Mass. 66, 30 L.R.A. 734, 52 Am. St. Rep. 496, 42 N. E. 504, 10 Am. Crim. Rep. 67.

A license to sell liquor being neither a contract nor a right of property, but merely a temporary permit to do that which would otherwise be unlawful, the authority which granted it always retains the power to revoke it, either for due cause or forfeiture, such as the violation of the laws regulating the traffic, or upon a change of policy and legislation in regard to the sale of liquors; and such revocation cannot be complained of as a breach of contract, or as unlawfully divesting the licensee of his rights or his property.

23 Cyc. Law & Proc. p. 155; Davis v.

Com. 75 Va. 944; Hogan v. Guigon, 20 Gratt, 705; Bishop, Statutory Crimes, § 1003a.

The order of the court not to use the room and premises for the sale and storage or manufacture of intoxicating liquors for one year from and after the conviction was not excessive, cruel, or unusual punishment.

23 Cyc. Law & Proc. p. 302; Code 1906, chap. 32, § 24; State v. Reymann, 48 W. Va. 307, 37 S. E. 591; Cohen v. King Knob Club, 55 W. Va. 108, 46 S. E. 799; State v. Adams, 81 Iowa, 593, 47 N. W. 770.

Brannon, J., delivered the opinion of the court:

By chapter 14 of the extra session of 1908 (Code Supp. 1909, § 933a1) a new offense is created. In its 1st section it enacts that "all rooms, except drug stores, where any of the liquors mentioned in § 1 paragraph c, chapter 36, Acts of 1905, are sold or kept for sale, either at wholesale or retail, shall be kept closed and securely locked on the first day of the week, commonly called Sunday, from and after the hour of 12 o'clock Saturday night and until 5 o'clock on the morning of the succeeding Monday, and no person shall be permitted in such room for any purpose during the days and hours when it is by

in fact had, as pointed out in STATE v. WOODWARD, and on the ground that the rights of the licensee are not "property" within the meaning of this constitutional provision. Thus, in Sprayberry v. Atlanta, 87 Ga. 120, 13 S. E. 197, involving a city ordinance providing that the conviction of a licensee for violation of the liquor laws should work an immediate revocation of his license, the court said: "The license being a mere privilege to carry on a business subject to the will of the grantor, it is not property in the sense which protects it under the Constitution. The revocation of the license does not deprive the citizen of his liberty or his property without due process of law."

And in Martin v. State, 23 Neb. 371, 36 N. W. 554, affirmed on rehearing in 27 Neb. 325, 43 N. W. 108, holding that a statute providing that a license "shall be revoked by the mayor and council upon conviction of the licensee of any violation of any law, ordinance, or regulation pertaining to the sale of such liquors," is not unconstitutional as depriving the licensee of property without due process of law, the court said: "There is no vested right in a license to sell intoxicating liquors, which the state may not take away at pleasure.

Such licenses are not contracts between the state or municipality issuing them and the licensee, but are mere temporary permits to do what otherwise would be unlawful."

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So, a statute providing that a liquor license shall be forfeited in addition to other penalties provided by law, for an illegal sale of liquor by the licensee, is not unconstitutional as depriving the licensee of his property without due process. Krueger v. Colville, supra.

And a statutory provision for a forfeiture of his license in addition to a fine, upon conviction of a licensee for violating the law, is not unconstitutional as depriving him of property without a jury trial. Dinuzzo v. State, supra.

And neither the constitutional provision preserving the right of trial by jury, nor one prohibiting the taking of property without a judicial proceeding, is violated by a statute providing that if the holder of a license permits certain illegal sales of liquor on his premises, his license shall thereby become forfeited, and that, upon prescribed complaint being presented to the board of excise commissioners, alleging that such license has become forfeited and specifying the acts complained of which are alleged to have worked such forfeiture, the board shall investigate, and if the licensee is found guilty of any of the alleged offenses, his license shall be revoked and annulled, and he shall be disqualified for one year from receiving a license in the state. Voight v. Board of Excise, 59 N. J. L. 358, 37 L.R.A. 292, 36 Atl. 686. A. C. W

law or ordinance required to be closed. All openings of every sort from such room to any other room, hall, vestibule, entrance, or stairway, situated in the building, or from such room to any building or room adjoining the room in which said business is carried on, or from such room to any basement or cellar, chamber or attic, shall be kept securely closed and locked on said first day of the week." Its 3d section (§ 933a3) provides that any person, his agent or employee, violating the 1st section, "shall on conviction be fined not less than \$50 nor more than \$250, and be imprisoned in the county jail not less than six months nor more than twelve months; and such violation by an agent or employee shall be deemed an offense as well by the principal or employer, and they may be indicted for the same either jointly or separately. The court before which such conviction is had shall, as a part of its judgment, revoke the license granted for the sale of spirituous liquors on said premises and shall order that said room and premises shall not be used for the sale, storage, or manufacture of such liquors for one year from and after such conviction." Under this James R. Woodward was indicted in the circuit court of Randolph county; the indictment charging that, having a state license to sell at retail spirituous liquors, he did, in a certain room in which he sold and kept for sale spirituous liquors, "unlawfully unlock and open the said room and enter therein on the morning of said day, being the first day of the week, commonly called Sunday." Woodward was found guilty by a jury, and the judgment was that he pay a fine of \$50 and be confined in jail six months, and that his liquor license be revoked, and that the room where he sold and kept liquors for sale should not be used for the sale, storage, or manufacture of such liquor for one year after the date of the judgment.

The defendant moved the court to quash the indictment, and for a new trial; but the court overruled the motions. In his motion to quash the indictment he suggested that the statute is contrary to the 14th Amendment of the Federal Constitution and § 10 of article 3 of the state Constitution (Code 1906, p. li.), both providing that no person shall be deprived of life, liberty, or property without due process of law. We cannot see that the statute is obnoxious to that objection. It provides for the ordinary process of law by conviction on trial upon indictment. I need not cite authority to show that this is due process of law. Surely, so far as fine and imprisonment are concerned, under our Constitution he must be indicted and tried by his peers. This is 30 L.R.A. (N.S.)

in the highest sense due process of law, under which even life may be taken. We do not think that that feature of the statute which commands the court, on conviction, to revoke the liquor license and to close the place of sale, is any more open to constitutional objection, since that is a part of the penalty prescribed by the statute for the offense, and is inflicted only after due process has been had. This matter falls under the rule that the legislature is clothed with power well nigh unlimited to define crimes and fix their punishment. So its enactments do not deprive of life, liberty, or property without due process of law and the judgment of a man's peers, its will is absolute. It can take life, it can take liberty, it can take property, for crime. "The legislatures of the different states have the inherent power to prohibit and punish any act as a crime, provided they do not violate the restrictions of the state and Federal Constitutions; and the courts cannot look further into the propriety of a penal statute than to ascertain whether the legislature had the power to enact it." 12 Cyc. Law & Proc. p. 136. "The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government." *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110. The legislature is ordinarily the judge of the expediency of creating new crimes, and of prescribing penalties, whether light or severe. *Com. v. Murphy*, 165 Mass. 66, 30 L. R. A. 734, 52 Am. St. Rep. 496, 42 N. E. 504, 10 Am. Crim. Rep. 67; *Southern Exp. Co. v. Com.* 92 Va. 66, 41 L.R.A. 436, 22 S. E. 809. For such a fundamental proposition I need cite no further authority. As to that feature of the act forfeiting license and closing the saloon, it falls under the power to punish after conviction. It is a forfeiture which may as validly be enacted as the imposition of imprisonment and forfeiture of money. The power of the legislature to declare what are nuisances and to authorize their removal is established clearly by authority. *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Kirkland v. State*, 72 Ark. 171, 78 S. W. 770, 65 L.R.A. 76, 105 Am. St. Rep. 25, 2 A. & E. Ann. Cas. 242, and note, is full on this subject.

Where Woodward accepted his license, he accepted it subject to legal regulations, and surely, for a violation of the law, the legislature could declare its forfeiture. And

so it might authorize the closing of the saloon, as the instrument used in the violation of the law. Statutes providing forfeiture of liquor licenses are numerous and constitutional. Fines may be imposed, and this is a fine levied on a specific article, instead of the offender's estate at large. The power is universally conceded, says Bishop's Statutory Crimes, §§ 993, 1056. So license may be revoked. *Id.*, § 1003a. Our very Constitution gives the state power to deal with the evil resulting from intoxicating liquors, in the provision that "laws may be passed regulating or prohibiting the sale of intoxicating liquors within the limits of this state." Article 6, § 46 (page lxiii.). This is a very great power; it is hard to say where its limits are. It may make any kind of regulations in the wisdom of the legislature adapted to regulation. This power falls within the great police power so widespread and so necessary to a state government. Though counsel for Woodward made the suggestion in the motion to quash the indictment, that the act deprived of life, liberty, and property without due process, he seems not to rely on it, as he does not pursue it in his brief. He seems rather to base his charge of unconstitutionality on that provision of the Constitution of the state (article 3, § 5, p. 1.) saying that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offense." What is meant by the provision against cruel and unusual punishment? It is hard to say definitely. Here is something prohibited, and, in order to say what this is, we must revert to the past to ascertain what is the evil to be remedied. Within the pale of due process, the legislature has power to define crimes and fix punishments, great though they may be, limited only by the provision that they shall not be cruel or unusual or disproportionate to the character of the offense.

Going back to ascertain what was intended by this constitutional provision, the history of the law tells us of the terrible punishment visited by the ancient law upon convict criminals. In our days of advanced Christianity and civilization, this review is most interesting, yet shocking and heart rending. Take the case of treason. Blackstone says (bk. 4, p. 92) that "the punishment of high treason in general is very solemn and terrible: 1. That the offender be drawn to the gallows, and not be carried or walk, though usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme tor-

ment of being dragged on the ground or pavement. 2. That he be hanged by the neck and then cut down alive. 3. That his entrails be taken out and burned while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the King's disposal." Blackstone, bk. 4, p. 327, says: "The English judgment of penance for standing mute was as follows: That the prisoner be remanded to the prison from whence he came, and put into a low, dark chamber, and there be laid on his back on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more; that he have no sustenance, save only, on the first day, three morsels of the worst bread, and, on the second day, three draughts of standing water, that should be nearest to the prison door; and in this situation this should be alternately his diet till he died, or (as anciently the judgment ran) till he answered." This horrible punishment was called in old English law, in law French, *peine forte et dure*. In case of a woman her judgment is to be drawn and burnt, as well in high treason as petit treason, and she is neither hanged nor beheaded. She was on account of sex relieved from exposure of disembowelment and being cut into four pieces. Blackstone says (bk. 4, p. 377): "Some punishments consist in exile or banishment, by abjuration of the realm, or transportation; others in loss of liberty, by perpetual or temporary imprisonment some extend to confiscation, by forfeiture of lands or movables, or both, or of the profits of lands for life; others induce a disability of holding offices or employments, being heirs, executors, and the like; some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears; others fix a lasting stigma on the offender, by slitting the nostrils or branding in the hand or cheek; some are merely pecuniary, by stated or discretionary fines; and, lastly, there are others that consist principally in their ignominy though most of them are mixed with some degree of corporal pain, and these are inflicted chiefly for such crimes as either arise from indigence, or render even opulence disgraceful, such as whipping, hard labor in the house of correction or otherwise, the pillory, the stocks, and the ducking stool." What was meant by "drawing" was tying the culprit's feet to a horse's tail and dragging him along the ground to the gallows. For this drawing the English had Bible precedent, as we find in Sharswood's Blackstone, bk. 4, p. 93, note: "This punishment for treason, Sir Edward Coke

tells us, is warranted by divers examples in Scripture; for Joab was drawn, Bithan was hanged, Judas was emboweled, and so of the rest." It was the infliction of such cruel judgments in the days of the tyrant Stuarts that caused the insertion in the English Bill of Rights in 1688 of this clause, and caused its presence in American Constitutions, national and state. But it refers only to punishment of such cruel character. It does not trench upon that wide power of the legislature to say what are offenses and fix their punishment, "so long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and make one shudder with horror to read of them, such as drawing, quartering, and burning." *Whitten v. State*, 47 Ga. 301. A free colored man was convicted of larceny of \$100, and was sentenced to receive 39 stripes on his bare back, and be sold as a slave, and transported and banished beyond the limits of the United States. A statute authorized that severe punishment. The general court of Virginia said that the constitutional provision was not designed to control the legislative right "to determine *ad libitum* upon the adequacy of punishment, but is merely applicable to the modes of punishment." *Aldridge v. Com.* 2 Va. Cas. 447. A man was convicted of keeping a gaming table. Under statute he was subject to punishment of imprisonment in the jail not less than one month nor more than six, on low, course diet, and punished with stripes to be inflicted at one or different times. It was held that the act was not repugnant to the Bill of Rights, and that whipping was not an "unusual" punishment in the constitutional sense, though it might consist of several whippings. *Com. v. Wyatt*, 6 Rand. (Va.) 694.

How can we say that the statute before us inflicts cruel punishment when our statutes have punished with death, lifelong imprisonment, and fines, and forfeiture of instruments of crime through centuries? Nobody can question their validity. Inflicting death by electricity is unusual, in a sense, a new mode, but held not contrary to the prohibition; not as cruel as hanging, which is surely not prohibited. *Re Kemmler*, 136 U. S. 436, 446, 34 L. ed. 519, 523, 10 Sup. Ct. Rep. 930. The court said punishments are cruel when they involve torture or lingering death, but punishment by death is not such. In *Wilkerson v. Utah*, 99 U. S. 130, 135, 25 L. ed. 345, 347, it was held that execution of death sentence by shooting does not violate this clause. The statute punished murder by death, by shooting, hanging, or beheading. It was held not to be invalid. It does not 30 L.R.A. (N.S.)

clearly appear that the court would have approved the sentence, if there had been judgment by beheading, but did not condemn the act. Beheading would be no more cruel than hanging, not so much so. The court said: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. *Cooley*, Const. Lim. 4th ed. 408; *Wharton*, Crim. Law, 7th ed. § 3405." The provision does not affect legislation providing imprisonment for life or years, or death by hanging or electrocution, and if it did, the laws for the punishment of crime would give no security. *Hobbs v. State*, 133 Ind. 408, 18 L. R. A. 774, 32 N. E. 1019. This interdict applies to such punishment as amounts to torture, like drawing, quartering, burning at stake, cutting off nose, arms, or limbs, starving to death, or such as were inflicted by the act of Parliament in 22 Henry VIII., whereby the prisoner was ordered to be thrown into boiling water and boiled to death for poisoning. *State v. Williams*, 77 Mo. 310. The word "cruel," as used in the Constitution, was intended to prohibit torture, agonizing punishment, but never intended to "abridge or limit the selection by the lawmaking power of such kind of punishment as was deemed most effective in the punishment and suppression of crime." *Garcia v. Territory*, 1 N. M. 415. See 35 L.R.A. 561, for a fine collection of authorities upon this subject. The late case of *Weems v. United States*, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, discusses this subject, and it is there said that the provision in question is intended to veto statutes inflicting such cruel punishments as had been inflicted in England above mentioned. The same principle will be found stated in *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693. In short, the text writers and cases say that the clause is aimed at those ancient punishments, those horrible, inhuman, barbarous inflictions. We can by no means say that the statute before us falls under this ban.

So I conclude that this act does not violate the Constitution in its injunction against "cruel and unusual punishment." When the court said, in the *Aldridge Case*, that the provision was not designed to control the legislature in determining at its pleasure upon the adequacy of the punishment, but merely as to the modes of pun-

ishment, it is possibly right, because the Virginia Bill of Rights prohibited cruel and unusual punishments, but did not contain those words in our Constitution: "Penalties shall be proportioned to the character and degree of the offense." This certainly does not only, if at all, refer to the mode of punishment, but to the degree, extent, and quality. Even without such a clause, under the words "cruel and unusual," it has been held that imprisonment for too long a time, though imprisonment is not cruel or unusual, is forbidden by those two words. *Weems Case*, supra. Surely, under our Constitution fines so excessive, imprisonment so long, looking to the offense, as to shock our feelings of humanity, conscience, justice, and mercy, would be branded by this clause. I suppose that a sentence for years to the penitentiary for assault and battery attended with no serious results, or long imprisonment in jail for profane swearing, would fall under that clause. But it is established everywhere that the legislature has large discretion as to punishment in kind and degree. Can we say that this act, which fixes punishment at a fine of from \$50 to \$250 and imprisonment from six months to one year, is so disproportionate to the offense as to be unconstitutional? Counsel says that it is unusual and severe and drastic. Drastic and severe it is, but not beyond the scope of legislative authority. The evident purpose of the new statute is to protect Sunday from profanation and desecration by not only carrying on a business, but from drunkenness. Through the centuries Sunday has been protected from secular business and desecration by statutes of more or less severity. The great majority of people whether members of the church or not, regard Sunday as a day of rest and peace and holiness, and approve laws to protect it from desecration. Of course, the open saloon would signally operate to its profanation. We cannot therefore say that this statute imposes for this offense a punishment disproportionate to it. We cannot thus deny the power of the legislature. As said in the *Weems Case*: "We disclaim the right to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power

er superior to it for the instant. And for the proper exercise of such power, there must be a comprehension of all that the legislature did or could take into account; that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist, and punish the crimes of men according to their forms and frequency."

The legislature has a wide power and has established wide practice in dealing with the evil of intoxicating liquors. All over the Union for years and years statute law has been growing more and more rigid and rigorous, and peculiarly in late years. This is so much the case that many people say that these laws are so rigid and comprehensive and severe as to amount to injustice, seeing that license is granted on payment of heavy taxes, and the privilege so restricted as to sometimes render the business practically unprofitable; but the legislatures look upon the sale of intoxicating liquors as an evil, as we are bound to say from a view of the large volume of statute law of the different states.

It occurred to me that this act might be unconstitutional on the theory that it violates constitutional law in prohibiting to the citizen his use of his property for innocent purposes. It says that he shall not enter the saloon for innocent purpose, to sleep, to cook his meals, to secure his money from theft forgotten in his drawer, to preserve his property from leakage of water pipes or from fire. It seems questionable to me in this respect, though not urged by counsel. The statute absolutely prohibits any use of the room or place. Whether entrance from stringent necessity would be excused by the incorporation of an exception by the courts, we do not say. Cases differ as to this. 23 Cyc. Law & Proc. p. 190. Perhaps it would be like the case of some ancient statute or law which forbade the drawing of blood, but which was held not to apply to the surgeon or physician drawing blood to save life. *Morganstern*

v. Com. 94 Va. 788, pt. 4, 26 S. E. 402. This statute makes no express exception.

Our Constitution gives express power to the legislature to either regulate or prohibit the sale of liquors. This is a very wide power, vesting the legislature with plenipotential powers to accomplish the end. There is no right in any person to engage in this business, in such sense as to remove it from legislative control, nor any vested right in those having license which prevents it being afterwards regulated or even forbidden by statute. *McKinney v. Salem*, 77 Ind. 213. The state has the right to prohibit, restrict, or regulate all sales of intoxicating liquors, and to inflict penalties therefor and for the abatement of property used for the forbidden purpose. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. It may require saloons to be closed on certain days. There have been many decisions upon statutes like this held constitutional. *Hedderich v. State*, 101 Ind. 565, 51 Am. Rep. 768, 1 N. E. 47. Entering a saloon for any purpose, though innocent, on Sunday, has been held to be a violation of such statute. *Monsee v. State*, 78 Ga. 110; *Rosenthal v. Hobson* (Iowa) 77 N. W. 488; *People v. Waldvogel*, 49 Mich. 337, 13 N. W. 620. Even to clean the saloon, or though it be an entrance to a dwelling. *People v. Talbot*, 120 Mich. 486, 79 N. W. 688, and *People v. Waldvogel*, supra. The offense consists in not keeping the saloon closed on Sunday, and it is not material whether or not any sales are made, nor what is the saloon keeper's intent in not keeping it closed, nor whether anyone was seen to enter or depart from it. *State v. Schell*, 22 S. D. 340, 117 N. W. 505; *State v. Fairchild*, 22 S. D. 343, 117 N. W. 506; *Black, Intoxicating Liquors*, 393. If he keep it open but for a moment, it is a violation of the statute; and there is no purpose for which the statute authorizes it to be open, as held in *Monsee v. State*, supra, and *Klug v. State*, 77 Ga. 734, and *Kroer v. People*, 78 Ill. 294.

So our conclusion is that we cannot hold as unconstitutional the 1st and 3d sections of the act creating the offense and imposing the penalty. The case does not involve the 2d section authorizing officers to close places conducted in violation of the act, and authorizing officers to arrest without warrant. We say nothing as to that section; it being separate and distinct from the other, and not involved in this case.

We affirm the judgment.

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UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

HUELING DAVIS, Claimant, Appt.,

v.

LOUISVILLE TRUST COMPANY, Trustee in Bankruptcy of Howe Manufacturing Company, et al.

(— C. C. A. —, 181 Fed. 10.)

Evidence — report to mercantile agency — admissibility of record.

1. A report made by an agent of a mercantile corporation to it, as to the financial standing of a merchant which he had been sent to investigate, and placed on file in due course of business, is admissible as evidence of facts which he learned at the time, although he has since deceased.

Same — methods in mercantile agencies.

2. Although courts take judicial notice of the methods of mercantile agencies, this knowledge may be supplemented respecting disputed methods of business by the testimony of experienced officers of the agencies themselves.

Fraud — right to rely on report to mercantile agency.

3. One securing information as to the standing of a corporation desirous of disposing of some of its treasury stock, through a subscriber to a mercantile agency to which such corporation had furnished such information, may, although he himself has no contractual relations with the agency, rely thereon in purchasing stock from the corporation, and, in case the information was erroneous, may rescind the contract.

Same — report of corporate condition — intent.

4. A report by the president of a corporation which is desirous of selling stock to a mercantile agency, which falsely states the amount of stock subscribed and the amount of capital paid in, and makes an unwarranted forecast as to the payment of the remainder, must be treated as having been designed fraudulently to influence the purchase of stock.

Note. — Although there are many cases using general language to the effect that, if a person makes to a mercantile agency a statement as to his pecuniary condition known to him to be false, for the purpose of procuring credit, such a false statement is fraudulent as to persons who deal with him in reliance on such representation, aside from *DAVIS v. LOUISVILLE TRUST Co.* and *Irish-American Bank v. Ludlum*, 49 Minn. 344, 51 N. W. 1046, sufficiently set out in the former case, no cases have been found where the court expressly passed upon the question whether a statement to a mercantile agency can be regarded as addressed to persons who are not subscribers or patrons of the agency.

Laches — delay in rescinding fraudulent contract.

5. Three years' delay by one fraudulent-ly induced to purchase stock of a corporation, in taking steps to rescind his contract, will not defeat the right on the ground of laches, in favor of creditors having notice of his claim.

Same—knowledge of fraud.

6. One defrauded into purchasing stock of a corporation cannot be charged with laches which will preclude his rescinding his contract until he has knowledge of the fraud, or knowledge should be imputed to him because of suspicious circumstances which he failed to pursue after receiving notice of them.

Judgment — absence of issues — right to enter.

7. A claim against the assets of an insolvent corporation, based upon a fraudulent sale by it of its stock, cannot, in the bankruptcy proceedings against it, be given preference to claims of other creditors, although they are officers of the corporation and parties to the fraud, and become parties to the proceeding, where no issues are made presenting the question of priority to the court.

(July 13, 1910.)

A PPEAL by Hueling Davis from an order of the District Court of the United States for the Western District of Kentucky, disallowing his claim against the bankruptcy estate of the Howe Manufacturing Company. Reversed.

Statement by Warrington, Circuit Judge:

This is an appeal from an order entered in the court below April 9, 1908, rejecting a claim of Davis, appellant, against the Howe Manufacturing Company, bankrupt, for \$5,000 and interest. The company was adjudicated a bankrupt December 22, 1906, and the Louisville Trust Company, one of the appellees, was thereafter appointed trustee. The claim grows out of a purchase by Davis of fifty shares of the par value of \$100 each of the capital stock of the bankrupt. In his original and amended proofs of claim, Davis alleges that he subscribed for the stock and paid its par value in cash to the company in reliance upon the truth of certain representations made by the company through its president and vice president, who were also directors; that these representations were false and fraudulent, and made for the purpose of inducing him to purchase the stock; that upon discovery of the fraud, he repudiated and rescinded the contract, tendered to the company the certificates representing the stock, and demanded payment of the price with interest, which was refused.

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The alleged false representations consist of two classes. The first class is said to be comprised in a report made by Ben Howe, as president of the company, to R. G. Dun & Company, a mercantile agency, then maintaining an office in Louisville. The other class is claimed to have been made principally, if not wholly, by T. L. Jefferson, as vice president and director of the company, through a letter written to a Mr. Chess, and through statements made by Jefferson both to Chess and Davis. A copy of the report to Dun & Company, as well as the letter written by Jefferson to Chess, were placed in the hands of Davis before he purchased. These representations related to the financial condition of the bankrupt company and also of another company bearing the same name, the assets and good will of which had been purchased and taken over by the new company. It is not necessary set out more than the substance of the statements said to have been made, or the evidence offered in support and denial of the contentions made by the respective parties.

In addition to what will be found in the opinion, it is sufficient to state here that the present controversy begins with negotiations had in July, 1903, between Davis and Howe, whereby Davis was to take stock and Howe was to give him employment in the company, and that Davis thereupon borrowed of Chess \$2,500 and of Llewellyn Smith the same sum, giving to them his notes and using the money in buying the stock. Davis was given employment in the company and continued therein in several capacities for a period of nearly three years, and received from the company compensation of about \$3,000, when at the close of April, 1906, he claims to have made discoveries which caused him to quit the employ of the company. He testified that he suspected financial difficulty in the affairs of the company in March of that year, through knowledge he obtained of a proposed contract—called a "four-cornered agreement"—to which the company, a "syndicate," the Western National Bank, and Jefferson were to be parties, designed in some way to aid Jefferson, if not the company itself. This resulted in an investigation and the discovery claimed to have been made by Davis upon which he bases his contention that he was entitled to rescind. He insists further that his right extends not only to proving a general claim for \$5,000, but also to priority over certain of the creditors, if not all of them in the assets of the bankrupt. The particular creditors against whom the claim of priority is made are Jefferson, the Western National Bank of Louisville, and Ben Howe, both individually and as as-

signee of certain claims of creditors of the bankrupt. The claims of Davis in both the respects last mentioned were allowed by the referee, but the orders in that behalf were reversed and set aside by the court below.

Argued before Severens, Warrington, and Knappen, Circuit Judges.

Messrs. Helm Bruce and Percy N. Booth, for appellant:

A statement made to a mercantile agency may be relied upon as a basis of credit, and will be misrepresentation upon which an action may be brought, if it be false.

National Bank v. Illinois & W. Lumber Co. 101 Wis. 247, 77 N. W. 185; Re Epstein, 109 Fed. 874; Re Weil, 111 Fed. 897; Bliss v. Sickles, 142 N. Y. 647, 36 N. E. 1064; Loveland, Bankr. 3d ed. pp. 452, 453; Smith, pp. 171, 173.

The record of R. G. Dun & Company, made by its regular city reporter, in the line of his duty, and in the regular course of business, to wit, that of collecting and recording information as to the financial condition of persons, is competent evidence to prove the fact that Ben Howe, as president of the Howe Manufacturing Company, made the statements which that record says he made.

Nicholls v. Webb, 8 Wheat. 326, 5 L. ed. 628; Pritt v. Fairclough, 3 Campb. 305; Price v. Torrington, 1 Salk. 285; Higham v. Ridgway, 10 East, 109, 11 Eng. Rul. Cas. 266; Hagedorn v. Reid, 3 Campb. 379; Welsh v. Barrett, 15 Mass. 380; Washington Bank v. Prescott, 20 Pick. 339; Blackburn v. Crawford, 3 Wall. 189, 18 L. ed. 192; Kennedy v. Doyle, 10 Allen, 161; Fisher v. New York, 67 N. Y. 73; Leiland v. Cameron, 31 N. Y. 115; Augusta v. Windsor, 19 Me. 317; Bridgewater v. Roxbury, 54 Conn. 213, 6 Atl. 415; Abel v. Fitch, 20 Conn. 96; Walker v. Curtis, 116 Mass. 98; Meyer v. Brown, 130 Mich. 449, 90 N. W. 285; Lassone v. Boston & L. R. Co. 66 N. H. 345, 17 L.R.A. 525, 24 Atl. 902; 5 Enc. Ev. p. 251; 2 Wigmore, Ev. chap. 51; Brown v. United States, 73 C. C. A. 187, 142 Fed. 1.

The company is bound by the representations of its officer, Jefferson.

Garrison v. Technic Electrical Works, 55 N. J. Eq. 708, 37 Atl. 741; Zang v. Adams, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509; Anderson v. Scott, 70 N. H. 350, 47 Atl. 607; Tyler v. Savage, 143 U. S. 79, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; Rives v. Montgomery South PL Road Co. 30 Atl. 92; Walker v. Mobile & O. R. Co. 34 Miss. 245.

Davis is entitled to priority because the equity acquired by a party who has been misled is superior to the interest in the 30 L.R.A. (N.S.)

same subject-matter of the one who willfully procured or suffered him to be thus misled.

2 Pom. Eq. Jur. § 686; Hooper v. Central Trust Co. 81 Md. 559, 29 L.R.A. 262, 35 Atl. 505; 1 Fonbl. Eq. 64; Kentucky Mut. Invest. Co. v. Schaefer, 120 Ky. 227, 85 S. W. 1098; Wright v. Geo. W. McAlpin Co. 18 Ky. L. Rep. 226, 35 S. W. 1039.

A trustee in bankruptcy is not treated as a bona fide purchaser for value, without notice, but as occupying simply the position of the bankrupt.

Donaldson v. Farwell, 93 U. S. 631, 23 L. ed. 993; Cook v. Tullis, 18 Wall. 332, 21 L. ed. 933; Loveland, Bankr. p. 419, § 144; Zartman v. First Nat. Bank, 216 U. S. 134, 54 L. ed. 418, 30 Sup. Ct. Rep. 368.

The date from which laches begins to run is the time when the subscriber is first chargeable with notice that a fraud has been perpetrated upon him.

1 Cook, Corp. §§ 161, 162.

The officers of a corporation, in making statements as to the affairs and business of the corporation, for the purpose of inducing persons to contract with it, are bound to know the truth of the facts which they assert, and if they make false representations, they cannot escape liability on the ground of fraud by saying that they did not know the representations were false.

14 Am. & Eng. Enc. Law, pp. 95, 96.

Messrs. Johnson & Heatt for appellee Louisville Trust Company.

Mr. Henry Burnett for appellee Jefferson.

Mr. Bernard Flexner for appellee Western National Bank.

Messrs. Henry Burnett and Bernard Flexner for appellee Howe.

Warrington, Circuit Judge, delivered the opinion of the court:

The initial test of the validity of the claim of Davis is involved in important questions of admissibility of evidence. It is contended in the first place that no competent witness was produced to testify that any report of the financial condition of the company was ever made to the mercantile agency; and, in the next place, that the instrument exhibited as such a report could not, if received in evidence, be considered as addressed to Davis, or as having been intended to influence him or anyone else in the purchase of treasury stock of the bankrupt company. The court below regarded the report as inadmissible, and so declined to consider it. This is made the subject of the first assignment of error.

The paper was received in evidence by the referee. It was admittedly a copy of what purported to be a report made by J. H.

Saunders as city reporter of Dun & Company at Louisville. It was shown that he had occupied that position for ten years, but that he was deceased at the time the report was offered in evidence, and that he had made and presented the writing on June 18, 1903, to the superintendent of Dun & Company. The material parts of the report are: An abstract of a portion of the articles of incorporation of the bankrupt company, dated June 1, 1903, showing its authorized capital stock, \$500,000, its successorship to the business of the old company, and names of the subscribers for 2,430 shares of \$100 each of the new capital stock, and specifying the number taken by each subscriber. It then proceeds:

"Ben Howe, the president, states there has been actually paid in cash \$250,000, that the assets consist of machinery, merchandise, etc., and that the new company has no indebtedness. He further states that the company has purchased a wholesale plumbing and steam fitting supply business, for which they paid \$150,000, and that they have also purchased another business for a like amount at Birmingham, Alabama, and, while all deals have been completed, they are not ready to make a detailed statement of the company's affairs. It is their intention to elect three more directors. Claims that the entire capital of \$500,000 will be paid up within the next two weeks. . . . It will be seen that they have not completed their affairs, and just what amount of actual capital they have cannot be ascertained."

J. J. Saunders testified that he was then manager of the mercantile agency at Louisville, and at the time the report was made he was assistant manager. He further testified that the paper offered in evidence was a "copy of the report from our records," production of the original having been waived, and referring to what he called the "record" of the report in question, he further said that his deceased brother was the author of the report; that the records show that his brother had received the statement contained in the report and had made it a matter of record; that "it was kept in our regular files, to be given to anybody that wanted information of that company (the Howe Manufacturing Co.) at that time;" and that such statements "are placed on record for the purpose of giving them to inquirers." He was, however, not present when Howe purports to have made statements to the deceased brother, but it was agreed that J. J. Saunders would, if recalled, testify: "His knowledge of such alleged statements was and is based on his knowledge of the record on file in the office of R. G. Dun & Company, and on his knowl-

edge of the making, filing, and preserving of said record, and on his knowledge of the business of R. G. Dun & Company, and the methods, rules, customs, and circumstances governing the statements made to R. G. Dun & Company, and governing the making, filing, and preserving of other records of such statements."

He delivered to Chess a copy of the report on August 4, 1903.

The objection urged against receiving this report is that it is hearsay. We think the right to resort to secondary proof in the circumstances stated is reasonably well settled. The principle underlying the admissibility of such evidence is that the person making the report was engaged in the regular course of a distinct business before any dispute arose, and in the discharge of a duty to record matters for others, without having any personal interest in the subject recorded.

It is well settled in what we regard as kindred cases that the duty thus discharged need not be imposed by law. It is enough that the duty is recognized. The fact that the record is designed for the use of all persons rightly interested in the subject, and that the success of the business of supplying the information so obtained is dependent upon its accuracy, cannot, we think, but enhance the obligation and sense of duty involved. When it is shown that a record was made in that way and with the motive indicated, that it has been carefully preserved, and that the author is dead, there can be no perceivable violation of any principle of evidence by treating the report as prima facie evidence that the acts and matters so recorded and purporting to relate directly to the business in hand occurred as there stated, subject, of course, to contradiction by other evidence.

In *Nicholls v. Webb*, 8 Wheat. 326, 337, 5 L. ed. 628, 630, when passing upon the admissibility of memoranda of a deceased notary, made in the regular course of his business, but not in obedience to law, Justice Story said: "We think it a safe principle that memorandums made by a person in the ordinary course of his business of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is, of course, liable to be impugned by other evidence; and to be encountered by any presumptions or facts which diminish its credibility or certainty."

The contention of counsel for appellees that that decision has been repudiated by the Supreme Court is not tenable. This will be seen by comparison of the last case relied on by counsel—*Rates v. Preble*, 151

U. S. 149, 38 L. ed. 106, 14 Sup. Ct. Rep. 277—with another case decided by the same justice later. We refer to Constable v. National S. S. Co. 154 U. S. 51, 38 L. ed. 903, 14 Sup. Ct. Rep. 1062. In passing upon the admissibility of a memorandum made in pursuance of a practice and usage in the port of New York touching the posting of notices in the customhouse of the time of unloading vessels, the learned justice said (69): "The practice even of a private office, if well established, is presumed to have been followed in individual cases, and is accepted as sufficient proof of the fact in question when primary evidence of such fact is wanting,"—[citing among other cases, *Nicholls v. Webb*].

The authority of *Nicholls v. Webb* was recognized, also, by Mr. Justice White in *Putnam v. United States*, 162 U. S. 687, 695, 40 L. ed. 1118, 1121, 16 Sup. Ct. Rep. 922. In *Kennedy v. Doyle*, 10 Allen, 161, 167, Judge Gray said: "In the United States the law is well settled that an entry made by a person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus recorded."

See also *Lassone v. Boston & L. R. Co.* 66 N. H. 345, 24 Atl. 902, including note to the case found in 17 L.R.A. 525, stating: "Careful research has failed to find any direct authority not cited in the report of the case." *Leland v. Cameron*, 31 N. Y. 115, 120; *Augusta v. Windsor*, 19 Me. 317; *Abel v. Fitch*, 20 Conn. 90, approved in *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415; 1 *Smith, Lead. Cas.* in note to *Price v. Torrington*, p. 571; 2 *Wigmore, Ev.* §§ 1517-1522.

Treating the report of the mercantile agency then as prima facie evidence of the fact that the president of the bankrupt company made the representations therein stated, the question arises: To whom were they addressed? Was Davis entitled to rely upon them? This question is not of easy solution. Davis was not a patron or subscriber of R. G. Dun & Company. He obtained the report through Chess, and Chess obtained it from Dun & Company through his membership of the Chess-Wymond Company, which seems to have been a patron of R. G. Dun & Company. It is clear enough that, if Chess had obtained the report for either his firm or himself for the purpose of determining whether to give credit in the way of sales of material or loans of money, he might rightfully have placed faith in the report; for ordinarily such statements are given for the very

object of fixing a basis of credit. As stated in *National Bank v. Illinois & W. Lumber Co.* 101 Wis. 247, 253, 77 N. W. 185, 188: "The commercial agency which gathers and circulates reports as to the financial standing of business houses is an institution now so well established, and its reports are so universally used, that no court or merchant can plead ignorance of its purpose or functions. When a merchant states to such an agency his financial condition, he knows it is for publication to the business world, and that such publication will probably be consulted when he applies to any business institution for credit. He makes his statement, therefore, knowing that it will probably be used as a basis of credit. Upon what ground can it be said that such a statement is not a representation made for the purpose of securing credit as fully as if made personally to each business house with which he has dealing?"

See also *Genesee County Sav. Bank v. Michigan Barge Co.* 52 Mich. 164, 170, 438, 17 N. W. 790, 18 N. W. 206; *Stevens v. Ludlum*, 46 Minn. 160, 161, 13 L.R.A. 270, 24 Am. St. Rep. 210, 48 N. W. 771; *Eaton C. & B. Co. v. Avery*, 83 N. Y. 31, 34, 38 Am. Rep. 389, limited in *Macullar v. McKinley*, 99 N. Y. 353, 358, 2 N. E. 9; *Fechheimer v. Baum (C. C.)* 2 L.R.A. 153, 37 Fed. 167, 177; *Re Weil (D. C.)* 111 Fed. 897, 898; *Re Epstein (D. C.)* 109 Fed. 874, 876; *Bliss v. Sickles*, 142 N. Y. 647, 36 N. E. 1064; *Loveland, Bankr.* 3d ed. § 152b.

It is further to be observed of these decisions that, where it is shown that the representations are falsely and fraudulently made, they are to be treated as having been made with that intent to each of the persons addressed, precisely the same as if each person had been singled out and so sought to be influenced. In *Genesee County Sav. Bank v. Michigan Barge Co.* the supreme court of Michigan, in expressing its approval of the language employed in *Eaton, C. & B. Co. v. Avery*, supra, quoted the following from that decision (52 Mich. 170): "And if a merchant furnishes to such an agency a wilfully false statement of his circumstances or pecuniary ability, with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured."

The facts of the decisions thus far cited concern sales of articles or loans of money

to the person making the report to the mercantile agency, and upon which reliance was placed by the sellers or lenders. It is not difficult, however, to conceive that it would be to the interest of business concerns, whether owned by individuals or corporations, to employ mercantile agencies as the means of communicating to others not merely responsibility in relation to desired purchases and loans, but also to attract dealers in investments and investors themselves. We think this conception is justified in this particular case, both by the report and the evidence adduced. In addition to the other features of the report which are obviously adapted to inspire confidence in the financial stability of the company, the report contains these statements (in substance): That about half the authorized shares had been subscribed, also that "Ben Howe, the president, states that there has been actually paid in cash \$250,000, . . . claims that the entire capital of \$500,000 will be paid up within the next two weeks." While the statements are not in terms expressive of a desire to sell stock, it cannot escape attention either (1) that all of the company's stock had not been taken; or (2) that the language was calculated to induce purchases of stock. But we now know that Howe was then wishing to sell treasury stock.

In his testimony he stated:

Q. Did you tell Mr. Davis that the company was desperately in need of money when you asked him to put in \$5,000?

A. That was one of the reasons I was trying to get subscribers for stock.

Q. Do I understand you to say that the New Howe Manufacturing Company was in need of money or ready cash to pay its debts or run its business in the fall of 1903?

A. We were, or we would not have been trying to get stock subscriptions.

Q. In August and September, 1903?

A. Yes, sir.

Now, wherever it is necessary to determine the scope of a given representation, of course, the intent and object of the one making it must be considered. Manifestly this company needed money and desired to sell stock to obtain it. Naturally it would not, and in truth it did not, confine its efforts to sell stock simply to persons from whom it might expect to buy materials or obtain loans. Why, then, should this report be so interpreted as to restrict the object of the company to an effort merely to establish a basis of credit? The company certainly had as much authority to sell treasury stock as it had to purchase ma-

terials or borrow money; indeed, at the time of making the report, it does not seem that the company was any more anxious to acquire a basis of credit than it was to obtain money through sales of stock. It is therefore not too much to say that one of the purposes of the report was to influence sales of stock.

Can the report then be regarded as having been addressed to persons desiring to buy treasury stock, but who were not patrons of the mercantile agency? The answer may, we think, be aided by the testimony.

Saunders testified:

Q. When statements such as these are made by business concerns to your agency what is customarily done with them by you?

A. Well, they are placed on record for the purpose of giving them to inquirers.

Q. For what purpose do you furnish these reports, or copies of your records to applicants?

A. Well, that is a pretty hard question for me to answer, because I do not know what use the people inquiring want to make of them. They are supposed to be, for the purpose of determining credit. Maybe it ain't always that way.

Q. How long has R. G. Dun & Company been in this business?

A. Since 1841.

Q. Do persons who furnish facts to your agency for the purposes which you have named do so with any knowledge that such statements will be communicated by your agency to any other persons?

A. Yes, sir; invariably. All statements are made as a basis for credit.

This testimony was received subject to objection, and although courts are accustomed to take judicial notice of the methods of mercantile agencies, we see no reason why such knowledge may not be supplemented respecting disputed features of their methods of business by the testimony of experienced officers of the agencies themselves.

It is to be observed that the witness said that such statements are made "as a basis for credit;" but he also stated that they are placed on record for the purpose of giving them to "inquirers." It is urged that "inquirers" must be limited to patrons. The witness did not state any such limitation. Further, it does not appear that the persons making reports to the agencies impose any restrictions in this regard. It may be assumed that the primary object of the agency is profit; but even in this view it seems that the agency gathering the information, not those giving it, determines the conditions upon which it will

be given circulation. Why, then, may not an agency rightfully give information so obtained to third persons generally, and upon such terms as the agency may choose to exact? Is not that in truth the ordinary course pursued by such agencies? Plainly it is consistent with the evidence that the reports "are placed on record for the purpose of giving them to inquirers."

If the agency had chosen to furnish Davis directly with a copy of the report, no matter on what terms, it is hard to see what reason the company would have to complain. The most that can be said in its behalf is that the agency did not furnish Davis with a copy. What happened was that Davis requested Chess to investigate, Davis testifying: "I was not in position to investigate this matter, and would like to have him (Chess) investigate it for me." Later Chess did investigate, and as a result turned over to Davis a letter he had received from Mr. Jefferson, together with a copy of the report in dispute, and Davis testified that he relied on this report as well as the letter in purchasing the stock. Chess made the investigation both because of his interest in Davis and of his purpose to loan Davis half of the money necessary to buy the stock. But the last analysis of the situation would seem to be that Chess undertook the investigation as the agent of Davis.

Now, it may be conceded that Davis could not have treated the report as addressed to him, if he had come into possession of it wrongfully. But can it be justly said as between him and the bankrupt company that he did obtain the report wrongfully? Surely he did not do so as to the portion of the report which purported to be based on the articles of incorporation. In that portion it is stated in substance that 2,430 shares of the stock had been subscribed by persons there named. The articles had been recorded in the office of the clerk of the Jefferson county court, and were obviously addressed to the public.

In *Emerson v. Detroit Steel & Spring Co.* 100 Mich. 127, 132, 58 N. W. 659, 660, it appeared that the report of a mercantile agency had been based upon sworn reports of the company to the secretary of state; and Montgomery, J., having occasion to pass upon an attachment in dispute, said: "The next question was whether there were grounds for attachment. We think there was sufficient to show that the indebtedness was fraudulently contracted. It sufficiently appears that Dun's reports were based upon the sworn reports of the company to the secretary of state, that both the plaintiffs in attachment extended credit upon the strength of these reports, and we are

satisfied that these statements of the company were false, and could have been made with no other purpose than that of establishing a false credit."

It is true that the question there involved differed from the one now under discussion; but the point of the reference is that notice of a report addressed to the public may be acquired through the medium of a report of a mercantile agency, and that action may be rightfully taken upon the faith of the information so derived. Now, as to the rest of the report, it is to be constantly borne in mind, as before pointed out, that the report is made to the mercantile agency for the very purpose of having its contents communicated to others; that is, as testified in this case, to "inquirers." Such a report cannot, in the nature of things, be of any sort of consequence to the mercantile agency, except only as the agency may itself choose to exhibit the report. It is not the case of one person authorizing another to make representations to a specified third person, for there the use to be made of the representations is expressly limited by the person making them. But, according to the testimony in this case, the report was turned over to the mercantile agency with authority to dispose of it, indeed to sell it, upon such terms and to such persons as it might determine. How does this differ in principle from the law as laid down in the old case of *Scott v. Dixon*, decided by the Queen's bench in 1859, and reported in 29 L. J. Exch. N. S. 62, note, 7 Eng. Rul. Cas. 523?

In that case a report in writing was made by directors of a bank and addressed expressly to the shareholders, but it was left at the bank, and copies could be had by sharebrokers or anybody applying for them who was desirous of information in regard to the affairs of the bank with a view to purchasing shares. Plaintiff Scott obtained a copy through a broker, and he and the other plaintiffs afterward purchased shares in their joint names. The report was held to be a representation made to persons other than the shareholders. Lord Campbell said: "The next point which we have to consider is, Was this representation made to the plaintiffs? Upon that I cannot entertain the slightest doubt. Reports of joint-stock companies, though addressed to the shareholders, are generally meant for the information of all who are likely to have dealings with the company, and I have no doubt that the directors in the present case knew that this particular report would, a few hours after its publication, be in the hands of all sharebrokers in Liverpool, and that it would

be acted on by those who had or wished to have dealings with the bank. But, moreover, we have here positive evidence that it was to be bought by any person who wished to become a purchaser of shares, and it thus came into the hands of the plaintiffs, and the plaintiffs, by the perusal of it, were induced to buy shares in the bank. I have therefore no doubt whatever that the allegation in the declaration that that representation was made to the plaintiffs is most completely established."

In *Peek v. Gurney*, L. R. 6 H. L. 377, 7 Eng. Rul. Cas. 527, Lord Chelmsford approved of the decision in *Scott v. Dixon*, distinguishing it from the famous case in which he was then delivering his opinion, in the following language (397): "An action was brought against a director of a banking company for falsely, fraudulently, and deceitfully publishing and representing to the plaintiffs that a dividend was about to be paid out of the profits, which were sufficient for payment of the dividend, and that the shares were a safe investment for the money. The plaintiffs bought their shares upon the faith of a report made by the directors to the shareholders which contained the false representations. Copies of this report were left at the bank, and were to be had by sharebrokers or any persons applying for it, who were desirous of information with regard to the affairs of the bank, with a view to the purchase of shares. The plaintiffs purchased at the bank, through their broker, a copy of the report. The court of Queen's bench held that there being positive evidence that the report was to be bought by any person who thought of becoming a purchaser of shares, and that it came into the hands of the plaintiffs in this manner, and by the perusal of it they were induced to buy shares in the bank, there was a publication to the plaintiff in the sense of the declaration. I do not doubt the propriety of this decision. The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares; and the representation must be regarded as having been made not indirectly, but directly to each person who obtained the report from the bank where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director."

The doctrine of *Scott v. Dixon* was approved by this court in *Hindman v. First Nat. Bank*, 57 L. R. A. 108, 50 C. C. A. 623, 112 Fed. 931, 943. It is true that in that case this court held that a certificate of a bank showing that a certain deposit of money had been made and filed with the

state insurance commissioner, in form as required by the law of Kentucky, was a representation intended only to influence the commissioner; and, further, that the fact that it was the duty of the commissioner on demand to furnish copies of the certificate to any of the public, and also to include the certificate in his official report, did not change the character of the representation. But we think that was far from holding that a report like the one in question would not have a broader scope than that of the bank certificate then under consideration.

There is another class of decisions which seems to us to lend analogy to the question under discussion. Those decisions concern liability growing out of representations made by corporate officers touching the financial condition of their companies, and sent to some state or Federal official, and subsequently published in pursuance of statutory requirement. One of the decisions alluded to is *Warfield v. Clark*, 118 Iowa, 69, 91 N. W. 833. That action was based upon a false statement of the financial condition of an insurance company. The Iowa Code required such statements to be filed with the auditor of state, setting out certain prescribed data, also that the auditor should arrange the information contained in the statement, and report the result to the governor, and also that these reports should be printed and distributed as part of the annual report of the auditor; and, further, that the companies themselves should annually publish a certificate showing their aggregate amount of assets and liabilities. The plaintiff bought stock in the Des Moines Insurance Company from stockholders on the faith of reports of this character, and afterward brought an action of deceit against the secretary upon the ground that the reports so made and published were false and fraudulent. Says the court at page 72 of 118 Iowa: "Insurance companies know that their reports are thus made public, and it is not going too far to say that they make them as favorable to their interests as the facts will warrant, for the express purpose of inducing public confidence, and by so doing to increase the volume of their business. . . . It is said, however, that in the purchase of stock from a third person, the plaintiff had no right to rely upon the representations made in the statement sworn to and filed by the defendant. If the defendant in fact falsely reported the financial condition of his company for the purpose of deceiving the public in relation to its responsibility as an insurer, it seems clear to us that we should not say as a matter of law that he only intended to

wrong that particular class, and that those dealing in its stock were not his intended victims; for he knew that stock in such companies was often bought and sold, and that reliance might be placed upon his sworn statement by those dealing therein.

See also *Gerner v. Mosher*, 58 Neb. 135, 146, 46 L. R. A. 244, 78 N. W. 384; *Mercantile Nat. Bank v. Thoms*, 28 Ohio L. J. (Cincinnati superior court, per Judge Rufus B. Smith) 164, 168; *Genesee County Sav. Bank v. Michigan Barge Co.* 52 Mich. 164, 170, 438, 17 N. W. 790, 18 N. W. 206; *Silberman v. Munroe*, 104 Mich. 352, 62 N. W. 555. See particularly, *Graves v. Lebanon Nat. Bank*, 10 Bush, 23, 19 Am. Rep. 50, where the bank was directly affected.

The relevance of these decisions, as they seem to us, is that the persons making the representations did so with knowledge not merely that the particular officer to whom they would be addressed would be advised of their contents, but also that their substance would be published to all who might wish to deal with the companies and in their stocks. How can one escape the charge that he contemplated the effect such representations would have upon others at the very time he made them? As it seems to us, therefore, it is immaterial whether representations are made voluntarily or in obedience to law, wherever they are put out with general authority in some agency to make publication of them to third persons, in such manner and to such extent as the agency shall desire.

We do not overlook *Irish-American Bank v. Ludlum*, 49 Minn. 344, 51 N. W. 1046, relied on by counsel for the trustee. In that case one Thompson appeared to have sold notes to the bank, which had been made to his order by the New York Pie Company. The bank brought suit on the notes against Ludlum, as owner of the pie company. At the trial Thompson testified that he was a subscriber to the commercial agency of Dun & Company, and had "called for and received a report from it" upon the pie company. This, it should be observed, may have been (though this does not expressly appear) a special report, made to him personally, and not a copy of the company record. He stated that he had lost this report, but could state its contents, and was permitted, against objection, to do so. The cashier of the bank was, under objection, allowed to testify that before receiving the notes he had been informed by Thompson of the nature and contents of the report of the agency, and believed in and relied upon the report in accepting the notes. It was held that this testimony "should have been excluded as immaterial and incompetent." If it was

meant by this ruling to hold, as in fact the court did in substance say, that representations made to a mercantile agency are intended only for its patrons, we are not disposed to follow it, especially upon a comparison of its facts with the facts disclosed in the present case. Indeed, we are constrained to hold under the evidence of the present case that Davis was so connected with the representations in dispute as to entitle him to place faith in and rely upon them.

Treating the report, then, as admissible, we must next inquire into its alleged falsity. It cannot be expected that we shall discuss the vast amount of evidence in detail, which bears upon this report. We shall state some of our conclusions. In the first place, the subscriptions to capital stock were not in truth made according to the only inference that could be drawn either from the articles of incorporation themselves or as they are stated in the report to the mercantile agency. It cannot be pretended that T. L. Jefferson made a bona fide subscription for 1,150 shares, as there represented. He testified that he only intended to subscribe for 250 shares for himself and 200 for his son, Floyd Jefferson, and that he was induced to make the additional subscription on statements made by Howe that certain shares had been practically taken, and that those sales should be made out of Jefferson's nominal portion. Jefferson also stated substantially the same thing respecting the apparent subscription of R. W. Bingham for 255 shares. The total number of shares apparently taken was 2,430. Immediately following the list of subscriptions is the statement said to have been made by Howe "that there has been actually paid in cash \$250,000." The evidence does not warrant any such statement. It was not true. Another statement purporting to have been made by Howe was "that the company has purchased a wholesale plumbing and steam fitting supply business, for which they paid \$150,000." As we understand the evidence, we are bound to say as to the payment of \$150,000 that this statement was equally untrue. What warrant Howe had for the claim ascribed to him that "the entire capital of \$500,000 will be paid up within the next two weeks" is not shown. This may in one sense be said to have been an opinion rather than a statement of a fact, but it certainly was an unwarranted forecast. If the features of the report so pointed out as not sustainable under the evidence had been omitted, the report would hardly have been calculated to influence either sales of merchandise or loans of money, much less

investments in the stock. It is therefore not necessary to compare the rest of the report with the evidence. Why should such a report have been made? Why should it not have been explained? It is said that Howe denied making the report. But, so far as we can discover, Howe did not in his testimony allude to the report. He did make one statement that is inconsistent with one portion of the report.

He testified:

Q. I will ask you to state whether or not you told Mr. Davis, or any one else, that the new Howe Manufacturing Company had bought the plant of T. A. Vogel & Sons, or the jobbing house in Birmingham, Alabama.

A. No, sir; I never told no one that in my life.

Q. As I understand, you had an option on it?

A. Yes, sir; an option on it; I never told anyone that I ever bought it.

But it surpasses our understanding why Howe would not directly and emphatically have denied the representations contained in the report, if in truth they had not been made.

It follows that there was error in excluding the report, and that the report must be treated as having been designed fraudulently to influence the sale of stock in question. While it is true that Davis testified, as before pointed out, that he was influenced both by the report and the letter of Jefferson, we see no escape from the conclusion that the effect of the report alone was sufficient to entitle Davis to rescind the contract, unless he was guilty of laches in repudiating it. This conclusion renders it unnecessary to consider the part that Jefferson is said to have taken toward influencing the sale of stock. We have no hesitation in finding that, whatever Jefferson did, he did not do in an official capacity or as an agent engaged in the transaction of the business of the company. The company did not deal with Davis through Jefferson. It dealt with him through Howe, its president. The company can claim title to the money it received for the stock only through the acts of Howe and Davis. We therefore see no reason or room for introducing Jefferson into the transaction for the purpose of binding the company.

Had Davis, through acquiescence and delay, lost his right to rescind? If we were to consider merely the lapse of time between the purchase of the stock and the repudiation of the contract, a period of three years, it would seem under some of the decided cases that Davis should have ascertained his rights and taken action

earlier. But, as a rule, the facts offered in support of defenses of laches vary so greatly that it is not ordinarily helpful to employ results reached in one case to determine the result that should be reached in another. There is, however, one principle pervading all the decisions that cannot be avoided here. It is that the defense of laches will not be entertained, unless it is made to appear that it would be inequitable to deny it. As observed by Justice Brewer in *Gallihier v. Cadwell*, 145 U. S. 368, 372, 36 L. ed. 738, 740, 12 Sup. Ct. Rep. 873, 874, when speaking of the cases in which this defense had been invoked: "It is true that, by reason of their differences of fact, no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

After commenting upon some of the decisions, the learned justice proceeded at page 373 of 145 U. S.: "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or the parties."

See also *Ward v. Sherman*, 192 U. S. 168, 176, 48 L. ed. 391, 395, 24 Sup. Ct. Rep. 227; *Stevens v. Grand Central Min. Co.* (8th Circuit) 67 C. C. A. 284, 133 Fed. 28, 31; *Cook, Corp.* §§ 161, 162. An instance of allowing the defense of laches against a subscriber to corporate stock, who had not been "vigilant in discovering such fraud and in repudiating his contract," appears in *Chubb v. Upton*, 95 U. S. 665, 667, 24 L. ed. 523, 524, where under the facts it would have been inequitable to enforce the subscriber's rights. In *Josly v. Cadillac Automobile Co.* (6th Circuit) 101 C. C. A. 77, 177 Fed. 863, 869, it was stated by Judge Knappen: "Acquiescence and waiver are always questions of fact, and, where set up to defeat rescission, the burden is upon the defendant to make it out. *Mudsill Min. Co. v. Watrous* (6th Circuit) 9 C. C. A. 415, 22 U. S. App. 12, 61 Fed. 163, 186, 188, 18 Mor. Min. Rep. 1;

Pence v. Langdon, 99 U. S. 578, 25 L. ed. 420, 13 Mor. Min. Rep. 32."

As we understand the evidence, practically all the claims of creditors of the bankrupt company have been purchased by Howe, and are held under some arrangement between him and Jefferson and the Western National Bank; and we are impressed with the belief that those parties, unlike the original creditors, parted with their money with notice of the claim now in dispute. Nor do we understand that the rights of any present stockholders were acquired without notice of this claim; and, further, we do not discover anything tending to show that the assets are sufficient to admit of payment of a dividend to stockholders in any event. There is no secondary or double liability of the stockholders. But, apart from these considerations, we are not convinced that the trustee has discharged the burden of showing that Davis either gained knowledge of the true conditions under which he purchased his stock, or that his relations to the company were of a character rightly to justify us in imputing to him or otherwise charging him with such knowledge, prior to March, 1906, when the "four-cornered agreement" mentioned in the statement was entered into; and we think that he thereupon investigated into the facts and pursued the remedies open to him with reasonable diligence.

What has been said must, of course, result in permitting Davis to prove his loss for the sum of \$5,000 with interest from July 27, 1906, the date of the rescission. But we cannot in this proceeding accord priority to the claim as was ultimately allowed by the referee. The referee ordered that the claim should be paid in full before any distribution of the estate should be made to Jefferson, Howe, or the Western National Bank. Our attention has not been called to any decision in which such priority was granted in a proceeding of this character. We do not see how such an order could be allowed without in effect determining the ultimate rights between Davis, on the one hand, and each of the parties named, on the other. We do not think that the proceeding is in condition to admit of such an order. It is true that the proceeding is of an equitable character, and that the creditors named have voluntarily become parties to it. But no such issues have been formulated and presented as to enable the court properly to hear and determine the rights of Davis against the other parties named, either severally or jointly. Such rights as Davis urges against them would ordinarily be enforced against them separately in actions for deceit. The 30 L.R.A.(N.S.)

evidence offered in the present proceeding might be admissible in each of those cases; but it is by no means certain that all of the evidence which the parties might wish and be entitled to produce is to be found in the present record.

The order of the court below will be reversed, with directions to cause an order to be entered allowing the claim of Davis as a general claim, with interest from July 27, 1906 (the date of rescission and demand), until the date of filing the petition in bankruptcy, against the estate of the bankrupt, and awarding to him his costs. Bankr. act July 1, 1898, chap. 541, § 1, subd. 10, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3419; Id., § 63, p. 563, Rule 21, Gen. Orders Bankr. 32 C. C. A. xxii. 89 Fed. ix.; Loveland, Bankr. 3d ed. § 117; Lowell, Bankr. § 198; Sloan v. Lewis, 22 Wall. 150, 156, 22 L. ed. 832, 833; Re Orne, 1 Ben. 361, 364, Fed. Cas. No. 10,581.

OKLAHOMA SUPREME COURT.

A. S. McKAY, Plff. in Err.,
v.

CITY OF ENID et al.

(— Okla. —, 109 Pac. 520.)

Nuisance — obstruction of highway — right of individual.

1. An action cannot be maintained by a private person for an interference with or an obstruction in a public highway constituting a public nuisance, unless he is thereby specially injured in some way not common to the public at large.

Railroad in street — right of owner of property not abutting.

2. Plaintiff is the owner of a quarter section of land cornering with an addition to a city. Where the land corners with said

Headnotes by HAYES, J.

Note. — As to whether one prevented by an unlawful obstruction from using a highway suffers a special damage which will sustain an action by him against the wrongdoer, see note to Sholin v. Skamania Boom Co. 28 L.R.A.(N.S.) 1053.

As to obstructions in highway preventing access to property except by a circuitous route, as a special injury entitling owner to maintain an action for damages, or to abate the nuisance, see note to Sloss-Sheffield Steel & I. Co. v. Johnson, 8 L.R.A.(N.S.) 226.

As to the right of an owner of property whose means of access from one direction is shut off by the closing of an adjoining street, or a portion of the street on which he is situated, see notes to Hyde v. Fall River, 2 L.R.A.(N.S.) 269, and Newark v. Hatt, ante, 637.

addition, two public highways adjacent to his land intersect. At this point, three streets leading across the addition from the city end in said public highways. A railway company, under legislative authority from the municipal corporation, was alleged to have constructed and operated lines of railway and switch tracks upon and across all of said streets, and upon two of them in such a manner as to obstruct greatly public travel over same. Held that, in the absence of averment in the petition showing that the streets obstructed were plaintiff's only means of access to his property which did not abut upon said streets, his petition failed to state sufficient facts to show that he had suffered an injury special to himself, and different in kind from that suffered by the general public, and a demurrer to his petition for that reason was rightfully sustained.

(May 10, 1910.)

ERROR to the District Court for Garfield County to review a judgment dismissing as to defendant City of Enid an action brought to recover damages alleged to have been caused by the wrongful obstruction of certain streets. Affirmed.

The facts are stated in the opinion.

Mr. J. M. Dodson, for plaintiff in error:

An obstruction or interference with a public street or way need not necessarily be in front of or contiguous to the property claimed to be affected thereby, in order to authorize a recovery. It is sufficient if it is such an obstruction or interference as produces a diminution in the value of the property, as distinguished from mere personal inconvenience to the owner.

1 Lewis, Em. Dom. 2d ed. §§ 56-59, 227; Rigney v. Chicago, 102 Ill. 64; Tilly v. Mitchell & L. Co. 121 Wis. 1, 105 Am. St. Rep. 1007, 98 N. W. 969; Parsons v. Hunt, (Tex. Civ. App.) 81 S. W. 120; Guilford v. Minneapolis & St. L. R. Co. 94 Minn. 108, 102 N. W. 365; Cincinnati, R. & M. R. Co. v. Miller, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001; Heard v. Connor (Tex. Civ. App.) 84 S. W. 605; Foster Lumber Co. v. Arkansas Valley & W. R. Co. 20 Okla. 523, 95 Pac. 224, 100 Pac. 1110.

Messrs. Blaine Acuff and Zinser & Helsell, for defendant in error:

A city is not liable for damages for obstructions in its streets placed there by other parties.

Frith v. Dubuque, 45 Iowa, 406; 15 Am. & Eng. Enc. Law, p. 1145; Davis v. Montgomery, 51 Ala. 139, 23 Am. Rep. 545; Ball v. Woodbine, 61 Iowa, 83, 47 Am. Rep. 805, 15 N. W. 864; Hill v. Charlotte, 72 N. C. 55, 21 Am. Rep. 451; Robinson v. Greenville, 42 Ohio St. 625, 51 Am. Rep. 857; Norristown v. Fitzpatrick, 94 Pa. 121, 39 30 L.R.A. (N.S.)

Am. Rep. 771; Schultz v. Milwaukee, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; Pierce v. New Bedford, 129 Mass. 534, 37 Am. Rep. 387; Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1.

The railway company accepted the grant subject to liability for any damage which may be sustained by individuals by an improper construction of the road or unauthorized use of the street.

Frith v. Dubuque, supra; 2 Dill. Mun. Corp. §§ 563, 767, 768; Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Sorensen v. Greeley, 10 Colo. 369, 15 Pac. 803; Stackhouse v. Lafayette, 26 Ind. 17, 89 Am. Dec. 450; 15 Am. & Eng. Enc. Law, p. 1154.

To constitute a taking, there must be a direct appropriation, seizure, and dispossession of the owner.

Hot Springs R. Co. v. Williamson, 136 U. S. 121, 34 L. ed. 355, 10 Sup. Ct. Rep. 956; Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357.

In the absence of a constitutional provision providing for compensation for damaging property, acts done in the proper exercise of public authority, and not directly encroaching upon private property, although its use may be impaired, do not constitute a taking, and do not entitle the owner to compensation.

15 Cyc. Law & Proc. pp. 625, 656; Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224; Pennsylvania R. Co. v. Miller, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34; Perry v. New Orleans, M. & C. R. Co. 55 Ala. 413, 28 Am. Rep. 749; Ford v. Santa Cruz R. Co. 59 Cal. 290; Savannah, A. & G. R. Co. v. Shields, 33 Ga. 601; Chicago, B. & Q. R. Co. v. McGinnis, 79 Ill. 269; Indiana, B. & W. R. Co. v. Eberle, 110 Ind. 542, 59 Am. Rep. 225, 11 N. E. 467; Hine v. Keokuk & D. M. R. Co. 42 Iowa, 636; O'Connor v. St. Louis, K. C. & N. R. Co. 56 Iowa, 735, 10 N. W. 263; Kansas, N. & D. R. Co. v. Cuykendall, 42 Kan. 234, 16 Am. St. Rep. 479, 21 Pac. 1051; Lexington & O. R. Co. v. Applegate, 8 Dana, 289, 33 Am. Dec. 497; Hill v. Chicago, St. L. & N. O. R. Co. 38 La. Ann. 599; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Paterson & P. Horse R. Co. v. Paterson, 24 N. J. Eq. 158; Fobes v. Rome, W. & O. R. Co. 121 N. Y. 505, 8 L. R. A. 453, 24 N. E. 919; Danville, H. & W. R. Co. v. Com. 73 Pa. 29; Houston & T. C. R. Co. v. Odum, 53 Tex. 343; Hanlin v. Chicago & N. W. R. Co. 61 Wis. 515, 21 N. W. 623.

If highways are obstructed, it is a public nuisance, to be remedied by indictment, and not by suit for damages.

15 Cyc. Law & Proc. pp. 654, 700, and notes.

No action can be maintained by any per-

son who has no interest in the subject-matter of the action different from that possessed by the rest of the community.

Central Branch Union P. R. Co. v. Andrews, 30 Kan. 590, 2 Pac. 677; Atchison & N. W. R. Co. v. Garside, 10 Kan. 552; Heller v. Atchison, T. & S. F. R. Co. 28 Kan. 625; Trosper v. Saline County, 27 Kan. 391; Pottawatomie County v. O'Sullivan, 17 Kan. 58; Roberts v. Brown County, 21 Kan. 252; Atchison, T. & S. F. R. Co. v. State, 22 Kan. 13; Gottschalk v. Chicago, B. & Q. R. Co. 14 Neb. 550, 16 N. W. 475, 17 N. W. 120.

Hayes, J., delivered the opinion of the court:

Plaintiff in error is the owner of the S. E. $\frac{1}{4}$ of section 1, township 22 N., range 7 W., which lies northwest and outside of the limits of the city of Enid. Immediately southeast of his property, and separated from it by the intersections of two public highways, is an addition of the city of Enid, known as "Kenwood Addition." From the intersection of the highway running east and west along the south side of plaintiff's property, with the highway running north and south along the east side at the southeast corner of his property, there are three streets running into the city of Enid,—one running south, known as "Nineteenth street;" one running southeast, known as "Kenwood boulevard;" and one running east, known as "Chestnut street" or "avenue." These three streets begin at the intersection of the two public highways at the southeast corner of plaintiff's land. He brought this action to recover damages from the defendant city of Enid and the St. Louis & San Francisco Railway Company jointly, because of alleged obstructions placed in said streets by the railway company. He alleges that the railway company, under the authority and with the permission of the city of Enid, granted by an ordinance which he attaches to his petition as an exhibit, has constructed upon, across, and over said streets its line of railway and switch tracks, and by so doing has so obstructed the highways as to make the access to plaintiff's land more difficult, because of which the value of his property has been greatly depreciated. He further alleges that the railway company had negligently constructed its tracks upon said streets upon a different grade from that of the streets, and by embankments, ditches, and standing cars upon its tracks, has greatly obstructed public travel over two of said streets. The city and the railway company filed their separate demurrers to plaintiff's petition. The demurrer of the city was sustained, and 30 L.R.A. (N.S.)

that of the railway company overruled. Whereupon, plaintiff refusing to plead further, judgment was rendered by the court in favor of the city, dismissing the action against it. From that judgment this proceeding has been brought.

The ordinance by which the city granted to the railway company permission to build over the streets involved in this action grants to the company the right to use and occupy all of said streets for its main line of track through the city of Enid, and its switches, stations, grounds, and buildings, and for all other railway purposes and for a right of way, with the limitation, however, that the right of the public to travel over and across said three streets is reserved to the public. The ordinance provides that "the public shall be allowed the right to travel upon and across said right of way on the streets in this section named, and in consideration of the grant of the public grounds and streets in this ordinance given to said railway company, and the right to use and occupy said public grounds, streets, avenues, alleys, it is hereby made the duty of said railway company to provide a suitable place on each of said streets for a crossing by vehicles over each of its main and side tracks; said crossing to be properly made with planks to be laid between the rails, and extending 1 foot on the outside of the rails on each side of the track. . . ."

The theory upon which plaintiff seeks to recover is stated in the brief of his counsel in the following language: "The plaintiff in error brought this action against the defendant in error, defendant below, jointly for the recovery of damages sustained by him, alleged to have been caused by the defendant railway company obstructing and interfering with the ingress and egress to his property; and seeks to hold the defendant city jointly liable with the defendant railroad company for permitting the obstructions to be placed and maintained in the streets and highways directly communicating with plaintiff's premises."

The title to the streets involved in this action is not in the abutting owners, but is in the municipality in trust for the use and benefit of the public for the purpose of public highways. Municipal corporations of the territory had, and of the state now have, by virtue of § 118, art. 9, chap. 18, Wilson's Stat. 1903, authority to grant railway companies the use of the streets of such corporations for railway purposes, to be used in common with the traveling public, consistent, with the rights of abutting property owners. Foster Lumber Co. v. Arkansas Valley & W. R. Co. 20 Okla. 583, 95 Pac. 224, 100 Pac. 1110; Blackwell, E.

& S. W. R. Co. v. Gist, 18 Okla. 516, 90 Pac. 889. Plaintiff does not deny that the city of Enid had the power to enact the ordinance granted to the railway company in this case, permitting the railway company to occupy the streets with its tracks, but he insists that if, in the exercise of this right granted to the railway company, it commits acts that result in injury to plaintiff's property, the city is liable therefor. The weight of authority supports the rule that where a railway company, under legislative authority from a municipal corporation, constructs upon the streets or public highways of a city, its railway tracks, and operates its trains thereon in a reasonable, proper, and lawful manner, the city is not liable for injury resulting to private rights.

In *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307, it was said: "It is the settled law of this court, as well as in most of the other states of this Union, that it is a legitimate use of a street or highway to allow a railway track to be laid down in it, and for doing so the city is not liable for any damages which may accrue to individuals." Other cases in point and to the same effect are: *Sorensen v. Greeley*, 10 Colo. 369, 15 Pac. 803; *Frith v. Dubuque*, 45 Iowa, 406. The same rule is declared by Judge Brewer, speaking for the supreme court of Kansas, in *Hedrick v. Olathe*, 30 Kan. 348, 1 Pac. 118, under a statute identically the same as the one existing in this state.

Discussing the same question, the supreme court of Colorado in *Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6, said: "But the construction of an ordinary railroad is not, as we have found, an improvement of the street for the convenience and benefit of the local public. It is a private enterprise, for private profit. True, the city attaches certain conditions to the license granted, such as that the roadbed shall be upon a certain grade, that culverts shall be constructed for the gutters, and planks laid at the crossings, but otherwise the municipal authorities do not control the enterprise; whether we term the railroad company purely a private, or whether we call it a quasi public, corporation, the situation remains unchanged. In constructing and operating the road it is acting for itself, and not for the city. It is no more the city's agent than is the individual licensed by ordinance or resolution to engage in some legitimate private business requiring such license or authority. If the railroad company disobey the law in building or operating its road, the city is no more responsible therefor than it would be for a tort 30 L.R.A.(N.S.)

of the private individual in the pursuit of his business aforesaid."

The rule of the foregoing authorities is sound in principle and is supported by good reason; but a grant to a railway company by the legislative department of the state or by a municipal corporation, of authority to construct its railway tracks upon the streets or public highways, is not an authorization to the company to violate private rights. Such authorization relieves the company only from liability to suit, civil or criminal, at the instance of the government, but the licensee must respond in damages for injury resulting to private rights. *Foster Lumber Co. v. Arkansas Valley & W. R. Co. supra*; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719. The only right granted by such acts of authorization is one against the public, and not against the private rights of individuals. That the state or a municipal corporation acting under legislative authority may grant such right is too well settled to require the citation of authorities, and to hold that a municipal corporation having the power to grant such right may, for the mere act of granting it, be penalized, would be a legal inconsistency. But plaintiff insists in his brief that defendant is liable for the reason that the railway company, in the exercise of the right granted to it to lay its tracks on the streets of defendant, has unreasonably and in an improper manner constructed its tracks across two of the streets, and permitted its cars to stand upon said tracks across said streets, so as to hinder and obstruct public travel thereon, and to make the access to his property more difficult and inconvenient. License to a railway company by a city to construct its tracks upon the streets and in the public highways of a city must be exercised in a reasonable and proper manner, and does not give to the railway company authority to monopolize the streets, and to construct its tracks or operate its trains thereon in negligent, unreasonable manner, without regard to the rights of the traveling public and of abutting property owners. It must exercise the right granted with due regard to the rights of the public, and if, by failure to do so, it obstructs the streets or highways, it renders itself subject to prosecution for the maintenance of a public nuisance, and if any individual suffers special and peculiar injury therefrom, he has a right of action to restrain the nuisance and to recover damages for his injury. *Ottawa, O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 2 L. R. A. 59, 19 Pac. 661.

Plaintiff's petition does not allege with

fullness the acts it charges the railway company with having committed, that create the obstruction upon the streets leading to his property; but the allegations of his petition are to the effect that upon two of these named streets, leading across the addition from the city into the public highways upon which plaintiff's property abuts, the railway company has constructed, in an unreasonable manner, embankments and ditches upon which it has laid its tracks, and over which it has failed to provide and maintain crossings in compliance with the contract with the city; and that it has permitted and now permits cars to stand upon said tracks, all of which results in blocking said streets and so obstructing same that plaintiff is required to go to and from his premises by a more circuitous and inconvenient route, and has rendered his farm less suitable for an addition to the city, and has depreciated its value. Whether plaintiff is entitled to maintain this action for damages for said alleged injuries involves two questions. First, whether the alleged nuisance maintained by the railway company in the streets results in special and peculiar injury to plaintiff, for which he has his right of action against the railway company for damages; and, second, if he has such right of action against the railway company, is the city likewise liable to him in a similar action against it, for the reason that the city has permitted the alleged public nuisance to be maintained in violation of its ordinance granting the license to the railway company, and after notice to it of the maintenance thereof? It will follow that if the acts charged against the railway company are insufficient to give a right of action for damages in favor of plaintiff against the railway company, none exists against the city, and we shall therefore consider that question first.

A railway constructed upon the streets of a city or public highway, under legislative authority, is not a nuisance *per se*, but it may become such by reason of the manner of construction or of its operation. It is unnecessary to determine how much of a street a railway company might appropriate to its exclusive use under legislative license without any limitation upon its rights in the ordinance granting such license; for, in the case at bar, it is specifically provided by the ordinance granting to the railway company permission to build upon the streets of the city, that the public shall be allowed the right of travel upon and across said streets, and that the railway company shall provide suitable places on each of said streets for crossings, and 30 L.R.A. (N.S.)

that its right to use and occupy the streets shall be subject to the rights of public travel.

Section 4751 of the Compiled Laws of 1909 defines a nuisance to consist in unlawfully doing an act or omitting to perform a duty, which act or omission, among other things, "unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, street, or highway." The terms of the ordinance clearly do not except the railway company from the operations of this statute, except in so far as it constructs and operates its line of railway in a reasonable and proper manner. Section 4751 provides three remedies against a public nuisance: First, indictment; second, civil actions; third, abatement. Section 4760 provides that a private person may maintain an action for a public nuisance if it is especially injurious to himself; but not otherwise. This provision of the statute is in harmony with the common-law rule. As to what are special damages flowing from a public nuisance, for which a private individual may recover, the rule is that the injury from which they result must be different in kind, not merely degree, from that suffered by the general public from the act complained of. *Bigley v. Nunan*, 53 Cal. 403; *Decker v. Evansville Suburban & N. R. Co.* 133 Ind. 493, 33 N. E. 349; *Gundlach v. Hamm*, 62 Minn. 42, 64 N. W. 50; *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 105 Am. St. Rep. 1007, 08 N. W. 969. "It is not," says Mr. Wood in his treatise on Nuisance, "that he has sustained more damage than another; it must be of a different character, special and apart from that which the public in general sustain; and not such as is common to every person who exercises the right that is injured." Wood, Nuisance, ¶ 646. The statement of the rule is easier than the application of it. It is often difficult to determine whether the injury to an individual from a public nuisance is or is not a kind that gives him a right of private action to recover damages therefor. The authorities generally hold that the injury resulting from an obstruction in a street or public highway in front of an abutting owner's property, which interferes with his ingress or egress to and from his property, is a special injury to him; and many authorities hold that, although the obstruction be not in front of the abutting property, if it be in such proximity to it, upon the street or highway upon which the property abuts, that the abutting owner's use and enjoyment of the

property is destroyed or greatly interfered with, and its value depreciated, this injury is special and peculiar to him. And it has been held that injury to property, the access to which has been interfered with by an obstruction, although the property be not adjoining the highway or street upon which the obstruction exists, if such street or highway is the owner's only means of access to the property, is a special injury, and the owner may recover therefor. *Bembe v. Anne Arundel County*, 94 Md. 321, 57 L.R.A. 279, 51 Atl. 179. But the facts in the case at bar do not bring it within any of these classes. Plaintiff's property does not abut upon any of the streets obstructed. It abuts only upon public highways into which said streets lead. He has no private easement in the streets obstructed, such as an abutting property owner has; his right therein, violation of which he complains, is one common to all the public. Plaintiff owns property in the vicinity of these highways, and the value of his right to travel over these may be of greater value to him than the value of the same right to others who have no property in the same vicinity; but this is a difference only in degree, and not in kind. He does not allege that the streets obstructed constitute the only means of access to the property, or that the obstruction complained of cuts off his communication with the city. On the other hand, of the three streets named by him as crossing the additions of the city, and leading to the highways adjoining his farm, he has charged that only two of them have been so obstructed by the railway company as to interfere with public travel over them, and it may be presumed that the remaining street furnishes him adequate means of access to his farm from the city, and, if it does not do so, it could not be presumed, in the absence of allegation to that effect, that there were no other highways and streets affording to him means of ingress and egress to and from his property. In *Houck v. Wachter*, 34 Md. 265, 6 Am. Rep. 332, it was held that one who was compelled by an obstruction in the highway that led to his farm, to go from and return to his farm by a very circuitous route, to his great inconvenience, did not suffer such special damage as entitled him to maintain an action therefor, and the court said: "All the authorities agree that to support the action, the damage must be different not merely in degree, but different in kind, from that suffered in common, hence, it has been well settled that, though the plaintiff may suffer more inconvenience than others from the obstruction, by rea-

son of his proximity to the highway, that will not entitle him to maintain an action."

In *Guttery v. Glenn*, 201 Ill. 275, 66 N. E. 305, the closing of a street by the board of trustees of a town was held to be a public nuisance, but that a private person whose property was not adjacent to the street closed, and to which the street did not afford direct access, could not enjoin the action of the trustees merely because, by closing the street, he would be inconvenienced in going from his premises to certain parts of the town. Other cases in point are; *McCowan v. Whitesides*, 31 Ind. 235; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *Shaubut v. St. Paul & S. C. R. Co.* 21 Minn. 502; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; *Zettel v. West Bend*, 79 Wis. 316, 24 Am. St. Rep. 715, 48 N. W. 379; *Dantzer v. Indiana Union R. Co.* 141 Ind. 604, 34 L. R. A. 769, 50 Am. St. Rep. 343, 39 N. E. 223; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 87 Am. St. Rep. 600, 62 N. E. 341; *Stoutemeyer v. Sharp*, 89 Ark. 175, 21 L.R.A.(N.S.) 74, 116 S. W. 189; *Guilford v. Minneapolis & St. L. R. Co.* 94 Minn. 108, 102 N. W. 365; *Van Buskirk v. Bond*, 52 Or. 234, 96 Pac. 1103.

The facts in *Shaubut v. St. Paul & S. C. R. Co.* and *Guilford v. Minneapolis & St. L. R. Co.* supra, are very similar to the facts in the case at bar. In the *Shaubut Case*, plaintiff owned unplatted lands which adjoined the limits of a city. The street obstructed ended at the boundary line of plaintiff's property; the only difference between that case and the case at bar being that in the *Shaubut Case* the end of the street obstructed was contiguous to the plaintiff's land, whereas in the case at bar the streets and highways are adjacent to plaintiff's land. In the *Guilford Case*, the street obstructed intersected a street that was adjacent to plaintiff's property. In each of these cases plaintiff's means of communication with the city from his property was made more inconvenient, but recovery of damages therefor was denied, because his injury was held not to be special and peculiar to him. Plaintiff in the case at bar alleges that he has suffered great injuries and damages "which are peculiar to himself alone, and that are not shared by the public generally." This statement is nothing more than the averment of a legal conclusion. The averment of probative facts contained in the petition fails to show that he has sustained an injury different in kind from that experienced by the public at large. *Van Buskirk v. Bond*, supra.

We are therefore of the opinion that

plaintiff's petition fails to show that he has suffered any special injury from the public nuisance charged in his petition, for which he can recover from those guilty of maintaining it. It is therefore unnecessary to decide whether, if he had suffered such special injury as would entitle him to recover against the railway company, the city would be liable, because it had suffered in violation of the ordinance granting to the railway company the right to lay its tracks upon the streets, the obstruction to be maintained after notice to it of its existence.

The judgment of the trial court is affirmed.

Dunn, Ch. J., and Williams, Kane, and Turner, JJ., concur.

ARKANSAS SUPREME COURT.

ADELIA P. DANAHER, Appt.,
v.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY.

(— Ark. —, 127 S. W. 963.)

Telephone — refusal of service — collection of debt.

A telephone company cannot refuse to serve one who offered to pay its rates and comply with its reasonable rules and regulations, for the purpose of coercing payment of a debt contracted for service rendered in the past.

(March 28, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County entered on a directed verdict for defendant in an action brought to recover a statutory penalty for alleged discrimination by defendant against plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. J. E. Williams, Austin & Danaher, and Palmer Danaher for appellant.

Mr. Walter J. Terry, for appellee:

A telephone company may remove the instrument or discontinue the service because of nonpayment of telephone rentals or tolls at the time required by the contract or regulations of the company.

Huffman v. Marcy Mut. Teleph. Co. 143 Iowa, 590, 23 L.R.A. (N.S.) 1010, 121 N. W. 1033; Cumberland Teleg. & Teleph. Co. v. Hobart, 89 Miss. 252, 119 Am. St. Rep. 702, 42 So. 349; Rushville Co-op. Teleph. Co. v. Irvin, 27 Ind. App. 62, 59 N. E. 327; Irvin v. Rushville Co-op. Teleph. Co. 161 30 L.R.A. (N.S.)

Ind. 524, 69 N. E. 258; People ex rel. Kennedy v. Manhattan Gaslight Co. 45 Barb. 146; Tacoma Hotel Co. v. Tacoma Light & Water Co. 3 Wash. 316, 14 L.R.A. 669, 28 Am. St. Rep. 35, 28 Pac. 516; Girard L. Ins. Co. v. Philadelphia, 88 Pa. 394; Frothingham v. Bensen, 20 Misc. 132, 44 N. Y. Supp. 883; Harrisburg's Appeal, 107 Pa. 102; Com. ex rel. Roman Catholic High School v. Philadelphia, 132 Pa. 288, 19 Atl. 136; Jones v. Nashville, 109 Tenn. 550, 72 S. W. 985; Mackin v. Portland Gas Co. 38 Or. 120, 49 L.R.A. 596, 61 Pac. 134, 62 Pac. 20.

Battle, J., delivered the opinion of the court:

Adelia P. Danaher brought this action against the Southwestern Telegraph & Telephone Company to recover the statutory penalty for discrimination against the plaintiff by refusing to furnish her telephone service for a period of forty days. Plaintiff alleged in her complaint that she

Note. — Right to refuse telephone service to coerce payment of bill.

There is nothing to compel a telephone company to furnish telephone service to one who will not pay for it, and a regulation that, in case a patron is in default, service will be denied, is reasonable and may be enforced. Rushville Co-op. Teleph. Co. v. Irvin, 27 Ind. App. 62, 59 N. E. 327; Irvin v. Rushville Co-op. Teleph. Co. 161 Ind. 524, 69 N. E. 258; Cumberland Teleg. & Teleph. Co. v. Hobart, 89 Miss. 252, 119 Am. St. Rep. 702, 42 So. 349; Malochée v. Great Southern Teleph. & Teleg. Co. 49 La. Ann. 1690, 22 So. 922; Magruder v. Cumberland Teleph. & Teleg. Co. 92 Miss. 716, 16 L.R.A. (N.S.) 500, 46 So. 404; Cumberland Teleph. & Teleg. Co. v. Baker, 85 Miss. 486, 37 So. 1012; Buffalo County Teleph. Co. v. Turner, 82 Neb. 841, 19 L.R.A. (N.S.) 693, 130 Am. St. Rep. 699, 148 N. W. 1064.

The reason for the rule is that the law compels a telephone company to furnish efficient service without discrimination under reasonable regulations, and since it can maintain an efficient service only through prompt payment of its dues and tolls, the use of the summary remedy of denying service for nonpayment is reasonable. Rushville Co-op. Teleph. Co. v. Irvin and Irvin v. Rushville Co-op. Teleph. Co. supra.

And telephone service may be refused for nonpayment of rental, despite the company's indebtedness to the subscriber, where the rule is reasonable. Rushville Co-op. Teleph. Co. v. Irvin; Irvin v. Rushville Co-op. Teleph. Co.; and Buffalo County Teleph. Co. v. Turner.—supra.

In State ex rel. Goodwine v. Cadwallader, 172 Ind. 619, 87 N. E. 644, affirmed on rehearing in 172 Ind. 644, 89 N. E. 319, it was said that, in case of dispute over a

is, "and for many years has been a subscriber to the defendant's telephone exchange in Little Rock, and as such had a telephone instrument in her residence, furnished by defendant, and was at all times upon her call furnished with connections to all other telephones in said exchange until March 30, 1908, when the defendant disconnected said telephone and arbitrarily refused to permit plaintiff to use same, continuing so to refuse her service until the 8th day of May, 1908, when it again connected her telephone with its exchange; that plaintiff paid defendant the rent upon

said telephone for said months of March, April, and May, 1908, and fully complied with all of defendant's rules and regulations; that defendant refused to permit plaintiff to use said telephone during all of said time from March 30, 1908, to May 8, 1908, both days included, and refused on each and all of said dates to answer any call made by plaintiff through said telephone, or to call plaintiff at the request of any other subscriber asking for connection with said telephone; that, by virtue of the statutes of this state, it is made the duty of defendant to furnish all appli-

question of indebtedness, the remedy of the patron is to pay under protest the amount demanded, and sue for excess; that the patron cannot compel service by mandamus to enforce his agreement.

But other cases take the view that such a regulation cannot be made the instrument by which the telephone company can become the judge in its own case, and refuse service to enforce payment of disputed bills. *State ex rel. Payne v. Kinloch* Teleph. Co. 93 Mo. App. 349, 67 S. W. 684; *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 32 N. W. 237.

In the last cited case it appeared that the telephone was removed because of relator's refusal to pay for its use during the time the company was in default in furnishing him with a directory or list of its subscribers with their numbers, which the relator claimed was essential to the profitable use of the telephone, and which it was the custom of the company to furnish to its subscribers, and that, upon relator's subsequent application to become a subscriber, and to have an instrument placed in his office, it was insisted that relator's conduct relieved the company from any obligation to furnish telephone service. It was held upon application for mandamus to compel the company to furnish telephone service, that the mere fact of a misunderstanding with those who desire to receive its benefits will not relieve the company from the discharge of those duties; that if the relator was indebted to the respondent for the use of its telephone, the law gives an adequate remedy by an action for the amount due.

And so, also, in *Southwestern Teleg. & Teleph. Co. v. Luckett* (Tex. Civ. App.) 127 S. W. 856, it was held that a telephone company, being a public service corporation, cannot refuse service to a patron who offers to pay the customary rental, because he owed the company for past services for which he had failed or refused to pay.

Nor can such regulation be used as a means to enforce payment which it is not the duty of the subscriber to pay. Thus, a telephone company cannot refuse to continue to furnish telephone service on the ground that there is an amount due from the complainant's wife for the use of another telephone. *Cumberland Teleg. & Teleph. Co. v. Hobart*, supra. 30 L.R.A. (N.S.)

In the above case it was also said that even if the complainant was indebted to the company for telephone service rendered under a separate contract, the company could only put an end to that contract wherein there was default; that the failure to pay a telephone bill on one house does not authorize discontinuing service from the other, where the service is rendered under separate contracts.

In *State ex rel. Payne v. Kinloch Teleph. Co.* supra, the right of the telephone company to enforce a regulation requiring pay for back service before restoring a telephone was denied, where it failed to perform the required service, and the party was not notified of the regulation at the time he originally contracted to have the telephone placed in his house. The court said: "Without deciding whether a previous failure to pay the rent, either from dishonesty or inability, would justify a telephone company in refusing to again install an instrument removed on account of the default, until it was made whole for the back rent and cost of installation, we do decide and hold that when the customer is solvent, and it is fairly doubtful if any back rent is owing, or, as in this case, when the subscriber has paid for all the service he got (and there is practically no testimony that these appellants owe anything, while they are shown to be financially responsible), a company cannot insist on that condition,—cannot be judge in its own case and decide the dispute."

And the fact that the applicant had violated a former contract with the company, to use its system exclusively, is no ground for the company's refusing the service. *State ex rel. Gwynn v. Citizens' Teleph. Co.* 61 S. C. 83, 55 L.R.A. 139, 85 Am. St. Rep. 870, 39 S. E. 257; *Gwynn v. Citizens' Teleph. Co.* 69 S. C. 434, 67 L.R.A. 111, 104 Am. St. Rep. 819, 48 S. E. 460.

But in *Rushville Co-op. Teleph. Co. v. Irvin*, supra, it was said obiter that telephone service could be refused as long as the patron refused to pay the rental for the preceding month.

Upon the question of the right to withdraw telephone service because of abuse of privilege, see note to *Huffman v. Marcy Mut. Teleph. Co.* 23 L.R.A. (N.S.) 1010.

A. L. R.

cants telephone connections, service, and facilities without discrimination or partiality, provided such applicants comply with all of defendant's reasonable rules and regulations; that the defendant discriminated against plaintiff each day of said period of forty days, in this: that other persons who were subscribers to said telephone exchange were permitted to use their telephone at their residences, and were given connections through said exchange, provided they paid to defendant the rental price for such telephones and service as plaintiff did; and that such other subscribers were permitted to have connection with the telephones of other subscribers in the city of Little Rock and elsewhere, for the purpose of transmitting messages and communicating through said telephones to all persons having telephones, upon their payment of an amount of money equal to that paid by plaintiff for like service during said period, while, during the above-mentioned period, and on each and every day thereof, the defendant refused to allow the plaintiff to use her telephone and kept it disconnected from its switchboard, so that no call made by plaintiff was received at the exchange of defendant, and defendant, during all of said time, refused to connect plaintiff's telephone with that of any other subscriber; that during all of said time, defendant furnished to other subscribers in like situation such service and connections; that, by reason of such discrimination, defendant has subjected itself to a penalty of \$100 for each and every day during said period, and plaintiff prayed judgment for \$4,000.

"Defendant answered, denying all the material allegations of the complaint, and stated that on March 13, 1908, plaintiff paid the defendant \$2, for which it receipted her, and, at that time and on several prior occasions, it notified her that there was a balance of \$4 due defendant from plaintiff for two months' prior telephone rentals; that plaintiff denied this indebtedness, claimed to have receipts covering it, and promised from time to time to produce them, but failed and refused to do so; that one of its rules is to refuse telephone service to such persons as neglect or refuse to pay their telephone rentals for preceding months; that this rule is reasonable and necessary, and was known to plaintiff, and was part of a contract existing between her and defendant; that on March 20th it notified plaintiff that she was indebted to it for two months' rental, amounting to \$4, and that, if same was not paid on March 30, 1908, here telephone service would be discontinued; that on March 30, 1908, plaintiff was again reminded of 30 L.R.A. (N.S.)

her delinquency, and again notified that if the bill was not paid, her service would be discontinued; that she failed and refused to make payment of such past due rentals, and for that reason service was refused her."

Mrs. Danaher, the plaintiff, testified that she resides in Little Rock, and has been a subscriber of the defendant for a number of years, and that she was a subscriber during the months of March, April, and May, 1908, and had a telephone in her residence; that she paid to the telephone company its regular charges for her telephone for every month since she first had the telephone, and that she paid the charges for March, April, and May, 1908; that the defendant, claiming that she was indebted to it in the sum of \$4 for services rendered in some month in the past, and she claiming that she had paid it and refusing to pay it again, discontinued her telephone service on the 30th day of March, 1908, in the afternoon, until May 8, 1908, about 2 o'clock in the afternoon, when it was resumed, and during all that time her neighbors were furnished with telephone service. Other evidence was adduced by both parties. The court instructed the jury trying the issues in the case, to return a verdict in favor of the defendant, which they did, and judgment was rendered accordingly, and plaintiff appealed.

The telephone company, in devoting its property to a use in which the public has an interest, becomes a public servant, and is bound to serve the public impartially. It is like common carriers, in that it is bound to serve those applying to it impartially and upon equal terms.

In *State ex rel. Webster v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237, the court said: "That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation, and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and, in so far as it has been introduced for public use and has been undertaken by the respondents, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have, taken its place by the side of the telegraph as such common carrier."

In *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 60 Md. 399, 59 Am. Rep. 167, 7 Atl. 809, it is said: "The appellant [the telephone company] is in the exercise of a public employment, and has

assumed the duty of serving the public while in that employment. . . . The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railroad company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and, while offering [themselves as] ready to serve some, refuse to serve others. The law requires them to be impartial and to serve all alike, upon compliance with their reasonable rules and regulations."

Section 7948 of Kirby's Digest provides: "Every telephone company doing business in this state, and engaged in a general telephone business, shall supply all applicants for telephone connection and facilities without discrimination or partiality, provided such applicants comply or offer to comply with the reasonable regulations of the company; and no such company shall impose any condition or restriction upon any such applicant that is not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring, as condition for furnishing such facilities, that they shall not be used in the business of the applicant, or otherwise, under penalty of \$100 for each day such company continues such discrimination, and refuses such facilities after compliance or offer to comply with the reasonable regulations, and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

A telephone company, being a public servant, cannot refuse to serve anyone of the public in that capacity in which it has undertaken to serve the public, when such one offers to pay its rates and comply with its reasonable rules and regulations. It cannot refuse to serve him until he pays a debt contracted for services rendered in the past. For the present services it has a right to demand no more than the rate of charge fixed for such services. It transcended its duty to the public when it demanded more. *State ex rel. Gwynn v. Citizens' Teleph. Co.* 61 S. C. 83, 55 L.R.A. 139, 85 Am. St. Rep. 870, 39 S. E. 257; *Nebraska Teleph. Case*, supra; *State ex rel. Payne v. Kinloch Teleph. Co.* 93 Mo. App 30 L.R.A. (N.S.)

349, 67 S. W. 684; *Jones, Teleg. & Teleph. Cos.* § 251, and cases cited.

A tender or payment of the telephone company of its rate or charge for service or rent of telephone for any particular time, and offer to comply with its reasonable rules and regulations, would entitle the applicant to such service or rent. Should the telephone company incur a penalty by refusing to rent or render such service, it could prevent the increase thereof by renting or offering to rent the telephone, or rendering, or offering to render, the applicant such service.

The evidence adduced by the plaintiff was sufficient to entitle her to a submission of the issues in the case to the jury for a verdict. The court erred in instructing the jury to return a verdict for the defendant. Reverse and remand for a new trial.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

JOHN R. SMITH, Appt.,

v.

F. T. RUCKER et al.

(— Ark. —, 129 S. W. 1079.)

Bill of review — what necessary to sustain.

1. A bill of review is a bill or complaint seeking, after the lapse of the term, to reverse or modify a decree that has been made and entered in the cause, and must be based

Note. — Bill of review for newly discovered evidence.

As a general rule, the newly discovered evidence for which a bill of review will lie must be relevant and material, such as, if produced, might probably have caused a different determination, and which was not known to the party or his attorney when it could have been used in the cause, and could not have been discovered by the use of reasonable diligence. Newly discovered evidence which is merely cumulative, or goes to impeach the character of the witnesses, is insufficient. 2 Enc. Pl. & Pr. p. 580; *Story, Eq. Pl.* §§ 414, 418.

But a bill of review for newly discovered evidence is not a matter of right; court, and whether such leave shall be granted rests in the sound discretion of the leave to file it must be obtained from the court. The exercise of this discretion in granting or in refusing leave to file a bill of review for newly discovered evidence will not be disturbed on appeal, except for manifest abuse. The cases dealing with the question as to the necessity of a performance of the decree before bringing a bill of review, and as to what extent a perform-

upon error in law apparent on the face of the decree, or on the discovery of new facts since the decree was entered.

Same — necessity of consent.

2. A bill of review cannot be filed without leave from the chancellor in whose court the decree was rendered.

Same — forgotten evidence.

3. There is no abuse of discretion in refusing to permit the filing of a bill to review a decree settling the credits to be allowed on a note given to a bank for money loaned to settle with the maker's creditors, because of newly discovered evidence consisting of items delivered to the bank for credit, but not credited, where the items were known to petitioner, or by the exercise of reasonable diligence could have been discovered, before the rendition of the decree, and which were merely overlooked or forgotten.

(June 27, 1910.)

ance is a prerequisite, have been excluded. And so, also, the cases dealing with the question as to who may bring a bill of review have been excluded.

Purpose of bill.

A bill of review based upon newly discovered evidence is designed to accomplish the same purpose as a petition for a rehearing in chancery, or a motion for a new trial at law. Such a petition or motion must, however, be filed or made during the term, while a bill of review is filed only after the term at which the decree was rendered. *Elzas v. Elzas*, 183 Ill. 160, 55 N. E. 669; *Watts v. Rice*, 192 Ill. 123, 61 N. E. 337.

Bills of review are in the nature of writs of error, calling upon the court to review and reverse the former decree. *Griggs v. Gear*, 8 Ill. 2.

But bills of review differ from writs of error and appeals; the former being by the court which renders the decree, the latter by a superior tribunal. *Poole v. Nixon*, 9 Pet. 770, 9 L. ed. 305, Fed. Cas. No. 11,270; *Camp Mfg. Co. v. Parker*, 121 Fed. 195.

Necessity of leave to file.

—leave as a matter of discretion.

A bill of review for newly discovered evidence cannot be brought as a matter of course, but application for leave to file it must be made to the court in which the decree was rendered. Such bills are not favored by the courts. And the allowance of it, not being a matter of right in the party, but of the sound discretion in the court, is to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause. *Evans v. Parrott*, 26 Ark. 600; *Camp Mfg. Co. v. Parker*, supra; *Callier v. Shields*, 2 Stew. & P. (Ala.) 417; *Johnson v. Offutt*, 2 30 L.R.A. (N.S.)

A PPEAL by defendant from a decree of the White Chancery Court refusing to file a bill to review a former decree of that court in plaintiffs' favor in an action brought to recover the amount alleged to be due on a certain promissory note. Affirmed.

The facts are stated in the opinion.

Mr. Grant Green for appellant.

Messrs. S. J. Crabtree, J. W. House, and M. House for appellees.

Frauenthal, J., delivered the opinion of the court:

This is an appeal from a decree of the chancery court refusing leave to file a bill of review seeking to reverse a former decree of that court on account of new facts alleged to have been discovered since said decree was entered. In December, 1906,

MacArth, 168; *Griggs v. Gear*, supra; *Rowan v. First Nat. Bank*, 112 Ill. App. 434; *Lancaster v. Springer*, 126 Ill. App. 140; *Karsten v. Winkelman*, 126 Ill. App. 418; *Schaefer v. Wunderle*, 154 Ill. 577, 39 N. E. 623; *Cole v. Burnap*, 164 Ill. 630, 45 N. E. 969; *Carneal v. Wilson*, 3 Litt. (Ky.) 90; *Pfultz v. Pfultz*, 1 Md. Ch. 455; *Hollingsworth v. McDonald*, 2 Harr. & J. 230, 3 Am. Dec. 545; *Burch v. Scott*, 1 Gill & J. 393; *Hodges v. Mullikin*, 1 Bland, Ch. 503; *Stockley v. Stockley*, 93 Mich. 307, 53 N. W. 523; *Vaughan v. Cutrer*, 49 Miss. 782; *Watkinson v. Watkinson*, 68 N. J. Eq. 632, 69 L.R.A. 397, 60 Atl. 931, 6 A. & E. Ann. Cas. 326; *Wiser v. Blachly*, 2 Johns. Ch. 488; *Traphagen v. Voorhees*, 45 N. J. Eq. 41, 16 Atl. 198; *Kennedy's Estate*, 15 Pa. Co. Ct. 494; *Conrad v. Conrad*, 9 Phila. 510; *Proudfit v. Pickett*, 7 Coldw. 563; *Frazer v. Sybert*, 5 Sneed, 100; *Young v. Henderson*, 4 Hayw. (Tenn.) 189; *Hill v. Bowyer*, 18 Gratt. 364; *Campbell v. Campbell*, 22 Gratt. 649; *Whitten v. Saunders*, 75 Va. 563; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549; *Heermans v. Montague*, 2 Va. Dec. 6, 20 S. E. 899; *Baker v. Watts*, 101 Va. 702, 44 S. E. 929; *Amiss v. McGinnis*, 12 W. Va. 371; *Long v. Granberry*, 2 Tenn. Ch. 85; *Ricker v. Powell*, 100 U. S. 104, 25 L. ed. 527; *Diamond Drill & Mach. Co. v. Kelley Bros.* 138 Fed. 833; *Poole v. Nixon*, supra; *Gould v. Tancred*, 2 Atk. 533.

The courts of Pennsylvania make a distinction in regard to newly discovered evidence and newly discovered matter, which is not recognized in any other jurisdiction, holding that a review may be had as a matter of right for new matter which has arisen after the decree, and it may be allowed *ex gratia* for new evidence as to facts on which the decree was grounded, which has been discovered after the decree, and which by reasonable diligence could not have been produced or used before the decree was made. *Green's Appeal*, 59 Pa. 235; *Bishop's Estate*, 1 Woodw. Dec. 149; *Rid-*

F. T. Rucker instituted an action in the circuit court against John R. Smith upon a note for \$1,500, which it was alleged had been executed by Smith & Ward, a partnership composed of John R. Smith and A. C. Ward, to the Bank of Beebe, on March 4, 1904, and by said bank transferred to said Rucker. To the complaint Smith filed an answer and cross complaint, and also a motion to make the Bank of Beebe a party to the suit, and a motion to transfer the cause to the chancery court. The cause was transferred to the chancery court, and the Bank of Beebe was made a party to the action. In his answer and cross complaint Smith denied that there was anything due upon the note sued on, but alleged that it had been paid. He alleged

that the firm of Smith & Ward had been engaged in the mercantile business, beginning in the year 1900, and that the note sued on was one of the debts of that firm, that the firm of Smith & Ward became financially embarrassed, and in 1905 filed a petition in voluntary bankruptcy. Shortly after the filing of said petition, F. T. Rucker, who was the cashier of the Bank of Beebe, suggested to the members of said partnership that they should attempt to make a settlement with their creditors, and that said bank would assist them by lending them the money to make the settlement, upon the agreement that the indebtedness due to the bank would be paid in full. That, in pursuance of said suggestion, a settlement was made with the

dle's Estate, 19 Pa. 431; Bishop's Appeal, 26 Pa. 470; Hartman's Appeal, 36 Pa. 70; Russell's Appeal, 34 Pa. 258; Milligan's Appeal, 82 Pa. 389; Scott's Appeal, 112 Pa. 427, 5 Atl. 671; Priestley's Appeal, 127 Pa. 420, 4 L.R.A. 503, 17 Atl. 1084; Kachline's Estate, 7 Pa. Super. Ct. 163; Bickford's Estate, 16 Pa. Super. Ct. 572.

Whether or not leave should be granted to file a bill of review for newly discovered evidence rests in the sound discretion of the court, arising out of the circumstances of each case. *Jacks v. Adair*, 33 Ark. 161; *Webster v. Diamond*, 36 Ark. 532; *Planters' & M. Bank v. Dundas*, 10 Ala. 661; *Cole v. Burnap and Peltz v. Peltz*, supra; *Hughes v. Jones*, 2 Md. Ch. 280; *Hollingsworth v. McDonald*, supra; *Lanahan v. Lanahan*, 110 Md. 176, 72 Atl. 672; *Roberge v. De Lisle*, 158 Mich. 16, 122 N. W. 362; *Putnam v. Clark*, 36 N. J. Eq. 33; *Love v. Blewit*, 21 N. C. (1 Dev. & B. Eq.) 108; *Harris v. Edmondson*, 3 Tenn. Ch. 211; *Winchester v. Winchester*, 1 Head, 460; *Frazier v. Sybert*, supra; *McGuire v. Gallagher*, 95 Tenn. 349, 32 S. W. 209; *Davis Sewing Mach. Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237; *Ketchum v. Breed*, 66 Wis. 85, 26 N. W. 271; *Providence Rubber Co. v. Goodyear*, 9 Wall. 805, 19 L. ed. 829; *Ricker v. Powell*, supra; *Society of Shakers v. Watson*, 23 C. C. A. 263, 47 U. S. App. 170, 77 Fed. 512; *Poole v. Nixon*, supra.

The court is at liberty to look into all the circumstances of the case, and if, upon full consideration of them all, it comes to the conclusion that opening the decree and rehearing the cause would be productive of mischief to innocent parties, or is for any other reason inexpedient, it may refuse to do so, though the facts, if admitted, would vary the decree. *Hughes v. Jones*, supra; *Young v. Keighly*, 16 Ves. Jr. 348; *Dexter v. Arnold*, 5 Mason, 315, Fed. Cas. No. 3,856; *Griggs v. Gear*, supra; *Murrell v. Smith*, 51 Ala. 301.

The exercise of discretion in granting or refusing the right to file a bill of review will not be disturbed on appeal, except for manifest abuse. *Karsten v. Winkelman*, 30 L.R.A. (N.S.)

supra; *Elzas v. Elzas*, 183 Ill. 132, 55 N. E. 673, affirming 83 Ill. App. 519; *Lancaster v. Springer*, supra; *Stockley v. Stockley*, 93 Mich. 307, 53 S. W. 523, Id. 93 Mich. 314, 53 N. W. 525; *Hoskins v. Hattenback*, 14 Iowa, 314; *Schaefer v. Wunderle*, supra; *Shaffer v. Shaffer*, 51 W. Va. 126, 41 S. E. 166; *Burch v. Scott*, supra.

In the *Burch* Case the complaint showed that the original plaintiff admitted that he had obtained a decree by default for more than was due, but did not allege that the complainant had lost any of his testimony, and it appeared that he had negligently omitted during the space of about five months to put in his answer, but, as he averred by his bill that he had a good and available defense to the merits, the decree was set aside and the complainant let in to answer on payment of costs; but on appeal the order setting aside the decree was reversed upon the ground that the establishment of such a lax principle of practice would be productive of deleterious consequences.

In *Bartlett v. Gregory*, 60 Ark. 453, 30 S. W. 1043, the supreme court held that they did not consider themselves bound by the exercise of the chancellor's discretion granting a bill of review, and, being of the opinion that the evidence in that case might have been discovered in time by the exercise of diligence, the case was dismissed.

In *Craufurd v. Smith*, 93 Va. 628, 23 S. E. 235, 25 S. E. 657, it was said that the court, before allowing a bill of review to be filed on the ground of after-discovered evidence, ought to be satisfied that the evidence relied on is new, and could not by ordinary diligence have been discovered prior to the date of the decree complained of; but when the court is so satisfied and allows a bill of review to be filed, those questions are finally determined, and are not open when the bill of review is heard upon the merits. Upon this question, see cases cited in subdivision, "Diligence in discovery of evidence,—when question may be raised."

Leave of court to file a bill of review must be granted in open court. *Colville v.*

creditors of the partnership, and that the Bank of Beebe advanced to the firm the money to pay off all other creditors. To secure the Bank of Beebe for the money thus advanced, they transferred and turned over to it certain notes and mortgages and the book of accounts of the partnership. He alleged that said Rucker, as cashier of the Bank of Beebe, had entire management and control of the collection of said notes and accounts, and that, from these collections and also from amounts paid by Smith, all the money advanced by the bank and all the indebtedness due to the bank, including the note sued on, was paid. The Bank of Beebe and said Rucker made answer to the cross complaint, denying that sufficient collections had been made on

said notes and accounts to pay off the indebtedness of Smith & Ward to the bank or to pay the note sued on. They also alleged that, for the money advanced by the bank to pay to the creditors of Smith & Ward, two additional notes had been executed to the bank, secured by mortgage on real estate, and they sought a recovery upon these notes and a foreclosure of the mortgage executed to secure their payment. The testimony which was adduced upon the trial of that cause is quite voluminous. It was introduced for the purpose of showing the collections which had been made upon said notes and accounts, and the payments that had been made by Smith upon the indebtedness due by said firm to the Bank of Beebe and upon said note sued

Colville, 9 Humph. 523; Finley v. Tayloy, 8 Baxt. 237; Saunders v. Savage (Tenn.) 63 S. W. 218.

The manifest purpose of the rule requiring a suitor to obtain leave before filing a bill of review is to prevent frivolous and vexatious litigation.

The fact that leave has been granted should be stated in the bill. Pendleton v. Fay, 3 Paige, 204; Lansing v. Albany Ins. Co. Hopk. Ch. 102.

In Hodson v. Ball, 1 Phill. Ch. 177, it was held that a bill of review filed without leave will be ordered to be taken from the files on motion.

In Henderson v. Cook, 4 Drew. 306, it was held that a bill of review filed without leave is demurrable for that reason.

To the same effect is Knight v. Atkisson, 2 Tenn. Ch. 384, where it was suggested that either remedy was available.

But in Webster v. Diamond, supra, it was held that where a bill does not appear upon its face to have been filed by leave of court, a motion to strike it from the files, and not a demurrer, is the proper mode of raising the objection.

After a defendant has demurred to a bill of review, he cannot raise an objection to the right of the plaintiff to file it. Hyde v. Lamberson, 1 Idaho, 539. To the same effect is McGowan v. Elroy, 28 App. D. C. 188.

In the Hyde Case it was said that a party, to avail himself of such objection, should move the court on his first appearance to strike the bill from the files or dismiss the suit.

Granting leave to file a bill of review does not estop the court to dismiss it on demurrer. McGuire v. Gallagher, supra.

A bill of review will be ordered to be taken off the file where it is inconsistent with the leave granted, as in the case where other objects than those comprehended in the leave are introduced. Buckingham v. Corning, 29 N. J. Eq. 238.

Petition for leave.

The proper mode of applying to the court for leave to file a bill of review for newly

discovered evidence is by petition. The petition must state the facts clearly and distinctly, and be supported by affidavits of witnesses in support of the averments, so as to enable the court to determine whether or not the newly discovered testimony, when produced, will be of such a character as will make it controlling in the cause. Greer v. Turner, 47 Ark. 17, 14 S. W. 383; Finlayson v. Lipscomb, 16 Fla. 751; Dixon v. Graham, 16 Iowa, 310; Rowan v. First Nat. Bank, 112 Ill. App. 434; Burch v. Scott, 1 Gill & J. 393; Vaughan v. Cutrer, 49 Miss. 782; Boyer v. Boyer (N. J. Eq.) 76 Atl. 309; Doyle v. New York & N. E. R. Co. 14 R. I. 55; Simpson v. Watts, 6 Rich. Eq. 304, 62 Am. Dec. 392; Long v. Granberry, 2 Tenn. Ch. 85; Berdanatti v. Sexton, 2 Tenn. Ch. 609; Burson v. Dosser, 1 Heisk. 754; Puryear v. Puryear, 5 Baxt. 640; Livingston v. Noe, 1 Lea, 55; McGuire v. Gallagher, supra; Griffith v. Griffith (Tenn.) 46 S. W. 340; Rittenhouse's Estate, 1 Pars. Sel. Eq. Cas. 313; Massie v. Graham, 3 McLean, 41, Fed. Cas. No. 9,263; Whitten v. Saunders, 75 Va. 563; Hatcher v. Hatcher, 77 Va. 600; Norfolk Trust Co. v. Foster, 78 Va. 413; Harman v. McMullin, 85 Va. 187, 7 S. E. 349; Taylor v. Easton, 103 C. C. A. 509, 180 Fed. 363; Thomas v. Rawlings, 34 Beav. 50.

The statements thus required to be presented in the petition under oath cannot be made by proxy. Only the applicant himself can state why he was ignorant of the particular facts previous to the decree, and that he used the necessary diligence to bring his application within the law.

In Quick v. Lilly, 3 N. J. Eq. 255, it was held that the court will not, before granting leave to file a bill of review, inquire whether the petitioner can prove the facts set out in his petition. If the facts and matters set forth in his petition, verified by affidavit, are such as to lay a sufficient foundation for a bill of review, it is all that is required.

In Long v. Granberry, supra, it was said that the bill might in most cases be so drafted as to embody all the requirements,

on. Upon the trial of the cause the chancellor found that the total indebtedness of the firm of Smith & Ward to the Bank of Beebe and said Rucker amounted to the sum of \$6,486.59, and that the total collections made by the bank and Rucker thereon, including all payments made by Smith and others for him, amounted in the aggregate to \$4,072.83, and he entered a decree for the balance in favor of the Bank of Beebe and said Rucker. From that decree said J. R. Smith appealed to this court, and said decree was by this court affirmed on December 21, 1908.

On August 27, 1909, this application or petition was filed in said chancery court for leave to file a bill of review of said decree, upon account of new facts discovered since

in which event, if properly verified, the application might be made by motion.

Nature of new evidence.

—materiality and weight.

By "material" is meant that the evidence must be of a character which would probably change the results of the cause if unanswered, or at least raise a question of so much nicety and difficulty as to be a fit subject of judgment in the cause. *Purcell v. Coleman*, 6 D. C. 87.

In *Thomas v. Rawlings*, supra, it was said that the question is whether the evidence is such as would have induced the court to make a different decree, when taken in connection with all the other evidence in the case.

In *Jenkins v. Eldredge*, 3 Story, 314. Fed. Cas. No. 7,267. Judge Story said: "It is not sufficient that it is such as might be argued, with more or less effect, by way of a presumption, against or in favor of former testimony. But it should go further, and demonstrate that, consistently with it, the decree ought not to stand." To the same effect are *Allgood v. Bank of Piedmont*, 130 Ala. 237, 29 So. 855; *Webster v. Diamond*, 36 Ark. 532; *Jones v. Robson*, 30 Ga. 826; *Boyden v. Reed*, 35 Ill. 458; *Walker v. Douglas*, 89 Ill. 425; *Lewis v. Topsico*, 201 Ill. 320, 66 N. E. 276; *Jenkins v. Prewitt*, 5 Blackf. 7; *Hines v. Driver*, 100 Ind. 315; *Hoskins v. Hattenback*, 14 Iowa, 314; *Brunk v. Means*, 11 B. Mon. 214; *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Glover v. Jones*, 95 Me. 303, 49 Atl. 1104; *Mosher v. Mosher*, 108 Mich. 612, 66 N. W. 486; *Quick v. Lilly*, supra; *Roche v. Hoyt*, 71 N. J. Eq. 323, 64 Atl. 174; *Bishop's Estate*, 1 Woodw. Dec. 149; *Doyle v. New York & N. E. R. Co.* supra; *Harvey v. Murrell*, Harp. Eq. 257; *Simpson v. Watts*, 6 Rich. Eq. 364, 62 Am. Dec. 392; *Long v. Granberry*, supra; *Winchester v. Winchester*, 1 Head. 460; *Burson v. Dosser*, supra; *Fuller v. Jackson* (Tenn.) 62 S. W. 274; *Stevens v. Dewey*, 27 Vt. 638; *McCall v. Graham*, 1 Hen. & M. 13; *Randolph v. Randolph*, 1 Hen. & M. 181; *Curry v. 30 L.R.A.* (N.S.)

the entering of said decree. The new matter thus set up consisted of certain collections and payments which it was alleged were made to the Bank of Beebe and said Rucker, and which had never been credited on the indebtedness due to the bank by said partnership, and which had never been presented upon the trial of the case. It was alleged that said Smith had, in 1905, delivered to said Rucker thirty-one bales of cotton to be applied upon said indebtedness, which had not been done; that Rucker had assured Smith that credit therefor had been given, and that, on account of his confidence in Rucker, he had accepted his word that it had been done; but since the rendition of the decree he had learned that this had not been done. On this ac-

Burns, 3 Call (Va.) 183; *Douglass v. Stephenson*, 75 Va. 747; *Hatcher v. Hatcher and Harman v. McMullin*, supra; *Durbin v. Roanoke Bldg. Co.* 108 Va. 468, 62 S. E. 339; *Nichols v. Nichols*, 8 W. Va. 174; *Bloss v. Hull*, 27 W. Va. 503; *Davis Sewing-Mach. Co. v. Dunbar*, 32 W. Va. 335, 9 S. E. 237; *Lorentz v. Lorentz*, 32 W. Va. 556, 9 S. E. 886; *Dingess v. Marcum*, 41 W. Va. 757, 24 S. E. 624; *Shaffer v. Shaffer*, 51 W. Va. 126, 41 S. E. 166; *Spill v. Celluloid Mfg. Co.* 22 Blatchf. 441, 22 Fed. 94; *Jourolmon v. Ewing*, 29 C. C. A. 41, 56 U. S. App. 149, 85 Fed. 103; *Ward v. Ward*, 79 C. C. A. 162, 149 Fed. 204, denying rehearing of 74 C. C. A. 146, 145 Fed. 1023; *Richardson v. Lowe*, 79 C. C. A. 317, 149 Fed. 625; *Yerrington v. Putnam*, 2 Bann. & Ard. 601, Fed. Cas. No. 18,137; *Southard v. Russell*, 16 How. 547, 14 L. ed. 1052; *Purcell v. Miner* (*Purcell v. Coleman*) 4 Wall. 519, 18 L. ed. 459; *Bennet v. Lec*, 2 Atk. 529; *Hosking v. Terry*, 15 Moore, P. C. C. 493; *Hungate v. Gascoyne*, 2 Phill. Ch. 25; *Ord v. Noel*, 6 Madd. Ch. 127.

The matter must be materially relevant and pressing upon the decree, and must be different from that of mere accumulation of witnesses to a litigated fact. *Callar v. Shields*, 2 Stew. & P. (Ala.) 417.

In *Long v. Granberry*, supra, it was said that the rule that the evidence should not be merely cumulative means that, besides being additional evidence to the same point, it should be sufficiently strong to change the former result without reference to the evidence in the original case.

To the same effect is *Burson v. Dosser*, 1 Heisk. 763, where it was said that if the rule were otherwise, there would probably be but few seriously contested cases where grounds equally strong might not be presented, since the parties, after the trial and after discovering the ground upon which they failed, would too often discover that upon another trial they could maintain their side of the contest with more evidence and greater skill, which would open the doors to endless frauds and perjuries.

And in *Brown v. Nutter*, 54 W. Va. 82, 46 S. E. 375, it was said that newly dis-

count it was alleged that no testimony had been introduced relative to the payment of said cotton on said indebtedness upon the trial of the cause. It was also alleged that Smith had, in 1905, made two deposits in the Bank of Beebe of \$200 each, which were to be applied in payment upon said indebtedness, but which had not been done; that, at the time of making the deposits, he had received written acknowledgments thereof, or deposit slips, which he had turned over to his attorney, and that they had been lost by the attorney, and on the trial of the case had been forgotten. The other items set out are smaller in amounts, and like allegations are made relative to the payment thereof, and the reason why

covered oral evidence, contradictory or cumulative in its nature, to be sufficient to sustain a bill of review, must be so indisputable as to be decisive of the case. To the same effect are *Rowan v. First Nat. Bank*, 112 Ill. App. 434; *Wieczorek v. Adamski*, 114 Ill. App. 161; *Aholtz v. Durfee*, 122 Ill. 286, 13 N. E. 645; affirming 25 Ill. App. 43; *Elzas v. Elzas*, 183 Ill. 132, 55 N. E. 673; affirming 83 Ill. App. 519; *Kinsell v. Feldman*, 28 Iowa, 497; *Iler v. Routh*, 3 How. (Miss.) 276; *Moody v. Farr*, 27 Miss. 788; *Love v. Blewit*, 21 N. C. (1 Dev. & B. Eq.) 108; *Stevens v. Hey*, 15 Ohio, 313; *Frazer v. Sypert*, 5 Sneed, 100; *McDowell v. Morrell*, 5 Lea, 278; *Carmichael v. Snodgrass*, 6 Lea, 183; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549; *Nichols v. Nichols*, 8 W. Va. 174; *Wethered v. Elliott*, 45 W. Va. 436, 32 S. E. 209; *Ketchum v. Breed*, 66 Wis. 85, 26 N. W. 271; *Baker v. Whiting*, 1 Story, 218, Fed. Cas. No. 786; *Blandy v. Griffith*, 6 Fisher Pat. Cas. 434, Fed. Cas. No. 1,530; *Reeves v. Keystone Bridge Co.* 2 Bann. & Ard. 256, Fed. Cas. No. 11,661; *Norris v. Le Neve*, 3 Atk. 26.

In *Webster v. Diamond*, supra, it was said that new written evidence of a binding nature, such as newly discovered papers, may be sufficient to move the court to grant leave for a bill of review, though evidence of a cumulative character.

In *St. John v. Alderson*, 32 Gratt. 140, it is said that in determining whether or not evidence is cumulative, the courts must see if the kind and character of the facts offered, and those adduced on the former trial, are the same, and not whether they tend to produce the same effect. It is their resemblance that makes them cumulative. The facts may tend to prove the same proposition, and yet be so dissimilar in kind as to afford no pretense to saying they are cumulative.

Thus, where the issue was payment, it was held that newly discovered evidence of a witness who could prove that he saw the creditor receive the money on account of that particular debt was not merely cumulative.

testimony was not adduced relative thereto in the trial of the case.

A bill of review is a bill or complaint seeking, after the lapse of the term, to reverse or modify a decree that has been made and entered in the case. In order to file a bill of review, leave must be obtained from the chancellor in whose court the decree has been rendered. Such bill may be based upon error in law which is apparent on the face of the decree, or on account of new facts discovered since the decree was entered. If it is based upon newly discovered evidence, it rests within the sound discretion of the chancellor to grant or refuse leave to file the bill of review; but this discretion is subject to review upon appeal, if it has been abused. *Jacks v. Adair*, 33

lative, since it was dissimilar in kind, and, if true, was conclusive of the case. *Ibid*.

But in *Burson v. Dosser*, supra, it was held that new proof that defendant had admitted the debt was paid was merely cumulative testimony, where the issue had been payment.

In *Diamond Drill & Mach. Co. v. Kelley Bros.* 138 Fed. 833, it was held, in a suit for infringement of a patent belt fastener, that newly discovered evidence of a witness, corroborated by two others, that he had made and used a belt fastener the exact counterpart of that patented some four years prior to the application for the patent relied on, and that his use was persisted in intermittently for two or three years, was sufficiently material to reopen the case, and allow the filing of a supplemental bill in the nature of a bill of review, where under the law such prior use would affect the validity of the patent.

But in *Blandy v. Griffith*, supra, it was held that where the question of priority of invention was put in the original suit, evidence of other alleged anticipations than those set up in that suit is mere cumulative evidence upon the former issue, and such evidence after judgment is not a ground for granting leave to file a supplemental bill.

—parol testimony.

There appears to be some conflict whether a bill or review may be maintained upon the discovery of parol testimony. *Traphagen v. Voorhees*, 45 N. J. Eq. 44, 16 Atl. 193.

There are authorities which seem to hold that leave should not be granted to let in new oral testimony as to facts which were controverted on the final hearing, and that as to these facts nothing short of written evidence will lay a sufficient foundation for a bill of review. *Lord Talbot in Taylor v. Sharp*, 3 P. Wms. 371, held that the new matter must be a release or receipt, or something of that kind, for, unless the new evidence was limited to writing, a

Ark. 161; *Webster v. Diamond*, 36 Ark. 532; 3 Enc. Pl. & Pr. p. 588. It is the policy of the law that a decree once solemnly entered should not be set aside or modified except for cogent reasons. The issues that are presented in a suit should be fully developed by the testimony, and it is presumed when a cause is finally submitted for determination and decree, that the parties have adduced all evidence of which they had knowledge, or which they could have known by the exercise of due diligence. Therefore it has been uniformly held that the new matter for which a bill of review will lie must be such as was not known to the petitioner or his attorney in time to be used in the suit, or could not have been known by the exercise of reasonable dili-

gence. *White v. Holman*, 32 Ark. 757; *Woodall v. Moore*, 55 Ark. 22, 17 S. W. 268; *Dumont v. Des Moines Valley R. Co.* 131 U. S. clx, Appx. and 25 L. ed. 520.

In the case of *Bartlett v. Gregory*, 60 Ark. 453, 30 S. W. 1043, the rule is thus stated: "Where a bill of review is for newly discovered matter, the rule now is that the matter must be such as could not have been discovered by the use of reasonable diligence, 'for, if there be any laches or negligence in this respect, that destroys the title to the relief.'"

A bill of review will not lie for evidence which was known in time to have been offered before the submission of the cause for determination or decree. It is the duty of the parties to present all such evidence,

vexatious person might resort to a bill of review as a means to oppress his adversary, and to keep the cause from ever being at rest. This case was cited with approval by Chancellor Kent in *Livingston v. Hubbs*, 3 Johns. Ch. 124. And the *Livingston Case* was cited with approval by Mr. Justice Nelson in *Southard v. Russell*, 16 How. 547, 569, 14 L. ed. 1052, 1062.

This is the doctrine which the court of appeals of Kentucky laid down in *Repass v. McClanahan*, Hardin (Ky.) 342, and which Mr. Justice Story thought was supported by sound reason. *Dexter v. Arnold*, 5 Mason, 303, Fed. Cas. No. 3,856; *Jenkins v. Eldredge*, 3 Story, 299, Fed. Cas. No. 7,267.

To the same effect are *Bowles v. South*, Hardin (Ky.) 451; *Vaughn v. Hann*, 6 B. Mon. 338; *Brewer v. Bowman*, 3 J. J. Marsh. 492, 20 Am. Dec. 158; *Head v. Head*, 3 A. K. Marsh. 121; *McDougald v. Dougherty*, 39 Ala. 409; *Bradshaw v. Garrett*, 1 Port. (Ala.) 47; *Callier v. Shields*, supra.

And the discovery of a receipt which of itself would have been inadmissible in evidence on the former trial, without parol testimony accompanying and explaining it, is insufficient new matter within the rule. *Bradshaw v. Garrett*, supra.

There are other authorities, however, which expressly hold that any evidence, whether written or oral, and whether it relates to facts which were controverted on the final hearing, or to entirely new facts, which is so material and cogent as to convince the court that, if the new evidence had been before it on the final hearing, it is highly probable that a different result would have been reached, or a different decree would have been pronounced, will be sufficient to entitle the applicant to leave to file a bill of review. *Massie v. Graham*, 3 McLean, 41, Fed. Cas. No. 9,263; *Thomas v. Rawlings*, 34 Beav. 50; *Long v. Granberry*, 2 Tenn. Ch. 85; *Perkins v. Partridge*, 30 N. J. Eq. 559.

In *Traphagen v. Voorhees*, supra, it was said upon this question that no consideration of either justice or policy exists why 30 L.R.A. (N.S.)

oral evidence, if it be of sufficient weight to convince the court that its decree is erroneous, should not be held to be a sufficient ground for granting leave to file a bill of review.

—whether new evidence must relate to matter controverted on the original hearing.

As to whether the new matter must relate to the matter controverted on the original hearing, there is conflict of authority. *Story*, Eq. Pl. §§ 415, 416; 2 *Dan. Ch. Pr.* 1577, note 3; *Elzas v. Elzas*, 83 Ill. App. 521; *Dexter v. Arnold*, 5 Mason, 313, Fed. Cas. No. 3,856.

In *Anonymous*, 2 *Freem. Ch.* 31, it was held that a bill of review should not be granted where the new proof referred to a matter which was particularly in issue on the original hearing.

In *Elzas v. Elzas*, 183 Ill. 132, 55 N. E. 673, affirming 83 Ill. App. 519, it was said that the newly discovered evidence must be such as relates to a matter in issue on the hearing,—not evidence to make a new case, but to establish the old one.

To the same effect are *Boyden v. Reed*, 55 Ill. 458; *Vaughan v. Cutrer*, 49 Miss. 782.

Thus, a decree granting a divorce on the ground of desertion, where the controverted fact in the case was the marriage of the parties, cannot be reviewed and reversed upon the ground that complainant had been guilty of adultery during the marriage. *Elzas v. Elzas*, supra.

But where the evidence sought to be introduced establishes a new fact of itself, decisive of the merits of the cause and necessarily changing the original decree, the rehearing should be granted. *Owens v. Love*, 9 Fla. 325. To the same effect is *Partridge v. Osborne*, 5 *Russ. Ch.* 195.

In *Craig v. Smith*, 100 U. S. 226, 25 L. ed. 577, it was said that there is no universal or absolute rule which prohibits the courts from allowing the introduction of newly discovered evidence under a bill of review, to prove facts which were in issue on the former hearing, but that the allow-

and if, through design or inadvertence, they do not introduce such evidence, they will not be permitted to wait the determination of the issue, and then seek to again try the issue upon evidence which they have designedly or negligently omitted to introduce. *Greer v. Turner*, 47 Ark. 17, 14 S. W. 383; *State ex rel. Nevada County v. Hicks*, 48 Ark. 515, 3 S. W. 524; *Boynton v. Chicago Mill & Lumber Co.* 84 Ark. 203, 105 S. W. 77; 16 Cyc. Law & Proc. p. 530.

The issues that were made by the pleadings in the case upon which the decree was rendered involved the indebtedness that was due by the firm of Smith & Ward to the Bank of Beebe and Rucker, and also all payments that had been made thereon by Smith or by anyone for him or said firm,

ance of it is not a matter of right in the party, but of sound discretion of the court, to be exercised cautiously and sparingly, and only under circumstances which demonstrate it to be indispensable to the merits and justice of the cause. To the same effect is *Wood v. Mann*, 2 Sumn. 334, Fed. Cas. No. 17,953, where the same rule was announced by Mr. Justice Story.

In *Shelton v. Van Kleeck*, 106 U. S. 532, 27 L. ed. 269, 1 Sup. Ct. Rep. 491, it was held that new matter alleged to have been discovered, when it related only to the proceedings in making a sale, could have no effect on the original decree in a foreclosure suit.

It may be safely asserted that new matters of fact may be ground for a bill of review, although such matter is not capable of being used as evidence of anything which was previously in issue in the cause. *Story*, Eq. Pl. § 416; *Dan. Ch. Pl.* 1577.

It was held in *Poole v. Nixon*, 9 Pet. 770, 9 L. ed. 305, Fed. Cas. No. 11,270, that an entirely new title in a party claiming adversely to all the original parties to a suit in which a title was established could not be considered newly discovered matter for the purpose of opening the decree by a bill of review.

Under the ruling of *Camden v. Farrell*, 50 W. Va. 119, 40 S. E. 368, it is held that a bill of review based on newly discovered evidence does not lie to a decree by default, since the newly discovered evidence must bear on the issue involved in the suit, and on which the decree is predicated. This distinction is not made in the Federal practice, as shown by ruling in *Thomson v. Wooster*, 114 U. S. 104, 59 L. ed. 105, 5 Sup. Ct. Rep. 788; *Acord v. Western Pochontas Corp.* 98 C. C. A. 625, 174 Fed. 1019, affirming 156 Fed. 989.

A change of ruling by the appellate court on a question of law and fact is not new matter for which a bill of review will lie. *Tilghman v. Werk*, 39 Fed. 680; *Bledsoe v. Carr*, 10 Yerg. 55.

So, the vacating of a material collateral decree may not be new matter. *Vetterlein v. Barker*, 45 Fed. 741. 30 L.R.A.(N.S.)

and all collections that had been made upon the notes and accounts of the firm. These matters were extensively developed by the testimony adduced upon the trial of the case. J. R. Smith gave his testimony, and deposed at length and in detail as to payments and collections for which he claimed credit. He was assisted in the preparation and trial of the case by able counsel. He was cognizant at the time he testified in the case of every item for which, in this petition for a bill of review, he now seeks credit. Before he gave his testimony in the case, and before the cause was submitted to the chancellor for determination, he knew the very facts and matters which he now sets up in this petition. These matters cannot therefore be said to be

But in *Ballard v. Searls*, 130 U. S. 50, 32 L. ed. 846, 9 Sup. Ct. Rep. 418, it was held that where the whole basis and foundation of a suit has disappeared by a decree rendered in another suit after the appeal taken to the appellate court, the appellate court will remand the cause to the lower court with instructions to allow the appellant, defendant below, to file a supplemental bill in the nature of a review, or a bill to suspend or avoid the operation of the decree upon the new matter arising from the reversal of the decree in the other case.

Upon the general question of bill of review because of newly discovered evidence, after affirmance or reversal by appellate court, see note to *Safe Deposit & T. Co. v. Gittings*, 4 L.R.A.(N.S.) 865.

In *Connolly v. Connolly*, 32 Gratt. 657, the discovery of a written confession of one that a will was a forgery was held sufficient to sustain a bill of review to set aside the probate of the will.

—evidence impeaching witnesses.

Evidence which simply tends to impeach the character or impair the credibility of witnesses examined upon behalf of the successful litigant has never been regarded as sufficient ground for giving leave to file a bill of review. *Traphagen v. Voorhees*, 45 N. J. Eq. 41, 16 Atl. 198; *Boyden v. Reed*, 55 Ill. 458; *Adamaki v. Wiczorek*, 93 Ill. App. 357; *Karsten v. Winkelman*, 126 Ill. App. 418; *Dixon v. Graham*, 16 Iowa, 310; *Foy v. Foy*, 25 Miss. 207; *Livingston v. Hubbs*, supra; *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549; *Southard v. Russell*, supra.

And the discovery of new evidence or of new witnesses for the purpose of showing subornation of perjury of the witnesses at the former hearing is not generally regarded as a sufficient ground for allowing a bill of review. *Society of Shakers v. Watson*, 23 C. C. A. 263, 47 U. S. App. 170, 77 Fed. 512; *Southard v. Russell*, supra.

And this is especially the case where the credibility of the witnesses was directly put in issue at the original hearing. *Ibid.*

newly discovered since the rendition of the decree. Upon an examination of the record in the case upon which the decree was entered, we find that testimony was introduced upon the trial of the cause relative to a great number of the matters and items which are set out in the petition as newly discovered, and we find that some of the items of payment now set out in the petition were not only considered by the chancellor, but that credit was given therefor in said decree. The chancellor in said decree made a finding that Smith & Ward were entitled to credits amounting in the aggregate to \$4,072.83. This sum consisted of a great number of different items.

In the testimony it appears that in some instances the different amounts of the credits are given, but the items thereof are

not specifically named. It may be that these credits represent the items, or a great many of the items, of payment which are now set out in the petition for the bill of review. However this may be, it clearly appears that the matters which are now set out as newly discovered were known to petitioner, or by the exercise of reasonable diligence could have been discovered by him, before the rendition of the decree; that these matters were within the issues of the case, and could have been brought out by the use of any degree of diligence.

Under these circumstances we cannot say that the chancellor abused his discretion in refusing leave to file a bill of review of said decree.

The decree is affirmed.

And in *Long v. Granberry*, supra, it was held that new evidence to sustain the character of a witness examined on the former hearing is not new proof to sustain a bill of review, since proof of character which turns upon the knowledge of the neighbors and acquaintances may always be had at once, and also because the proof could not be otherwise than cumulative.

But in *Brewer v. Bowman*, supra, while holding that discovery of parol testimony to a matter in issue was insufficient to sustain a bill of review, but that testimony of a "permanent nature and unerring character" which, had it been produced on the trial, would have changed the decree, it was said by showing by record that witnesses, upon whose testimony the decree was procured, have been convicted of perjury, upon their testimony, given in the case sought to be reviewed, would be a sufficient ground for a bill of review.

Time of discovery.

The rule is that if the new matter has arisen or been discovered after the hearing in the original case, it may be brought forward by bill of review. The English rule of chancery formerly requiring that evidence of new matter, to authorize a bill of review, should have come to light after the decree, has been relaxed, and it is sufficient if such new matter be discovered subsequent to publication. *Caller v. Shields*, 2 Stew. & P. (Ala.) 417; *Cochran v. Rison*, 20 Ala. 463; *Livingston v. Hubbs*, 3 Johns. Ch. 124; *Evans v. Parrott*, 26 Ark. 600; *White v. Holman*, 32 Ark. 753; *State ex rel. Nevada County v. Hicks*, 48 Ark. 515, 3 S. W. 524; *Woodall v. Moore*, 55 Ark. 22, 17 S. W. 268; *Johnson v. Offutt*, 2 MacArth. 168; *Purcell v. Coleman* 6 D. C. 87; *Finlayson v. Lipscomb*, 16 Fla. 751; *Murphy v. Savannah*, 73 Ga. 263; *Basye v. Beard*, 12 B. Mon. 581; *Bush v. Madeira*, 14 B. Mon. 212; *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Robinson v. Sampson*, 26 Me. 30 L.R.A. (N.S.)

11; *Pfultz v. Pfultz*, 1 Md. Ch. 455; *West Feliciana R. Co. v. Stockett*, 27 Miss. 739; *Kenon v. Williamson*, 2 N. C. (1 Hayw.) 350; *Kennedy's Estate*, 3 Pa. Dist. R. 795; *Carter v. Allan*, 21 Gratt. 241; *Durbin v. Roanoke Bldg. Co.* 108 Va. 468, 62 S. E. 339; *Ketchum v. Breed*, 66 Wis. 85, 26 N. W. 271.

Numerous cases in describing the requisites for the filing of the bill of review state that the new matter must have been discovered after the date of the decree. It is believed, however, that in all the recent cases, and where the question was squarely presented, it is sufficient that it has come to the knowledge of the party for the first time after it was too late to produce it at the hearing.

In *Cochran v. Rison*, supra, it was held that an agreement entered into between the complainant and one of the defendants after publication of the testimony had passed, whereby the complainant, for a valuable consideration paid him by the said defendant, agreed to proceed no further against him in the original suit, and reserved his right to proceed against the other defendants, was proper subject-matter for a bill of review, and entitled the said defendant to relief against the original decree.

Not only must the evidence have been discovered after the taking of the testimony, but the fact must have been unknown to the party. It must not be such evidence of a fact as was known to the party and which he failed to bring forward for any reason. *Vetterlein v. Baker*, supra; *Hill v. Phelps*, 41 C. C. A. 569, 101 Fed. 650; *Purcell v. Miner* (Purcell v. Coleman) 4 Wall. 519, 18 L. ed. 459; *Banks v. Long*, 79 Ala. 319; *McCrackin v. Finley*, 1 Bibb, 455; *Perkins v. Partridge*, 30 N. J. Eq. 559; *Costen's Appeal*, 13 Pa. 292; *Hartman's Appeal*, 36 Pa. 70; *Milligan's Appeal*, 82 Pa. 389; *Rittenhouse's Estate*, 1 Pars. Sel. Eq. Cas. 313; *Simpson v. Watts*, 6 Rich. Eq. 364, 62 Am. Dec. 392; *Hinson v. Pickett*, 2 Hill, Eq. 351; *Bledsoe v. Carr*,

10 Yerg. 55; *Cleveland v. Martin*, 2 Head. 128; *Larson v. Moore*, 1 Tex. 22; *Winston v. Johnson*, 2 Munf. 305; *Richmond v. Richmond*, 62 W. Va. 206, 57 S. E. 736; *Dousman v. Hooe*, 3 Wis. 466.

Thus, a bill of review will not be granted because of the absence of witnesses, where the party knew the facts and the witnesses. *Long v. Granberry*, 2 Tenn. Ch. 85; *Green's Appeal*, 3 Brewst. (Pa.) 66.

It was suggested in the case last cited that the proper remedy was to apply to the court for time to obtain the testimony of the witnesses.

And in *Putnam v. Clark*, 36 N. J. Eq. 33, leave to file a bill of review on the ground that the complainant had, since the decree, discovered the whereabouts of a material witness, whose existence and materiality she knew when she began her suit, was denied on the ground of the impolicy of allowing a renewal of the litigation.

So, also, the following circumstances were held to furnish no sufficient ground for granting a bill of review:

—where the discovery was made in time to have been brought forward in either an amended or supplementary bill. *Barnes v. Dickinson*, 16 N. C. (1 Dev. Eq.) 326;

—mere finding of papers of which the party had knowledge. *Ord v. Noel*, 6 Madd. Ch. 127;

—discovery of new documentary evidence which was known before the determination of the suit in the appellate court. *Stevens v. Dewey*, 27 Vt. 638 (this case was controlled largely by statute);

—the omission to prove a material fact during the examination of a witness who had knowledge thereof. *Evans v. Parrott*, supra;

—a mere misapprehension of the effect of the evidence taken, or a mistake of the law respecting the admissibility of evidence, either by the party or by his counsel. *Robinson v. Sampson*, supra;

—erroneous advice of counsel. *Franklin v. Wilkinson*, 3 Munf. 112; *Foy v. Foy*, supra;

—that certain documents on which complainant's right to a decree depended, and which he intended to exhibit with his original bill, were lost or mislaid by his counsel, and not found until after the decree against him. *Jones v. Pilcher*, 6 Munf. 425;

—matter that counsel omitted to claim through mistake. *Triplett v. Wilson*, 6 Call (Va.) 47.

—failure of officer to return a deposition in time for use. *Miday v. Harvey*, 9 Gratt. 458.

Diligence in discovery of evidence.

Another indispensable requisite is that the evidence on which the application is grounded must not only be new and material, but the applicant is bound to show that the nature, condition, or situation of the new evidence was such that he could not, by the use of reasonable diligence, have discovered it in time to have made use of it on the original hearing, so that the court 30 L.R.A. (N.S.)

may judge for itself whether or not reasonable diligence has been used, "for, if there be any negligence in this respect, that destroys the title to the relief." *Story*, Eq. Pl. 10th ed. § 414; *Dexter v. Arnold*, 5 Mason, 312, Fed. Cas. No. 3,856; *Hughes v. Jones*, 2 Md. Ch. 289; *Perkins v. Partidge*, 30 N. J. Eq. 559.

The material point is, not what the applicant knew, but what, using reasonable diligence, he might have known. *Young v. Keighly*, 16 Ves. Jr. 348; *Hitch v. Fenby*, 4 Md. Ch. 190.

In *Adler v. Van Kirk Land & Constr. Co.* 114 Ala. 551, 62 Am. St. Rep. 133, 21 So. 490, it was said that diligence in this respect is of the essence of the equity of the bill; laches or negligence is as fatal to relief as the actual absence of a matter of defense. The courts have uniformly and rigorously adhered to this qualification.

Such was the case of *Young v. Keighly*, supra, decided by Lord Eldon, where a strong intimation, if not positive opinion, is expressed by him, that, by refusing the application then made for leave to file a bill of review, he was deciding against the justice of that particular case, deeming it better, as he said, that individual injury should be inflicted than that rules established to prevent general mischief should be broken down. The same doctrine has been fully sanctioned by Chancellor Kent in *Wiser v. Blachly*, 2 Johns. Ch. 488, and by Mr. Justice Story in *Dexter v. Arnold*, supra.

The reason for this qualification of the rule is clearly expressed in *Nichols v. Nichols*, 8 W. Va. 187, where it is said that "if a party were allowed to go on to a decree without looking for evidence which might be obtained by proper search, and afterwards, by finding the evidence, to file a bill of review, there would be no end to such bills."

Whether or not reasonable diligence has been exercised must be determined by the court upon the particular facts and circumstances of each case. This question was passed upon in the following cases: *Bradshaw v. Garrett*, 1 Port. (Ala.) 47; *Murrell v. Smith*, 51 Ala. 301; *Banks v. Long* and *Adler v. Van Kirk Land & Constr. Co.* supra; *Greer v. Turner*, 47 Ark. 17, 14 S. W. 383; *Bartlett v. Gregory*, 60 Ark. 453, 30 S. W. 1043; *Boynton v. Chicago Mill & Lumber Co.* 84 Ark. 203, 105 S. W. 77; *Purcell v. Coleman*, 6 D. C. 87; *McGowan v. Elroy*, 28 App. D. C. 188; *Finleyson v. Lipscomb*, 16 Fla. 751; *Reynolds v. Florida C. & P. R. Co.* 42 Fla. 387, 28 So. 861; *McDaniel v. James*, 23 Ill. 407; *Boyden v. Reed*, 55 Ill. 458; *Elzas v. Elzas*, 183 Ill. 132, 55 N. E. 673; *Watts v. Rice*, 192 Ill. 123, 61 N. E. 337; *Wieczorek v. Adamski*, 114 Ill. App. 161; *Jenkins v. Prewitt*, 5 Blackf. 7, s. c. subsequent appeal 7 Blackf. 329; *Gullett v. Housh*, 7 Blackf. 52; *Graham v. Dixon*, 16 Iowa, 310; *Gentry v. Thornberry*, 3 Dana, 500; *Tharp v. Cotton*, 7 B. Mon. 636; *Carter v. Stennet*, 10 B. Mon. 250; *Brunk v. Means*, 11 B. Mon. 214; *Bayse v. Beard*, 12 B. Mon. 581; *Atkinson v.*

Conner, 56 Me. 546; Ridgeway v. Toram, 2 Md. Ch. 303; Whelan v. Cook, 29 Md. 1; Ryerson v. Eldred, 23 Mich. 537; Taylor v. Boardman, 25 Mich. 527; Roberge v. Le Lisle, 158 Mich. 16, 122 N. W. 362; Iler v. Routh, 3 How. (Miss.) 276; Putnam v. Clark, supra; Clayton v. Clayton, 59 N. J. Eq. 310, 44 Atl. 840; Watkinson v. Watkinson, 68 N. J. Eq. 632, 69 L.R.A. 397, 60 Atl. 931, 6 A. & E. Ann. Cas. 326, reversing 67 N. J. Eq. 142, 58 Atl. 384; Richards v. Shaw (N. J. Eq.) 77 Atl. 618; Lansing v. Albany Ins. Co. Hopk. Ch. 102; Wiser v. Blachly, supra; Livingston v. Hubbs, 3 Johns. Ch. 124; Stevens v. Hey, 15 Ohio, 313; Rittenhouse's Estate, supra; Conrad v. Conrad, 9 Phila. 510; Scott's Appeal, 112 Pa. 427, 5 Atl. 671; Priestley's Appeal, 127 Pa. 420, 4 L.R.A. 503, 17 Atl. 1084; Kachline's Estate, 7 Pa. Super. Ct. 163; Bickford's Estate, 16 Pa. Super. Ct. 572; Doyle v. New York & N. E. R. Co. 14 R. I. 55; Hinson v. Pickett, 2 Hill, Eq. 351; Simpson v. Watts, 6 Rich. Eq. 364, 62 Am. Dec. 392; Young v. Henderson, 4 Hayw. (Tenn.) 189; Proudfit v. Pickett, 7 Coldw. 563; Burson v. Doaser, 1 Heisk. 754; McDowell v. Morrell, 5 Lea, 278; Fuller v. Jackson (Tenn.) 62 S.W. 274; Larson v. Moore, 1 Tex. 22; Brainard v. Morse, 47 Vt. 320; McCall v. Graham, Hen. & M. 13; Campbell v. Campbell, 22 Gratt. 649; Hatcher v. Hatcher, 77 Va. 600; Norfolk Trust Co. v. Foster, 78 Va. 413; Booth v. McJilton, 82 Va. 827, 1 S. E. 137; Trevelyan v. Lofft, 83 Va. 141, 1 S. E. 901; Reynolds v. Reynolds, 88 Va. 149, 13 S. E. 395, 598; Sanders v. Burk, 2 Va. Dec. 175, 22 S. E. 516; Durbin v. Roanoke Bldg. Co. 108 Va. 468, 62 S. E. 339; Nichols v. Nichols, 8 W. Va. 174; Bloss v. Hull, 27 W. Va. 503; Dingess v. Marcum, 41 W. Va. 757, 24 S. E. 624; Bodkin v. Rollyson, 48 W. Va. 453, 37 S. E. 617; Ketchum v. Breed, 66 Wis. 85, 26 N. W. 271; Providence Rubber Co. v. Goodyear, 9 Wall. 805, 19 L. ed. 828; Poole v. Nixon, 9 Pet. 770, 9 L. ed. 305, Fed. Cas. No. 11,270; Easley v. Kellom, 14 Wall. 270, 20 L. ed. 890; Baker v. Whiting, 1 Story, 218, Fed. Cas. No. 786; Massie v. Graham, 3 McLean, 41, Fed. Cas. No. 9,263; Reeves v. Keystone Bridge Co. 2 Bann. & Ard. 256, Fed. Cas. No. 11,661; Spill v. Celluloid Mfg. Co. 22 Blatchf. 441, 22 Fed. 94; Tilghman v. Werk, 39 Fed. 680; Municipal Signal Co. v. Gamewell Fire-Alarm Teleg. Co. 77 Fed. 452; Boston & R. Electric Street R. Co. v. Bemis Car-Box Co. 38 C. C. A. 661, 98 Fed. 121; Kissinger-Ison Co. v. Bradford Belting Co. 59 C. C. A. 221, 123 Fed. 91; Acord v. Western Pocahontas Corp. 98 C. C. A. 625, 174 Fed. 1019; Ludlow v. Macartney, 2 Bro. P. C. 67; Hasking v. Terry, 15 Moore, P. C. C. 493; Portsmouth v. Effingham, 1 Ves. Sr. 430; Sheffield Canal Co. v. Sheffield & R. R. Co. 1 Phill. Ch. 484; Bingham v. Dawson, Jacob, 243.

Diligence to procure the newly discovered evidence for the trial must be alleged by apt averments in the bill. Warren v. Adams, 26 30 L.R.A. (N.S.)

Colo. #4, 60 Pac. 632; Lewis v. Topsico, 201 Ill. 320, 66 N. E. 276.

In Greer v. Turner, supra, it was held that the bill should show that the plaintiff had not been guilty of negligence in failing to discover and produce the evidence at the former trial, by stating how and when he first came to a knowledge of the matters alleged, and the means that were used, if any, to keep him in ignorance thereof.

Where the diligence used is alleged to have consisted in making inquiries, the time, place, and circumstances must be stated. Hines v. Driver, 100 Ind. 315.

The reason for the rule is that the complainant must rebut the presumption existing against him, and this he can do only by showing that he made inquiries in the proper quarter and in due season. Ibid.

And the rule that the evidence must be such as could not have been discovered by the exercise of reasonable diligence applies not only to the party, but also to his attorneys, solicitors, and agents, since notice to either of them is notice to the principal. Norris v. Le Neve, 3 Atk. 26; Gould v. Tancred, 2 Atk. 533; Jones v. Pilcher, 6 Munf. 425; Greenlee v. McDowell, 39 N. C. (4 Ired. Eq.) 481.

And there is no ground for a bill of review where the proofs showed that the evidence was in existence and accessible, and was probably not produced because not deemed material by counsel. Lafferty Mfg. Co. v. Acme R. Signal & Mfg. Co. 74 C. C. A. 521, 143 Fed. 321.

Nor will it be available for the reason that the party was prevented from offering the evidence by the advice of one of his counsel in the absence of the other. Franklin v. Wilkinson, 3 Munf. 112.

It is no excuse that the solicitor did not know the postoffice address of his client to enable them to communicate with each other regarding depositions taken by the other side, and to take necessary steps to prepare the case for trial by putting counsel in possession of the facts that would have shown the falsity of the testimony taken, since a special messenger might have been sent if necessary, for the party should have informed his counsel on employing him how his letters should be directed. Foy v. Foy, 25 Miss. 207.

Nor is the ill health of the party any excuse, since he might and ought to have sent an agent to his counsel if not well enough to go himself. Ibid.

The diligence and prudence required of ordinarily prudent litigants requires something more on their part than the mere employment of counsel, especially when they are given information which would put an ordinarily prudent person on his guard. Stockley v. Stockley, 93 Mich. 307, 53 N. W. 523.

In Ex parte Vandersmissen, 5 Rich. Eq. 519, 60 Am. Dec. 102, a bill of review was allowed where the evidence might have been produced at the original trial if the coun-

sel had been astute and diligent; but there the new evidence was in a foreign language, it was decisive of the case, and the apparent negligence of counsel was excused by a change of attorneys.

Parties claiming through a general assignee are bound to inquire of him in case of a controversy for any facts in his knowledge bearing upon it, and failure to do so is such negligence as will defeat the right to file a bill of review for matter afterwards discovered. *Ryerson v. Eldred*, 23 Mich. 537.

And in *Sayre v. King*, 17 W. Va. 562, it was held that a surety cannot rely on his ignorance of a substantial defense known to his principal, unless he alleges in his bill and proves that he took proper steps to ascertain from his principal, or otherwise, the true state of the case, or that he was prevented from doing so by circumstances not under his control.

Although the party applying for a rehearing may himself have no merits because of his laches, yet, if it appears that the interest of innocent third persons or those for whom he is trustee may be injuriously affected, the rehearing will be granted. *Hodges v. Mullikin*, 1 Bland, Ch. 503.

With administrators who are strangers to the transaction, and who have to look after evidence to defend the estate, the same stringency in ruling as to knowledge of the facts ought not to be exercised. *Owens v. Love*, 9 Fla. 325.

In *Harris v. Edmondson*, 3 Tenn. Ch. 211, it was held that the rule requiring the exercise of diligence had been complied with where a personal representative of a decedent, having no knowledge of the facts, had twice examined the books and papers of the deceased without success, to find evidence on the subject, and afterwards, after the rendition of the decree, had accidentally discovered the evidence in searching among the same papers for another purpose.

In *Re Houghton*, L. R. 18 Eq. 573, it was held that an infant who petitions for leave to file a bill of review will not be required to give evidence that knowledge of the facts relied upon could not have been previously obtained by reasonable diligence. It was doubted whether it was necessary for an infant to obtain leave of court to file a bill of review.

But in *Woodall v. Moore*, 55 Ark. 22, 17 S. W. 268, it was held that the infancy of the plaintiffs will not exempt them from the rule of laches where their rights are asserted by their guardian or next friend, since they proceed under the eye of the court and are supposed to enjoy its care and protection, and conclusions therein reached are as binding upon them as upon persons *sui juris*.

The finding of a document since the decree, which would have been relevant evidence on the hearing, cannot sustain a bill of review where the party knew of its existence and contents, since it was his duty to prove its existence and contents if it could not be produced on the hearing. 30 L.R.A. (N.S.)

Davis Sewing Mach. Co. v. Dunbar, 32 W. Va. 335, 9 S. E. 237. To the same effect is *Wethered v. Elliott*, 45 W. Va. 436, 32 S. E. 209.

In *Society of Shakers v. Watson*, 23 C. C. A. 263, 47 U. S. App. 170, 77 Fed. 512, it was held that the failure to prove at the original hearing the loss of books, the contents of which were sought to be proved by secondary evidence, which, because of such failure, was excluded, was such gross negligence as would prevent the subsequent discovery of the books from being good ground for filing a bill of review, though it was shown that the books were in fact lost at the time of the original hearing.

In *Repass v. McClanahan*, Hardin (Ky.) 342, it was said that there is an important difference between the discovery of a matter or fact itself which, though it existed at the former hearing, was not then known to the party to exist, or which was not alleged or put in issue by either party, and the discovery of new witnesses or proof of a matter or fact which was then known or in issue. In the former case, the party not knowing the fact, and it not being particularly in issue, there was nothing to put him in the reach either of the fact or the evidence of the fact; and therefore the presumption is in his favor that, as the matter made for him, his failure to show the matter was not owing to his negligence or fault. But where the matter was known or put in issue, the party is put upon the investigation, and the presumption is strong that by using due diligence he might have shown the truth of the matter on the former hearing.

So, leave to file a bill of review was refused upon newly discovered evidence of which the party was sufficiently apprised by the suggestions in a letter and the proceedings in the case, to have enabled him with reasonable diligence to have put it upon the record originally. *Young v. Keighly*, 16 Ves. Jr. 348.

And in *Banks v. Long*, 79 Ala. 319, it was held that newly discovered evidence of a fact was not ground for a bill of review where it appeared that while the original suit was pending, and before final decree rendered, the complainant was informed by his counsel of a fact which ought to have put him on inquiry, and which, if followed up diligently, would have led to the discovery of the very fact which he relied on as newly discovered evidence.

In *Livingston v. Hubbs*, 3 Johns. Ch. 124, the issue was whether the land sold was as represented and fit for cultivation, and the petition for the bill of review stated that, since the decree, the defendant had discovered that several of the witnesses had mistaken the land in question, and had testified respecting lands adjoining thereto; that, since the decree, he had the tract in question surveyed, and that several intelligent persons had since visited it and declared it to be as he had represented it; but the application was refused, since defendant's attention was called to the very fact by the issue submitted under the pleadings,

and he was bound to use reasonable diligence in bringing forward his proof on that point. To the same effect is *Iler v. Routh*, 3 How. (Miss.) 276.

In *Warren v. Adams*, 26 Colo. 404, 60 Pac. 632, it was held that the lack of effort to produce a witness at the trial will not be excused because the petitioners for a bill were led, by allegations in the pleadings of their adversary in the original suit, to believe that his evidence would be favorable to their adversary, and against the petitioners' interest, and that said witness would be produced by their adversary. The court said that, however diligent the adverse party may have been to produce the witness, it would not excuse the lack of effort on the part of those seeking to avoid the decree, since the diligence used to procure new evidence relied upon as a basis of a bill of review must be the diligence of the parties seeking the review, and not the diligence of their adversaries.

And in *Novelty Tufting Mach. Co. v. Buser*, 85 C. C. A. 413, 158 Fed. 83, 14 A. & E. Ann. Cas. 192, it was held not a sufficient excuse for failing to take the testimony of witnesses known to have some knowledge respecting the matters in controversy, that they refused to state what their testimony would be, to entitle the party so failing to afterwards present their testimony as newly discovered evidence.

But in *Becker v. Johnson*, 16 Va. Law Reg. 615, 68 S. E. 986, it was held in a suit to declare a sale of stock void for false representations that a certain person had bought some of the stock, and had paid a certain price for it, that plaintiff's request to such person to testify as to whether he had made such purchase was the use of such reasonable diligence to obtain that evidence as should sustain a bill of review on the ground of the subsequent procurement of such evidence.

And in *Diamond Drill & Mach. Co. v. Kelley Bros.* 138 Fed. 833, it was held that the testimony of a witness with whom the defendants had been in conversation before the original decree, and from whom they represented to have obtained newly discovered evidence establishing a prior use of a patented device, as a defense to a suit for infringement, will not be regarded as accessible to the defendants by the exercise of due diligence, where it is shown that such witness had only been sought out in order to learn about other matters, and, except as he volunteered information, there was no means of knowing that he had any information with reference to such prior use which he then did not disclose.

And in *Sutherland v. Gent* (Va.) 69 S. E. 340, it was held that leave to file a bill of review was properly granted for newly discovered matter, upon application based upon affidavits of friends and neighbors of the parties to the suit, stating matters that would bring about a different result, which testimony the petitioner was unable to secure before the trial because of the witnesses' desire not to appear or take part in the controversy.

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In *Bradshaw v. Garrett*, 1 Port. (Ala.) 47, it appeared that the facts requiring the new matter came to the knowledge of the complainants about a week before the trial term of the court at which the cause was heard, but as the record did not disclose enough of the attending circumstances to enable the reviewing court to determine whether there had been a reasonable time in this interim to have taken the necessary proofs, it was suggested by the court that, if, however, the distance of the residence of the parties and witnesses was such as to make it impracticable with ordinary diligence to take the proofs, yet it was incumbent upon the parties to apply for a continuance of the cause, and since no sufficient excuse was offered for that omission, the complainants could not disturb the former adjudication, even if the matters discovered could otherwise furnish ground for a review.—not having done everything which could be reasonably required, to avail themselves of the new matter during the pendency of the suit.

To the same effect are *Hines v. Driver*, 100 Ind. 315; *Hood v. Green*, 42 Ill. App. 664; *Pendleton v. Fay*, 3 Paige, 204; *Huffacre v. Green*, 4 Hayw. (Tenn.) 51.

—matters of record.

Discovery of matter in public records which existed before the entry of the decree does not show a sufficient exercise of due diligence to entitle the party to a bill of review. *Jorgenson v. Young*, 69 C. C. A. 222, 136 Fed. 378; *Acord v. Western Pochontas Corp.* 98 C. C. A. 625, 174 Fed. 1019, affirming 156 Fed. 989; *Gentry v. Thornberry*, 3 Dana, 500; *Dumont v. Des Moines Valley R. Co.* 131 U. S. clx. Appx. and 25 L. ed. 520 (record evidence in the archives of the government); *Bennett v. Schooley*, 77 Fed. 352; *Kissinger-Ison Co. v. Bradford Belting Co.* 59 C. C. A. 221, 123 Fed. 91 (records in the patent office); *Watts v. Rice*, 192 Ill. 123, 61 N. E. 337 (title of real estate); *Harvey v. Murrell Harp. Eq.* 257 (inventory and appraisement of the property of a decedent's estate).

But the failure of a party to a suit to discover that the authenticated copy of a decree signed by his adversary, and relied upon as *res judicata*, was incomplete, when a complete copy would have shown the invalidity of such decree, is not such laches as will prevent such party from availing himself of the invalidity of the decree upon a bill of review. *Boynton v. Chicago Mill & Lumber Co.* 84 Ark. 203, 105 S. W. 77.

—when question may be raised.

Some courts take the view that the question of diligence is necessarily a preliminary one, to be considered and passed upon at the time application is made for leave to file the bill upon the ground of after-discovered evidence, and being used and disposed of when the bill is allowed, it cannot be again considered on the hearing of the bill. *Birdsboro Steel Foundry & Mach. Co.*

v. Kelley Bros. 78 C. C. A. 101, 147 Fed. 713, affirming 142 Fed. 868; Lewellen v. Mackworth, 2 Atk. 40; Hodges v. Mullikin, 1 Bland, Ch. 503; Craufurd v. Smith, 93 Va. 628, 23 S. E. 235, 25 S. E. 657.

A denial in the answer, of the averment of diligence made in the bill, raises therefore an immaterial issue. *Birsboro Steel Foundry & Mach. Co. v. Kelley Bros.* supra.

But a different view is taken in *Massie v. Graham*, 3 McLean, 41, Fed. Cas. No. 9,263, where it was said that the defendant ought not to be concluded from contesting the facts on the hearing of the bill of review, by a preliminary proceeding.

Whether or not the newly discovered evidence could have been produced at the original hearing must be considered on appeal as having been proved by the evidence submitted below, and in the absence of the evidence produced on this question, the appellate court will presume that the case was brought within the requirement. *Craig v. Smith*, 100 U. S. 226, 25 L. ed. 577.

A. L. R.

ARKANSAS SUPREME COURT.

T. F. TILLAR, Appt.,

v.

MRS. MATTIE REYNOLDS, Admr., etc.,
of William Reynolds, Deceased.

(— Ark. —, 131 S. W. 969.)

Action — joinder — death by wrongful act.

1. Claims for the benefit of the widow and next of kin of one killed by another's wrongful act, and for the benefit of his estate, may be joined in one action to hold the one responsible for the wrong liable for the damages.

Master — liability for act of servant.

2. The owner of a convict farm is not absolved from liability in damages for the act of the warden whom he has placed in charge of the farm, in punishing a convict so severely that he dies from the effects thereof, by the fact that the warden, al-

Note. — As to several actions for wrongful death, see notes to *Stewart v. United Electric Light & P. Co.* 8 L.R.A.(N.S.) 384, and *Mahoning Valley R. Co. v. Van Alstine*, 14 L.R.A.(N.S.) 893.

As to liability of master for tort committed by servant in the course of his employment and with a view to the furtherance of his master's business, but contrary to the master's express instructions, see note to *Barrett v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 L.R.A.(N.S.) 416.

As to liability of private person or corporation for acts of special police officer appointed by public authority, see notes to *McKain v. Baltimore & O. R. Co.* 23 L.R.A.(N.S.) 289, and _____ v. _____, — L.R.A.(N.S.) —.
30 L.R.A.(N.S.)

though having authority to punish, disobeys not only the instructions of the employer, but also the regulations of the state authorities with respect to the severity of the punishment.

Damages — death of convict.

3. Three thousand seven hundred dollars is not excessive to award as damages for the wrongful killing of a strong man thirty-one years old, who is the sole support of his wife and children, and who shortly before his death was earning from \$50 to \$60 per month, most of which he contributed to their support, although at the time of his death he was serving a short sentence for the commission of a misdemeanor.

(November 7, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Drew County in plaintiff's favor in an action brought to recover damages for wrongful death of plaintiff's intestate, alleged to have been caused by defendant's warden. Affirmed.

The facts are stated in the opinion.

Mr. James C. Knox, for appellant:

There were two separate and distinct causes sought to be set up to in this action, one for benefit of the estate and the other for the benefit of the next of kin.

Davis v. St. Louis, I. M. & S. R. Co. 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801.

It was therefore reversible error in the court to overrule the demurrer interposed.

Texarkana Gas & Electric Light Co. v. Orr, 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. W. 66.

Messrs. R. W. Wilson and A. J. Johnson, for appellee:

It was not reversible error to overrule defendant's demurrer. There was no misjoinder of actions.

Mahoney v. Roberts, 86 Ark. 138, 110 S. W. 225; *Ashford v. Richardson*, 88 Ark. 128, 113 S. W. 808; *American Ins. Co. v. Haynie*, 91 Ark. 51, 120 S. W. 825.

Instruction No. 2, is a correct exposition of the law.

Cooley, Torts, 538; *Wood, Mast. & S.* § 307; *St. Louis, I. M. & S. R. Co. v. Hackett*, 58 Ark. 381, 41 Am. St. Rep. 105, 24 S. W. 881; *Ward v. Young*, 42 Ark. 542; *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 109, 33 L.R.A. 366, 34 S. W. 547; *Binghampton Trust Co. v. Auten*, 68 Ark. 294, 57 S. W. 936; *St. Louis, I. M. & S. R. Co. v. Grant*, 75 Ark. 585, 88 S. W. 580, 1133.

Under the contract for hiring prisoners, Gentry took the place of the Lincoln county jailer, and he was, under the law, clothed with no greater power for disciplining prisoners; neither had he greater power

than the warden of the state prison, whose authority he exceeded in many ways.

Werner v. State, 44 Ark. 133; *Boone v. State*, 8 Lea, 739; *Smith v. State*, 8 Lea, 744; *Cornell v. State*, 6 Lea, 624; 9 Cyc. Law & Proc. p. 877; *Re Birdsong*, 4 L.R.A. 628, 39 Fed. 599.

Kirby, J., delivered the opinion of the court:

This suit was brought by Mrs. Mattie Reynolds, administratrix of the estate of William Reynolds, deceased, for damages for his wrongful death, caused, it is alleged, by defendant's warden, in charge of his convict farm, where her intestate was detained a prisoner working out a sentence of fine and imprisonment for a misdemeanor committed, under the lease of convicts from Lincoln county, unlawfully and brutally whipping and beating him. The complaint contains two causes of action sufficiently alleged in separate paragraphs,—one for the benefit of the widow and next of kin of decedent, and the other for the benefit of his estate,—and in each of which damages are claimed in the sum of \$5,000.

A demurrer was filed and overruled, and defendant answered, admitting that he was operating a convict farm leasing Lincoln county convicts, and that deceased Lincoln to his farm under said lease, and died there a week or two after arrival; denied that William Reynolds, deceased, was assaulted or whipped by W. L. Gentry, or anyone else, as alleged; denied all the other allegations of the complaint, "and he says, further, that, if the said Reynolds was assaulted or whipped by Gentry or any other person in any manner whatever, it was without the knowledge, consent, or direction of this defendant, and beyond the scope of authority of employment of said Gentry by this defendant; further answering, defendant says that he has faithfully carried out every item of his contract with Lincoln county in the matter of leasing prisoners, in relation to the said William Reynolds, that the death of the said Reynolds was due to natural causes that it was in no way due to any mistreatment by this defendant or his employees, that everything was done for the said Reynolds that could be done under the circumstances, that neither this defendant nor his employees are in any way responsible for his death, that the defendant is seldom about the farm, and knew nothing personally of his sickness until after his death, that as soon as his condition was discovered, everything that could possibly be done for the deceased was done by the defendant and his employees," and denied that plaintiff was entitled to punitive damages. The jury returned a verdict for the 30 L.R.A. (N.S.)

plaintiff for damages for the benefit of the widow and next of kin in the sum of \$3,750. Defendant appealed.

The evidence shows substantially, that Mattie Reynolds was duly appointed administratrix. That she was the wife of William Reynolds, and they had three small children, two girls and a boy, of the ages of three, six, and seven years. That William Reynolds was convicted of a misdemeanor in Lincoln county, and sentenced to a small fine and imprisonment, and sent to the convict farm of defendant, T. F. Tillar, under his lease of convicts from Lincoln county, about July 8th, and remained there in the custody and under the control of defendant's warden, G. L. Gentry. That on the morning of July the 18th, the warden compelled him to take off his clothes and lie down across a log or block face downward, and whipped him on the bare back with a leather strap about 30 inches long, and from $\frac{1}{2}$ to $\frac{3}{4}$ of an inch thick. One witness says it was an inch thick. This strap was fastened to a staff, and "Mr. Gentry handled the strap with both hands, over his shoulders," and struck deceased from twelve to fifteen licks hard, one witness says; and another that "he whipped him on the small part of his back. Gentry was standing by his side. I was standing right there. He had me here to hold him down if he bucked. The licks were hard. He hit him with both hands." That, after the whipping, he was sent to work, and the guard in charge of his squad said that he commenced complaining of his kidneys hurting him about 11 o'clock. That afternoon he acted like a drunk man, wanted to urinate frequently. "He complained of the small of his back hurting and his kidneys hurting him. He wasn't able to work. He was urinating all evening. Every five minutes he urinated blood. I sent for Mr. Gentry to come and get him. He came and got him. The man was dead when I got in." Reynolds died that night about 8:30 o'clock without any medical attention whatever. The witnesses who prepared the body for burial stated "we noticed a couple of black spots over the small of his back and back down otherwise on him. They were black spots about the size of my hand. Over his loins and down he was bruised pretty badly, from half way of his back down. There was a great big blue place on him right across the small of his back. They looked like they were very severe." That the beating might have and probably did cause his death. It showed, further, that Reynolds's wife and children were solely dependent upon him for support, that he was engaged in getting out staves at the time of his conviction, and shortly before

for a number of months he had been making from \$50 to \$60 a month as a car repairer, the greater part of which he contributed to the support and maintenance of his wife and children; that he was strong and of sound bodily health, and had an expectancy of life of thirty-four years.

Rule 6 of the penitentiary board is as follows: "No convict shall for any cause be punished by whipping on his naked body; and no warden shall whip any convict except he be designated and authorized to do so by the superintendent; and a report thereof shall be made by the superintendent monthly to the board, together with the causes therefor, and a witness shall be called to all whippings, and in no case shall more than ten lashes be administered at any one time."

Several instructions given are complained of, but only error in giving the one numbered 2 is insisted on here. It is copied in the opinion.

The appellant raises three objections, contends that there was a misjoinder of actions, that the court erred in giving plaintiff's instruction No. 2 herein set out, argues that the evidence does not sustain the verdict, and claims that the verdict is excessive. There is nothing in the first contention. The actions could be joined and were properly brought together, and the demurrer should have been overruled. Kirby's Dig. §§ 6970, 6290; Davis v. St. Louis, I. M. & S. R. Co. 53 Ark. 117, 7 L.R.A. 283, 13 S. W. 801. If two actions had been brought separately they could have been consolidated by the court. Act No. 339 of Acts 1905 Ark. Leg.; Mahoney v. Roberts, 86 Ark. 138, 110 S. W. 225; Ashford v. Richardson, 88 Ark. 124, 113 S. W. 808; American Ins. Co. v. Haynie, 91 Ark. 51, 120 S. W. 825. Did the court err in giving plaintiff's instruction No. 2? "You are further instructed that the employer who puts his agent or employee in a place of trust or responsibility, or commits to him the management of his business, is responsible when the agent or employee, acting within the scope of his authority, through lack of judgment or discretion, or under the influence of passion, inflicts an unjustifiable injury upon another, *even though he go beyond the strict line of his duty or authority.*" The objectionable part of the instruction being the italicized words. We think not. It is undisputed that Gentry, the warden, was defendant's agent in charge of the convict farm at the time Reynolds was delivered to the farm, and at the time of his death, and for months thereafter, and that he was instructed to observe the rules laid down by the penitentiary board governing the convicts confined in the peniten-

tiary, and charged by defendant not to depart from said rules in the management and punishment of the convicts placed on the farm. He had the authority to punish, and was acting within the scope of it when he inflicted the injury.

In Ward v. Young, 42 Ark. 543, 544, in discussing the liability of the master for the tort of his servant, this court said: If Hawkins' was clothed with the authority to protect the property, then his act was," inlaw, the act of Ward notwithstanding it may have been contrary to express orders. 'Having employed the servant to protect his property or to maintain his possession, he is liable for all the acts done in pursuance of such employment, and within the power implied therefrom, even though he expressly directed the servant what to do. Having set in motion the agency for producing mischief, he is bound at his peril to prevent mischievous consequences.' " Further: "It is not necessary, in order to fix the master's liability, that the servant should at the time of the injury have been acting under the master's orders or directions, or that the master should know that the servant was to do the particular act that produced the injury in question. It is enough if the act was within the scope of his employment, and, if so, the master is liable, even though the servant acted willfully and in direct violation of his orders." Continuing on page 553: "It is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty, to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment." "The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances or the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." Cooley, Torts, p. 538. In St. Louis, I. M. & S. R. Co. v. Hackett, 58 Ark. 387, 41 Am. St. Rep. 105, 24 S. W. 882, this court said: "The question is, Was he acting in the course of his employment?" "If he was, the company is liable in damages for any wrongful act of his in the course of his employment, resulting in injury to another, though he exceeded his authority as such night watchman." "A servant may do an act expressly forbidden by his employer, and yet, if it be within the scope of his authority, the employer may be liable for a

resulting injury. This rule is constantly enforced in the cases against railroads, electric light and gas companies, and it applies to private persons who employ servants to transact their business." *Pine Bluff Water & Light Co. v. Schneider*, 62 Ark. 116, 33 L.R.A. 366, 34 S. W. 548. This court, on a question of this kind, quoted with approval *Clark & Skyles Law of Agency*: "It is a well-established rule that a principal is liable for all torts, negligences, or rather malfeasances committed by his agent in the course of his employment and for the principal's benefit, although such torts or negligences are not authorized or ratified by the principal, or even though he had forbidden or disapproved of them, and the agent disobeyed or deviated from his instructions in committing them. . . . This rule is not based on the ground that the agent had authority, express or implied, to commit the tort, as is the case with contractual obligations binding on the principal; but it is based on the ground that in such cases the agent represents the principal, and all acts done by the agent in the course of his employment are of the principal, and is also on the ground of public policy that, where one of two innocent persons must suffer from the agent's wrongful act, it is just and reasonable that the principal, who has put it in the agent's power to commit such wrong, should bear the loss rather than the innocent third person." *St. Louis, I. M. & S. R. Co. v. Grant*, 75 Ark. 585, 88 S. W. 582, 1133. There was no error in giving the instruction, and, on the whole, the instructions fairly presented the issues of fact to the jury. The evidence, although somewhat contradictory, tended strongly to show that the deceased was unlawfully and brutally whipped and beaten on his bare back with a leather strap 4 inches wide, and from $\frac{1}{2}$ to $\frac{3}{4}$ of an inch thick, and about 30 inches long, attached to a staff or handle about 18 inches long, by defendant's agent and warden; that he wielded the strap with both hands, striking more licks than felons in the penitentiary are permitted to be whipped, and on the bare skin, even if against defendant's directions; that deceased was compelled to work thereafter in the sun till he reeled and staggered like a drunken man, and was sent from the field groaning with pain and urinating blood, and died that night early without being furnished any medical attention; that the beating might have and probably did produce death, and the jury so found, and the evidence amply sustains the verdict.

Is the verdict excessive? Was William Reynolds life of the value of \$3,750 to his widow and minor children? He was a 30 L.R.A. (N.S.)

strong man of sound bodily health, the sole support of his wife and children, about thirty-one years old, with an expectancy of life of thirty-four years, and shown to have been earning shortly before his death from \$50 to \$60 a month, most of which was contributed to the maintenance and support of his family, and the jury fixed the damages at that sum, which we do not regard excessive.

Finding no error in the case, it is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

GEORGE F. JACKSON

v.

OLD COLONY STREET RAILWAY COMPANY.

(206 Mass. 477, 92 N. E. 725.)

Carrier — assault on former passenger — liability.

1. A carrier is not liable for an assault on a former passenger after he has left the car, by its conductor, for what had transpired on the car, or for insults offered after the passenger had left it.

Same — unjustifiable assault — liability.

2. An assault by the conductor upon a passenger who is leaving the car at his command without resistance is unjustifiable, and will render the carrier liable for the consequences of it.

Pleading — ejection of passenger — assault — special defense.

3. A defense to an assault by the conductor of a car upon a passenger, that it was the result of the use of only necessary force rightfully to eject the passenger from the car, must be specially pleaded.

Same — provocation — offensive language.

4. Offensive language addressed by a passenger, whom the carrier is bound to pro-

Note. — On the general subject of the liability of a master for malicious act of servant when master owes special duty to party injured, see note to *Daniel v. Petersburg R. Co.* 4 L.R.A. (N.S.) 485.

As to whether assault growing out of a quarrel commenced while employee is acting within the scope of his employment may be regarded as a personal act of the employee for which the employer is not liable, see note to *New Ellerslie Fishing Club v. Stewart*, 9 L.R.A. (N.S.) 475.

Upon the specific question as to the liability of a railway or street railway for assault by employee on passenger outside of car or train, see note to *Blomness v. Puget Sound Electric R. Co.* 17 L.R.A. (N.S.) 763. And see *Berryman v. Pennsylvania R. Co.* post, 1049.

teet, to its conductor, is no justification for an assault on him by the conductor which will absolve the carrier from liability for the consequences of the assault.

Evidence — assault on passenger — offensive language — mitigation of damages.

5. Evidence of insulting language by a passenger on a car, which induced the conductor to assault him, is admissible in evidence in mitigation of damages in an action against the carrier based on the assault.

(October 19, 1910.)

REPORT by the Superior Court for Plymouth County for the opinion of the Supreme Judicial Court after directing a verdict for defendant of an action brought to recover damages for an assault alleged to have been made by defendant's servant upon plaintiff. Verdict set aside and a new trial granted.

The facts are stated in the opinion.

Mr. C. B. Snow for plaintiff.

Mr. Asa P. French, for defendant:

If the plaintiff's language or demeanor was such as in common experience naturally and ordinarily provokes or induces an assault, he cannot hold the defendant responsible for failing to protect him from the consequences of his own improper behavior.

Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311; Scott v. Central Park, N. & E. River R. Co. 53 Hun, 414, 6 N. Y. Supp. 382; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Harrison v. Fink, 42 Fed. 787; Peavy v. Georgia R. & Bkg. Co. 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 701.

Braley, J., delivered the opinion of the court:

The plaintiff, having entered the car and paid his fare, became a passenger, and when the evidence closed it was uncontroverted that he had been assaulted by the conductor, although the place of the assault was for the jury to decide, upon conflicting evidence.

During the first part of the journey, they engaged in a verbal quarrel, which resulted in ill feeling between them; but there was no testimony that, during the last half, the dispute was renewed, or that the plaintiff was told that if upon request he did not depart he would be put off when the car stopped at the turnout, where the conductor was to set a switch and display a signal light. If, as the defendant contended, and its witnesses testified, the jury were satisfied that the encounter took place after the conductor returned from the switch, they could find that the plaintiff,

having passed from the car, had become a traveler, and the defendant would not be responsible for an injury then inflicted out of a spirit of vindictiveness for what had taken place on the car, or by anger aroused by the insult with which, as the conductor testified, the plaintiff then greeted him. Creamer v. West End Street R. Co. 156 Mass. 320, 16 L.R.A. 490, 32 Am. St. Rep. 456, 31 N. E. 391; McGilvray v. West End Street R. Co. 164 Mass. 122, 41 N. E. 116; Conroy v. Boston Elev. R. Co. 188 Mass. 411, 74 N. E. 672.

The plaintiff, however, contended that upon arrival at the turnout, he had reached the end of his journey, and prepared to leave, and the jury would have been warranted in finding upon his evidence that as he stood, with one foot on the platform and the other on the step, and while he was in the act of descending, the conductor who was standing on the ground at the foot of the steps, seized, pulled him off and knocked him down. If the turnout was his destination, or if, in response to the conductor's order, which the plaintiff said was given, he was leaving the car, as the evidence shows, without making any resistance, and in an orderly manner, the use of violence upon his person was unjustifiable. St. John v. Eastern R. Co. 1 Allen, 544. It is only where a passenger refuses to comply with a lawful order that, if he resists, reasonable force may be used to eject him. Coleman v. New York & N. H. R. Co. 106 Mass. 160; Conklin v. Consolidated R. Co. 196 Mass. 302, 82 N. E. 23, 13 A. & E. Ann. Cas. 857. And if he uses violence on his part beyond what is necessary to prevent blows, or to protect himself from excessive force, the burden is on him to prove that his illegal acts did not contribute to the injury. Coleman v. New York & N. H. R. Co. supra. The declaration, which is for an assault and battery upon the plaintiff, alleges that the assault was committed by the defendant's conductor while the plaintiff was a passenger; and the answer, after a denial of these allegations, raised by further averments the issues that, if an assault was committed, the conductor at the time was not acting within the scope of his employment, or, if he was so acting, that the force used was not excessive, but justifiable in self-defense, to repel an attack by the plaintiff. But there is no evidence to which this last averment is applicable. It appears that neither in the car nor while passing from the car to the ground did the plaintiff threaten him with bodily harm, or lay hands upon the person of the conductor.

If the defendant intended to rely upon the defense that the plaintiff was rightly ejected with the use of no more force than

was necessary, it should have pleaded the avoidance. It was not available under the present answer. *Hathaway v. Hatchard*, 160 Mass. 296, 35 N. E. 857; *Dixon v. New England R. Co.* 179 Mass. 242, 249, 60 N. E. 581. The conductor, if attacked during transportation, "undoubtedly would have been justified in using sufficient force to repel the assault and protect himself, and this defense would be available in the defendant's behalf when sued for his acts. *New Orleans & N. R. Co. v. Jopes*, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109. It is plain upon the evidence, as it stood at the close of the trial, that a verdict for the defendant could not have been ordered, and, apparently with the consent of the parties, the judge submitted to the jury three questions, the answer to which it was assumed would be decisive of the defendant's liability. The first question, however, was not answered; and the answer to the third question simply having negatived any contention of the plaintiff that an attempt was made to eject him as he was leaving the car, the further issue, covered by the first question, whether he was assaulted before he ceased to be a passenger, was left undecided.

But if there was evidence that the assault took place on the car, the defendant, without any objection by the plaintiff that the defense was not open under the pleadings, took the position that a failure to answer the first question became immaterial, since, the jury having found, in answer to the second question that the assault was provoked by the plaintiff, it was not liable even if the contract of carriage had not been terminated.

The evidence leaves no doubt, and the defendant concedes, that the only provocation during transportation was the offensive language which the plaintiff addressed to the conductor; and it also should be borne in mind that the jury could find that not only was the battery disproportionate to the insult given, but the assault was not delivered at the time of the alleged provocation, if the assailant waited until the plaintiff was leaving the car. In other words the defense is that because the plaintiff, while a passenger, insulted the conductor by the use of abusive language, he contributed to his own harm, or invited the punishment inflicted upon him, and thereafter during transportation the defendant was discharged from any further duty to protect him from an assault by its servant. If the plaintiff's words absolved the defendant, then where a passenger purposely behaves in an insulting manner toward a servant, the passenger no longer can claim the protection of the

carrier, but is put in jeopardy of a retaliatory assault at any time before transportation has ended, if such be the pleasure of the servant. He may be seriously injured or crippled for life, but has no remedy except to sue the servant, while, in the meantime, all other duties arising out of the contract must be reasonably performed by the carrier. By the plaintiff's contract, the duty rested upon the defendant of affording him full protection from unlawful violence at the hands of the conductor, to whom, as its representative, the management of the car had been intrusted. *Ramsden v. Boston & A. R. Co.* 104 Mass. 117, 121, 6 Am. Rep. 200. In *Bryant v. Rich*, 106 Mass. 180, 190, 8 Am. Rep. 311. Chief Justice Chapman, in speaking of his duty, said: "For the violation of such a contract, either by force or negligence, the plaintiff may bring an action of tort or an action of contract." And in the case of *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 213, 2 Am. Rep. 39, which was referred to in the opinion with approval, it was said: "The carrier's obligation is to carry his passenger safely and properly and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. . . . He must not only protect his passenger against the violence and insults of strangers and copassengers, but *a fortiori* against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but on the contrary the passenger is assaulted and insulted, through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible."

It is to be presumed that the defendant did not authorize the acts complained of, and no question of the conductor's authority is involved. The plaintiff's contract was with the defendant, whose liability for the consequences which could have been found to have followed from neglect of its duty to protect the plaintiff, while he remained a passenger, from the conductor's violence, is established not only by our own decisions, but by the great weight of authority. *Moore v. Fitchburg R. Co.* 4 Gray, 465, 64 Am. Dec. 83; *St. John v. Eastern R. Co.* 1 Allen, 544; *Ramsden v. Boston & A. R. Co.* 104 Mass. 121, 6 Am. Rep. 200; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Brooks v. Old Colony R. Co.* 168 Mass. 164, 165, 46 N. E. 566; *Levins v. New York, N. H. & H. R. Co.* 183 Mass. 175, 177,

97 Am. St. Rep. 434, 66 N. E. 803; Hayne v. Union Street R. Co. 189 Mass. 551, 3 L.R.A. (N.S.) 605, 109 Am. St. Rep. 655, 76 N. E. 219; Kuhlen v. Boston & N. Street R. Co. 193 Mass. 341, 346, 7 L.R.A. (N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815; Busch v. Interborough Rapid Transit Co. 187 N. Y. 388, 392, 80 N. E. 197, 10 A. & E. Ann. Cas. 460; Hanson v. European & N. A. R. Co. 62 Me. 84, 88, 16 Am. Rep. 404; Pittsburg & C. R. Co. v. Pillow, 76 Pa. 510, 18 Am. Rep. 424; Craker v. Chicago & N. W. R. Co. 36 Wis. 657, 17 Am. Rep. 504; Chicago & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 33; Williams v. Gill, 122 N. C. 967, 29 S. E. 879; Birmingham R. Light & P. Co. v. Mullen, 138 Ala. 614, 35 So. 701; Spohn v. Missouri P. R. Co. 101 Mo. 417, 14 S. W. 880; New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689; McKinley v. Chicago & N. W. R. Co. 44 Iowa, 314, 318, 24 Am. Rep. 748; Louisville & N. R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149; Sherry v. Billings, 8 Bush, 147, 8 Am. Rep. 451; Baltimore & O. R. Co. v. Barger, 80 Md. 23, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560; Haver v. Central R. Co. 62 N. J. L. 282, 285, 43 L.R.A. 84, 72 Am. St. Rep. 647, 41 Atl. 916; Knoxville Traction Co. v. Lane, 103 Tenn. 376, 46 L.R.A. 549, 53 S. W. 557; Mahoning Valley R. Co. v. De Pascale, 70 Ohio St. 179, 65 L.R.A. 860, 71 N. E. 633, 1 A. & E. Ann. Cas. 896; Lafitte v. New Orleans City & Lake R. Co. 43 La. Ann. 34, 12 L.R.A. 337, 8 So. 701; Houston & T. C. R. Co. v. Batchler, 32 Tex. Civ. App. 14, 17, 73 S. W. 981; Haman v. Omaha Horse R. Co. 35 Neb. 74, 52 N. W. 830; Smith v. Norfolk & W. R. Co. 48 W. Va. 69, 70, 35 S. E. 834; Texas & P. R. Co. v. Williams, 10 C. C. A. 463, 23 U. S. App. 379, 62 Fed. 440; Harrison v. Fink (C. C.) 42 Fed. 787; New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; New Orleans & N. E. R. Co. v. Jones, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109. It results from the application of this rule that the servant is justified in using force upon a passenger only to protect himself from bodily harm, but even then he cannot lawfully go farther than is reasonably necessary for his defense, and the proper management of the carrier's business.

If provocation by mere words, therefore, does not exonerate the carrier, yet, when sued for the assault, evidence of insulting language and insolent conduct of the passenger which induced the attack is admissible in mitigation of compensatory damages, where it appears that the provocation and the blow were substantially coincident. Child v. Holmer, 13 Pick, 503, 507; Brown 30 L.R.A. (N.S.)

v. Gordon, 1 Gray, 182; St. John v. Eastern R. Co. supra; Tyson v. Booth, 100 Mass. 258; Bonino v. Caledonio, 144 Mass. 299, 11 N. E. 98; Kiff v. Youmans, 86 N. Y. 324, 330, 40 Am. Rep. 543; Robison v. Rupert, 23 Pa. 523; Baltimore & O. R. Co. v. Barger, 80 Md. 23, 24, 26 L.R.A. 220, 45 Am. St. Rep. 319, 30 Atl. 560.

We find nothing in the cases cited by the learned counsel for the defendant which materially modifies or affects the conclusion to which we have come, except the case of Scott v. Central Park, N. & E. River R. 53 Hun, 414, 6 N. Y. Supp. 382, where a contrary decision was made by a divided court. But that case was doubted, criticized and not followed in Weber v. Brooklyn Q. C. & Suburban R. Co. 47 App. Div. 306, 62 N. Y. Supp. 1. The use of opprobrious and hot-tempered language by the plaintiff, even though it was justly provocative of anger, and with his partial intoxication, might have warranted his ejection as a passenger, did not justify the use of physical force upon his person by the conductor, whatever may have been the motive by which he was prompted, and the defendant's duty had not been discharged until the plaintiff had a reasonable opportunity to pass unmolesated from the car, and to depart. The substantial error of the trial arose from the assumption that under the circumstances verbal provocation was the legal equivalent of justification, and the special findings of the jury not having determined the rights of the parties if the assault was committed as described by the plaintiff, the court could not properly order a verdict for the defendant. Hurley v. Boston, 202 Mass. 68, 88 N. E. 586.

We do not find it necessary to consider more specifically the rulings given and refused, and in accordance with the terms of the report a majority of the court are of opinion that the verdict must be set aside and a new trial granted.

So ordered.

PENNSYLVANIA SUPREME COURT.

WILLIAM H. BERRYMAN

v.

PENNSYLVANIA RAILROAD COMPANY,
Appt.

(228 Pa. 621, 77 Atl. 1011.)

Master — assault by servant — liability.

1. A railroad company is not liable for the unprovoked shooting, without justifica-

Note. — As to liability of carrier for assault by employee on passenger, see Jackson v. Old Colony Street R. Co. ante, 1046.

tion, of a passenger while in the act of leaving the train and station, by a policeman in its employ and on duty at the station.

Carrier — termination of passenger's relation.

2. The relation of a passenger to a railroad company ceases when he has alighted from the train upon the platform at his destination, and proceeded far enough towards the exit from the company's property to be out of danger from the movement of the train, and necessity for further relation with the servants of the company has ceased.

Master — assault by servant — attempted arrest.

3. A railroad company is not liable for the act of its police officer in wilfully and maliciously inflicting injury upon one whom he is attempting to arrest for a justifiable cause, while he is in the act of leaving the company's train.

(July 1, 1910.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Lycoming County in plaintiff's favor in an action brought to recover damages for an assault alleged to have been made by defendant's servant upon plaintiff. Reversed.

The facts are stated in the opinion.

Mr. Seth T. McCormick, for appellant:

The railroad company, the master, is not liable for the wilful, wanton, and malicious acts of its servant outside of the line of his employment.

Lotz v. Hanlon, 217 Pa. 339, 10 L.R.A. (N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 A. & E. Ann. Cas. 731; Shay v. American Iron & Steel Co. 218 Pa. 172, 67 Atl. 54; Scanlon v. Suter, 158 Pa. 275, 27 Atl. 963; Nicholas v. Keeling, 21 Pa. Super. Ct. 181; Rudgeair v. Reading Traction Co. 180 Pa. 333, 36 Atl. 859; McFarlan v. Pennsylvania R. Co. 199 Pa. 408, 49 Atl. 270; Brennan v. Merchant & Co. 205 Pa. 258, 54 Atl. 891; Sarver v. Mitchell, 35 Pa. Super. Ct. 69; Guille v. Campbell, 200 Pa. 119, 55 L.R.A. 111, 86 Am. St. Rep. 705, 49 Atl. 938; Murphey v. Philadelphia Rapid Transit Co. 30 Pa. Super. Ct. 87; Decker v. Lackawanna & W. Valley R. Co. 39 Pa. Super. Ct. 225.

The carrier is not responsible for the wilful, wanton, and malicious attack upon a passenger by a servant not employed in executing the contract of transportation,

and cases referred to in the footnote appended to that case.

As to liability of private person or corporation for acts of special police officer appointed by public authority. see notes to McKain v. Baltimore & O. R. Co. 23 L.R.A. (N.S.) 289, and — v. —, — L.R.A. (N.S.) —. 30 L.R.A. (N.S.)

when the passenger has left the train at his destination, but is still on the carrier's premises.

New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; Greb v. Pennsylvania R. Co. 41 Pa. Super. Ct. 61; Mulligan v. New York & R. B. R. Co. 129 N. Y. 506, 14 L. R. A. 791, 26 Am. St. Rep. 539, 29 N. E. 952.

The carrier is not responsible for the unlawful and negligent acts of a railroad policeman appointed by the governor under the act of February 27, 1865.

Miller v. Hastings, 25 Pa. Super. Ct. 570; Norristown v. Fitzpatrick, 94 Pa. 121, 39 Am. Rep. 771; Tucker v. Erie R. Co. 69 N. J. L. 19, 54 Atl. 557; Healey v. Lothrop, 171 Mass. 263, 50 N. E. 540; Hershey v. O'Neill, 36 Fed. 168; Foster v. Grand Rapids R. Co. 140 Mich. 689, 104 N. W. 380; Tolchester Beach Improv. Co. v. Steinmeier, 72 Md. 313, 8 L.R.A. 846, 20 Atl. 188.

Messrs. Thomas M. B. Hicks, John Houston Merrill, and Wister M. Elliot, for appellee:

The relation of carrier and passenger begins as soon as one intending in good faith to become a passenger enters in a lawful manner upon the carrier's premises to engage passage, and that relation continues to exist until the passenger has been made aware of his arrival at the place of destination, and has had a reasonable time to alight from the car and to leave the premises of the carrier.

Powell v. Philadelphia & R. R. Co. 220 Pa. 638, 20 L.R.A. (N.S.) 1019, 70 Atl. 268; Clunn v. Williamsport & N. B. R. Co. 39 Pa. Super. Ct. 591.

The carrier is bound to the exercise of the utmost degree of diligence and care to protect passengers from violence at the hands of disorderly persons, which duty involves the exertion by its employees of every power at their command for the passenger's protection.

Pittsburgh, Ft. W. & C. R. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224; Pittsburg & C. R. Co. v. Pillow, 76 Pa. 510, 18 Am. Rep. 424; Duggan v. Baltimore & O. R. Co. 159 Pa. 248, 39 Am. St. Rep. 672, 28 Atl. 182, 186.

The duty of the carrier to exercise at least reasonable and ordinary care for the protection of passengers exists as much while the passengers are on its premises provided for that purpose, waiting for or departing from trains, as while actually in the train.

Ellinger v. Philadelphia & B. R. Co. 153 Pa. 213, 34 Am. St. Rep. 697, 25 Atl. 1132; Muhlhause v. Monongahela Street R. Co. 201 Pa. 237, 50 Atl. 937; Kennedy v.

Pennsylvania R. Co. 32 Pa. Super. Ct. 623; Thomp. Neg. 1902 ed. §§ 3184, 3191.

The defendant is liable under the principle of *respondent superior*.

Schimpf v. Harris, 185 Pa. 46, 39 Atl. 820; Duggan v. Baltimore & O. R. Co. supra; Lake Shore & M. S. R. Co. v. Rosenzweig, 113 Pa. 519, 6 Atl. 545; Philadelphia Traction Co. v. Orbann, 119 Pa. 37, 12 Atl. 816; Artherholt v. Erie Electric Motor Co. 27 Pa. Super. Ct. 141; Brennan v. Merchant & Co. 205 Pa. 258, 54 Atl. 891; Guinney v. Hand, 153 Pa. 404, 26 Atl. 20; McFarlan v. Pennsylvania R. Co. 199 Pa. 408, 49 Atl. 270; Pennsylvania R. Co. v. Spicker, 105 Pa. 142; Brunner v. American Teleg. & Teleph. Co. 151 Pa. 447, 25 Atl. 29; Simmons v. Pennsylvania R. Co. 199 Pa. 232, 48 Atl. 1070.

The mere fact that a railroad policeman, for the convenience and security of his employer, has delegated to him the additional authority of a state or municipality, does not make his employer any the less liable for a tort committed within the scope of that employment.

Deck v. Baltimore & O. R. Co. 100 Md. 168, 108 Am. St. Rep. 399, 59 Atl. 650; Tolchester Beach Improv. Co. v. Scharnagl, 105 Md. 199, 65 Atl. 916; Baltimore, C. & A. R. Co. v. Twilley, 106 Md. 445, 67 Atl. 265; Baltimore, C. & A. R. Co. v. Ennalls, 108 Md. 75, 16 L.R.A.(N.S.) 1100, 69 Atl. 638; Philadelphia, B. & W. R. Co. v. Green, 110 Md. 32, 71 Atl. 986; Hirst v. Fitchburg & L. Street R. Co. 196 Mass. 353, 82 N. E. 10; St. Louis, I. M. & S. R. Co. v. Hackett, 58 Ark. 388, 41 Am. St. Rep. 105, 24 S. W. 881; Higby v. Pennsylvania R. Co. 209 Pa. 452, 58 Atl. 858; Brill v. Eddy, 115 Mo. 596, 22 S. W. 488; Kastner v. Long Island R. Co. 76 App. Div. 323, 78 N. Y. Supp. 469; Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400.

When railroad companies, for their own benefit and protection, have certain employees commissioned as railroad policemen, they merely add a third capacity to the other two capacities in which their employees may act. All employees may do certain acts, either in their capacity as individuals or in their capacity as employees. Railroad policemen, duly commissioned, may also do certain acts in their capacity as peace officers of the state. The question in which of three capacities a railroad policeman acted does not differ, in principle, from the question in which of two capacities another employee acted. Both are questions for a jury.

Krulovitz v. Eastern R. Co. 143 Mass. 228, 9 N. E. 613; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 30 L.R.A.(N.S.)

Am. St. Rep. 827, 14 S. E. 243; Markley v. Snow, 207 Pa. 447, 64 L.R.A. 685, 56 Atl. 999; Deck v. Baltimore & O. R. Co. 100 Md. 168, 108 Am. St. Rep. 399, 59 Atl. 650, 102 Md. 669, 62 Atl. 953; Baltimore, C. & A. R. Co. v. Ennalls; Philadelphia, B. & W. R. Co. v. Green; St. Louis, I. M. & S. R. Co. v. Hackett; Brill v. Eddy; and Hirst v. Fitchburg & L. Street R. Co.,—supra; Dickson v. Waldron, 135 Ind. 521, 24 L.R.A. 483, 41 Am. St. Rep. 440, 34 N. E. 506, 35 N. E. 1.

Stewart, J., delivered the opinion of the court:

Assuming, as we must, that the facts are as testified to by the plaintiff, the case may be stated thus: Plaintiff had been a passenger on the defendant company's road, traveling from Wilmerding to Pitcairn, on the night of October 30, 1907, in company with one Boyer. He had gone from his home in Pitcairn to Wilmerding that day to hunt, and on his return brought his gun with him. Bledsoe, a policeman or patrolman in the employ of the defendant company, with one Reed, also a patrolman in the same service, boarded the same train at Wilmerding, and occupied the same car with the plaintiff and Boyer. When the train arrived at Pitcairn, all these parties alighted, the plaintiff and Boyer first, and, immediately following, Bledsoe and Reed. On either side of the place where the train stopped there is a paved platform for the accommodation of passengers. When the plaintiff was in advance of Bledsoe and Reed some 15 feet, moving over the platform to the subway, he heard Bledsoe say: "Hey there, Berryman." He stopped, and then stepped back. As Bledsoe approached, speaking with Reed, he again stopped, resting the stock of his gun on his foot or on the platform, and covering the muzzle with his hand. As he was thus standing, Bledsoe began shooting at him from a revolver, while only four or five steps away. The first shot took effect in his abdomen and prostrated him on the platform, another followed entering his groin, two more followed striking his right leg above the knee, a fifth struck him in his thumb. Bledsoe and Reed then ran from the scene, and the plaintiff was carried helpless to his home, where, upon examination, it was discovered that there were seven bullet wounds on his person. Plaintiff had given no occasion for offense; was behaving in a quiet, orderly way; had had no altercation with anyone, and had been guilty of no violation of law. The case was submitted to the jury with this instruction as to the law: "If you find this was an unprovoked assault and bat-

tery, or unprovoked shooting, without justification, and occurred in the manner in which the plaintiff has testified it did, and you find, at the same time, that Bledsoe was in the discharge of his duty as an officer of this railroad company, and was there at the time in the discharge of the duty which he owed to the defendant company, then you can find for the plaintiff." We are at a loss to construct out of these facts any theory which would justify this submission. Accepting the facts as we have stated them, the attack on the plaintiff was a wilful, wicked, and malicious assault with intent to kill him, or at least inflict upon him grievous bodily injury. The circumstances as detailed would be almost conclusive that the intent was to commit the more serious offense. It having been shown that Bledsoe was a policeman in the defendant company's employ, it may follow presumptively that he was present at the station in the course of his employment, and while there was on duty; but no presumption arises that every act he did while there was done in the discharge of a duty owing to the company. The evidence must show at least circumstances from which a jury can reasonably infer such facts, before the employer can be held answerable for the consequences. When it discloses circumstances which admit of no other inference than that the act complained of was both wilful and separate from duty, the individual committing the trespass alone is responsible. The law is thus stated by Mr. Justice Mitchell in *McFarlan v. Pennsylvania R. Co.* 199 Pa. 408, 49 Atl. 270: "For a wilful or intentional trespass by an employee outside of the line of his duty under his employment, it is settled that the employer is not responsible, even though it be committed while the servant is in the exercise of his employment. But in the latter case its wilful and separate character must appear." That the act of Bledsoe was wilful and malicious, on the plaintiff's showing, admits of no question. Was it something separate from the duty he owed his employer? Let the facts answer. Plaintiff had not been guilty of any violation of law. No information had been lodged against him. He was not disturbing the peace, and manifestly the assault could not have been made with a view to accomplishing his arrest. Plaintiff was peaceably departing from the station on his way to his home, disturbing no one, when he was halted. Without any explanation as to why he was addressed, without a single remark, and while he was resting his gun upon the floor with his hand covering the muzzle, Bledsoe, standing only four or five feet away, began the murderous as-

sault upon him, which only ceased when every load in his revolver had been discharged, and when he had every reason to believe he had killed his victim. Had death followed the assault, Bledsoe's crime, on this evidence, would unquestionably have been murder in the first degree. Now, what is there in the evidence that would support a finding that the assault was committed in discharge of any duty Bledsoe owed to the railroad company? Certainly, the defendant company was not requiring the plaintiff's blood at the hands of Bledsoe, its policeman; nor does it appear that the company had any purpose to serve by having his freedom interfered with in the slightest degree. The company had employed Bledsoe to preserve the peace, not to disturb it; and the case shows an entire absence of anything on the part of the plaintiff, the doing of which could have concerned the company even in the remotest way. The only inference the evidence allows is that the assault was a malicious one to gratify private vengeance of the assailant, disassociated with any duty Bledsoe owed to his employer.

The cases cited by the learned counsel for the appellee in support of their contention that Bledsoe, in committing this assault, was in the line of his duty, are inapplicable. They deal either with cases where a special duty towards the injured party, arising out of contract relation was violated, as in the case of a conductor who, in collecting fares or tickets from passengers, or in preserving peace and order in his car, commits a wilful and malicious assault on a passenger; or where an officer makes violent assault while engaged in making arrests. In every such case the employee is directly in the line of his duty, in the sense that he is presently engaged in doing the work for which he was employed. It is the duty of the conductor to make his collections, and it is his duty to maintain order in the car for the protection of passengers; and it is as well the duty of the policeman to make arrests when proper occasion arises. It is for such purposes these employees are engaged. If the assault in this case had been made by Bledsoe in the course of an attempt to arrest the plaintiff, it might be contended that it was done when in the line of his duty, and it would be a question for the jury to decide; but, as we have said, every circumstance shows that here no arrest was intended. The plaintiff does not assert that it was, shows no circumstance that indicates it, while Bledsoe positively asserts that it was not. Or, if it had been made in the attempt to do anything that Bledsoe was employed to do, as, for instance, keeping the

peace, suppressing disorderly conduct, discovering crime, a like result would follow. This is the extent to which the cases cited go. The distinction is too apparent to require further discussion. Ordinarily, whether the assault was committed in the line of the servant's duty is a question for the jury; but no question of fact is ever submitted to a jury except it is raised by the evidence. Here there was no evidence which could possibly support a finding that Bledsoe was in the line of duty under his employment, when he committed the assault. The fact that it was committed at the defendant company's station is of no importance. Plaintiff had been a passenger, but that relationship ceased when he alighted at his destination, and had so far proceeded on his way as to be out of danger from the movement of the train, or further necessity of relation with the servants of the company. The defendant company thereafter owed him no special duty, no contract relation existing between them. But take the other view of the case, and assume that Bledsoe had intended an arrest on justifiable grounds. So far he would unquestionably have been in the discharge of the duty of his employment. But the fact that in the attempt he committed a wanton and malicious assault admits of no possible dispute. No jury could find otherwise on this evidence. We have said quite enough as to that. In such case, where the servant in the discharge of a lawful duty wilfully and maliciously inflicts injury, he alone is responsible for the consequences. The rule *respondeat superior* applies only where the injury results from the negligent manner in which the duty is discharged. The master cannot be held responsible for the malicious acts of his servants. In *Pittsburg, A. & M. Pass. R. Co. v. Donahue*, 70 Pa. 119, is was sought to charge the company with liability for injuries inflicted by a conductor on a boy who was a trespasser on the train. In ejecting the boy the conductor struck him upon the head with an iron switch turner and knocked him over. On appeal from the judgment rendered, this court said in a *per curiam*: "We agree with the counsel for the plaintiff in error that for a wilful and wanton trespass committed by a car driver the company is not responsible." In *Pennsylvania Co. v. Toomey*, 91 Pa. 256, it was held that where a conductor of a railroad train, acting in the line of his duty, ejects from the platform of a car a person who has no right thereon, the company is liable if he has done it in a careless, negligent, or reckless manner, but not if he maliciously ejects him therefrom. In these cases the common-law doctrine

was applied and is alike applicable here. With Bledsoe's explanation of the occurrence we have nothing to do, except to remark that it supplies nothing that is wanting in the plaintiff's case. Upon a careful review of the evidence, we are of opinion that the defendant company was entitled to an affirmative answer to its first point, which was that under all the evidence the verdict should be for the defendant. The refusal of this point is made the first assignment of error.

The assignment is sustained, and the judgment is reversed.

**UNITED STATES CIRCUIT COURT
OF APPEALS, SEVENTH CIRCUIT.**

**HARVEY H. ATHERTON, Trustee, etc., of
James W. Quillen, Appt.,**

v.

J. W. GREEN et al.

(103 C. C. A. 298, 179 Fed. 806.)

**Bankruptcy — preference — collection
— accepting security.**

Acceptance by one who has transmitted a mortgage to an insolvent banker for collection, of a deed to real estate and notes of strangers in satisfaction of the proceeds of the mortgage, which the banker transmitted with instructions to accept the same upon hearing that the bank had closed its doors, amounts to treating the transaction as an indebtedness, and terminates the trust relation, where the banker dissipates the proceeds of the collection and closes the bank without funds into which the proceeds can be traced; and the owner of the mortgage is therefore not entitled to a preference over other creditors, but may be required to surrender his security to the banker's trustee in bankruptcy, who is appointed within four months thereafter.

(June 10, 1910.)

Note. — Bankruptcy: voidability as preference of transfer made in satisfaction of claim for misappropriation of property.

The case of *Upham v. New York Loan & T. Co.* 76 N. Y. 1, is much like that of *ATHERTON v. GREEN*. It appeared that the defendant had sent to the bankrupts, Paddock & Company, certain notes for collection, and that they delivered them to another party. Upon demand for a return of the notes, or immediate remittance, the bankrupts delivered other securities to the defendant, and these were sought to be recovered by the assignee in bankruptcy. The court said: "The transaction was not an exchange of securities. The defendant had a claim against Paddock & Company, for the conversion of the notes. The notes had

APPEAL by complainant from a decree of the District Court of the United States for the Northern Division of the Southern District of Illinois dismissing a bill filed to set aside certain conveyances which were alleged to be preferential and voidable under the Federal bankruptcy act. Reversed.

Statement by Seaman, Circuit Judge:

The appellant, as trustee of the estate of Quillen, a bankrupt, filed a bill in the district court to set aside conveyances of real estate (a) by the bankrupt to the appellee Green, for the benefit of the appellee Trimmer, and (b) by Green to Trimmer in compliance with the bankrupt's purpose, alleged to be preferential and voidable under the provisions of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418). Upon reference of the issues to a special master and hearing of the testimony, the master found and reported in favor of the appellant for the relief sought in the bill. Exceptions to such findings and conclusions were filed by the appellees; and the trial

court, on hearing thereof, sustained the exceptions and dismissed the bill. This appeal is from a final decree accordingly.

The material facts in evidence are uncontroverted and are summarized in the opinion.

Argued before Baker, Seaman, and Kohl-saat, Circuit Judges.

Mr. John M. Elliott for appellant.

Mr. B. M. Chipperfield for appellees.

Seaman, Circuit Judge, delivered the opinion of the court:

The decree appealed from dismisses the appellant's bill, filed to set aside a transfer of real estate made by the bankrupt in favor of the appellees, alleged to be conveyed and accepted in violation of the bankruptcy act. All the circumstances of the conveyances respectively are established by undisputed evidence, and the legal effect thereof, under the provisions of the act referred to, is the sole question raised.

The bankrupt, Quillen, prior to May 20, 1908, was engaged in banking, as sole proprietor of the business conducted under the

not been collected, but had been delivered by Paddock & Company to the insurance company, under a claim by the insurance company that they belonged to the company. This acquiescence in the claim concluded Paddock & Company in respect to the right of the insurance company. Paddock & Company had not received any proceeds from the notes, and the securities obtained by the defendant had no relation to or connection with them. The misappropriation of the notes by Paddock & Company was a gross breach of trust. They owed a duty to protect the defendant from loss resulting from their act. But it was a duty which they could not discharge at the expense of their other creditors; and having taken the securities with knowledge, as the jury have found, of the insolvency of Paddock & Company it was an unlawful preference within the provisions of the bankrupt act."

In *Sharp v. Philadelphia Warehouse Co.* Fed. Cas. No. 12,709a, 19 Nat. Bankr. Reg. 378, it was held that there had been an unlawful preference where the bankrupt had, shortly before bankruptcy, and while insolvent, turned over goods in the place of goods which he had wrongfully abstracted while holding them as a warehouseman.

And in *Burgoyne v. McKillip* (C. C. A.) 182 Fed. 452, the bankrupt had been a member of a firm acting as loan agents for an insurance company. He converted to his own use a large sum of money belonging to the insurance company, and when this was discovered he executed a trust deed to the insurance company, covering his own property. Within four months a petition in bankruptcy was filed against him. In determining that the trust deed was a void-

able preference the court said: "It is contended by complainants there was no preference, because the relation between the company and McKillip was not that of creditor and debtor, the demand of the former was not one provable in bankruptcy, and also that there was a present consideration to sustain the transaction. In case of embezzlement or misappropriation of funds, the person defrauded may at his option assert a demand as upon implied contract to repay, and such a demand is provable in bankruptcy. When the company took from McKillip what was in substance a mortgage upon his property, it clearly did so as a creditor, and it cannot retain it and at the same time abandon the position then assumed. This is not a case of following trust funds. The property was not conveyed to Burgoyne as the property of the company in which its funds had been invested. It was accepted as the property of the debtor, and as security for the payment of money due the company. The funds of the company were not traced into the property, and there was no reclamation of them as trust funds. Though a demand may be founded on a breach of trust, the entire estate of the recreant trustee is not thereby necessarily impressed with a trust. The holder of the demand cannot, as an ordinary creditor, take and hold transfers of property from the insolvent defaulter free from the provisions of the bankruptcy act respecting preferences."

In *Smith v. Au Gres Twp.* 9 L.R.A. (N.S.) 870, 80 C. C. A. 145, 150 Fed. 257, 17 Am. Bankr. Rep. 745, involving a mortgage of the bankrupt's stock of goods in favor of a town whose money he had appropriated and used in purchasing a part

name of Bank of Ipava, in the village of Ipava, Fulton county, Illinois; and the appellee Green, during all the times in controversy, was cashier of the People's State Bank of Astoria, located in the same county. In May, 1908, the appellee Trimmer placed with the last-mentioned bank, for collection, a note and mortgage owned by him, for \$2,100 principal and accrued interest; and cashier Green, for the bank, delivered such note and mortgage to Quillen (as the Bank of Ipava), with instructions to collect principal and interest and return the proceeds to People's State Bank of Astoria for account of Trimmer. Quillen collected the principal on May 13, and on May 16, 1908, collected \$121.32 as accrued interest, but failed to remit either amount, and appropriated the proceeds either to his personal use or that of his bank. He went to Chicago on the night of May 18th and was there during May 19th, in alleged effort to obtain means for carrying on the bank, returning to Ipava on the evening of May 19th, and meantime Green had his son call up the Bank of Ipava,

by telephone, to inquire about the collection, but ascertained only that Quillen was absent. The Bank of Ipava was not opened after Quillen's return from Chicago; and it appears from the evidence that its doors were closed on the morning of May 20th, with no cash on hand, except \$730 in change,—“mostly nickels, dimes, quarters, and pennies,”—and no “deposits of money in banks and elsewhere.”

Petition for voluntary bankruptcy was filed by Quillen June 6, 1908, adjudication thereof was entered June 8th, and the appellant became trustee of the estate in due course. Insolvency of Quillen at all the above-mentioned dates is established, with indebtedness to depositors far in excess of assets.

On May 20, 1908, the bankrupt (without request thereto) executed a deed of conveyance, together with his wife, in favor of the appellee Green, for a village lot which the bankrupt had long theretofore owned, stating the consideration to be \$1,700. This instrument was sent to the grantee by mail, together with two promissory notes

of the stock, the court merely remarked, in passing, that such mortgage constituted a preference.

On the other hand it was held in *McNaboe v. Columbian Mfg. Co.* 83 C. C. A. 81, 153 Fed. 907, 18 Am. Bankr. Rep. 684, that where the bankrupt had stolen money from, and afterward restored it to, one who was ignorant of both the theft and the restoration, such money was not recoverable by the trustee in bankruptcy upon the theory that the restoration constituted a preference.

The case of *Cook v. Tullis*, 18 Wall. 332, 21 L. ed. 933, 9 Nat. Bankr. Reg. 433, is sufficiently set out in *ATHERTON v. GREEN*, and is therein distinguished.

The English courts seem inclined to regard the fact that the transfer is made to compensate for a misappropriation of property, as going to the intention of the bankrupt; for it is the rule under the English statute, as well as under ours, that to constitute a preference the debtor must have intended to prefer the transferee over other creditors.

The case of *Sharp v. Jackson*, 80 L. T. N. S. 841, arose under § 48 of the English bankruptcy act of 1883, which makes transfers within three months before bankruptcy subject to attack as preferences. The bankrupt, two days before bankruptcy, had executed a deed to make good certain breaches of trust by him. This case turned upon the intent and purpose of the debtor, it being held that there was no invalid preference unless the debtor intended to prefer one creditor over others. Lord Macnaghten said: “Now I do not think that this gentleman at the time when he executed this deed was in a position to execute it with free choice at all. I think that he executed

it under an overwhelming sense of very imminent peril. The fact that two years before he had had this deed prepared shows to my mind that he had a sense of his dangerous position before his mind at the time; and at the last moment, when it became certain that he would be exposed to bankruptcy and all its consequences, including the examination that would follow, he executed the deed. I think that he executed it simply with the view of protecting himself.” This last remark, doubtless, had reference to protection against criminal prosecution, to which he was subject by reason of the acts constituting the breaches of trust.

In *Re Lake*, 84 L. T. N. S. 430, a transfer of securities, made shortly before bankruptcy, was upheld upon the theory that there was no intent to prefer creditors, since the debtor, moved by the dictates of an offended conscience, made the transfer under a sense of obligation to make good a breach of trust.

On delivery of property on eve of bankruptcy to one holding execution contract therefor made within the four months' period, as a preference, see the note in 21 L.R.A.(N.S.) 901.

On voidability of transfer within four months' period pursuant to executory agreement antedating that period, see the note in 17 L.R.A.(N.S.) 935.

On validity of transfer to secure pre-existing debt within four months of bankruptcy, in absence of any intent on part of debtor to hinder, delay, or defraud creditors, or of reasonable cause on part of creditor to believe that it was intended as preference, see the note in 15 L.R.A.(N.S.) 372.

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(one of \$575 and the other of \$100.25) made by third parties, inclosed with the bankrupt's letter, requesting "Green to hold the deed and notes until he heard definitely that he (Quillen) had closed the bank." Green received these papers May 20th, about noon, and "heard definitely," at about 2 P. M. of the same day, that the bank had closed. He immediately informed Trimmer thereof, executed conveyance of the lot to Trimmer, and delivered over both deed and notes above mentioned. Relief is sought by the trustee in bankruptcy, under the present bill, in respect of the above-mentioned transfer of real estate, without reference to the notes turned in; and the net value of the lot so conveyed appears under the testimony to be about \$1,300.

We believe, therefore, these premises for the bill to be established: That the grantees (appellees) respectively accepted the transfer with ample notice of the bankrupt's insolvency; that it was made and received by way, either of satisfaction or security, for the amount theretofore collected for and withheld from the appellees, as above recited, and not as a purchase of the lot, by either appellee, "in good faith and for a present fair consideration," within the exception provided in § 67 (3)e of the bankruptcy act; that prior to such transfer by the bankrupt the lot so conveyed formed a part of his estate, and was neither obtained through nor in any sense represented the proceeds of the above-mentioned collection on account of the appellees; and that the effect thereof was to deplete the estate of the bankrupt for the benefit of the appellees as against general creditors in bankruptcy. Thus the transaction was plainly an unlawful preference, under § 60 of the bankruptcy act, unless the pre-existing relation of the parties—as one of agency or trust, and not that of debtor and creditor—exempts it from such provision.

The decree in favor of the appellees rests (as stated in the opinion filed below) upon these propositions in substance: That the collection was made by the bankrupt as the appellees' agent, and his "wrongful conversion of the money . . . could not establish the relation of creditor and debtor without the assent" of the principals; that such assent was not given; and that the transfer so made by the bankrupt "to make good or partially good the loss" caused by his conversion was (in effect) "an exchange if properties" made and accepted accordingly, and not in violation of the bankruptcy act. In support of this view the opinion cited *Cook v. Tullis*, 18 Wall. 332, 21 L. ed. 933, and *Holder v. Western German Bank*, 68 C. C. A. 554, 136 Fed. 90, 92, and 30 L.R.A. (N.S.)

counsel for the appellee further cites numerous authorities reaffirming and defining the general doctrine that neither a collection thus made nor conversion of the proceeds by the collecting agent creates the relation of creditor and debtor therein, between principal and agent, unless the principal so elects,—all in harmony with the well-settled rule applicable to such trust relation. So, the proceeds of the collection belonged to the principals, and the misappropriation vested no right to the fund in favor of the estate in bankruptcy, and the owner in such case is entitled to follow and recover the amount, in so far as it either remains on hand or is traceable into other investments or property derived therefrom. Failing such recourse to the trust fund, it is optional with the owner to treat the misappropriation as an indebtedness, thereby becoming a creditor on a par with other general creditors of the estate and subject to the bankruptcy provisions applicable to such relation. With neither the property nor its proceeds appearing on hand in any form, the fact that the indebtedness arose through conversion of the property gives the owner thereof no right of preference over general creditors.

When the bankrupt closed his bank on the morning of May 20th, with the proceeds of the collection dissipated, and no funds (except the small change above mentioned) nor bank credits remaining to meet liabilities, the ensuing execution and transmission of the deed of real estate owned by the bankrupt, to be accepted by the appellees as indemnity (in part) for misappropriation of their proceeds, in the event of hearing "definitely that Quillen had closed the bank," can bear no interpretation otherwise, as we believe, than treatment of that transaction as an indebtedness for which the conveyance was thus tendered by way of security or indemnity, and so recognized by the appellees in their immediate and unqualified acceptance, upon advice of closure of the bank. We are of opinion, therefore, that the conveyance was made and accepted as preferential security, out of the general estate of the bankrupt, in the relation of the parties as debtor and creditor, with the property so conveyed neither derived from the misappropriation, nor standing chargeable with the proceeds in any equitable sense; that the transaction is not within the rule upheld in *Cook v. Tullis*, supra, nor sustainable under any of the authorities cited in support of the decree.

In reference to the case of *Cook v. Tullis*, which arose under the bankruptcy act of 1867 (act March 2, 1867, chap. 176, 14 Stat. at L. 517) containing like provision

against preferences, the exchange of securities was made at a time and under circumstances plainly distinguishable from the facts above recited. Homans (the bankrupt) was a banker and had purchased bonds for Tullis, from time to time, which were left with the banker for safe-keeping, inclosed in envelopes, distinctly marked in the name of Tullis, and kept in an individual deposit box. Tullis had permitted Homans to take out and use \$20,000 of these deposited bonds, upon his substitution of an equivalent amount of bills receivable and promise to replace the bonds when required; and the bonds were so replaced. Subsequently, in March, 1869, without permission or knowledge on the part of Tullis, Homans used from the deposit, \$6,000 of bonds, for which he first substituted bills receivable, and "in April," 1869, substituted for the bills transfer of a note and mortgage (belonging to him) for \$7,000 due in ninety days. The mortgage was not paid at maturity, and "in August," 1869, was taken by Homans from its envelop and placed in the hands of an attorney for collection. On August 26, 1869, Homans failed, and was adjudged an involuntary bankrupt September 20th. Tullis ascertained the taking and substitutions last mentioned soon after the failure "signified his acceptance," and directed the attorneys having the mortgage in charge to commence foreclosure. In suit by the trustee in bankruptcy to set aside the transfer of this security as preferential, it further appeared that Homans was not insolvent when the substitution and transfer was made, and he testified that he inferred (from the earlier transactions) that it would be satisfactory to Tullis and that he "did not apprehend insolvency or bankruptcy." It was there held that the transaction was not in violation of the statute, and that Tullis was entitled to \$6,000 of the mortgage proceeds. No sanction appears in that ruling, as we believe, for the present decree in favor of the appellees. The decree of the District Court is therefore reversed, with direction to enter a decree for relief of the appellant as prayed in his bill.

INDIANA SUPREME COURT.

ILO OIL COMPANY, Appt.,

v.

INDIANA NATURAL GAS & OIL COMPANY.

(— Ind. —, 92 N. E. 1.)

Injunction — right — similar delicts — effect.

An injunction against the pumping of
30 L.R.A. (N.S.)

oil and gas wells will not be awarded in favor of the owner of neighboring wells, if the latter has been guilty of similar acts, even though in a lesser degree.

(June 10, 1910.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Delaware County in defendant's favor in a suit to enjoin the pumping of certain gas and oil wells. Affirmed.

The facts are stated in the opinion.

Note. — Right of one who pumps oil, gas, or water on his premises to enjoin similar acts of his neighbor.

This note is not concerned with the question whether a person may in any event be enjoined from pumping gas, oil, or water on his premises, but rather whether, in view of the fact that the complainant himself is guilty of the acts complained of, he is in such a position as to ask a court of equity to come to his aid.

The cases discussing the constitutionality of statutes to prevent waste of subterranean water, natural gas, or oil are discussed in a note to *Hathorn v. Natural Carbonic Gas Co.* 23 L.R.A. (N.S.) 436.

An extended search has revealed but little authority dealing with the application to a case of the maxim that one who comes into equity must come with clean hands, whereas in *ILO OIL CO. v. INDIANA NATURAL GAS & OIL CO.*, an injunction against the pumping of oil and gas wells was sought to be awarded in favor of the owner of neighboring wells, who himself was guilty of similar acts.

A case somewhat similar is *Merrick Water Co. v. Brooklyn*, 32 App. Div. 454, 53 N. Y. Supp. 10, affirmed in 160 N. Y. 657, 55 N. E. 1097, where it was held that a corporation pumping water on its premises for sale in other localities cannot complain of similar acts upon the part of another corporation, on the latter's premises. The court said: "In the present case both corporations seek to obtain water in a similar manner, for a precisely similar purpose: *i. e.*, for transportation and sale. Neither party intends to make use of its land for any other purpose than will facilitate the gathering and distribution of water. In this respect their rights are equal, one as great as the other; and we see no reason why the rule should not be applicable as would apply in case either owner desired to improve its land for purposes of use. Then, as we have seen, neither party would be liable for the diversion of percolating water, because each is engaged in the exercise of a legal right, and the rights of each are equal in the use and enjoyment of the land. When both seek to use their land for exactly the same purpose, and neither seeks to improve it for the purpose of beneficial enjoyment, but to make a profit from the business carried on, the right to such use must also be equal.

Messrs. A. L. Well, C. M. Thorp, Ralph S. Gregory, and Walter J. Lotz for appellant.

Messrs. W. O. Johnson, W. H. H. Miller, C. C. Shirley, and Samuel D. Miller, for appellee:

He who extends his hands for relief to a court of equity must extend clean hands. He who seeks equity must do equity.

Pom. Eq. Jur. § 385; Cassady v. Cavenor, 37 Iowa, 300; 11 Am. & Eng. Enc. Law, 2d ed. p. 162; Curtis v. Winslow, 38 Vt. 691; Nebraska Teleph. Co. v. Western Independent Long Distance Teleph. Co. 68 Neb. 772, 95 N. W. 18; Edward Thompson Co. v. American Law Book Co. 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Hilson Co. v. Foster, 80 Fed. 896.

An adjoining owner has the right to put down his well, and to shoot and pump the same so as to increase the value thereof, notwithstanding by so doing he may draw the gas from his neighbor's land.

People's Gas Co. v. Tyner, 131 Ind. 277, 16 L.R.A. 443, 31 Am. St. Rep. 433, 31 N. E. 59, 17 Mor. Min. Rep. 481, s. c. 131 Ind. 408, 31 N. E. 61; Westmoreland & C. Natural Gas Co. v. De Witt, 130 Pa. 235, 5 L.R.A. 731, 18 Atl. 724; Townsend v. State, 147 Ind. 624, 37 L. R. A. 294, 62 Am. St. Rep. 477, 47 N. E. 19; Consumers' Gas Trust Co. v. American Plate Glass Co. 162 Ind. 393, 68 N. E. 1020; Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 466; Federal Oil Co. v. Western Oil Co. 57 C. C. A. 428, 121 Fed. 674, 22 Mor. Min. Rep. 429; Brewster v. Lanyon Zinc Co. 72 C. C. A. 213, 140 Fed. 809; Acme Oil & Min. Co. v. Williams, 140 Cal. 681, 74 Pac. 296; 30 Am. & Eng. Enc. Law, 2d ed. p. 314; Jones v. Forest Oil Co. 194 Pa. 379, 48 L.R.A. 748, 44 Atl. 1074, 20 Mor. Min. Rep. 350; Hague v. Wheeler, 157 Pa.

324, 22 L.R.A. 141, 37 Am. St. Rep. 736, 27 Atl. 714; Ocean Grove Camp Meeting Asso. v. Asbury Park, 40 N. J. Eq. 447, 3 Atl. 168.

Monks, Ch. J., delivered the opinion of the court:

Appellant brought this suit to enjoin appellee from using devices for pumping, and from employing any other artificial power or appliance for the purpose of having the effect of increasing the natural flow of natural gas and oil from wells of appellee. It is alleged in the amended complaint that appellee "has and is, by compressors, pumps, suction lines, and stations, producing a vacuum and suction upon the gas and oil, sand, and rock underlying its leases and leases of the appellant and surrounding territory, and thereby it has been sucking the oil and gas away from appellant's property, and destroying its wells and leases, and that appellee threatens to continue and will continue such application unless enjoined," etc. Prayer for an injunction. Appellee filed an answer in two paragraphs. The first paragraph was a general denial; the second set up in substance that appellant was guilty of the same acts complained of in its complaint, but in a lesser degree. The court, at the request of both parties, made a special finding of facts, and stated conclusions of law thereon. The conclusions of law stated by the court were: (1) The law is with the defendant, and the plaintiff is entitled to take nothing by its complaint herein; (2) that the defendant is entitled to recover its costs in this action laid out and expended. Over a motion for a new trial, judgment was rendered in favor of appellee. The errors assigned by appellant call in question each conclusion of law and the action of the court in overruling appellant's motion for a new trial.

Appellee insists that even if it might be

Under such circumstances, if one gets more than the other, we think there can be no more ground of complaint than would exist if both sought to improve their own land, and one secured more than the other, or one was damaged and the other not. As applied to such obligations, the doctrine of reasonable use and relative rights has never been adopted by any of the courts in this state, nor in any other state, so far as our research has discovered, except in New Hampshire. We are not able to see, therefore, that the act of the defendant has infringed upon any legal right which the plaintiff possessed."

But in Hathorn v. Natural Carbonic Gas Co. 194 N. Y. 326, 23 L.R.A. (N.S.) 436, 128 Am. St. Rep. 555, 87 N. E. 504, 16 A. & E. Ann. Cas. 989, it was held that the 30 L.R.A. (N.S.)

fact that one who has marketed water naturally flowing from springs on his land does not deprive him of the right to equitable relief against the forcible pumping of the water from the common reservoir and letting it go to waste, for the purpose of securing for sale the gas connected therewith. The court took occasion to say that if the respondents were seeking to restrain the mere marketing of the products of appellant's well, it might be a sufficient answer to say that they were doing the same thing; but that it failed to see how the sale of waters naturally flowing in their springs fairly or equitably forbade them from restraining appellant from continuing, by artificial means, the increased and wasteful flow of waters and gas which was the thing complained of.

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enjoined from increasing the natural flow of gas and oil by pumping or other artificial means, under the rule declared in *Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 461, 50 L.R.A. 768, 57 N. E. 912, 20 Mor. Min. Rep. 672, that appellant is not in a position to obtain such relief because the court found that it was also guilty of the same acts in connection with the matter in controversy. The court, in its special finding, found facts which show that appellant was guilty of the same acts in a lesser degree (in connection with the same matter) which it seeks to enjoin appellee from doing. This finding of the court is challenged by appellant in its motion for a new trial, on the ground that it is not sustained by sufficient evidence. There is, however, evidence to support this finding, and it is well settled that the finding made by a trial court as to questions of fact will not be disturbed when there is evidence to support such finding. *Ewbank's Manual of Prac.* § 128; *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338, and cases cited; *Tappen v. Eshelman*, 164 Ind. 338, 73 N. E. 688; *Thompson v. Beatty*, 171 Ind. 579, 86 N. E. 961, and cases cited; *Parkison v. Thompson*, 164 Ind. 609, 73 N. E. 109, 3 A. & E. Ann. Cas. 677; *Burk v. Matthews Glass Co.* 40 Ind. App. 81, 81 N. E. 88; *Ellison v. Flint*, 43 Ind. App. 276, 87 N. E. 38; *Roberts v. Koss*, 32 Ind. App. 510, 70 N. E. 185.

As appellant was guilty, although in a lesser degree, of the same acts charged against appellee, the court will leave the parties where it finds them, for the reason that he who seeks equity must do equity, and must come into court with clean hands.

Pittsburgh, C. C. & St. L. R. Co. v. Crothersville, 159 Ind. 330, 332, 337, 64 N. E. 914, and cases cited; *Bunch v. Bunch*, 26 Ind. 400, 405, 406; *McAllister v. Henderson*, 134 Ind. 453, 34 N. E. 221; *A. N. Chamberlain Medicine Co. v. H. A. Chamberlain Medicine Co.* 43 Ind. App. 213, 86 N. E. 1025, and cases cited; *Cassady v. Cavenor*, 37 Iowa, 300; *Brutsche v. Bowers*, 122 Iowa, 226, 97 N. W. 1076; *Medford v. Levy*, 2 L.R.A. 368, and note (31 W. Va. 649, 13 Am. St. Rep. 887, 8 S. E. 302); *Acheson v. Stevenson*, 130 Pa. 633, 18 Atl. 873; *Nebraska Teleph. Co. v. Western Independent Long Distance Teleph. Co.* 68 Neb. 772, 95 N. W. 18; *Board of Trade v. O'Dell Commission Co. (C. C.)* 115 Fed. 574; *Olcott v. Sheppard Knapp & Co.* 96 App. Div. 281, 89 N. Y. Supp. 201; *Edward Thompson Co. v. American Law Book Co.* 62 L.R.A. 607, 59 C. C. A. 148, 122 Fed. 922; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 430; *Hilson* 30 L.R.A. (N.S.)

Co. v. Foster (C. C.) 80 Fed. 896; *Joseph v. Macowsky*, 96 Cal. 518, 19 L.R.A. 53, 31 Pac. 914. See note to *Knapp v. Jarvis Adams Co.* 70 C. C. A. 543, 546, 548-550; 1 Pom. Eq. Jur. 3d ed. §§ 385, 397-399; 2 Pom. Eq. Rem. § 582; 11 Am. & Eng. Enc. Law, 2d ed. p. 163; 16 Cyc. Law & Proc. pp. 144-149.

It is evident, therefore, under said findings, that even if appellee might be enjoined from the acts complained of in the complaint,—a question we need not and do not determine,—appellant is not in a position to obtain such relief.

Judgment affirmed.

Petition for rehearing denied.

IOWA SUPREME COURT.

WISECARVER & REYNARD

v.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY, Appt.

(— Iowa, —, 122 N. W. 909.)

Removal of cause — costs — jurisdiction.

1. A state court has jurisdiction to render a judgment for the costs which accrued before the removal of the cause to the Federal court, even though it should eventually be established that the petition which was filed before the accrual of a portion of the costs, such as those on appeal from an order denying the removal, should have been granted.

Costs — judgment — removal of cause.

2. A state court should not enter a judgment for the costs which accrued before it in a case which was removed to a Federal court, until a final determination of the cause.

(October 22, 1909.)

Note. — *Power of state court to render judgment for costs in case removed to Federal court and not remanded.*

But very little authority has been found on the question whether a state court has jurisdiction to render judgment for the costs therein, while the case is in the Federal court and undetermined.

A case which seems to be directly in point is *Williams v. Adkins*, 6 Coldw. 615, where, upon the application of one to have the cause against him removed to the Federal court, a judgment at the same time was rendered against him by the state court for all the costs which had accrued up to that time. From this judgment an appeal in error was brought to the supreme court of the state, and it was there said: "The circuit court of Campbell county, upon the question whether or not the cause should

APPEAL by defendant from an order of the District Court for Jefferson County denying a motion to tax costs to plaintiff in an action brought to recover damages for injuries to plaintiff's horse while in defendant's possession for transportation which had been removed to the Federal courts. Affirmed.

The facts are stated in the opinion.

Messrs. Carroll Wright, J. L. Parrish, and Leggett & McKemey, for appellant:

A removal transfers the whole case, with its incidents and remedies, to the Federal court.

Moon, Removal of Causes, 1st ed. §§ 205, 207.

Messrs. Rollin J. Wilson and Crall & Crall, for appellee:

Costs should be governed by the rule announced in the following case.

Palmer v. Palmer, 97 Iowa, 454, 86 N. W. 734.

Deemer, J., delivered the opinion of the court:

In the year 1906 plaintiff brought action in the district court of Jefferson county against the defendant to recover damages which it alleged it had sustained by reason of an injury to a horse which had been shipped over defendant's line of railroad.

be transferred, had no discretion except simply to determine whether the application came within the provisions of the act of Congress. Upon deciding this question in the affirmative, the right of the plaintiff in error to have the cause transferred became absolute. Upon what ground, then, could the court render judgment against him for costs? In general, the right of one party at law, to recover his costs from the opposite party, results from his final success in the cause. This, by statute, is so far modified that the court may adjudge costs against either party, as terms of continuance, etc. Code §§ 2942, 2943. It is provided by § 3220 that, if any case shall occur, not directly or by fair implication embraced within the provisions of the law, the court may make such disposition of the costs as in its sound discretion may seem right. This has reference to causes where it becomes the duty of the court in disposing of the cause to adjudge the costs. The judgment for costs in this cause cannot be regarded as terms for granting the transfer, for the court had no discretion in the matter. It was not a cause where the law required the court to adjudge the costs. The provisions of the act are that when the application is made in conformity therewith, the state court shall proceed no further, and upon entering copies, etc., in the Federal court, the cause shall proceed as if originally brought there. The judgment for costs in this cause was arbitrary and clearly erroneous, if not void absolutely. 30 L.R.A. (N.S.)

The defendant appeared, filed answer, and a petition for removal to the circuit court of the United States on the ground of diversity of citizenship. This petition was denied on the 3d day of December, 1906, and thereafter the cause came on for hearing at a regular term of the district court, resulting in a verdict and judgment for plaintiff in the sum of \$1,000 and costs amounting to \$434.60. Thereafter the cause was appealed to this court, resulting in a reversal, because the court below erred in overruling defendant's petition for removal, and the cause was remanded to the district court of Jefferson county. See 139 Iowa, 596, 117 N. W. 961. The cause was remanded without direction, although the procedendo of course ordered the court below to proceed in said case in a manner not inconsistent with the opinion of this court. Thereafter, and on the 1st day of February, 1909, defendant filed a motion asking that the judgment theretofore entered be canceled and set aside, that it have judgment against plaintiff for the costs of said action in the amount above stated, and that the cause be transferred for trial to the United States circuit court. Plaintiff resisted this motion upon many grounds, chief among which were: (a) That the court was without jurisdiction to do more than order a transfer of the cause; and

The court, until the order of transfer was made, had jurisdiction of the parties, but it may be doubtful if the court at this stage of the case had jurisdiction of the subject-matter of costs."

In National S. S. Co. v. Tugman, 27 C. C. A. 116, 51 U. S. App. 496, 82 Fed. 246, it was held that where removal of a cause to the Federal court is denied by a state court, and that decision is affirmed by the appellate courts of the state, but reversed by the Supreme Court of the United States upon the ground that the filing of the petition and bond worked a removal, and by it remanded to the state court, with direction to "accept the bond tendered" and "proceed no further in the cause," a judgment thereafter rendered by the state court, awarding the appellant the costs of the action in the various courts, is a nullity.

A case closely related, but not strictly in point, is Oishei v. Pennsylvania R. Co. 102 App. Div. 473, 91 N. Y. Supp. 1034, holding that the fact that, subsequent to the settlement of an action against a railroad company for personal injuries, the cause of action had been transferred to the Federal court, did not deprive the state court of jurisdiction to enforce the lien of the plaintiff's attorney.

After a new trial this doctrine was reaffirmed in 117 App. Div. 110, 102 N. Y. Supp. 368, and the latter case was affirmed without opinion in 191 N. Y. 544, 85 N. E. 1113.

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(b) that the costs attendant upon the former trial should abide the final judgment rendered in whatever should be determined to be the court of ultimate trial and decision. The trial court ordered that the case be transferred to the United States circuit court; that the judgment theretofore entered against the defendant be set aside; and made an order, concluding as follows: "It is further ordered by the court that the motion of the defendant for judgment against the plaintiffs for the costs of the trial in this court—being the costs of witnesses, court officers, and other fees incurred upon the trial, following the overruling of defendant's motion to transfer to the Federal court—be and the same is hereby overruled, to which ruling the defendant at the time duly excepts, and plaintiff excepts to setting aside of the judgment. It is further found by the court that this is a proper question for appeal to the supreme court, and one which should be passed upon by that court, and this order shall be considered as a certificate for the taking of such appeal."

The appeal is from the latter part of this order, and presents two questions for our consideration. The first of these is the jurisdiction of the district court to render judgment for the costs made therein while the case is in the Federal court and undetermined; and, second, assuming that such jurisdiction exists, should such order be made until the final judgment is rendered by the court which shall finally decide the case? As to the first proposition, we entertain no doubt of the jurisdiction of the district court to render judgment for costs which accrued in that court, even though it should finally hold that the petition for removal filed before the accrual of these costs, or the major part of them, should have been sustained. The second question is of more doubt; but we are constrained to hold that until the final determination of the case no order should be made in the district court regarding the costs taxed in that suit.

It does not appear that the case has been tried in the United States court, nor is there any showing of a judgment therein. Moreover, it does not appear whether a motion to remand has been filed, submitted, or determined in that court. The most that can be said for the record is that the action is now pending there. It may be that this case will eventually be remanded to the district court of Jefferson county for trial, and in that event it would become the duty 30 L.R.A. (N.S.)

of the court trying that case to make a proper order as to costs. If defendant in such event were successful, the entire costs would be charged to the plaintiff. If, on the other hand, plaintiff should secure the verdict, the costs might either be apportioned or taxed to the defendant. Surely this would be true as to some of the items of costs which were taxed as part of the original judgment. Defendant's motion included all of the costs of the action. In no event, as it seems to us, would defendant be entitled to have the costs, made before filing the petition for removal, taxed to the plaintiff. If this case were to be retried in the Jefferson county district court, and the plaintiff were successful, he would be entitled to all costs, save those growing out of and relating to the first trial. The motion to tax the costs was, as it seems to us, premature, and the order denying it must be sustained. All this, however, should be without prejudice to appellant's right to renew this motion, if so advised, upon the final determination of the case.

Our conclusion finds some support in *Palmer v. Palmer*, 97 Iowa, 454, 66 N. W. 734. In that case it appeared that the action had been transferred to the equity docket, and a hearing had upon the merits, resulting in a decree against the plaintiff. Upon appeal to this court it was determined that a motion to transfer to the equity docket should have been overruled, and the decree was reversed. The case was again tried in the district court as a law action, resulting in a verdict and final judgment for the defendant. Upon motion the district court taxed all the costs, including those made on the first trial of the cause, to the plaintiff. Plaintiff excepted and appealed, and the order was affirmed, the court saying: "We think it has always been the practice that, when one trial has been had and the verdict is set aside by the district court, or the cause reversed in this court, and another trial is had in the district court, the costs of the first trial follow those of the last. In the case at bar the final result showed that the plaintiff instituted and prosecuted an unfounded claim, and in the first trial, as well as the last he was the defeated party, and the order requiring him to pay the costs which accrued in the district court is right."

The order of the District Court is therefore affirmed.

Petition for rehearing denied.

IOWA SUPREME COURT.

MRS. JENNIE KITHCART

v.

JESSE R. KITHCART

and

WABASH RAILROAD COMPANY, Gar-
nishee, Appt.

(— Iowa, —, 124 N. W. 305.)

**Assignment — claim for tort — settle-
ment.**

1. Where claims for tort may be assigned, a railroad company against which a claim exists for a personal injury cannot, by settlement with the person injured, avoid liability to his wife for the amount due her under an agreement between them in a divorce proceeding that she shall have a portion of the recovery as alimony, which has been confirmed by a decree which made the allowance a lien on the fund to be recovered, after it had notice thereof.

**Lien — divorce proceeding — claim
against stranger.**

2. A decree in chancery granting a divorce may establish a lien in favor of the wife upon a fund due the husband by a

third person for an injury negligently inflicted upon him.

(January 20, 1910.)

A PPEAL by the garnishee from a judgment of the District Court for Wright County in plaintiff's favor in a supplementary proceeding to reach funds alleged to have been paid plaintiff's judgment debtor in settlement of a claim for personal injuries, in alleged violation of plaintiff's rights. Affirmed.

Statement by Deemer, Ch. J.:

In a supplementary proceeding to compel the Wabash Railroad Company, garnishee, to pay to plaintiff a specified part of a sum of money which had been paid by it to defendant in settlement of a claim for damages on account of personal injuries, the court rendered judgment for the plaintiff as against said garnishee, and the garnishee appeals.

Messrs. Hewitt & Wright, for appellant:

Garnishment is wholly a statutory pro-

**Note. — Validity of provision in decree
for alimony declaring a lien on hus-
band's personalty.**

The decision in KITHCART v. KITHCART, holding that a lien on the husband's personalty might be created by a decree allowing alimony where its terms so provide, does not seem to be in entire harmony with the few decisions which have considered the question.

The holding of these cases seems to establish the rule that, in the absence of express statutory authority, the court has no power to establish a lien upon the husband's personalty to secure the payment of alimony.

Thus, it was held in Johnson v. Johnson, 22 Colo. 20, 55 Am. St. Rep. 113, 43 Pac. 130, that a court, either by its ordinary powers, or under a statute giving it power to require reasonable security for, and to enforce the payment of alimony in any other manner consistent with the rulings and practice of the court, had no power to decree that the alimony allowed in a divorce case be a lien upon defendant's personal property. The court said: "There seems to be no reason for extending this rule, and in practice we think that liens of this character upon personal property would lead to great inconvenience. Such a decree is unusual and as the usual remedies for the enforcement of a decree for alimony are complete and adequate, there is no reason for resorting to a doubtful remedy."

So, a court has no power to decree alimony a lien on a horse, where in one section of a statute it provides that the court's decrees shall create liens on "lands and tenements;" and in another it expressly provides 30 L.R.A. (N.S.)

that it may, in cases where the act to be performed is something other than the payment of money, order that it shall be a lien upon both the real and personal estate of the defendant. Yelton v. Handley, 28 Ill. App. 640.

And in Griswold v. Griswold, 111 Ill. App. 269, where the defendant had been enjoined by the lower court from selling or disposing of his personal property, except in the usual course of business, or from disposing of or reducing it so as to endanger the plaintiff's claim for alimony, it was held that a court of equity had no power to make a decree for alimony a lien on personal property.

In Conklin v. Conklin, 93 Minn. 188, 101 N. W. 70, where there was no authority in the court to decree alimony a lien upon personalty, but it had power to order its sale on execution for the payment of alimony, where a decree declaring alimony a specific lien upon personal property, and directing that the plaintiff, to whom the alimony had been granted, retain possession of the property, which she then had, until the amount decreed was paid, it was held that that part of the decree with reference to the specific lien might be regarded as surplusage and immaterial, and that she might hold the property as security.

A judgment in a divorce proceeding awarding a wife a money judgment does not give her a lien upon a policy of insurance on the life of the husband, which was assigned to her before the granting of the divorce, such judgment being in no way connected with the policy. Hatch v. Hatch, 35 Tex. Civ. App. 373, 80 S. W. 411.

J. T. W.

ceeding. Attachment by garnishment is not known to the common law. Its effectiveness and validity depend wholly upon the provisions of the statute, beyond which it cannot be extended.

2 Shinn, Attachment & Garnishment, § 485.

No lien is created upon the property in the hands of the garnishee.

Woodward v. Adams, 9 Iowa, 474; Moorar v. Walker, 46 Iowa, 164; McConnell v. Denham, 72 Iowa, 494, 34 N. W. 298; Gilmore v. Cohn, 102 Iowa, 254, 71 N. W. 244; Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 255, 47 L.R.A. 131, 77 Am. St. Rep. 539, 80 N. W. 345; Scott v. Rogers, 77 Iowa, 483, 42 N. W. 377.

The liability of the garnishee is measured by his obligation to the defendant at the time of the service of notice of garnishment.

Huntington v. Risdon, 43 Iowa, 517; Bowen v. Port Huron Engine & Thresher Co. 109 Iowa, 258, 47 L.R.A. 131, 77 Am. St. Rep. 539, 80 N. W. 345; Kesler v. St. John, 22 Iowa, 565; Hughes v. Monty, 24 Iowa, 499; First Nat. Bank v. Davenport & St. P. R. Co. 45 Iowa, 126; Buck-Reiner Co. v. Beatty, 82 Iowa, 353, 48 N. W. 96.

Liability for tort, where there is a wrong done resulting in no pecuniary benefit to the wrongdoer, is not a debt, and is not, therefore, subject to garnishment.

14 Am. & Eng. Enc. Law, 2d ed. p. 763; 2 Shinn, Attachment & Garnishment, § 483; 2 Wade, Attachm. § 447; Johnson v. Butler, 2 Iowa, 535; Raver v. Webster, 3 Iowa, 502, 66 Am. Dec. 96; Lord v. Gaddis, 6 Iowa, 52; Warner v. Cammack, 37 Iowa, 642; Wentworth v. Whittemore, 1 Mass. 471; Jackson v. Bell, 31 N. J. Eq. 554; Duncan v. Lyon, 3 Johns. Ch. 351, 8 Am. Dec. 513; Capes v. Burgess, 135 Ill. 61, 25 N. E. 1000.

A debt not in existence at the time of the garnishment is not a debt "to become due," in contemplation of § 3935 (§ 2975 Code 73).

Thomas v. Gibbons, 61 Iowa, 50, 15 N. W. 593; Thomas v. McDonald, 102 Iowa, 566, 71 N. W. 572.

The garnishee cannot be held liable upon a contingent claim, the claim must be owing absolutely to the principal defendant.

14 Am. & Eng. Enc. Law, 2d ed. p. 765; Williams v. Young, 46 Iowa, 140; Briggs v. McEwen, 77 Iowa, 303, 42 N. W. 303; Streeter v. Gleason, 120 Iowa, 703, 95 N. W. 242.

Until judgment has been entered against the principal defendant, absolute in terms and as to the amount, no judgment can be properly entered against the garnishee.

1 Black, Judgm. p. 407; Hawarden State 30 L.R.A. (N.S.)

Bank v. Hessler, 131 Iowa, 691, 109 N. W. 210; 2 Wade, Attachm. § 327; Battell v. Lowery, 46 Iowa, 53; 20 Cyc. Law & Proc. p. 1106, note B; Canan v. Carryell, 1 N. J. L. 3.

The fact that the garnishee paid the defendant a sum of money to avoid a possible liability to him would not subject it to make payment a second time, if no indebtedness existed at the time the garnishment was had.

Victor v. Hartford F. Ins. Co. 33 Iowa 210.

A proceeding in garnishment should be tried as an ordinary proceeding, and equitable issues cannot be injected into such a proceeding.

Sears v. Thompson, 72 Iowa, 61, 33 N. W. 364; Neff v. Manuel, 121 Iowa, 706, 97 N. W. 73.

Messrs. Sylvester Flynn and J. W. Henneberry for appellee.

Deemer, Ch. J., delivered the opinion of the court:

In 1903 plaintiff instituted an action against defendant for divorce and alimony, and in that action the issuance of a writ of attachment against the property of the defendant was authorized by the court. Under this writ of attachment notice of garnishment was served upon the Wabash Railroad Company, requiring it not to pay any debt due by it to said defendant or thereafter to become due. The garnishee answered that it had been served with an original notice of an action by this defendant against it to recover damages on account of personal injuries alleged to have been received while in defendant's service, and that said suit had been removed to the circuit court of the United States, where it was then pending. This answer of the garnishee was controverted by the plaintiff, who alleged that the garnishee was indebted to the defendant for personal injuries in the sum of \$50,000, and judgment was asked against the garnishee for whatever amount might be awarded her in the action for a divorce. Thereupon a stipulation was entered into between the plaintiff and the defendant in the divorce suit, wherein it was agreed that as it might be a long time before the action for damages brought by defendant against the garnishee could be settled, tried, or otherwise disposed of, the plaintiff should receive as permanent alimony one fourth of the defendant's share of whatever sum he might obtain from said garnishee, whether by trial or compromise (defendant's share being the amount recovered or paid less attorney's fees, which should not exceed 50 per cent), and that any decree which should

be rendered in favor of plaintiff for alimony should be made a lien upon any money in the hands of the garnishee due or to become due to the defendant on his said claim, and that plaintiff should have judgment against defendant for costs. In pursuance of this stipulation a decree was entered in the divorce proceeding, giving to plaintiff an absolute divorce from the defendant, and judgment by way of alimony for one eighth of the entire amount that defendant should recover, receive, or obtain from the Wabash Railroad Company in his action for personal injuries then pending in the Federal court, and such judgment was declared to be a lien from the date of the garnishment notice upon any judgment which defendant might obtain in said suit and upon any amount that might be agreed upon between defendant and said company in settlement of said claim. It was provided, further, that upon the rendition of judgment against, or upon settlement with, said railroad company and in favor of the plaintiff for one eighth of the amount of such judgment, or of the total amount agreed upon in settlement of said suit, by provision of this decree the railroad company, as garnishee, was to be discharged in the event that defendant failed to recover anything either in settlement or on trial of this said action. This decree was rendered in 1905, and a certified copy thereof was served upon the Wabash Railroad Company as garnishee.

In April, 1908, the plaintiff filed in her original action a supplementary petition, reciting the rendition of the decree and the service of a copy thereof as above stated, and alleged that on March 30, 1908, the Wabash Railroad Company, garnishee, effected a settlement with defendant, whereby it paid to and on behalf of said defendant about \$8,000 in full settlement and discharge of the claim which said defendant had against said company for personal injuries, and demanded judgment against the railroad company for a portion of that amount in accordance with the terms of the previous decree. To this supplementary petition the railroad company interposed an answer admitting the settlement, but denying the validity of the decree and conditional judgment, and denying any indebtedness to the plaintiff. It also asked that it be discharged from any and all liability under the garnishment proceeding. The issues thus raised were tried upon a stipulation of facts, from which it appeared that a settlement was made by the railroad company with the defendant Jesse R. Kithcart, in pursuance of which there was paid to him the sum of \$4,125 and paid to his attorneys the sum of \$1,750, said attorneys

having previously filed an attorney's lien for their services; and further that, preceding such settlement, a judgment had been recovered by said Kithcart against the railroad company in the United States circuit court for \$8,000, which upon writ of error to the circuit court of appeals was reversed, and that after a mandate had issued to the trial court the case was again noticed for trial, and the plaintiff therein filed an amendment to his petition, wherein he stated more fully the ground upon which he claimed the right to recover. Under these stipulated facts the trial court, hearing the case standing before it on plaintiff's supplemental petition and the answer of the railroad company thereto, entered a decree finding the facts as above recited and giving judgment in favor of plaintiff against the defendant and the railroad company, garnishee, for the sum of \$734.37 and costs.

1. In view of our conclusion upon the issue tendered by plaintiff in her supplementary petition, it is not necessary to consider the effect of a garnishment. Indeed, there is much ground for saying that, if the action was bottomed upon the garnishment alone, it could not be sustained. It appears that, as already stated, plaintiff brought an action for divorce against her husband, Jesse R. Kithcart, one of the defendants herein, in which action she asked for an allowance of alimony. At the time of the commencement of that suit and until the final settlement of the defendant railway company, plaintiff's husband held a claim or cause of action sounding in tort, it is true, against the defendant railway company. In the divorce action it was agreed that plaintiff therein should have and receive as and for her permanent alimony one fourth of whatever sum defendant, her husband, might obtain from the railway company, whether upon trial or by way of compromise; and that any decree which should be rendered for alimony should be made a lien upon all money in the hands of the railway company due or to become due the defendant husband on his claim against the company. Pursuant to the stipulation a decree was granted, giving plaintiff a divorce and awarding her one eighth of the entire amount that her husband should recover, receive, or obtain from the railway company in his action for personal injuries, and the judgment was declared a lien upon any judgment which the husband might obtain in his suit or upon any amount which might be agreed upon between him and the company in settlement of the claim. Provision was also made for a final decree against the railway company in the event judgment went

against it, or in case of settlement, which decree was to be in favor of plaintiff and against the railway company for one eighth of the amount of the judgment, or of the amount agreed upon by way of settlement. This decree was rendered in the year 1905, and a certified copy thereof was immediately served upon the defendant railway company. Notwithstanding these agreements and decrees, the railway company, in the year 1908, settled with plaintiff's husband, paying no attention to her claims or to her decree, and now claims that it is fully released and discharged, and that plaintiff has no claim against it.

One holding a claim against a railway company, no matter whether scunding in tort or based upon contract, may, in this state, assign the same or a part thereof, and after notice of such assignment to the railway company it is bound thereby, and must respect such assignment. At common law claims growing out of tort could not be assigned; but in this jurisdiction all things in action are assignable. Code, §§ 3044, 3461. Under these sections it has been held that a liability for a tort may be sold, transferred, or assigned so as to give the holder priority over an attaching creditor of the assignor. *Weire v. Davenport*, 11 Iowa, 49, 77 Am. Dec. 132. In that case *Wright, J.*, speaking for the court, said: "But it is, in the second place, contended that the liability of the city was for a tort, and that this could not be assigned. This was true, at common law, so far at least that the right of action for such an injury could not be transferred. What change the Code has made in this respect we need not stop to inquire, for the reason that we entertain no doubt but that such a liability may be sold or transferred, if bona fide, so as to give the holder a priority over an attaching creditor of the transferor. It may be sold just as a horse or any other property may be, and the title pass just as completely. And, whether the transferee could sue in his own name or not, the vendor still could not deny his title, nor could the creditors of such vendor. Not only so, but there was an action pending at the time of this assignment, and the transfer related to and included the verdict and judgment as well as the mere cause of action. That this might be done, in the absence of fraud, so as to give the assignee or vendee a good title to the judgment, and a right to control it as his own property, we entertain no doubt. *Robinson v. Weeks*, 6 How. Pr. 161; *Hodgman v. Western R. Corp.* 7 How. Pr. 494; *Purple v. Hudson River R. Co.* 4 Duer, 78; *McKee v. Judd*, 12 N. Y. 622, 64 Am. Dec. 515. So far as the plaintiff was concerned, notice 30 L.R.A. (N.S.)

of the assignment was only necessary to protect the assignee against the subsequent acts of the assignors, as their subsequent sale or transfer or the like. The Code has not narrowed the assignability of claims. Whatever could be assigned before may still be, and some claims are made negotiable which before were not. In addition to this, a right of action is given to the assignee of some claims in his own name which did not exist at common law. It is by no means true that only those instruments or claims which are specifically named in chapter 58 can be assigned. To mention none other, a judgment is not mentioned, and yet it has been held that it may be assigned so as to give the holder a right to sue thereon in his own name, *Edmonds v. Montgomery*, 1 Iowa, 143." See also *Gray v. McCallister*, 50 Iowa, 497-502; *Clews v. Traer*, 57 Iowa, 459-466, 10 N. W. 838; *Vimont v. Chicago & N. W. R. Co.* 64 Iowa, 513-520, 17 N. W. 31, 21 N. W. 9; *Vimont v. Chicago & N. W. R. Co.* 69 Iowa, 296-299, 22 N. W. 906, 28 N. W. 612.

The stipulation entered into by the defendant husband with plaintiff, his wife, as a basis for the decree as to alimony, amounted to a voluntary assignment of one eighth of the cause of action held by the husband against the railway company. That defendant had notice of this assignment appears from the record, and it had this notice before it settled with the plaintiff's husband. After notice it could not pay to the assignor in disregard of plaintiff's claim. But whether this be true or not, the decree rendered in the divorce case, in so far as it relates to alimony, undoubtedly transferred to plaintiff one eighth of the amount which the husband might recover, or which might be paid him in settlement of his claim against the railway company. This decree was entered, as shown upon its face, by and with the consent of the husband; but, had it been entered without his consent against his wishes, the legal effect would be the same. The decree transferred one eighth of the claim to the plaintiff, and made her claim a lien upon the amount recovered or paid in settlement of the cause of action held by the husband. A copy of this decree was served upon the railway company, so that it had actual notice thereof. That this decree as to alimony amounted to a transfer or assignment of one eighth of the claim from the defendant husband to his wife is, as we think, perfectly clear; and, as defendant railway company had actual notice thereof, it was in position to protect itself, and it cannot now be heard to urge in defense that it paid the entire claim to the assignor. There

is no need to discuss the question of *lis pendens*, for defendant railway company had actual notice, both of the stipulation and of the provision of the decree, before it settled with the defendant husband. It is also entirely immaterial that it was not made a party to the divorce proceedings, or that the garnishment was of no validity. It could not, no doubt, be held as a garnishee; but, if the decree amounted to an assignment of part of the claim or cause of action as between plaintiff and her husband, it is not necessary that the railway company should have been made a party to the divorce proceedings. Notice of the assignment, whether it be held voluntary or involuntary, is all that is required.

In support of these conclusions, we quote the following from Freeman on Judgments, 4th ed. vol. 2, §§ 425, 426: "It is no valid objection to an assignment that at the date of its execution no judgment existed. 'The assignment carries the whole title to the subject-matter of the action, and, of course, to the judgment, when perfected. As between the parties to the assignment, clearly the whole right passes to the assignee, and the defendant, the moment the judgment is perfected, becomes the debtor of the assignee, and not of the nominal plaintiff.' An assignment of a judgment not yet recovered need not purport to be an assignment of a judgment. Every transfer of an assignable cause of action *pendente lite* has the effect of assigning any judgment subsequently recovered thereon.

. . . We find the rule laid down in some decisions, in general terms, that 'secret assignments cannot be allowed to entrap innocent parties.' This rule, though manifestly of a very equitable character, is, we think, hardly sustained by the reported decisions. If it is strictly true in any case, it is in regard to the effect of an assignment without notice upon the rights of the judgment debtor. It is undoubtedly true that if the assignee gives no notice of the change of ownership in the judgment, and permits the assignor to control the execution, the judgment debtor will be protected in all payments which he may make to the apparent judgment creditor. While it is said that notice of an assignment need not be given directly to the judgment debtor, yet there is no doubt that he is protected in all payments made to the judgment creditor until he has either actual notice of an assignment, or notice of such facts as put him upon inquiry, and are therefore equivalent to actual notice. . .

. One not a party to a judgment who holds lands subject to the lien thereof is protected in payments made to secure a release of such lien from an assignment of the judg-

ment of which he had no notice. On the other hand, the assignee will be protected from all acts of the parties after notice of the transfer."

In Ohio and in Illinois it has been held that a judgment debtor cannot compromise with an assignor after notice of the assignment, and thus defeat the claim of the assignee. See *Pittsburg, C. C. & St. L. R. Co. v. Volkert*, 58 Ohio St. 362, 50 N. E. 924. From this case we quote the following: "The same principle would apply to the case of an assignment of part of a debt. In each case a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it." By other of the authorities such transfer is said to create an interest in the fund in the nature of an equitable property. By others it is denominated an equitable assignment. But, whatever term is applied to it by way of description, the result reached is to give to the assignee a property right in the thing assigned,—a right which is cognizable by and enforceable in a court of equity. Authorities in support of the proposition here advanced are so abundant that one is at loss which to select. The following will be found, as we think, conclusive upon the subject: *Public Schools v. Heath*, 15 N. J. Eq. 22; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435; *People ex rel. Dannat v. The Comptroller*, 77 N. Y. 45; *Whittemore v. Judd Linseed & Sperm Oil Co.* 124 N. Y. 565, 21 Am. St. Rep. 708; 27 N. E. 244; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *First Nat. Bank v. Kimberland*, 16 W. Va. 555; *Phillips v. Edsall*, 127 Ill. 535, 20 N. E. 801; *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439; *Price v. The Elmbank (D. C.)* 72 Fed. 610; *National Exch. Bank v. McLoon*, 73 Me. 498, 40 Am. Rep. 388; 2 Freeman, Judgm. § 426. See also *Stanbery v. Smythe*, 13 Ohio St. 501; *Gamble v. Carlisle*, 3 Ohio N. P. 279, 6 Ohio S. & C. P. Dec. 48, opinion by Smith, J., and authorities there cited. . . . The right of the debtor to compromise with his creditor is not disputed, but it is not a right of so high a character as to override every other right which courts respect. The books are full of cases holding that where a debt has been assigned, and a debtor has knowledge of the assignment, any attempt to settle the case with the assignor, and ignore the claims of the assignee, will be held to be futile so far as the rights of the latter are concerned. *Harris Co. v. Campbell*, 2 Am. St. Rep. 472, and note; (68 Tex. 22, 3 S. W. 243); *Field v. New York*, supra; *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *McDaniel v. Maxwell*, 21 Or. 202, 28 Am. St. Rep. 740, 27

Pac. 952; Schilling v. Mullen, 55 Minn. 122, 43 Am. St. Rep. 475, 56 N. W. 586; 3 Pom. Eq. Jur. § 1280; Hughes v. Trahern, 64 Ill. 48; Ullmann v. Kline, 87 Ill. 268; Stoddard v. Benton, 6 Colo. 508. . . . It thus appears that the right of a debtor to compromise means only that his right to compromise will be preserved as respects his dealing with the real parties in interest, of whose claims he has knowledge; and, if this be so, the release by one of the parties in interest cannot affect the portion of the debt belonging to another. As held in Upjohn v. Ewing, 2 Ohio St. 13: 'One or more of several joint creditors, between whom no partnership exists, cannot release the common debtor, so as to conclude their co-creditors who do not assent to such release.' . . . The duty of the court to protect the interest of an assignee of a chose in action is elsewhere in the opinion recognized in these words: 'It is by no means our intention to shake the well-established principle that a court of law will protect the interest of the bona fide assignee of a chose in action, after notice to the debtor of the assignment. The rule is convenient, and necessary in the administration of justice, to secure parties against fraud and circumvention.' How could parties be secured against 'circumvention' if the rule were established that, although a judgment debtor have full knowledge of an assignment or part of a judgment to a third person, yet he may, without the knowledge, and behind the back of that assignee, negotiate an alleged compromise with the original creditor which will discharge the entire debt? It is confidently submitted that neither by any process of right reasoning, nor upon any respectable authority, can such a proposition be maintained."

These quotations from that opinion are eminently sound, and, if applied to the facts now before us, should result in an affirmance of the judgment. Moreover, it was competent for the court to declare a lien in the divorce proceeding upon the money which should eventually be found due upon trial, or be paid, to the defendant Kithcart in settlement of his claim. This decree may not, in and of itself, have been binding upon the railway company, because it was not a party thereto, and perhaps the doctrine of *lis pendens* does not apply. But it was given actual notice of the decree, and, as it stood indifferent as between plaintiff and her husband, the decree, in so far as it attempted to dispose of the funds between the wife and husband, and specifically created a lien upon the fund, was binding upon the railway company after due notice of the provision thereof. 30 L.R.A. (N.S.)

Ordinarily a judgment is not a lien upon choses in action or an other form of personalty until levy thereon by execution; but a decree in chancery may in terms create and establish liens upon both personal and real estate, and all persons having notice of such liens are bound thereby. As to real estate the prevailing rule of *lis pendens* applies. Whether this rule also applies to personalty there is no need now to determine, for the railway company had actual notice of the decree. Although the case of Smith v. Chicago, R. I. & P. R. Co. 56 Iowa, 720, 10 N. W. 244, has reference to an attorney's lien, much that is said therein may be considered as applicable to this branch of the present discussion.

The judgment against the defendant railway is correct, and it is affirmed.

IOWA SUPREME COURT.

GEORGE DUFFEY

v.

CONSOLIDATED BLOCK COAL COMPANY,
NY, Appt.

(— Iowa —, 124 N. W. 609.)

Evidence — burden of proof — assumption of risk.

1. The burden of proving nonassumption of risk cannot be laid upon a servant seeking damages for injuries alleged to have been caused by his master's negligence.

Pleading. — assumption of risk.

2. A master must plead assumption of risk to be entitled to present such defense to the jury, in an action by his servant

Note. — The distinction between the term "assumption of risk" as used in reference to the ordinary risks incident to the employment, and as used with reference to the risks arising out of the negligence of the master, which is so clearly stated in the foregoing opinion, is frequently overlooked by the courts, with the result that much confusion has arisen. This question has been discussed at length in the note to Scheurer v. Banner Rubber Co. 28 L.R.A. (N.S.) 1207.

Where the risks in question are merely the ordinary risks of the service, the phrase "assumption of risk" does not express any distinctive rule of law, but merely expresses the legal principle that the master is not an insurer of the safety of his servant, and as is pointed out in DUFFEY v. CONSOLIDATED BLOCK COAL Co., a specific pleading of the assumption of risk of the ordinary dangers incident to the service adds nothing to the general denial, and this is almost universally asserted wherever the precise question is passed upon by the courts.

On the other hand, the term "assumption of risk" as applied to risks arising out of the

to hold him responsible for personal injuries, where he relies on assumption of risk in its true sense, which refers to risks arising out of negligence of the master which are known to, and the danger of which is appreciated by, the servant.

Same — sufficiency of allegation.

3. A mere allegation that the injuries for which a servant is suing his master were such as he assumed the risk of in his employment amounts to no more than a general denial, and does not raise the question of assumption of risk of the employer's negligence.

Master and servant — assumption of risk — negligence of master.

4. The defense of assumption of risk in its true sense in an action by a servant for injuries caused by the master's negligence has reference to those risks arising out of negligence of the master which is known to, and the danger from which is appreciated by, the servant.

Evidence — accident — measurements of place.

5. It is not reversible error to permit a witness in an action by a servant to hold his master liable for personal injuries, who testifies as to measurements taken immediately after the accident, to state that he was a member of a committee whose duty it was to investigate the circumstances of accidents, and that he took the measurements in making such examination.

Appeal — nonprejudicial evidence.

6. The admission of immaterial evidence will not require a reversal if it is nonprejudicial.

Evidence — damages — expressions of pain.

7. Witnesses for a servant may testify in an action to hold his employer responsible for personal injuries, to expressions of existing pain at a time long subsequent to the date of injury.

Appeal — trial — order of evidence.

8. It is not reversible error to refuse to permit questions to be put to a witness on recross-examination, where no excuse is given why they were not asked upon the cross-examination, where the witness has

been finished with once and recalled, and the party offering him has finished with him.

Evidence — negligence of servant — propriety of conduct.

9. Upon the question of the negligence of a driver in a mine, seeking to hold his employer liable for personal injuries due to his coming in contact with the roof of the tunnel, evidence is competent that it was proper and customary for him to ride upon the drawbar at the rear of the car, where he was when he was injured, rather than upon the tail chain at the mule's heels.

(February 8, 1910.)

A PPEAL by defendant from a judgment of the District Court for Appanoose County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Wilson & Smith and H. W. Byers for appellant.

Messrs. Howell & Elgin, for appellee:

In determining as to the company's negligence or as to the presence or absence of contributory negligence on the part of the damage claimant, it is permissible to inquire as to the general custom or manner of doing the thing, the doing or not doing of which is claimed to be negligence.

Cotton v. Center Coal Min. Co. (Iowa) 123 N. W. 384; Taylor v. Star Coal Co. 110 Iowa, 40, 81 N. W. 249; Hammer v. Janowitz, 131 Iowa, 20, 108 N. W. 109; Betts v. Chicago, R. I. & P. R. Co. 92 Iowa, 343, 26 L.R.A. 248, 54 Am. St. Rep. 558, 60 N. W. 623.

Testimony as to expressions of pain need not be confined to a period immediately after the accident.

Keyes v. Cedar Falls, 107 Iowa, 509, 78 N. W. 227; Hamilton v. Mendota Coal & Min. Co. 120 Iowa, 149, 94 N. W. 282;

master's negligence is an affirmative defense relied upon by the master to relieve him from the prima facie case made out against him by proof of his negligence, and, being an affirmative defense, it must, according to the weight of authority, be pleaded. Much confusion has arisen by general statements to the effect that assumption of risk need not be pleaded, for statements to that effect in cases dealing solely with the assumption of the ordinary risks incident to the employment have been cited as authority for decisions dealing with risks arising out of the master's negligence.

As is shown in the earlier note, the so-called Missouri rule, which is followed in the majority of the Missouri cases, is to the effect that the servant never assumes the risk of the master's negligence, even though 30 L.R.A. (N.S.)

he may be aware of it. In several instances the Missouri courts, being called upon to pass upon a cause of action arising in another state, have stated that the Missouri rule is not different from the rule existing in other states, and, as authority for such a declaration, have quoted from decisions in other jurisdictions statements which seem to uphold that view, because in such cases the courts have not distinguished between the assumption of the ordinary risks of the service and the assumption of the risks arising out of the master's negligence. Were the courts to make a distinction as clearly as did the court in the DUFFEY CASE, there could be no excuse for citing the decisions in other states to support the Missouri doctrine, which has never been recognized in any other jurisdiction. W. M. G.

Bailey v. Centerville, 108 Iowa, 20, 78 N. W. 831.

Mining is an occupation the details of which are not a matter of common knowledge, and expert evidence is permitted on matters relating thereto.

Taylor v. Star Coal Co. and Cotton v. Center Coal Min. Co. *supra*; Dunham v. Rix, 86 Iowa, 300, 53 N. W. 252; Morgan v. Tremont County, 92 Iowa, 644, 61 N. W. 231; McConnell v. Osage, 80 Iowa, 293, 3 L.R.A. 778, 45 N. W. 550.

A pleading alleging that the plaintiff assumed all the incidental hazards necessarily connected with the business into which he entered, as alleged in defendant's answer, will not justify the court in submitting to the jury the question as to whether the plaintiff assumed the risk connected with a defect negligently permitted by the company to remain.

Miller v. White Bronze Monument Co. 141 Iowa, 701, 118 N. W. 518; Mace v. H. A. Boedker & Co. 127 Iowa, 731, 104 N. W. 475.

Assumption of risk is based on contract, and a risk thus assumed by an employee does not include those arising out of the negligence of the master.

Mace v. H. A. Boedker & Co. and Miller v. White Bronze Monument Co. *supra*; Beresford v. American Coal Co. 124 Iowa, 39, 70 L.R.A. 256, 98 N. W. 902; Martin v. Des Moines Edison Light Co. 131 Iowa, 734, 106 N. W. 359.

Evans, J., delivered the opinion of the court:

At the time of the injuries complained of the plaintiff was a coal miner and an employee of the defendant. The defendant was operating its mine in what is known in the record as the "low coal" district. The coal vein in this region is thin, and the entries are correspondingly low, usually running less than 5 feet in height. On the day of the accident the plaintiff was directed by the pit boss to engage temporarily in driving a mule in one of the entries, known in the record as the "first left entry." That is to say, the cars were drawn by a mule, and the plaintiff was required to bring in loaded cars from the miner's rooms, and to take back empty cars for distribution thereto. According to plaintiff's evidence, he was not familiar with the work, and he entered some degree of protest against it. The pit boss assured him that it was a safe entry, and pressed the service upon him. According to his understanding, the mule presented some elements of danger. She would "kick and balk." Because of this fact, and because of his lack of experience, he entered upon the work with

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some trepidation, and doubtless with some lack of skill. He made two round trips without incident, and was engaged upon the third when the accident happened. While bringing in a string of loaded cars, he was caught between the load and a rock overhead, which protruded from the roof at one side of the entry several inches lower than the face of the rock on the other side thereof. In his previous trips he had necessarily passed this point five times, but had not observed this condition of the roof. He had not passed under this protruding rock, but had passed to one side of it, where the roof was higher. There was sufficient evidence to go to the jury on the question of defendant's negligence and plaintiff's contributory negligence, and no serious complaint is made as to the form of the instructions. The jury returned a verdict for the plaintiff for \$150.

1. Appellant complains because the trial court failed to instruct the jury on the subject of assumption of risk. Appellant submitted to the trial court three instructions on the subject, which the trial court refused. The first of these requested instructions laid upon the plaintiff the burden of proving that he did not assume the risk involved in passing through the entry at the place of injury. This was clearly erroneous as an abstract proposition. Assumption of risk is an affirmative defense, and the burden is upon the defendant to plead it and prove it. Assuming that the other two instructions asked on the subject were correct as abstract propositions of law, they were properly refused because the defendant had not pleaded such defense. The only reference to the subject contained in its answer is the following: "Defendant further states that whatever injuries, if any, the plaintiff received, were such as he assumed the risk of in his employment by the company." The term "assumption of risk" has come to be used in a twofold sense. It is often said that an employee assumes the ordinary risk that is incident to his employment. This form of assumption of risk is often pleaded by defendants in personal injury cases, although it is quite unnecessary to do so. Assumption of risk in its true sense has reference to those risks arising out of the negligence of the master, when such negligence is known to the employee, and the danger therefrom appreciated by him. In the first form herein indicated, a specific pleading of assumption of risk of the ordinary dangers incident to an employment is a mere amplification of the general denial, and adds nothing to it in a legal sense. In the second form herein indicated, it is an affirmative defense, and must be specifically plead-

ed as such. *Sankey v. Chicago, R. I. & P. R. Co.* 118 Iowa, 39, 91 N. W. 820; *Mace v. H. A. Boedker & Co.* 127 Iowa, 731, 104 N. W. 475; *Martin v. Des Moines Edison Light Co.* 131 Iowa, 734, 106 N. W. 359; *Beresford v. American Coal Co.* 124 Iowa, 39, 70 L.R.A. 256, 98 N. W. 902. The most that can be said of defendant's pleading in this respect is that it sets up an assumption of risk in the first form. There is no suggestion in it that plaintiff knew the defect complained of, or that he ought to have known it, nor any suggestion that he knew, or ought to have known, of the danger arising therefrom. The trial court therefore properly refused to submit the issue to the jury.

2. Complaint is made because the court permitted the witness Coop to testify as to the duties of the "pit committee," of which he was a member. This witness had made a measurement of the height of the entry at the alleged place of the accident immediately after it happened. The testimony complained of was given in explanation of the circumstance of measurement. He stated, in substance, that when an accident happened it was the duty and "general custom" of the pit committee to examine the circumstances of the accident, and that that was how he came to make the particular measurement. The testimony was purely explanatory, and was, in a sense, personal to the witness. It was clearly within the discretion of the trial court to permit it, and we can see nothing in it that was in any sense prejudicial to the defendant.

There was much inquiry of witnesses throughout the trial on the subject of "general custom," and appellant complains of it *en masse*. It is urged upon us that proof of "general custom" has become entirely too common in the trial of cases in the "low coal" district. It is urged in substance that it has become the "general custom" of lawyers in personal injury cases in such district, to supply all deficiencies of evidence as to real facts with proof of some "general custom." We find nothing in this case that affords the appellant any just ground of complaint. It was incumbent upon the plaintiff to show freedom from contributory negligence. The cross-examination by defendant was directed towards showing contributory negligence on the part of the plaintiff. As bearing upon this question, the usual and customary method of doing the work was properly shown. These usual and customary methods were often referred to as "general custom." The most that can be said is that it presented a slight inaccuracy in the use of terms.

3. As bearing upon the customary method

obtaining in the mine, the plaintiff produced a written agreement said to obtain between the miners and operators, and identified it by a witness as being the one "in force" at the time of the alleged accident. To this the defendant objected as incompetent, immaterial, and secondary, and the mere conclusion of the witness. We see little materiality to the evidence complained of, and the court might well have excluded it on that ground. On the other hand, it was plainly nonprejudicial. That the defendant deemed it nonprejudicial is indicated by the fact that later in the trial it introduced the same agreement in evidence.

4. Certain witnesses on behalf of plaintiff were permitted to testify to his complaints of existing pain at a time long subsequent to the date of the injury. It is urged that this was improper, and that such evidence should be confined to a time approximating the date of injury. Under our previous decisions, this question is not even debatable. *Keyes v. Cedar Falls*, 107 Iowa, 509, 78 N. W. 227; *Hamilton v. Mendota Coal & Min. Co.* 120 Iowa, 149, 94 N. W. 282; *Taylor v. Star Coal Co.* 110 Iowa, 40, 81 N. W. 249.

5. One Martin was examined by the plaintiff, and testified as to the nature of the duties which devolved upon a driver in the mine. The defendant complains because of the refusal of the court to permit certain cross-examination. The line of such examination is indicated by the following question: "Mr. Martin, in this class of mines, it is a matter of common knowledge among all the miners who work in a mine like this, that these entries change overnight, is it not?" This question was pertinent and proper as cross-examination. The question, however, was put by the defendant to the witness as a recross-examination after the plaintiff had closed his direct examination. There was no claim of oversight on the part of the defendant, and no reason stated why the question was not put during the cross-examination proper. The plaintiff was entitled to the last word with his witness. This was the second time that the witness was called to the stand. The defendant had had the privilege of cross-examination and recross-examination when the witness was first called. He had rested his cross-examination upon the second call. It was within the proper discretion of the trial court to terminate the examination when it did.

6. Other points are argued by counsel, but the foregoing are illustrative of them all. We cannot take the time to discuss them in detail. The following points in the brief speak for themselves: "(5) A witness

should not be allowed to answer a question which calls for an invasion of the province of the jury. . . . (7) What the witness himself would expect to find is inadmissible. (7½) It is legitimate cross-examination of an expert to ask questions pertinent to the matter involved. (8) A witness should not be allowed to say a person looked better, or that he believed a person to be more vigorous, before than after an injury. (9) It is an invasion of the province of the jury for a witness to say that there is greater or less liability to be struck under certain conditions. (10) It is a conclusion that mules are liable to take to strangers."

We have no occasion to take issue with the appellant on any of the foregoing propositions, but they present nothing decisive for our consideration. As to the last-stated proposition, the complaint is that the character of the mule was proved by "general custom." That line of proof seems to have been acquiesced in at the trial. Even the defendant proved that it takes some time for a driver to "get onto the way of a mule." Only one mule was involved in this particular case. The testimony was not altogether harmonious as to what a man of ordinary courage might reasonably expect from her. Whether she should be deemed a gentle mule or a kicking mule would seem to depend upon the point of view. One of defendant's witnesses testified that she was not a kicking mule, although he had "seen her kick." Whether he intended thereby to classify her as gentle or as merely normal does not appear. She was said to be twenty years old, and this was deemed to be in her favor. While this lengthened her history and possibly enlarged her reputation, it tended to soften her normal propensities and to reduce her expectancy. To the plaintiff, at least, she seemed a present peril.

Defendant's witnesses contended that the plaintiff ought to have taken his position on the "tail chain" at her heels, with one hand upon her tail, and the other upon the front end of the car. It is said that this position enables the driver to keep his head below the sky line of the mule's back, and that it is one from which he may be easily dislodged in case of accident. But the plaintiff chose to ride upon the "drawbar" in the rear of the first car, and preferred the risk of unknown danger to that which was obvious and imminent. His witnesses testified that this was a proper place, and in accord with the "general custom." This latter "general custom" has arisen somewhat in deference to the "general custom" of mules. It is in this wise that the propensities of the motive power have been

come involved in the legal subject of "general custom." This is the concrete case. We see no way to apply it to any legal principles with entire safety to the great body of the law, which might well deem the "drawbar" preferable to the "tail chain" in such an application. Unique as the subject is, we are disposed to the opinion that the evidence was generally competent. But whether competent or incompetent, it is certain that the defendant was not hurt by it.

We find no prejudicial error in the record, and the judgment below is affirmed.

Petition for rehearing denied.

KANSAS SUPREME COURT.

S. L. CLUTE

v.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY, Appt.

(— Kan. —, 111 Pac. 431.)

Carrier — delay in transportation — right of consignee.

Notwithstanding title may have been retained by the consignor, the consignee of goods may sue the carrier for losses he has sustained through the negligent delay in their transmission, although he refuses to accept them because not sooner delivered.

(November 5, 1910.)

Headnote by MASON, J.

Note. — Right of consignee who refuses to accept goods to maintain action for damages against carrier.

Where there has been no rescission of the sale, actions for conversion have been maintained by consignees after a refusal by them to accept the goods from the carrier on the ground of unreasonable delay, the question of the consignee's right to maintain the action not being raised or discussed. Chicago, R. I. & P. R. Co. v. Pfeifer, 90 Ark. 524, 22 L.R.A.(N.S.) 1102, 119 S. W. 642; Chesapeake & O. R. Co. v. Saulsbury, 126 Ky. 179, 12 L.R.A.(N.S.) 431, 103 S. W. 254.

And in *Baumann v. New York, N. H. & H. R. Co.* 35 Misc. 223, 71 N. Y. Supp. 632, where goods delayed in transit had become worthless from negligent exposure to moisture, after the consignee had refused to receive them, he was allowed to recover, his right to sue not being questioned.

And the refusal of a consignee through a mistake as to the identity of the shipment, to receive goods, the title to which passed to him on delivery to the carrier, will not preclude his maintaining an action against the carrier for a wrongful refusal to subsequently make a delivery, where the goods

A PPEAL by defendant from a judgment of the District Court for Clark County in plaintiff's favor in an action brought to recover damages for losses alleged to have resulted from defendant's failure promptly to transport and deliver certain goods tendered it for transportation. Affirmed.

The facts are stated in the opinion.

Messrs. M. A. Low and Paul E. Walker, for appellant:

The plaintiff, not being a party to the contract, cannot recover from the carrier for any damage he may have sustained on account of the breach of the contract between the railway company and the consignor, as such damages cannot be the natural consequence of the alleged breach.

Winterbottom v. Wright, 10 Mees & W. 109; Thomas v. Winchester, 6 N. Y. 407, 57 Am. Dec. 455; Matheson v. Southern R. Co. 79 S. C. 155, 60 S. E. 437; Benjamin, Sales, § 693; 24 Am. & Eng. Enc. Law, p. 1050; McNeal v. Braun, 53 N. J. L. 617, 26 Am. St. Rep. 441, 23 Atl. 687; Neimeyer Lumber Co. v. Burlington & M. River R. Co. 54 Neb. 321, 40 L. R. A. 534, 74 N. W. 670; Detroit Southern R. Co. v. Malcomson, 144 Mich. 172, 115 Am. St. Rep. 390, 107 N. W. 915.

If any liability could be charged to the carrier, the measure of damages for the unreasonable delay was the difference between the market value of the machines at

the time and place they should have been delivered and the market value at the time and place they were actually delivered.

Kansas P. R. Co. v. Reynolds, 8 Kan. 623; Missouri P. R. Co. v. McGrath, 3 Kan. App. 220, 44 Pac. 39; Lee v. St. Louis, I. M. & S. R. Co. 136 N. C. 533, 48 S. E. 809; Lewark v. Norfolk & S. R. Co. 137 N. C. 383, 49 S. E. 882; McKerrall v. Atlantic Coast Line R. Co. 76 S. C. 338, 56 S. E. 965; Illinois C. R. Co. v. Hopkinsville Caning Co. 132 Ky. 578, 116 S. W. 758; Tiller & Smith v. Chicago, B. & Q. R. Co. 142 Iowa, 309, 120 N. W. 672.

In order for damages to be recoverable upon the breach of a contract, they must be the direct and proximate result of the wrong complained of. Damages which are remote and speculative cannot be recovered.

Walrath v. Whittekind, 26 Kan. 482; Macy v. Peach, 2 Kan. App. 575, 44 Pac. 687; Paola Gas Co. v. Paola Glass Co. 56 Kan. 614, 54 Am. St. Rep. 598, 44 Pac. 621; Sherman Center Town Co. v. Leonard, 46 Kan. 354, 26 Am. St. Rep. 101, 26 Pac. 717; Central Coal & Coke Co. v. Hartman, 49 C. C. A. 244, 111 Fed. 96; DeFord v. Maryland Steel Co. 51 C. C. A. 59, 113 Fed. 72; Iron City Toolworks v. Welisch, 63 C. C. A. 245, 128 Fed. 693; Howard v. Stillwell & B. Mfg. Co. 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500; 8 Am. & Eng. Enc. Law, p. 616; Pollock v. Gantt, 69 Ala. 373, 44 Am. Rep. 519.

were still in their hands; and there can be no question as to the right of such consignee to maintain the action. Bacharach v. Chester Freight Line, 133 Pa. 414, 19 Atl. 409.

But where the consignee has refused to accept goods shipped on his approval, it has been held that he cannot maintain an action against the carrier for their loss while they were being returned to the consignor.

Thus in Gurwitz v. Weir, 127 App. Div. 352, 111 N. Y. Supp. 557, where a consignee received goods by express for inspection, with the privilege of returning them if they did not suit, it was held that he could not maintain an action against the carrier for their loss, where he returned them; since he was not the owner.

And the same holding was made in Nathan v. Missouri P. R. Co. 135 Mo. App. 46, 115 S. W. 496, where the consignee had refused to accept goods because they were not what he ordered, and had reshipped them to the consignor.

And where goods were shipped to a consignee who was not bound to receive them unless they conformed with certain conditions, the consignor was held to have a right of action against the carrier for negligence, where the consignee did not accept the goods because of damage resulting from the carrier's negligence. Chicago & E. I. R. Co. v. Boggs, 134 Ill. App. 348. The court 30 L.R.A.(N.S.)

said: "The corn having failed to come up to grade at Nashville, and the purchaser not asserting any rights under his contract of purchase and bill of lading, which appellee had indorsed and delivered to it, the sale was never consummated, and the right of action for damages against the party responsible therefore is in appellee."

And where a consignee refused to receive goods sold on credit, on the ground of unreasonable delay, which ground was not well taken, and the consignor when communicated with by the carrier ordered the shipment returned to him, it was held that the consignee could not maintain an action of conversion against the carrier, there being no act in defiance of his right or any exercise of dominion over the goods to his exclusion. Stafsky v. Southern R. Co. 143 Ala. 272, 39 So. 132.

For a note on right of consignee as against carrier to reject consignment of freight for delay in transportation, see Chesapeake & O. R. Co. v. Saulsberry, 12 L.R.A.(N.S.) 431.

And for a note on the right of agent, factor, broker, or commission merchant to whom goods are consigned for sale, to maintain action against a common carrier for damage to or loss of goods during transit, see Grinnell-Collins Co. v. Chicago, M. & St. P. R. Co. 26 L.R.A.(N.S.) 437. J. T. W.

If the plaintiff wished to regulate the receipt of his machines by the preferences of certain persons with whom he had been negotiating, this fact should have been brought to the attention of the carrier at the time the shipment was made, and in the absence of such action the special damages suffered by reason of the peculiar conditions cannot be recovered.

8 Am. & Eng. Enc. Law, pp. 557, 596; Buffalo Barb Wire Co. v. Phillips, 64 Wis. 338, 25 N. W. 208; Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. R. Co. 62 Wis. 642, 51 Am. Rep. 725, 22 N. W. 827.

If damages other than the difference in the market value at the time when they should have been delivered and the time when they were delivered are demanded, the special character of such damages must be shown by both the pleadings and the evidence to be such as were contemplated by both parties when the property was received for shipment.

Houston & T. C. R. Co. v. Brown, 33 Tex. Civ. App. 237, 76 S. W. 580; Illinois C. R. Co. v. Johnson, 116 Tenn. 624, 94 S. W. 600.

Special damages on account of loss arising from failure to deliver goods within a reasonable time cannot be recovered except upon allegation and proof that the railway company had notice of the special circumstances at the time of the shipment.

Strange v. Atlantic Coast Line R. Co. 77 S. C. 182, 57 S. E. 724; McKerrall v. Atlantic Coast Line R. Co. supra; Kolb v. Southern R. Co. 81 S. C. 536, 62 S. E. 872; Matheson v. Southern R. Co. supra; Lee v. St. Louis, I. M. & S. R. Co. and Lewark v. Norfolk & S. R. Co. supra; American Exp. Co. v. Jennings, 86 Miss. 329, 109 Am. St. Rep. 708, 38 So. 374; Crutcher v. Choctaw, O. & G. R. Co. 74 Ark. 358, 85 S. W. 770; Traywick v. Southern R. Co. 71 S. C. 82, 110 Am. St. Rep. 563, 50 S. E. 549; Wesner & W. Mfg. Co. v. Atlantic Coast Line R. Co. 71 S. C. 211, 50 S. E. 789; Illinois C. R. Co. v. Hopkinsville Canning Co. supra; Patterson v. Illinois C. R. Co. 123 Ky. 783, 97 S. W. 426; Choctaw & M. R. Co. v. Walker, 71 Ark. 571, 76 S. W. 1058; 3 Hutchinson, Carr. 1367; Baldwin v. United States Teleg. Co. 45 N. Y. 744, 6 Am. Rep. 165, 3 Mor. Min. Rep. 70; 1 Sutherland, Damages, 3d ed. § 45.

Messrs. F. C. Price and J. B. Hayes for appellee.

Mason, J., delivered the opinion of the court:

S. L. Clute, an implement dealer, ordered several harvesting machines of the manufacturer, and they were shipped from Wichita to Minneola, consigned to him, over the Rock Island railroad. He claimed that 30 L.R.A. (N.S.)

there was an unreasonable delay in their transportation, and that they arrived too late to serve the purpose for which they were ordered, namely, for sale during the harvesting season upon orders already taken. He refused to receive them, and sued the railroad company for the profits he would have made by selling them if they had arrived in time. He recovered, and the defendant appeals.

The appellant claims that under the evidence the plaintiff bought the machines with the understanding that the manufacturer was to make delivery at Minneola; that therefore the title remained in the shipper, and, as the plaintiff refused to receive them, he never acquired any interest in the property, and cannot maintain the action. The abstract does not clearly show a retention of title by the shipper. Ordinarily the right of action for delay or damages is in the consignee. 6 Cyc. Law & Proc. pp. 510, 511. In Savannah, F. & W. R. Co. v. Commercial Guano Co. 103 Ga. 590, 593, 30 S. E. 555, 556, it was held that where, by reason of injury to the goods in transit, the consignee refuses to receive them, the consignor may sue; but this does not negative the right of the consignee to recover for any loss on his part. The court said: "In the event of liability by the carrier, the only question which remains for determination is whether or not the plaintiff, who sues, has been damaged, and, if so, to what extent." Much artificial and technical reasoning has been employed to determine the proper plaintiff in an action of this sort. The consignor has been allowed to recover for the benefit of the consignee (6 Cyc. Law & Proc. p. 513, note 91), and the consignee for the benefit of others having an interest (6 Cyc. Law & Proc. p. 511, note 84). These refinements are not in harmony with the spirit of the Code. Neither the consignor nor the consignee can be said to be a stranger to the transaction. The carrier has notice of the interest of each, and, if either suffers an injury through its fault, he should be permitted to obtain redress in his own name in a direct action against the wrongdoer. This is the effect of the decision in Missouri P. R. Co. v. Peru-Van Zandt Implement Co. 73 Kan. 295, 6 L.R.A. (N.S.) 1058, 117 Am. St. Rep. 468, 85 Pac. 408, 87 Pac. 80, 9 A. & E. Ann. Cas. 790, where it was held that an agent to whom his principal sent goods for sale might recover for his commissions lost through the negligent delay of the carrier.

It is contended that the measure of damages for delay in the delivery of goods by a carrier is necessarily the difference between their value when actually delivered and

what they would have been worth upon seasonable delivery. This is the usual, but not the universal, rule. "In addition to this difference in market value, the carrier will be liable also for such other and incidental damages as naturally and proximately flow from the delay." 3 Hutchinson, Carr. 3d ed. § 1366. It is also argued that the damages here recovered were too remote, and could not have been anticipated by the carrier. The same contention was made under substantially similar circumstances in *Missouri P. R. Co. v. Peru-Van Zandt Implement Co.* supra, and held untenable.

The trial court required a remittitur from the verdict rendered; but the excess was not of such an amount or character as to show passion or prejudice, and did not require a new trial.

Although the orders taken by the plaintiff for the machines were not unconditional, the evidence justified submitting to the jury whether his sales were lost by the unreasonable delay of the defendant, and the verdict is conclusive on those points.

The judgment is affirmed.

All the Justices concur:

MICHIGAN SUPREME COURT.

GOODFELLOW TIRE COMPANY

v.

MYRTLE P. HURLBUT, Park and Boulevard Comr.

(— Mich. —, 128 N. W. 410.)

Highway — power to forbid use.

Since owners of property abutting on a highway have the absolute right of access thereto, a statute empowering commissioners to make reasonable rules and regulations concerning the use of a boulevard, and providing that no connections therewith shall be allowed without a permit from the commissioners, does not authorize the refusal of a permit.

(November 11, 1910.)

CERTIORARI to the Circuit Court for Wayne County to review a judgment denying a petition for mandamus to compel the issuance of a permit to allow relator to construct a driveway connecting the roadway of the boulevard with his premises. Mandamus awarded.

The facts are stated in the opinion.

Messrs. May & Dingeman, for relator:

An abutting owner has two distinct kinds of rights in the street,—the public 30 L.R.A. (N.S.)

one, which he enjoys in common with other citizens, and private rights, which arise from his ownership of contiguous property. Among the private rights are: The right of free and unimpeded ingress and egress to and from his property for himself and animals and goods . . . and the right to have the street kept open and continued as a public street for the benefit of his contiguous property.

28 Cyc. Law & Proc. pp. 856, 863.

Respondent's refusal to grant the permit deprived the owner of the ordinary use of his property, and this under the law is, unquestionably a taking for which compensation must be made.

Ranson v. Sault Ste. Marie, 143 Mich. 668, 15 L.R.A. (N.S.) 49, 107 N. W. 439.

Messrs. P. J. M. Hally, for respondent:

It was the intention of the legislature to permit the park and boulevard system of the city to be used, not for business, but for pleasure, and to be preserved as such for the use and enjoyment of the public.

McQuillin, Mun. Ord. § 520; *Randall v. Evening News Asso.* 101 Mich. 566, 60 N. W. 301; *Howe v. Lowell*, 171 Mass. 575, 51 N. E. 536; *West Chicago Park v. Farber*, 171 Ill. 146, 49 N. E. 427.

The city holding this land does so, not

Note. — *Right of abutting owner to join his land to street by driveway or walk.*

This note does not discuss the right of a municipality to cut off or render difficult access to and from his land by an abutting owner by a change of grade, nor his right to compel the municipality to make the connection of his land with the traveled part of the highway, but is confined to the right of abutting owner himself to make the connection.

As to right of abutting owner to continue enjoyment of pass way across highway, see note to *Snively v. Washington Twp.* 12 L.R.A. (N.S.) 918.

In addition to the general right to use the highway which he possesses in common with the rest of the public, the owner of land abutting on a highway has a special right or easement of access to and from his land, of which he cannot be deprived without just compensation.

It follows that he has a right to construct a driveway or other suitable approach in front of his premises, from his land to the traveled part of the highway, if done in such a way as not to interfere with the rights of the public.

Thus, it was held in *Highway Comrs. v. Ely*, 54 Mich. 173, 19 N. W. 940, that an abutting owner "has a right of access to the public street, and, if necessary for him to reach the traveled part, he has the right to bridge a ditch or construct a grade for that purpose; but in doing so he has no right

as an agency of the state, but in its corporate, individual capacity, having private rights which the people have a constitutional right to enjoy undisturbed.

Thompson v. Moran, 44 Mich. 602, 7 N. W. 180.

The commissioner's discretion in the premises should not be disturbed by the extraordinary writ of mandamus.

Abrey v. Livingstone, 95 Mich. 181, 54 N. W. 714.

Mr. J. J. Speed, also for respondent:

The legislature had power to provide for the laying out of the boulevard, to provide for its improvement, and to regulate and limit its use.

Com. v. Davis, 162 Mass. 510, 26 L.R.A. 712, 44 Am. St. Rep. 389, 39 N. E. 113; *McCormick v. South Park*, 150 Ill. 516, 37 N. E. 1075; *Brooklyn Park v. Armstrong*, 45 N. Y. 234, 6 Am. Rep. 70; *Detroit Citizens' Street R. Co. v. Detroit*, 110 Mich. 384, 35 L.R.A. 859, 64 Am. St. Rep. 350, 68 N. W. 304; *Seovel v. Detroit*, 146 Mich. 93, 109 N. W. 20.

Mandamus will not ordinarily issue to compel the performance of an act within the discretion of an officer, and this is especially so when the duty of the officer

requires an investigation and determination of facts.

People ex rel. Horn v. Wayne Circuit Judge, 39 Mich. 15; *Sheldon v. Stewart*, 43 Mich. 574, 5 N. W. 1067.

Moore, J., delivered the opinion of the court:

The relator is a Michigan corporation, whose principal business is that of filling automobile tires with a composition claimed to render them puncture proof. It also sells and handles automobile accessories. It is the owner of the north 95 feet of the easterly 100 feet of lots 2 and 3, and the southerly 5 feet of lot 1, of Frisbee & Foxen's subdivision of part of fractional section 31. These lots are at the corner of the boulevard and Woodward avenue in the city of Detroit. Lots 1, 2, and 3 front upon Woodward avenue. On the front 100 feet of the lots a block of stores three stories high is erected; at the rear of said stores, and between them and the alley, the relator is erecting a two-story building for the purpose of carrying on its business. Its property fronts on the boulevard. It applied to the respondent for a permit to give access to its building to and from the

to wilfully obstruct such ditch or highway, his rights as a private landowner being subordinate to the public right of constructing and keeping the highways in repair."

So, also, in *Sandpoint v. Doyle*, 14 Idaho, 749, 17 L.R.A. (N.S.) 497, 95 Pac. 945, where a municipality erected a bridge 450 feet long across a small stream 25 feet wide and the adjacent ravine or depression in the natural surface of the ground, and such bridge was of a height of 20 feet from the ground at the place where it passed alongside the lot of an abutting property owner located in the ravine, it was held that the municipality was without the power and authority unqualifiedly to prohibit and deny the property owner the right to erect a platform on his own lot to such height as to enable him to go from his building to the bridge, and to connect such platform with the bridge by proper and substantial railings, and, by such means and in such manner, exercise the right of ingress and egress.

And in *Metcalf v. Boston*, 158 Mass. 284, 33 N. E. 586, where the street commissioners and city council had laid out a street 200 feet wide, but graded a width of only 60 feet in the center, in an action of mandamus brought by abutting landowners to require the city to grade the street and fit it for travel through its entire width, the court said: "It is contended that the abutting landowners have a right to require the construction of the road up to the lines of their lots for convenience of access. Undoubtedly, they have a right of access to the road from their lots; but roads are constructed for the use of the public, and

there is no law requiring cities and towns to construct approaches from the houses or lots of adjacent landowners to the traveled part of the way, or to grade and construct the way up to the lines of the lots, to enhance the value of the property. If the construction of the road in a reasonable way for public use will be likely to make access to the road from a neighboring lot difficult, and to require a large expenditure on the part of the owner in the construction of a passageway, that will be taken into account in assessing the damages. The petitioners in the present case own the fee of the street to the center opposite their land, and they have a right to make for themselves driveways to the wrought part of the street in any reasonable way which does not interfere with the use of the street by the public." This language was quoted and approved in *Atty. Gen. v. Boston*, 186 Mass. 209, 71 N. E. 574.

But the owner of land abutting on a highway, in order to reach the traveled part of the road, can use only that part of the highway in front of his own land, and has no right to construct and grade a driveway in front of his neighbor's land, though within the limits of the highway, and though, owing to a steep declivity in front of his own land, it was reasonably necessary for him to take such diagonal course in order to obtain convenient and safe access to the traveled part of the highway; and if he should attempt to do so, he would become a trespasser on his neighbor's land. *Burr v. Stevens*, 90 Me. 500, 38 Atl. 547.

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boulevard by means of two driveways. The commissioner having denied the application for permission to construct the driveways, a petition for a writ of mandamus was filed in the court below, and, on denial of this petition, the cause was brought to this court by certiorari.

The claim of the respondent is stated by his counsel as follows (we quote from the brief): "The respondent further says in his answer that, under the statute relating to said office of commissioner of parks and boulevards of said city of Detroit, and to the parks and boulevards of said city, he submits he has the sole charge and management and control of said parks and boulevards, and of the improvements and maintenance thereof, and he avers it was and is within his exclusive judgment and discretion, as to whether a permit should be issued for the construction of said driveway, and, in the exercise of such judgment and discretion, he refused to issue a permit therefor. This respondent respectfully submits that this court has no jurisdiction to control the exercise of the discretion of this respondent, to command him, as against his judgment in the premises, to issue permits for the construction of driveways on said boulevard, or determine when, how, or where said driveways shall be made; and he makes this submission as in the nature of a demurrer to said petition."

One of the counsel for respondent says in his brief that "almost this identical question here contended for was presented to this court in a case which is entitled *Abrey v. Livingstone*, 95 Mich. 181, 54 N. W. 714. The jurisdiction of the commissioner in that case and in this is similar, and the act there construed is the act here under consideration. *Abrey* desired to have ingress and egress from the land under the control of the park commissioners to his land which abutted upon its holdings, and his right for that purpose was denied." An examination of that case will show that the act which was construed was not the one before us now, but was act No. 391, Local Acts 1879. In disposing of the case Justice Long, speaking for the court, said, in part, as follows: "The complainants filed their bill in the Wayne circuit court in chancery, setting up that they are the owners of the lands adjacent to these strips, and have a frontage thereon. They procured their titles to these lands after Kanter and wife deeded the approach to the bridge to the city, and now claim that such approach is in its entire width a public street, through which they have the right of ingress and egress from their lands. It is claimed by the defendants that it is their intention

to ornament these strips outside of the walks, and, to prevent encroachments thereon, to erect necessary fences or walls along the outer sides of the same. The complainants seek by their bill to enjoin the defendants from erecting and maintaining these fences or walls. Defendants claim that these pieces of land are not a part of the public highway, but that the city may devote them to the purposes of a park, and shut off the approaches from either side. Complainants' bill was dismissed in the court below, and they appeal. It is contended by counsel for complainants that these parcels of land have always been regarded throughout their entire width by the common council and the board of public works as a street; that the strip of land from Jefferson avenue to the river was purchased for the purpose, and no other, of an approach to the bridge and a continuation or extension of the boulevard to the bridge. This piece of land was purchased by the city under the power granted by the above-named act." The court held in that case, with the defendant, that the land had never been a highway, and sustained the contention of the city. The boulevard was called into existence by virtue of act No. 374, Local Acts 1879. When the boulevard was established, much of it, including the land now belonging to the relator, was in the country outside of the city limits. Section 10 of the act gave to the commissioners the following powers: "To adopt plans, for constructing, laying out, improving, ornamenting, and beautifying the said boulevard, and shall have a supervisory and superintending control of the execution of such plans. They shall also have a like control and management of the maintenance and care of the said boulevard, and shall have power to make all reasonable rules and regulations concerning the use of said boulevard, and for the protection of the same." Section 14 of the act reads: "Whenever the said boulevard, or any part thereof, shall be opened, either by grant or conveyance, or by proceedings *in invitum*, the same shall, under such reasonable rules and regulations as shall be adopted by the said board of boulevard commissioners, be common and public, for the uses and purposes of such boulevard."

After the city limits were extended so as to take in the boulevard, legislation was had to meet the new conditions. The respondent is the successor of the previous commissioners. The act of 1879 was amended May 24, 1895, and May 4, 1901. By the act of 1895 (Acts 1895, No. 436), numerous detailed provisions were added further regulating or empowering the commissioners to regulate the use of the parks and

boulevards. For example, prohibiting the bringing or the driving of animals, excepting horses, in the parks and boulevards; limiting the rate of speed, restraining the use of footpaths, grass plats, and other portions thereof, excepting upon carriage drives, by vehicles; preventing the obstruction of roadways, the injuring of property, the destruction of or interference with plants, trees, grass, etc. Heavy traffic was forbidden excepting where there was no alley in rear, and then only to the nearest cross street. Funeral and other processions were prohibited, as was also the playing of games and the speeding of horses, excepting at places designated by the commissioner. The act of 1901 (Acts 1901, No. 417) provided for a single commissioner of parks and boulevards in place of the board of commissioners, and re-enacted many of the sections of the act of 1895, substituting "commissioner" in place of "commissioners" or "board." In its present form both of these acts contained the following (Local Acts 1895, p. 595, No. 436, § 39; Local Acts 1901, p. 414, No. 417, § 39): "No person shall dig, remove, or carry away any sward, sand, turf, or earth in or from any public park or boulevard, and no person shall open or dig up or tunnel under any part or portion of the boulevard without a permit from the commissioner of parks and boulevards, and, before granting any such permit, the applicant therefor shall be required to deposit with the secretary of said commissioner such sum of money as the superintendent of the boulevard, or such other officer as the commissioner may designate for that purpose, shall estimate will fully cover any expense to be incurred by the commissioner in connection with such opening or tunneling, and the commissioner may make suitable regulations and conditions with respect to issuing said permits. And said commissioner may retain the actual expense, which shall be certified by the superintendent, which may be incurred by the commissioner in connection with any work done by him, for the purpose of restoring any roadways, sidewalk, planting place, or other portion of said boulevard, and the secretary shall refund to the person to whom said permit shall be issued the difference, if any, between the amount deposited and the amount so certified by the superintendent. Carriage or driveways and footwalks connecting with any premises adjoining the boulevard, or hitching posts thereon, shall be allowed only on a permit issued under this section, and the material used in making such ways, walks or posts shall be determined by the said commissioner."

It is claimed under existing conditions 30 L.R.A. (N.S.)

the commissioner may deny relator the right to construct any driveway from his premises to the boulevard.

At volume 28 of Cyc. Law & Proc. p. 856, it is said: "An abutting owner has two distinct kinds of rights in the street,—the public one, which he enjoys in common with all citizens, and private rights, which arise from his ownership of contiguous property. Among the private rights are: The right of free and unimpeded ingress and egress to and from his property for himself and animals and goods, . . . and the right to have the street kept open and continued as a public street for the benefit of his contiguous property." In the same volume, at page 863, it is said: "Abutting owners have an indefeasible right of access to and from their property to the street." In the notes many cases are cited which sustain the text.

Counsel for respondent cite McCormick v. South Park, 150 Ill. 516, 37 N. E. 1075; but that case is not conclusive in favor of the respondent. Indeed, it is said in the opinion: "Undoubtedly, the owners of lots bordering upon streets or ways have the right to make all proper and reasonable use of such part of the street for the convenience of their lots, not inconsistent with the paramount right of the public to the use of the street in all its parts. Smith v. McDowell, 148 Ill. 51, 22 L.R.A. 393, 35 N. E. 141, and cases cited. In the absence of legislative direction or municipal declaration of what such rights shall be, what is to be deemed a reasonable and proper use will depend, in a large degree, upon the public usage in like instances, and upon the local situation. General use by lot owners, and acquiescence therein by the public and public authorities, may always be resorted to as evidence of what is a reasonable and proper use, and of the existence of the right. 2 Dill. Mun. Corp. 521, 553, 585, 794; Van O'Linda v. Lothrop, 21 Pick. 292, 32 Am. Dec. 261; Com. v. Blaisdell, 107 Mass. 234; Nelson v. Godfrey, 12 Ill. 22."

Scovel v. Detroit, 146 Mich. 93, 109 N. W. 20, is also cited. In the opinion in that case occurs the following: "In 2 Dillon on Municipal Corporations, 4th ed. § 656, it is said: 'Public streets, squares, and commons, unless there be some special restrictions, when the same are dedicated or acquired, are for the public use, and the use is none the less for the public at large, as distinguished from the municipality, because they are situate within the limits of the latter, and because the legislature may have given the supervision, control, and regulation of them to the local authorities. The legislature of the state repre-

sents the public at large, and has, in the absence of special constitutional restraint, and subject (according to the weight of more recent judicial opinion) to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places."

Our attention has not been called to a case holding that an abutting owner might be deprived of ingress and egress by means of a driveway to and from his property to the highway in front of it. Certainly, when the legislature, in 1879, gave to the commissioners authority "to make all reasonable rules and regulations concerning the use of said boulevard," no one supposed they might deny the right of the abutting owner to construct a driveway to the boulevard. The provision in § 39, reading: "Carriage or driveways and footwalks connecting with any premises adjoining the boulevard, or hitching posts thereon, shall be allowed only on a permit issued under this section, and the material used in making such ways, walks, or posts shall be determined by the said commissioner,"—does not contemplate that the permit shall be denied, but the inference is a fair one that it shall be allowed upon suitable regulations and conditions.

The Commissioner, instead of refusing the permit, should have granted it subject to reasonable regulations and conditions as to number, location, plan of construction, and material used therein, and it will be so ordered.

MISSISSIPPI SUPREME COURT.

CHARLES N. FULLER, Appt.,
v.

CITY OF JACKSON.

(Two Cases.)

(— Miss. —, 52 So. 873.)

Evidence — judicial notice — intoxicating quality of liquor.

1. The court takes judicial notice of the fact that a liquor containing more than 2 per cent of alcohol by weight will intoxicate.

Intoxicating Liquor — prohibition — intoxicating effect.

2. The statutory prohibition of the sale of malt liquor makes the sale of such liquor unlawful regardless of the amount of alcohol it contains or its intoxicating quality.

Note.—As to whether statutes forbidding the sale of a certain class or classes of liquor include nonintoxicating liquor of that class, see notes to *Luther v. State*, 20 L.R.A. (N.S.) 1146, and *Bowling Green v. McMullen*, 26 L.R.A. (N.S.) 895.
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Same — nonintoxicating quality.

3. The prohibition of the sale of alcoholic liquor does not apply to a beverage which contains less than 2/10 of 1 per cent of alcohol.

(Anderson and Smith, JJ., dissent.)

(May 30, 1910.)

APPEAL by defendant from judgments of the Circuit Court for Hinds County convicting him of selling intoxicating liquors in violation of an ordinance of the City of Jackson. Case No. 14,306 reversed. Case No. 14,307 affirmed.

Statement by Anderson, J.:

These cases, being governed by practically the same principles, are considered together. The defendant was convicted in two cases for the unlawful sale of intoxicating liquors under the ordinances of the city of Jackson, and appeals to this court.

As authorized by § 3410, Code 1906, the municipal authorities adopted a general ordinance making all offenses against the criminal laws of the state, occurring within the limits of the city, not amounting to a felony, violations of the city ordinances and punishable as such. In each case the affidavit charged the defendant, Fuller, with selling "vinous, malt, alcoholic, intoxicating, and spirituous liquors," etc., in violation of § 1746, Code 1906, which had become an ordinance of the city as above set forth. There was an agreed state of facts in each case. In case No. 14,306 the facts agreed on are as follows: "The defendant did sell in the city of Jackson, Hinds county, Mississippi, a beverage known as 'Brewett' on the date mentioned in the affidavit filed herein. He sold it for cash and received the money for it. The said beverage sold by the said Fuller contained by volume .18 of 1 per cent of alcohol, and by weight .13 of 1 per cent of alcohol. The said beverage did not contain enough alcohol to make it intoxicating to any extent when drunk to excess. The said beverage so sold was not in fact an intoxicating liquor."

In this case the court gave the following instruction for the plaintiff: "The court instructs the jury, for the plaintiff, that if you believe from the evidence, beyond a reasonable doubt, that the defendant did on the date named in the affidavit sell a beverage known as 'Brewett,' and that the said liquor contained some alcohol, although not a sufficient amount of alcohol to make the said beverage intoxicating to any extent when drunk to excess, you should find him guilty as charged." And refused instructions Nos. 1, 2, and 3 on behalf of the defendant, as follows: "No. 1. The court in-

structs the jury to find the defendant not guilty. No. 2. The court instructs the jury, for the defendant, that a liquor is not, within the meaning of the statutes of this state, alcoholic, unless it contains a sufficient amount of alcohol to make it intoxicating to some extent when drunk to excess. No. 3. The court further instructs the jury for the defendant that if you believe from the evidence that the defendant did on the date named in the affidavit sell a certain beverage known as 'Brewett,' and that the said beverage contained the small per cent of alcohol shown by the evidence, and that the said percentage of alcohol was too small to make the said liquid intoxicating to any extent even when drunk to excess, then you should find the defendant not guilty."

In case 14,307 the agreed facts are as follows: "The said defendant did on the date laid in the affidavit herein sell for cash, in the city of Jackson, Hinds county, Mississippi, as a beverage, a certain liquor known as 'Malt Ale.' The said beverage sold by the said defendant on the said date contained by volume 2.70 per cent of alcohol and by weight 2.12 per cent of alcohol.

The court gave the following instruction for the state: "The court instructs the jury, for the plaintiff, that if you believe from the evidence, beyond a reasonable doubt, that the defendant on or about the date named in the affidavit sold a certain liquor known as 'Malt Ale,' and that the said liquor was sold as a beverage and contained 2.12 per cent of alcohol or 2.70 per cent, then you will find the defendant guilty as charged." And refused the following instructions asked on the part of the defendant: "The court instructs the jury, for the defendant, that the burden is upon the city of Jackson to prove that the liquor charged to have been sold is intoxicating to some extent when drunk to excess; that it is not sufficient merely to show that the said liquors contained a small amount of alcohol. The court further instructs the jury that, unless you believe from the evidence that the said liquor sold by the defendant contained a percentage of alcohol large enough to make the same when drunk to excess intoxicating to some extent, then you will find the defendant not guilty."

The giving of the charges asked for the state, and refusing those asked on behalf of the defendant, are assigned as error.

Messrs. Flowers, Fletcher, & Whitfield for appellant.

Mr. James R. McDowell for appellee.

Anderson, J., delivered the opinion of the court:

The paragraph of § 1746 of the Code of 30 L.R.A. (N.S.)

1906, which is the ordinance of the city under which the defendant was convicted, is as follows: "If any person shall (a) sell or barter, or give away to induce trade, or keep for sale or barter, or to be given away to induce trade, any vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters, or other drinks, which if drunk to excess will produce intoxication, in any quantity less than 1 gallon, without having a license therefor in pursuance of this chapter," etc. The language, "which if drunk to excess will produce intoxication," qualifies the terms "vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters, or other drinks." There are alcoholic drinks which are known to the law to be intoxicating. Within this class are alcohol, wine, beer, ale, porter, whisky, brandy, gin, rum, and perhaps others. Such liquors, according to the common understanding, are intoxicating. The courts take judicial notice of the fact that they are alcoholic liquors, and will produce intoxication when drunk to excess. 23 Cyc. Law & Proc. pp. 61-63; 17 Am. & Eng. Enc. Law, 2d ed. pp. 198-201. There will be found collated in these two authorities the cases on this subject. In a case where the liquor in question belongs to this class, it is not necessary for the state to prove that it will intoxicate when drunk to excess; while, on the other hand, if it is not within this class which the court judicially shows are intoxicating, it is necessary for the state to prove that if drunk to excess it will cause intoxication. The term "alcoholic" is a general term which seems to have been thrown in rather for good measure than for any purpose. The statute is directed against alcoholic intoxicants. The sale of alcoholic liquors is prohibited provided they contain sufficient alcohol to intoxicate when drunk to excess.

The history of what is commonly known as the "prohibition movement" in this state, which resulted in the enactment of the statutes on this subject now in force, shows that it was directed against the sale of intoxicating liquors. Construing all these statutes together it is apparent that the object of the legislature was to prohibit the sale of intoxicating liquors. This is clearly demonstrated by §§ 1747, 1748, 1749, 1750, 1752, 1755, 1758, 1759, 1765, 1767, 1773, 1776, 1791, 1794, 1797 and 1798 of Code 1906, and also chapter 117 of the Laws of 1908, which is a memorial to Congress, to enact a law to prevent the issuance of United States revenue license to any person selling "intoxicating liquors" in any locality where the sale is prohibited by local laws.

It is contended that the case of *Edwards v. Gulfport* (Miss.) 49 So. 620, is authority for the instructions given in these cases for the state. The liquor sold in the *Edwards Case* was "Pabst Mead," containing 4.6 per cent alcohol to each bottle; and the testimony showed that two bottles of it would intoxicate an average man. The court charged the jury that, if the liquor sold was a malt or alcoholic liquor, they should find the defendant guilty, whether shown to be intoxicating or not. Judge Whitfield uses this language in that case: "This case falls squarely within the case of *Reyfelt v. State*, 73 Miss. 415, 18 So. 925. On the evidence in this case it is perfectly manifest that a conviction is proper on either one of the two grounds: First, that the liquor was shown to be both an alcoholic and a malt liquor; and, second, that it was shown to contain enough alcohol to make an average man drunk if he drank two bottles." *Marks v. State*, 159 Ala. 71, 133 Am. St. Rep. 20, 48 So. 864, is referred to as authority for the *Edwards Case*. It is true that in the *Marks Case* (reviewing the statute substantially the same as § 1746, Code 1906) the Alabama court held that the language, "which if drunk to excess will produce intoxication," did not relate to each and all the liquors preceding it. However, the court held further in that case (exactly contrary to what was held in the *Edwards Case*): "Whether a beverage containing 1.46 per cent alcohol by weight, and 1.88 per cent by volume, and 1.20 per cent maltose, making about 2½ teaspoonfuls of alcohol to the pint, is an alcoholic, spirituous, vinous, malt, or intoxicating liquor, or whether if drunk to excess it will produce intoxication, is a question of fact for the jury." The *Reyfelt Case* is not authority for the *Edwards Case*. In the former the liquor sold was home-made wine; and the court held it was unlawful to sell it, regardless of the opinion of witnesses that it would not intoxicate. The decision of the court was manifestly correct, because wine is one of the liquors which has an accepted judicial meaning, and judicially known to be intoxicating when drunk to excess.

It is contended on behalf of the state that the purpose of the legislature was to prohibit the sale of all drinks as beverages containing alcohol in any quantity, however small; the object being not alone to lessen drunkenness, but to put out of reach of the people drinks which have a tendency to create a thirst for intoxicants. There is nothing in our statutes, nor in the history of the "prohibition movement," to indicate such purpose.

If the charges complained of in the in-
30 L.R.A. (N.S.)

stant cases, and which were authorized by the *Edwards Case*, are the law, then if a person should sell, as a beverage, a barrel of water with a teaspoonful of alcohol in it, he would violate this statute; and so would the owners of soda fountains, selling the usual cold drinks, using various extracts in the same, containing a small portion of alcohol for their preservation.

These views necessitate, in my judgment, the overruling of so much of the *Edwards Case* as holds that the charge in question in that case was a correct statement of the law. That case stands alone, unsupported, and is unsound.

In both of these cases the court should have instructed the jury peremptorily to find a verdict for the defendant, because neither of the drinks sold were shown to be intoxicating when drunk to excess. In case No. 14,307, if the "Malt Ale" sold had been proven to be ordinary ale, then the jury would have been authorized to convict, whether the ale was shown to be intoxicating or not when drunk to excess; ale being in the class of liquors which are judicially known to be intoxicating.

Both of these cases are therefore reversed and remanded.

Smith, J., dissenting:

I feel constrained to differ with both of my brethren in the construction put by them upon the statute in question. When this statute was under review in *Reyfelt v. State*, 73 Miss. 416, 18 So. 925, this court said: "The statute, for a violation of which the appellant was convicted, makes it unlawful to sell, *inter alia*, any 'vinous or alcoholic' liquor. The defendant sold home-made wine made from the grape and from blackberries, which wine he and his witnesses swore would not intoxicate. He asked the court to instruct the jury to acquit, if it believed from the evidence the wine would not produce intoxication. This the court declined to do, but charged the jury to convict if the sale of wine was proved. This action of the court was correct. The legislature, believing in chemistry, and that the process of fermentation of the juice of the grape will produce alcohol, has seen fit to prohibit the sale of such product, and, regardless of the opinion of the witnesses that this prohibited article would not intoxicate, the sale was unlawful, for the legislature prohibited such sales because it thought that alcoholic wines would, in some instances, intoxicate."

This was a square adjudication that the words, "which if drunk to excess will produce intoxication," did not qualify the terms "vinous, alcoholic, malt, intoxicating, or spirituous liquors." The court in its

opinion said nothing about judicial notice, but held that it was unnecessary to prove that vinous or alcoholic liquor was intoxicating, for the sole reason that the legislature had so ordered. The same argument with reference to the qualification of these words by the words, "if drunk to excess will produce intoxication," was made in that case by counsel for appellant, as was made in the case of *Edwards v. Gulfport* (Miss.) 49 So. 620. This latter case announced no new construction of the statute, but simply followed the *Reyfelt* Case. The legislature has adopted the construction put upon this statute in the *Reyfelt* Case by twice re-enacting it. I do not think, therefore, that these cases should be overruled; neither do I think they should be qualified to the extent of saying that "when the beverage sold contains a sufficient quantity of alcohol to constitute the dominant quality of the beverage, and is the thing on account of which it is sold, there is then a violation of the law, even if it be conclusively shown that the beverage will not intoxicate." The statute does not provide that alcohol must be the "dominant quality of the beverage," but in express terms prohibits the sale of alcoholic liquor without reference to its intoxicating quality and irrespective of the amount of alcohol which it contains. *Gilbert v. Husman*, 76 Iowa, 241, 41 N. W. 3; *Sawyer v. Botti* (Iowa) 27 L.R.A. (N.S.) 1007, 124 N. W. 787.

The words "alcoholic liquor" have a plain and definite meaning; that is, a liquor containing alcohol; and, since the legislature has not limited the amount of alcohol such liquor must contain in order to come within the prohibition of the statute, this court has no right to do so. The legislature meant to establish and fix a certain guide for the court in administering this statute, and did not intend to leave it to the juries to say when alcohol was, or when it was not, the dominating quality of the liquor.

A suggestion of error having been filed, *Mayes*, Ch. J., on June 20, 1910, handed down the following response:

The same appellant is here on appeal in two cases,—one being No. 14,306 and the other No. 14,307. For convenience I follow the method adopted by Justice Anderson, and discuss the two cases in this opinion. Both cases charge the unlawful sale of "vinous, malt, alcoholic, intoxicating, and spirituous liquors." Both originated in prosecutions conducted for a violation of the ordinance of the city of Jackson, in the court of the police justice of the city. The ordinances of the city prohibiting the sale or barter of intoxicating liquors are re-

scripts of chapter 115 of the Acts of 1908. In discussing these cases, therefore, I shall deal with them as though they arose under the act.

The facts in both cases are agreed to, and on the trial in the circuit court the agreed facts constituted all the testimony. In case No. 14,306 it was agreed that the beverage sold was "Brewett," and contained .18 of 1 per cent of alcohol by volume, and .13 of 1 per cent of alcohol by weight. There is no proof in the record as to how this "Brewett" is made,—that is to say, whether or not it is a malt liquor,—nor is it proven to be vinous or spirituous. The agreed facts show only that it contains a small quantity of alcohol. Under the agreed facts this beverage, therefore, if a prohibited liquor, must be such a prohibited liquor as falls within the class designated as "alcoholic liquor." Case No. 14,307 charges the same offense; but the agreed facts show that the beverage in that case was "Malt Ale," and contained 2.71 per cent of alcohol by volume and 2.12 of alcohol by weight. In this last case the agreed facts concede that it is a malt liquor.

It may be also stated that I take judicial notice of the fact that any liquor containing more than 2 per cent of alcohol by weight will intoxicate, as a matter of fact, if drunk to excess. See full report of case of *United States v. Cohn*, 2 Ind. Terr. 474, 52 S. W. 41. In the *Cohn* Case, in the proof found in the report of the case, it is shown by expert witnesses that beverages containing more than 2 per cent of alcohol will intoxicate, and the trial court in that case took judicial notice of it. It is also shown in that case that the government fixed 2 per cent of alcohol, by weight, as in truth constituting an intoxicating liquor. I feel, therefore, that I am safe in saying that I shall take judicial notice of a fact so well established by proof and legislative action.

Chapter 115, p. 116, Laws 1908, enumerates certain classes of liquors which cannot be sold, or bartered, under any condition. The statute prohibits the sale of such liquors as it expressly names, without regard to their intoxicating or nonintoxicating quality, and without reference to what quantity of alcohol may be contained in them. If a party is charged with merely selling an "alcoholic liquor," and such liquor is neither vinous, malt, nor spirituous, if the quantity of alcohol is so negligible as not to constitute the beverage sold an "alcoholic liquor," of course there can be no conviction of a sale of such liquors, even if it be shown that in truth there is some alcohol in the beverage. There must be enough alcohol in it to make it "alcoholic"

by me when these cases were first before the court, it follows therefrom that I concur with Brother Mayes in holding that the liquor sold in cause No. 14,307, known as "Malt Ale," containing 2.71 per cent of alcohol by volume, and 2.12 per cent of alcohol by weight, is both a malt and an alcoholic liquor, and therefore its sale is prohibited by the statute. It also follows that I dissent from the view expressed by him that the liquor sold in cause No. 14,306, which contained .18 of 1 per cent of alcohol by volume, and .13 of 1 per cent of alcohol by weight, is not an alcoholic liquor. In my opinion the amount of alcohol which a beverage contains is immaterial. Its sale is prohibited by the statute if it contains any alcohol.

NEBRASKA SUPREME COURT.

ANNIE C. SLABAUGH

v.

OMAHA ELECTRIC LIGHT & POWER
COMPANY, Appt.

(— Neb. —, 128 N. W. 505.)

Highway — trimming of trees — electric light company — rights.

1. In the absence of a valid legislative act or municipal ordinance granting to public service corporations authority to trim shade trees growing in the streets of metropolitan cities without compensating the abutting owner for damages thereby inflicted, and enacted before the lot owner

Headnotes by Root, J.

Note. — Liability to abutting owner for mutilating trees in highway by erecting poles or stringing wires.

The early cases upon the question of the liability to abutting owners for mutilating trees in highway by erecting poles or stringing wires are covered in the note to Cartwright v. Liberty Teleph. Co. 12 L.R.A. (N.S.) 1125, and this note includes only the decisions which have passed on the question since that time.

Neither a city nor a telephone company has a right to cut an abutting owner's trees situated immediately in front of their lot, unless a necessity for the act exists. Betz v. Kansas City Home Teleph. Co. 121 Mo. App. 475, 97 S. W. 207.

And in the absence of evidence of such necessity the presumption is that the cutting was unlawful. Ibid.

So, a telephone company occupying a street as a licensee is liable to an abutting owner for the removal or damage done to trees planted by such owner inside the curb line. State v. Graeme, 130 Mo. App. 138, 108 S. W. 1131.
30 L.R.A. (N.S.)

plants trees in that part of the street contiguous to his lot, an electric light company is liable to the owner for damages accruing to his lot by reason of such trimming.

Limitation of action — wrongfully trimming trees in street.

2. In such a case, the statute of limitations does not commence to run in favor of the electric light company until it trims the trees.

(Sedgwick, J., dissents.)

(November 16, 1910.)

APPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages caused by the alleged unlawful trimming of certain shade trees. Affirmed.

The facts are stated in the opinion.

Messrs. Weaver & Giller and W. W. Morseman for appellant.

Messrs. W. W. Slabaugh, C. M. McElfresh, and Shotwell & Shotwell, for appellee:

The constitutional provision that "the property of no person shall be taken or damaged for public use without just compensation therefor" applies.

Welton v. Dickson, 38 Neb. 767, 22 L.R.A. 496, 41 Am. St. Rep. 771, 57 N. W. 559; Vanderburgh v. Minneapolis, 98 Minn. 329, 6 L.R.A. (N.S.) 741, 108 N. W. 480; Jaynes v. Omaha Street R. Co. 53 Neb. 631, 39 L.R.A. 751, 74 N. W. 67; Bronson v. Albion Teleph. Co. 67 Neb. 112, 60 L.R.A. 426, 93 N. W. 201, 2 A. & E. Ann. Cas. 639; Cosgriff v. Tri-State Teleph. Co. 15 N. D. 210, 5

Before trimming or removing trees planted inside the curb line by an abutting owner, a telephone company should proceed under the statute to have the damage assessed, or should make an agreement with the owner. Ibid.

A landowner is entitled to damages done to shade trees by trimming and removing limbs during the erection of poles and the stringing of wires in the street upon which his lot abuts, by a telephone company, without his consent, although the company had a franchise to use the street for the establishment of such lines; since the use in question is an additional burden upon the fee. Osborne v. Auburn Teleph. Co. 189 N. Y. 393, 82 N. E. 428.

And it was held in Kellar v. Central Teleph. & Teleg. Co. 53 Misc. 523, 105 N. Y. Supp. 63, that one could recover for the damage sustained by him through the injury done by a telephone company to a tree immediately in front of his premises, although he did not own the fee.

And a street railway company which, without a license, erects a feed wire through trees standing upon the sidewalk,

L.R.A.(N.S.) 1142, 107 N. W. 525; Rigney v. Chicago, 102 Ill. 64; Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224.

Root, J., delivered the opinion of the court:

This is an action for damages caused, as alleged by the defendant, in trimming shade trees in a street and contiguous to the plaintiff's lot. The plaintiff prevailed, and the defendant appeals.

There is no conflict in the evidence. In 1884 the city council of the city of Omaha granted to the defendant's assignor a franchise to transact a general electric light business in said city, and granted said assignor a right of way upon and over the streets, alleys, and public grounds in said

city for the purpose of erecting and maintaining the poles, wires, and appurtenances necessary for the transaction of said business. In 1895 the plaintiff purchased a lot in said city. At that time two maple trees were growing between the sidewalk and the curb line in that part of Fortieth street contiguous to said real estate. About 1902 the defendant erected poles and attached wires thereto in the line of said trees in said street. At that time the wires were suspended above the trees. Subsequently limbs of the trees grew up to, among, and above said wires and interfered therewith. In 1908 the building inspector of said city gave the defendant permission to trim the trees, and, without the plaintiff's knowledge or consent, its servants cut off the limbs with-

near the curb line, and, by passing a current through the wire, kills and injures the trees, is guilty at least of trespass, making it liable for nominal damages. *Bathgate v. North Jersey Street R. Co.* 75 N. J. L. 763, 70 Atl. 132.

But he could not recover the damages provided for by a statute giving treble damages for despoiling trees on the land of another, since such statute is penal, and the right is given on the theory of an injury to the land of the person injured. *Ibid.*

And an abutting owner who planted and nurtured trees in the street, with the acquiescence of the city, has a sufficient title to recover for an injury done to them by a telephone company in the erection of its line, although she may not own to the center of the street. *Osborne v. Auburn Teleph. Co.* 111 App. Div. 702, 97 N. Y. Supp. 874, reversed on other ground in 189 N. Y. 393, 82 N. E. 428.

Where a statute provides that "no person or corporation shall have a right to cut, mutilate, or injure any shade or ornamental tree, for the purpose of erecting or maintaining their line, without consent of the owner of the land on which it grows; or if his consent cannot be obtained, unless the selectmen, upon petition, after notice to and hearing the parties, decide that the cutting or mutilation is necessary, and assess the damages that will be occasioned the owner thereby; nor until the damages are paid or tendered,"—an electric light company which cuts limbs from an abutting owner's trees standing near the line of the street, without his consent or authority from the selectmen, is liable to the owner in an action of trespass. *Darling v. Newport Electric Light Co.* 74 N. H. 515, 69 Atl. 885.

And under a statute authorizing telephone companies to construct and maintain lines of wire or other material, "providing the same shall not injuriously interfere with other public uses of the said places, streets, and highways, or injure any trees located along the lines of such streets or highways," a telephone company is liable, if, by trimming, it injuriously injures an

oak tree standing on an abutting owner's land, whose limbs extend over into the street. *Boland v. Washtenaw Home Teleph. Co.* 161 Mich. 315, 126 N. W. 425.

And the fact that the company had trimmed the tree before the plaintiff's title began will not justify their trimming it after he acquired title. *Ibid.*

So, under a statute providing that "if any person shall wilfully and unlawfully cut down, or destroy by belting, topping, or otherwise destroy or injure any fruit or shade trees of another," he shall be liable to a fine, a judgment against a telephone company was affirmed, where it appeared that it had cut down oak and hickory trees located on the abutting owner's property, but bordering on the highway. *Russellville Home Teleph. Co. v. Com.* 33 Ky. L. Rep. 132, 109 S. W. 340.

A city cannot authorize a telephone company, without compensation, to cut and injure trees belonging to abutting owners which are located between the street and the sidewalk, notwithstanding the city's right to destroy them where the public use of the street demands it. *Brahan v. Meridian Home Teleph. Co. (Miss.)* 52 So. 485.

If the owner of a fee makes an agreement, by himself or an agent, giving a telephone company the right to construct a telephone line upon her side of the highway, the company has the right to cut or trim trees standing upon such land, so far and to such an extent as is reasonably necessary for the proper construction and operation of the line. *Jordan v. Delaware & A. Teleph. & Teleph. Co. (Del.)* 75 Atl. 1014.

And a wife may ratify such an agreement made by her husband, with reference to her lands, so that she will be bound by its terms. *Ibid.*

So, a contract between an abutting owner and a telephone company whereby the former, for a consideration, grants the latter the right to operate lines, and do the necessary trimming of trees to clean wires "18 inches on and along my property in J. county," covers land owned by the first party, but occupied by other persons, as well as that occupied by himself. *Nachand v. Cumber-*

in the center of the head of the trees, some 15 feet below the tops thereof, thereby damaging them and depreciating the value of the plaintiff's property. The plaintiff charges that the defendant acted maliciously, unlawfully, and wilfully in trimming her trees. The court instructed the jury that, if they found from a preponderance of the evidence that the defendant by trimming said trees damaged the plaintiff's lot, they should find in her favor.

The defendant does not argue that the damages are excessive, but its counsel contend that the evidence does not establish that the defendant acted maliciously or unlawfully, nor prove that the plaintiff's trees were trimmed more severely than was necessary to enable the defendant to safely and successfully convey currents of electricity over its wires, and for these reasons the defendant is not liable for such damages as the plaintiff may have suffered. The defendant admits that the plaintiff's grantor had the right to plant, and she had the authority to maintain, the trees in question, but that the defendant also had authority to construct and maintain its poles and wires in said streets, and that the individual's right to maintain the trees is at all times subordinate to a superior authority on the part of the defendant to trim or remove them whenever such action might become necessary in the construction or maintenance of its electric light plant. It is further argued that, since the defendant's right to use the street was granted in 1884, the plaintiff's cause of action accrued at that date, and the statute of limitations bars a recovery in the instant case.

1. It may be conceded that the proof fails to establish that the defendant's servants acted maliciously in trimming the plaintiff's trees, and yet there is sufficient evidence to support the verdict. The allegations with respect to malice and unlaw-

ful acts were and are immaterial. They could have been stricken from the petition, and were properly ignored by the court in its charge to the jury. The city of Omaha holds title to its streets and alleys in trust for the benefit of the public. *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L.R.A. 751, 74 N. W. 67. The city council had authority to grant the defendant's assignor a right of way over the streets and alleys in the city for the construction and maintenance of the poles and wires in question; and the use of those streets for that purpose is a public use. *Plattsmouth v. Nebraska Teleph. Co.* 80 Neb. 460, 14 L.R.A. (N.S.) 654, 127 Am. St. Rep. 779, 114 N. W. 588. If the defendant had the right under its franchise to trim the plaintiff's trees, but in the exercise of that authority it damaged her property, it should respond in damages under § 21 of article 1 of the Constitution, which reads: "The property of no person shall be taken or damaged for public use without just compensation therefor." *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420, 23 N. W. 503; *Plattsmouth v. Boeck*, 32 Neb. 297, 49 N. W. 167; *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379; *Jaynes v. Omaha Street R. Co.* supra; *Bronson v. Albion Teleph. Co.* 67 Neb. 111, 60 L.R.A. 426, 93 N. W. 201, 2 A. & E. Ann. Cas. 639; *Brown v. Asheville Electric Co.* 138 N. C. 533, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62; *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131; *Daily v. State*, 51 Ohio St. 348, 24 L.R.A. 724, 46 Am. St. Rep. 578, 37 N. E. 710.

The defendant's counsel argue with great force and learning that the owner of plaintiff's lot at the time the trees were planted was charged with notice that in the proper use of said street for a public purpose it might become necessary to trim or even remove the trees, and her property rights therein are subject to the greater right of the public, and that the defendant

land Teleph. & Teleg. Co. 134 Ky. 257, 120 S. W. 319.

And such owner cannot recover unless he shows that the trees trimmed were not an obstruction to the lines, or that more was trimmed than necessary to clean the lines. *Ibid.*

And a telephone company which has maintained a line running along a highway, for seven years, and during that time has cut out the undergrowth which interfered with its line, without objection being made, is not liable to one who took the property by descent, for a statutory penalty for wilfully or maliciously cutting, where it cuts only such small growth as interferes with its line. *Cumberland Teleph. & Teleg. Co. v. Martin*, 93 Miss. 505, 46 So. 247.

A conviction of a telephone employee under a statute making it a misdemeanor for 30 L.R.A. (N.S.)

anyone to "wilfully and maliciously, or wantonly and without right, enter the premises of another, and cut, take away, destroy, etc., any fruit tree, ornamental, or shade tree," cannot be upheld unless his act was wantonly and wilfully done. *State v. Graeme*, 130 Mo. App. 138, 108 S. W. 1131.

An injunction will not be granted at the instance of an abutting owner to restrain a telephone company from cutting trees and shrubs along the highway in the erection of its lines, since the remedy at law is adequate. *Hobbs v. Long Distance Teleph. & Teleg. Co.* 147 Ala. 393, 7 L.R.A. (N.S.) 87, 41 So. 1003, 11 A. & E. Ann. Cas. 461.

For a note on the right of municipal corporations to cut or trim trees within limits of highway, see 20 L.R.A. (N.S.) 809.

J. T. W.

stands in the shoes of the public with respect to the acts referred to in the petition. There is no proof in the record that the city council of the city of Omaha ever enacted an ordinance for the purpose of controlling the planting or maintenance of shade trees upon the streets of said city, or providing that such trees might be trimmed or removed whenever they interfered with the public service, and without compensation to the lot owner, or that said trees were planted subject to any ordinance other than one directing that limbs of shade trees shall not be permitted to grow within a certain distance of the sidewalks in said city; nor is there any proof that the plaintiff, in maintaining her trees in the condition in which they existed before defendant trimmed them, violated any ordinance of the city. The defendant, therefore, must justify under the terms of its franchise, and the Constitution of the state. An application of the fundamental law to the record in this case amply supports the judgment of the district court.

2. To the argument that the plaintiff's cause of action arose in 1884, it is sufficient to say that the owner of the plaintiff's lot could not know at that time that the defendant would erect the poles and string the wires in question; nor could the plaintiff have known, when the wires were strung, that defendant would years thereafter trim her trees, and thereby damage her property. It was feasible to remove such wires to the alley, and it was possible they would be placed in conduits beneath the surface of the street before the necessity might arise for trimming the trees. The plaintiff's cause of action arose when her property was damaged, and the statute does not bar that action.

The judgment of the District Court is right, and is affirmed.

Letton, J., concurring in conclusion:

I concur in the affirmance, but do not agree to much that is said in the opinion. The petition alleges a wilful and malicious cutting, breaking, and injury of plaintiff's trees, and damages to her property. The answer pleads defendant's franchise, and that it was necessary to trim the trees in order to carry on its business. The evidence for the plaintiff clearly showed a reckless and wanton mutilation of the trees. This evidence was not contradicted, nor was any proof offered to show that the wholesale cutting was reasonably necessary. The fact of the existence or non-existence of malice as charged is immaterial. With the issues and proof in this condition, the verdict was justified. The court instructed the jury properly as to the meas-

ure of damages, and the general instructions as to the right of plaintiff to recover damages could not, under the proofs in this case, prejudice the defendant. The wires when erected were above and clear of the trees, and the growth of the trees extended the limbs among the wires. Under these circumstances, I think the defendant had the right to trim the trees so often and to the extent that was reasonably necessary to exercise its franchise, but that this right should have been exercised in such a manner as to inflict as little injury as possible to the property; that if it neglected for years to trim, and thus allowed the growth of large limbs the removal of which would mutilate and damage the trees, it would be liable for such damages to the property rights of the tree owner as might be thereby occasioned.

I am further of opinion to quote the language of the opinion in *Southern Bell Teleph. Co. v. Francis*, 109 Ala. 224, 31 L.R.A. 193, 55 Am. St. Rep. 930, 9 So. 1, that "if the city or other corporation invested with the right of eminent domain, acting under municipal authority, proceeds to cut or trim trees planted on a sidewalk by the owner of abutting property under lawful authority, when no necessity for such cutting exists, or when the cutting clearly exceeds the necessity, and consequential injury results therefrom to such abutting property, the owner will have his appropriate remedy at law to redress the injury."

Reese, Ch. J., concurring:

I concur in the affirmance of the judgment of the district court. I do not believe that any corporation or person has any higher right to the property of another than has the owner himself, even though that corporation or person be in the enjoyment of a "franchise," or it be what is known as a "public service" corporation or person. The fact that the city has conferred upon defendant the right to use the streets for its poles and wires—and that is all there is of the so-called franchise—does not give it the right to injure or destroy the property of others without compensation, any more than it gives a private individual the right to destroy or injure the property of his neighbor which happens to be in his way or renders the enjoyment of his own any the less. The trees were rightfully growing on and in connection with plaintiff's property at the time the alleged franchise was granted. According to the usual course of nature, those trees would grow up. As well might defendant have chopped them down in anticipation of their natural upward growth.

as to wait until they had become more valuable, and then, without consent or payment and by the force and authority of might, practically ruin them. The rights of persons ought to be held just as sacred as the rights of property, and of the single individual as sacred as those of the multitude.

Sedgwick, J., dissenting:

The city has title to its streets, as stated in the majority opinion, and can, of course, regulate and control the use of the streets in planting and maintaining trees therein, and in the use of poles and wires for public service. It is said in the opinion that the council had authority to grant a right of way over the streets for these poles and wires, and that the use of the streets for that purpose is a public use, and "if the defendant had the right under its franchise to trim the plaintiff's trees, but in the exercise of that authority it damaged her property, it should respond in damages under § 21 of article 1 of the Constitution, which reads: 'The property of no person shall be taken or damaged for public use without just compensation therefor.'"

This, it seems to me, fails to decide the questions presented. Did the defendant have the right to occupy the space which the city had allowed it to take under its franchise, to the exclusion of all except the city? If it did, should the plaintiff have prevented her trees from infringing upon that space, and if she neglected that duty, would she thereby become a trespasser? If the defendant found the animals or trees of others trespassing upon its property and so injuring the service, would it have the right to remove such encroachments in a reasonable and prudent manner? These are the questions, as it appears to me, that ought to be decided in this case. If the defendant had a right to the space it occupied, and for that reason had the right to prevent the plaintiff from crowding into that space with her trees, the trimming of the trees is not taking or damaging them for public use, any more than if the city should trim them to prevent them from interfering with the use of the sidewalk. As well hold that to drive trespassing animals from the capitol grounds would be damaging them for public use. It might, of course, be a great damage to them if they could not obtain feed elsewhere, but the act of driving them away would not be within the constitutional prohibition. I understand the above language quoted from the majority opinion to mean that the court intends to hold that, because the original location of the lines and poles along this street cast an additional

burden upon the adjacent property, therefore each trimming of the trees from time to time, to prevent their infringing upon these lines and poles, will be an additional damage or taking of the property for public use. I think I ought to protest against such holding.

If the occupation of the space in the street allotted to defendant, and the proper maintenance of its lines and poles within that space to the exclusion of the owner of the adjacent lots, in any way affected and lessened the value of the lots, damages to the lots so caused might be claimed or waived when the lines and poles were located and the burden thereof cast upon the adjacent lots. Afterwards damages caused by any improper or unlawful use of the space appropriated, or by negligent or malicious conduct on the part of defendant in the use of its property and rights, could be recovered by the party injured, but not damages caused by the original occupation of the street, and the lawful use of the franchise and location granted to defendant by the city. Damages caused by the original location of the lines and poles, or that necessarily resulted therefrom, are presumed to have been received or waived at the time of the appropriation of the space allotted by the city for that purpose.

NEW MEXICO SUPREME COURT.

COLORADO TELEPHONE COMPANY,
Appt.,

v.

CHARLES G. FIELDS.

(— N. M. —, 110 Pac. 571.)

Contracts — telephone service — construction.

1. An ambiguous or doubtful contract between a telephone company and a municipal corporation in which it is to trans-

Note. — Right of telephone company to require patron to pay for installing or transferring instruments.

No case has been found in which the question as to the right of a telephone company to require a patron to pay for installing or transferring instruments has been squarely presented, as in *COLORADO TELEPHONE CO. v. FIELDS*, though the rulings in the following cases construing rate regulations fixed by the public seem broad enough to control the question here presented:

In *Hockett v. State*, 105 Ind. 250, 53 Am. Rep. 201, 5 N. E. 178, it was held that the word "telephone," used in a statute prescribing the maximum rental charges for the use of such instruments, referred to an apparatus composed of all the usual and

act business, as to the rights of the public under it, will be construed in favor of the public rights.

Same — construction — general intent.

2. To the construction of a contract between a telephone company and a municipality in which it is to transact business, the rule applies that where a contract as a whole discloses a given intention, if certain words or clauses taken literally would defeat the intention, it will be construed, if possible, so as to be consistent with the general intent.

Same — telephone service — short term rate.

3. A contract between a municipal corporation and a telephone company seeking to do business within its limits, that the rental rates for instruments shall be a certain amount per annum, merely fixes a mode of computation, and applies to contracts for a portion of the year as well as to yearly contracts, and therefore the company cannot charge at a higher rate for short term contracts than for yearly ones.

Telephone — transferring instruments — burden.

4. A telephone company whose maximum rentals are fixed by contract with the municipality in which it is to transact its

business cannot enforce a regulation requiring patrons to pay a charge in addition thereto, for installing and transferring instruments.

(August 9, 1910.)

A PPEAL by plaintiff from a judgment of the District Court for Bernalillo County in defendant's favor in an action brought to recover compensation for removing and installing a telephone instrument. Affirmed.

Statement by Parker, J.:

The appellant received from the city of Albuquerque a grant of a privilege and license to erect in, upon, across, and along and under all streets and alleys of the city of Albuquerque, such poles, wires, and fixtures, and to construct such underground conduits, as may be necessary for the operation of a telephone exchange in said city. Section 6 of the ordinance making said grant is as follows: "Sec. 6. This franchise shall be null and void unless the said Colorado Telephone Company, its successors or assigns, shall, within fifteen days

necessary instruments for the transmission and reception of telephonic messages, and not to a single instrument only. To the same effect is *Central U. Teleph. Co. v. Bradbury*, 106 Ind. 1, 5 N. E. 721.

In the *Hockett* Case it appeared that the telephone company contracted to extend its line several miles in the country to the subscriber's residence, and to supply complete equipment, which consisted of several improved instruments to give more efficient service. The contract price included charges for construction and maintenance, and greatly exceeded rental charges fixed by the statute. In a suit to collect the penalty provided by the statute for exceeding the maximum rental charges, it was held no defense that the company could not supply the facilities provided for in the contract, for the rental fixed by the statute, without serious loss, since there was nothing which required a telephone company to construct a new line against its will, or to maintain an old one longer than it may feel inclined to do so in the exercise of a legitimate business discretion.

And in *Chicago Teleph. Co. v. Illinois Mfrs. Asso.* 106 Ill. App. 54, it was held that the words "telephone service" in an ordinance regulating rates for such service, which was accepted by the company upon receiving its franchise, include subsequent improvements which may be made to render the service more efficient.

And in *Johnson v. State*, 113 Ind. 143, 15 N. E. 215, it was held that a fixed charge of \$1 per month, in excess of the rate allowed by the statute, for the use of the telephone by nonsubscribers, which was charged and collected whether the telephone

was used by nonsubscribers or not, and without regard to the number of such persons who may use it, is a violation of the law making it a criminal offense to charge or collect a sum in excess of the amount fixed by the statute. The court said: "It is true that defendant divided the monthly sum of \$4, which he charged and collected from Mr. Lute Wile for the use of 'one telephone only,' into two items, one of which he designated as rental and the other as a monthly charge 'for nonsubscribers;' but, divided the \$4 as he might, and designate the items as he might, the fact remains and is apparent that defendant did thereby 'charge, collect, or receive, for the use of one telephone only, a sum in excess of \$3 per month,' to wit, the sum of \$4 per month. Having done this, the statute says he 'shall be deemed guilty of a public offense,' etc."

But a statutory prohibition against charging or receiving "more than \$50 per annum for the use of a telephone on a separate wire" does not require a telephone company to furnish such additional equipment, as wall cabinet and desk, auxiliary bells, etc., for which separate charges had theretofore been made. *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881.

Upon the somewhat analogous question as to the right to compel consumer to pay for connection with water mains, see note to *Bothwell v. Consumers' Co.* 24 L.R.A. (N.S.) 485.

And as to rules of gas company with respect to meters, see note to *State ex rel. Hallett v. Seattle Lighting Co.* ante, 492.

A. L. R.

from the date of the passage hereof, execute and enter into a contract with the mayor and city council relative to conditions not provided for. . . ." Appellant thereupon entered into a contract with the city of Albuquerque, and, among other things, obligated itself "to maintain telephone rental rates not to exceed the following amounts within a radius of 1 mile of its central office in Albuquerque: . . . One party residence, \$36 per annum." Appellee, a resident of the city of Albuquerque, applied to appellant to install one of its phones in his residence for a term of three months, and, pursuant to the request, the appellant installed a set of its instruments at an expense of \$2.50. Thereafter appellee moved his place of residence to another locality in the city, and applied to the appellant to move its instruments so supplied to him to his last place of residence, and to install the same for a term of three months. The appellant, pursuant to the request, did remove the instruments and install them in the appellee's last-named place of residence at an expense of \$2. At the time appellee applied for the installation of the phone, and when he applied to have the same removed to his last place of residence, he was aware of the existence of a rule theretofore promulgated by appellant, to the effect that on all contracts for less than one year's rental, a charge of \$2.50 would be made for installation and a charge of \$2 for removal of instruments. Appellee refused to make a contract for one year's rental, and refused to pay the installation and removal charges. Thereupon, appellant brought its action for \$4.50 against appellee. Appellee demurred to the complaint upon the ground that the complaint failed to state facts sufficient to constitute a cause of action, which demurrer was sustained by the court, and, the appellant electing to stand upon its complaint, the cause was dismissed at the cost of appellant. From this judgment, appellant appeals.

Messrs. Marron & Wood, for appellant:

The plaintiff's contract with the city of Albuquerque does not prohibit a reasonable installation or removal charge to a person wishing to contract for less than a year's service.

Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881.

A liberal construction should be placed on the contract in favor of the company.

Robbins v. Bangor R. & Electric Co. 100 Me. 496, 1 L.R.A.(N.S.) 963, 62 Atl. 136.

The rule requiring temporary customers to pay the expense of installing or removing

telephones is reasonable and consistent with the contract limitation.

27 Am. & Eng. Enc. Law, pp. 1021, 1037; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. 236; *Western U. Teleg. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Hewlett v. Western U. Teleg. Co.* 28 Fed. 181; *Western U. Teleg. Co. v. McGuire*, 104 Ind. 130, 54 Am. Rep. 296, 2 N. E. 201; 14 Am. & Eng. Enc. Law, p. 930, notes 6 & 7; *Morris v. Atlantic Ave. R. Co.* 116 N. Y. 552, 22 N. E. 1087; *Buffalo County Teleph. Co. v. Turner*, 82 Neb. 841, 19 L.R.A.(N.S.) 693, 130 Am. St. Rep. 699, 118 N. W. 1064.

Messrs. Hickey & Moore, for appellee:

The franchise and the contract should be construed together.

Hannig v. Mueller, 82 Wis. 241, 52 N. W. 100; *Beckman v. Beckman*, 86 Wis. 659, 57 N. W. 1119; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; *Gildart v. Gladstone*, 12 East, 668; *Dubuque & P. R. Co. v. Litchfield*, 23 How. 66, 16 L. ed. 500.

The franchise should be construed liberally in favor of the public, and strictly against the grantee.

Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Dubuque & P. R. Co. v. Litchfield*, supra; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 51, 35 L. ed. 65, 11 Sup. Ct. Rep. 478; *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *The Binghamton Bridge (Chenango Bridge Co. v. Binghamton Bridge Co.)* 3 Wall. 51, 18 L. ed. 137.

Only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest.

Rice v. Minnesota & N. W. R. Co. 1 Black, 358, 17 L. ed. 147; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 666, 24 L. ed. 1038; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 51, 35 L. ed. 65, 11 Sup. Ct. Rep. 478; *Hannibal & St. J. R. Co. v. Missouri River Packet Co.* 125 U. S. 271, 31 L. ed. 735, 8 Sup. Ct. Rep. 874; *Stein v. Bienville Water Supply Co.* 141 U. S. 67, 35 L. ed. 622, 11 Sup. Ct. Rep. 892; *Perrine v. Chesapeake & D. Canal Co.* 9 How. 182, 13 L. ed. 97; *Omaha Water Co. v. Omaha*, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1; *Indiana R. Co. v. Hoffman*, 161 Ind. 593, 69 N. E. 399; *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 60 L.R.A. 822, 66 N. E. 436; *Joy v. St. Louis*, supra; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224.

A municipal corporation has power to

stipulate as to the maximum rates to be charged.

Muncie Natural Gas Co. v. Muncie, *supra*; Boerth v. Detroit City Gas Co. 152 Mich. 654, 18 L.R.A.(N.S.) 1197, 116 N. W. 628; Westfield Gas & Mill. Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033; Zanesville v. Zanesville Gaslight Co. 47 Ohio St. 1, 23 N. E. 55; Allegheny v. Millville, E. & S. Street R. Co. 159 Pa. 411, 28 Atl. 202; People ex rel. West Side Street R. Co. v. Barnard, 110 N. Y. 548, 18 N. E. 354; Detroit v. Detroit City R. Co. 37 Mich. 558.

The rule requiring customers who subscribe for their telephones for a period less than a year, to pay the expense of installing or removing such phone, is a subterfuge for the purpose of evading the contract, and is not reasonable nor is it consistent with the contract.

Central U. Teleph. Co. v. Falley, 118 Ind. 194, 10 Am. St. Rep. 131, note 19 N. E. 604; Missouri ex rel. Baltimore & O. Teleg. Co. v. Bell Teleph. Co. 23 Fed. 539; Cumberland Teleg. & Teleph. Co. v. Hobart, 89 Miss. 252, 119 Am. St. Rep. 702, 42 So. 349; Capital Gas & Electric Light Co. v. Gaines, 20 Ky. L. Rep. 1464, 49 S. W. 462; Louisville Gas Co. v. Dulaney, 100 Ky. 405, 36 L.R.A. 125, 38 S. W. 703; Johnson v. State, 113 Ind. 143, 15 N. E. 217; Central U. Teleph. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721.

Parker, J., delivered the opinion of the court:

From the foregoing statement it appears that there is a single question involved in this appeal, *viz.*, What is a proper construction of the charter and contract of appellant?

Appellee contends, in support of the judgment of the court below, that, in construing a grant of power to corporations of the class of appellant, they are to be strictly construed against the grantee, and that nothing passes but what is conveyed in clear and explicit terms, and cites in support of his proposition Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, and many other cases from the Supreme Court of the United States. Appellant does not deny this proposition, but, on the other hand, expressly admits it as correct. Appellant, however, attempts to draw a distinction between the grant of a right of this nature and a contract made in pursuance of such grant, and, as a condition therefor, he claims that a different rule of construction is to be adopted in regard to the contract. Counsel cites in 30 L.R.A.(N.S.)

support of this proposition Chesapeake & P. Teleph. Co. v. Manning, 186 U. S. 238, 46 L. ed. 1144, 22 Sup. Ct. Rep. 881. We do not deem that case as applicable to the facts in this case. In that case the question was whether an act of Congress prohibiting a charge of "more than \$50 per annum for the use of a telephone on a separate wire" included such additional equipment as a wall cabinet, auxiliary bells, etc. In view of those facts, the court said: "In other words, there is no presumption of an intent to interfere with the management by a private corporation of its property any further than the public interests require, and so no interference will be adjudged beyond the clear letter of the statute." On the other hand, appellee cites Omaha Water Co. v. Omaha, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1, a case in the circuit court of appeals for the eighth circuit, in which the court, after examining numerous cases, extracts from them the following rule, which we adopt, *viz.*: "Where the meaning of a grant or contract regarding such a suspension or regarding any public franchise or privilege, is ambiguous or doubtful, it will be construed favorably to the rights of the public. Where the grant or the contract is clear and plain, it will be protected and enforced." It thus appears that the true rule is that both the grant and the contract, in case of ambiguity or doubt, are to be construed favorably to the rights of the public, and we so hold. In the consideration of this contract, a certain other well-known rule of construction is applicable. Where a contract as a whole discloses a given intention, if certain words or clauses taken literally would defeat the intention, it will be construed, if possible, so as to be consistent with the general intention. 2 Page, Contr. § 1113.

Another consideration entering into a proper construction of this contract is as to the proper definition of the words "per annum" in relation to the rental charge. The words "per annum," of course, usually mean by the year, but they have often been held to have a somewhat different meaning. Thus, in Ramsdell v. Hulett, 50 Kan. 440, 31 Pac. 1092, the words "per annum" in a note were held to mean merely the rate of interest, and had nothing to do with the time when the interest was to be paid. To the same effect, Cooper v. Wright, 23 N. J. L. 200, and Tanner v. Dundee Land Invest. Co. 8 Sawy. 187, 12 Fed. 648. In State ex rel. Abbott v. McFetridge, 64 Wis. 130, 24 N. W. 140, the court held that, in fixing the rate of license for railroads, "per annum" meant in the year preceeding the date of fixing the license, Cassoday, J.,

strongly dissenting, and applying the same construction to the words "per annum" which we do in this case. In *Haney v. Caldwell*, 35 Ark. 156, it was held that a contract to pay an engineer \$2,500 per annum salary was not an employment for a definite period, but that the words "\$2,500 per annum" were a mere measure of compensation. In *State, Stanford, Prosecutor, v. Fisher Varnish Co.* 43 N. J. L. 151, a contract increasing the salary of an employee in the sum of \$104 per annum merely increased the weekly salary, and did not convert the contract into an annual one. The words "per annum" were used only as a mode of computation.

In view of what has been heretofore stated, we may approach the consideration and construction of this contract as follows: A public service corporation is desirous of securing a charter authorizing it to use the streets of the city of Albuquerque for its purposes in the construction, maintenance, and operation of a telephone system. The city council is desirous of protecting the people of the city of Albuquerque from unjust charges for telephone service, and consequently exacted from the public service corporation the contract in question. It is perfectly apparent that the city council did not intend to prescribe maximum rental rates for only a portion of its inhabitants within the district mentioned in the contract. It proposed to prescribe maximum rental rates for all of its people. It therefore did not contract merely for those people who would make an annual contract for a telephone, but the words "per annum" were inserted in the contract as furnishing a mode of computation merely for a rental charge. This evidently was the sense in which the words were used by the city. To conclude otherwise would be to convict the city council of the grossest failure in duty. In view of the rules of construction hereinbefore noted, there seems to be no difficulty whatever in holding that this is the true construction to be placed upon this contract. It is clearly susceptible of such construction, and the rules of construction seem to require it.

Appellant seems to justify the charges for installation and removal on the ground that they are made in pursuance of a reasonable regulation on their part. We cannot understand, however, that a regulation can under any circumstances be adopted by a public service corporation which will result in increasing a rental charge above what has been fixed by contract as a maximum charge. This was attempted in *Johnson v. State*, 113 Ind. 143, 15 N. E. 215, and it was held to be invalid. And the obligation

to furnish telephone service at not to exceed a specified rental charge certainly must include the installation of a usable appliance connected with a system.

For the reasons stated, the judgment of the lower court will be affirmed; and it is so ordered.

Pope, Ch. J., and McFie, Mechem, and Wright, JJ., concur. Abbott, J., having tried this case below, did not participate in this opinion.

PENNSYLVANIA SUPREME COURT.

THEODORE R. CONVERSE, Receiver of Minnesota Thresher Manufacturing Company,

v.

CARRIE G. CLARK PARET, Appt.

(228 Pa. 156, 77 Atl. 429.)

Corporation — stockholders' liability — trustee.

A trustee who permits stock to stand on the register of the corporation in his individual name, without disclosing the fact of the trusteeship, is not entitled to the benefit of a provision in a statute creating a stockholders' liability, that no person holding stock as executor, administrator, guardian, or trustee shall be personally subject to any liability as a stockholder.

(May 2, 1910.)

Note. — Personal liability of executor, administrator, or trustee on corporate stock belonging to estate or trust, but standing in his name.

This note includes only cases where the representative character of one appearing as stockholder is not indicated on the books of the corporation; hence cases are excluded where the word "trustee" or the like appeared in connection with the stockholder's name. Neither does it include the right of the corporation or its receiver or creditors to recover from the *cestui que trust* or the estate of decedent, etc.; nor the right of the trustee, etc., to reimbursement from the trust estate, *cestui que trust*, etc. As to liability of pledgee of stock as a shareholder, see note to *Marshall Field & Co. v. Evans*, J. S. Co. 19 L.R.A.(N.S.) 249, supplementing a note to *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 139.

Cases like *Brown v. Allebach*, 166 Fed. 488 (reversed on point of practice in 103 C. C. A. 16, 179 Fed. 32); *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 27 Pac. 674, 30 Pac. 776; *McKim v. Glenn*, 66 Md. 479, 8 Atl. 130; *Mann v. Currie*, 2 Barb. 294, upholding liability of broker or other person in whose name the stock stood solely for convenience of parties in effecting transfers, are omitted; as are also cases

APPEAL by defendant from a judgment of the Court of Common Pleas for Monroe County in plaintiff's favor, notwithstanding a verdict for defendant, in an action brought to recover certain assessments which had been levied on the corporate stock of the Minnesota Thresher Manufacturing Company, which had become insolvent. Affirmed.

The facts are stated in the opinion.

Mr. F. B. Holmes, for appellant:

When, upon the reorganization of a Minnesota corporation, stock in the reorganized company is issued to the executrix of a deceased stockholder in the original company, and, by the mistake or oversight of the officers of the company, said stock is issued to the executrix in her individual

name, without the addition of the word "executrix," such executrix, upon the insolvency of the company, is not personally liable for the amount of an assessment.

Bernheimer v. Converse, 206 U. S. 510, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755; Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 38.

A discrimination should be made between those who hold stock in their own right and those who hold it merely in a representative capacity or as trustees or by the way of collateral security.

Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

Statutes which impose individual liability on stockholders for the debts of the corporation are to be strictly construed.

like Bird's Case, 4 De G. J. & S. 200, upholding liability of agent who subscribes for stock in his own name, without disclosing the fact of agency.

One to whom stock is issued by the corporation, who allows himself to appear on the books of the corporation as the owner, is liable personally to creditors of the corporation, as though he were the absolute owner, even though he is in fact but a trustee. Baines v. Babcock, supra; Crease v. Babcock, 10 Met. 525 (*dictum*); Grew v. Breed, 10 Met. 576 (holding trustee liable whether trust relationship appeared on books of company or not); Mann v. Currie, supra; Re Central Bank, 18 Ont. App. Rep. 489; King's Case, L. R. 6 Ch. 196.

One who subscribes for shares of stock in his own name is liable on such subscription, though he signed upon a secret trust for another. Ollesheimer v. Thompson Mfg. Co. 44 Mo. App. 172.

Effect of statutes.

One who appears on the register of stockholders as the absolute owner of shares, it being forbidden by statute for a trust to be recorded upon the register, will, as to creditors, be placed upon the list of contributories, although he in fact holds the shares as trustee. Chapman's Case, L. R. 3 Eq. 361 (for, the company itself); Mitchell's Case, L. R. 9 Eq. 363; Ex parte Bugg, 2 Drew. & S. 452.

The person appearing on the books of the corporation as stockholder is the only person to whom a liquidator of the company can look, though he is insolvent, and is trustee for a solvent *cestui que trust*. Hemming v. Maddick, L. R. 9 Eq. 175.

Under a statute providing that "no person holding stock in any corporation as executor, administrator, conservator, guardian, or trustee, . . . shall be personally subject to any liability as stockholder of such corporation," one who holds stock as trustee for another is nevertheless liable as stockholder to creditors, where the trust relationship is not indicated on the books of the corporation. Sherwood v. Illinois 30 L.R.A. (N.S.)

Trust & Sav. Bank, 195 Ill. 112, 88 Am. St. Rep. 183, 62 N. E. 835.

—national banks.

One section (5152, U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 3465) of the national banking law enacts that "persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders." Under this statute one whose representative character appears on the face of the books of the bank is not personally liable. Lewis v. Switz, 74 Fed. 381.

But where the representative character does not appear on the books, one appearing thereon as stockholder is estopped to show, as against creditors, that he is in fact only a trustee. Davis v. First Baptist Soc. 44 Conn. 582, Fed. Cas. No. 3,033; Bundy v. Jackson; 24 Fed. 628; Yardley v. Wilgus, 56 Fed. 965; Lewis v. Switz, supra; Kerr v. Urie, 86 Md. 72, 38 L.R.A. 110, 63 Am. St. Rep. 493, 37 Atl. 789 (where stockholder was a self-appointed attorney or trustee of her infant child).

Or even that he is a trustee for the bank itself. Bundy v. Jackson and Lewis v. Switz, supra.

Thus, where by statute national banks are forbidden to purchase their own shares of stock, except when necessary to prevent loss on a debt previously contracted in good faith, and are required to dispose of it within six months on pain of having a receiver appointed, the president and cashier of a bank, who appear on the books as stockholders, are estopped, when sued as such, to prove that they in fact hold the stock for the bank, and that it was stock originally owned by the bank and put in their names to avoid a forfeiture of the bank's charter, or for any other deceptive or illegal purpose; nor can they avoid liability by retransferring the stock to the bank. Bundy v. Jackson, supra.

So, one who permits his name to appear as stockholder of a national bank, without anything to indicate that the stock was held in trust, cannot show as a defense to

O'Reilly v. Bard, 105 Pa. 569; DeHaven v. Pratt, 223 Pa. 633, 72 Atl. 1068.

Defendant is not estopped from proving that she held the stock as executrix.

Burgess v. Seligman, *supra*; Matthews v. Albert, 24 Md. 527; McMahon v. Macy, 51 N. Y. 155; Marshall Field & Co. v. Evans, J. S. & Co. 106 Minn. 85, 19 L.R.A. (N.S.) 249, 118 N. W. 55; May v. Genesee County Sav. Bank, 120 Mich. 330, 79 S. W. 630; Colonial Trust Co. v. McMillan, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933; Cook v. Carpenter, 212 Pa. 177, 61 Atl. 805; Tourtelot v. Stolteben, 101 Fed. 362; Litchfield Bank v. Peck, 29 Conn. 384; Thomas v. Whallon, 31 Barb. 172; Billings v. Robinson, 94 N. Y. 415; Erie & W. Pl. Road Co. v. Brown, 25 Pa. 156; Pittsburgh & C. R. Co. v. Stewart, 41 Pa. 54; McCully v. Pittsburgh & C. R. Co. 32 Pa. 25; Wickham v. Twaddell, 25 Pa. Super. Ct. 188; Sanborn v. VanDuyne, 90 Minn. 215, 96 N. W. 41; 16 Cyc. Law & Proc. p. 733; Stroup v. McCloskey, 2 Sadler (Pa.) 427, 10 Atl. 421.

Messrs. Wilton A. Erdman and George H. Butler for appellee.

Stewart, J., delivered the opinion of the court:

James B. Clark, a citizen of the state of Connecticut, died in August, 1894. By his last will he appointed his wife, the defendant in this action, executrix, and gave her the full use and control of his entire estate until his only son should arrive at the age of twenty-one years, at which period the will directed that whatever estate then remained should be divided equally between widow and son. At the time of his death Clark was the owner of forty shares of the capital stock of the Northwestern Manufacturing & Car Company, a corporation organized under the laws of the state of Minnesota. In 1884 the Thresher Manufacturing Company, also a Minnesota corporation, acquired the assets of the manufacturing and car company, and substituted its own stock for that of the former. The defendant, as executrix of the will of Clark, surrendered the certificates of stock that were in her husband's name, and received in exchange certificates for forty shares in the thresher company in her own name,

an assessment by a receiver, that it was taken by the bank in part payment of an indebtedness due the bank by a stockholder, to save itself from loss, and was put in his name to hold in trust for the bank. *Lewis v. Switz, supra*.

But one appearing on the books of a national bank as the owner of stock, but who in fact is merely a trustee, cannot be held liable as stockholder for the debts of the bank, where the real owner was sued as 30 L.R.A. (N.S.)

Carrie G. Clark. She had given no directions as to the transfer, but the stock so issued to her was carried on the stock ledger and also upon the stub of the certificate book as the stock of Carrie G. Clark. The promoters of the new company organized a voting trust, and in December, 1887, the defendant delivered to the trustees the certificates that had been issued to her in her own name, signing at the same time an agreement in which she averred that she individually was the owner of the stock, and receiving in exchange a trustees' receipt which recited that the stock was held by them for Carrie G. Clark. Upon surrender of the trustees' certificate in 1894, a certificate for forty shares of the capital stock in her then name, Carrie G. Clark Paret, was issued and receipted for by her. Once in 1886, and again in 1897, defendant voted by proxy the stock standing in her name. In 1901, at the suit of a creditor, the Minnesota Thresher Company was adjudged insolvent, and the plaintiff in this action was appointed receiver. Under the laws of Minnesota, stockholders in corporations such as this are held liable to the amount of their stock at its par value. The courts directed two assessments on the capital stock of the company, one in 1902, of 36 per cent, and one in 1907, of 64 per cent. At these dates the defendant's home was in Monroe county in this state. Action was there brought against her for the recovery of these assessments. The defense set up was that the defendant was not the beneficial owner of the stock, but that the same belonged to the estate of her deceased husband; that the stock had not been issued in her name at her direction; that she continued to hold it in her name because unadvised that such fact indicated individual ownership on her part; that she had no knowledge of how it was registered on the books of the corporation; that she never asserted ownership over it; that as executrix of her husband's will she had fully accounted for it,—subsequent, however, to the insolvency of the corporation,—and had transferred it to her son, who was a legatee under the will. On the trial of the case defendant testified very fully in support of these averments contained in the affidavit of defense, and nothing was offered by way of contradiction.

stockholder and judgment obtained against him, even though execution was returned wholly unsatisfied, as both cannot be held. *Yardley v. Wilgus, supra*.

The statute above quoted refers not alone to a trustee appointed by a will or by the order of a court or judge, but the relation of trustee and *cestui que trust* may exist without such formal action. *Lucas v. Coe*, 86 Fed. 972.

R. A. E.

It was submitted to the jury to determine the question of ownership of the stock; and it was further submitted to them—unnecessarily, since there were no facts in dispute—to determine whether defendant was estopped from claiming that she was not the owner of the stock by reason of anything she had done or failed to do in connection with the certificate which had been issued to her.

Whether an estoppel results from established facts is a question for the determination of the court. *Lewis v. Carstairs*, 5 Watts & S. 205. On both issues the finding was for the defendant. A motion for judgment *non obstante* followed. The court in a lengthy opinion filed sustained the motion, and directed judgment to be entered for the plaintiff, on the ground that, under the statutes of Minnesota as construed by the highest judicial tribunal of that state, "the liability of a person to assessment on stock in an insolvent corporation is fixed by the names in which the stock stands on the stock register of the corporation when it ceases to be a going concern, irrespective of who is the real or absolute owner thereof, subject, of course, to the knowledge of the person sought to be charged of how the certificates are actually issued, or to acts which make the person a party to its appearing on the stock register." It is conceded that, as a general statement of the law of Minnesota governing the liability of stockholders of insolvent corporations, this is correct; but the applicability of the general rule to cases such as that under present consideration is denied. Section 13 of the General Statutes of Minnesota of 1840-1858 reads as follows: "No person holding stock in such corporation as executor, administrator, guardian, or trustee, and no person holding stock as collateral security, shall be personally subject to any liability as a stockholder of such corporation; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estates and funds in the hands of such executor, administrator, guardian, or trustee shall be liable in like manner as the testate or intestate would have been if he had been living, or the ward or person interested in such trust funds would have been if he had been competent to act, and held the same stock in his own name." In repeated decisions the supreme court of the state has held that the exemption from liability allowed by this statute when the stock is held as collateral security extends only to cases where the fact of such collateral holding appears on the stock register. Of the cases cited by the learned trial judge, we need only refer to *Dunn v. State* 30 L.R.A. (N.S.)

Bank, 59 Minn. 221, 61 N. W. 27; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Marshall Field & Co. v. Evans J. S. & Co.* 106 Minn. 85, 19 L.R.A. (N.S.) 249, 118 N. W. 55.

That no case has been found where an executor has been held liable individually for an assessment on stock belonging to an estate in his hands, but which was registered in his own name, is without significance. It means nothing more than that no case involving such fact has yet arisen. The conclusion is irresistible that the construction placed on the statute with respect to the rights of those holding stock as collateral security must necessarily be the same with respect to the rights of one holding as executor, guardian, or trustee. It is impossible to find any distinction between them in the statute, and no reason can be suggested why they should be distinguished. The learned trial judge was entirely correct in accepting it as the settled law of Minnesota, upon the authorities cited, that the exemption allowed by the statute can be claimed only when the registry of the stock discloses that it is held by the party to whom the certificate had been issued, not as owner, but as pledgee or trustee.

A like statute with this, in the state of Missouri, has received similar judicial construction there, a fact unimportant except that the construction placed on the statute by the Missouri court met with disapproval and dissent in the Supreme Court of the United States. The reference is to the case of *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. There the circuit court had sustained the right of a party registered as the holder of stock to show that in point of fact it was held as collateral security. On appeal the United States Supreme Court affirmed the circuit court, notwithstanding the supreme court of Missouri had meanwhile decided in several cases that the registry as it stood was conclusive against the party; the Supreme Court of the United States asserting its right to disregard these decisions, and its unwillingness to be bound by them. The basis of this affirmation was that, when the circuit court rendered its decision in the case, the question raised had not then been adjudicated by the Missouri supreme court, and the former court having adopted its own interpretation of the law applicable to the case, as it had a right to do, such interpretation was not to be disturbed because of the fact that a different interpretation had been adopted by the state court after the right had accrued to the circuit court. True, the case holds that a construction of the statute which would give the holder of the stock the right of exemp-

tion from liability when it is shown that, notwithstanding the registry of it in his own name, he holds it as collateral, is supported by the better reason, and refers approvingly to decisions in Maryland and New York where similar statutes have been so construed; but the court makes it very clear that its decision, though contrary to that of the Missouri supreme court, is not an attempt to overrule or set aside the latter, except as a controlling authority in the particular case then under consideration. The opinion proceeds: "Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state Constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But, where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt." As thus explained, the case of *Burgess v. Seligman*, supra, is not an authority governing in the present issue. It is enough to know that the Minnesota courts have repeatedly, since the decision in *Burgess v. Seligman* (1882), reasserted their adherence to the construction they originally gave this state statute, notably in *Harper v. Carroll*, supra, decided in 1896. The suggestion that the Minnesota cases holding a pledgee liable where the registry discloses nothing inconsistent with his ownership of the stock rests on the fact that, when rendered, there was no statute in existence exempting pledgees from liability, is simply an unsupported suggestion, and nothing more. If the statute which we have above quoted was ever

either wholly or in part repealed, so far as it relates to holders of stock as collateral, it was for the appellant to show the fact. In *Marshall Field & Co. v. Evans, J. S. & Co.* supra, decided in 1908, there is a clear recognition of the existence of the statute. It is there said: "It is well settled that one to whom corporate stock has been transferred in pledge or in trust or as collateral security for money loaned, but who appears on the books of the corporation as the general owner thereof, is liable as a stockholder for the debts of the corporation." The language here used is significant not only with respect to the existence of the statute, but it connects trustees with pledgees in such a way as to leave no doubt that the construction given the statute applies equally to both.

Aside from these controlling considerations, we see no equity in the defense here attempted on the facts as established. That question, however, need not be discussed. It is sufficient that under the laws of Minnesota the defendant is estopped from asserting ownership of the stock in anyone but herself. The judgment is affirmed.

PENNSYLVANIA SUPREME COURT.

R. B. ALLEN

v.

TUSCARORA VALLEY RAILROAD COMPANY, Appt.

(— Pa. —, 78 Atl. 34.)

Limitation of action — amendment of complaint — change from common law to statutory action.

1. The complaint in an action by a railroad employee for injuries caused by failure of the company to use cars equipped with couplers in ordinary use cannot, after the limitation period has elapsed, be amend-

Note. — Amendment of pleading after limitation period by changing from common law to statute, or vice versa, or from statute of one jurisdiction to statute of another.

The earlier cases as to amendment after limitation period by changing from common law to statute, or vice versa, are covered by the note to *Missouri, K. & T. R. Co. v. Bagley*, 3 L.R.A. (N.S.) 287.

There seems to be some conflict among the different jurisdictions as to whether a cause of action at common law and one based upon a statute, or a cause of action based upon a statute of one state and one based upon a statute of another state or a Federal statute, where the basic transaction is the same, are the same cause of action or are different and distinct from each other. If they are the same, an amend-

ed so as to charge failure to comply with the act of Congress requiring interstate railroad companies to equip their cars with automatic couplers, and depriving them of the defense of assumption of risk.

Pleading — departure — change from common law to statutory use.

2. A departure arises where a complaint charging liability of a railroad company to an employee for injuries caused by the use of couplers not of the ordinary type is amended so as to show that defendant was engaged in interstate commerce, and did not use the couplers required by the act of Congress.

(July 1, 1910.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Juniata County in favor of plaintiff in an

ment changing from one to the other after the statute of limitations has run is proper, and relates back to the time of the original pleading, so as to avoid the bar of the statute; but if they are held to be different and distinct from each other, the amendment, in some jurisdictions, as indicated in ALLEN v. TUSCARORA VALLEY R. Co., is not allowed after the limitation period has elapsed; while in others it is permitted, but a plea of the statute of limitations is thereafter allowed as a bar to recovery upon the amendment.

Common law to statute, or *vice versa*.

Thus, where an original complaint alleged in one count the negligent causing of the death of plaintiff's intestate by defendant's failure to provide a reasonably safe and secure place for him to perform the duties of his employment, a new count under a statute, charging that the negligent death of the intestate resulted from obeying orders to which it was his duty to conform, may be added by amendment after the expiration of the limitation period, and relates back to the filing of the original complaint, so as to cut off the defense of the statute of limitations. Alabama Consol. Coal & I. Co. v. Heald, 154 Ala. 580, 45 So. 686, second appeal, 53 So. 162. In this case, the court said: "It will be observed that the wrong complained of is identical,—the wrongful death of the intestate,—whether the recourse sought is under the common law or statute, or both; and a judgment on either count would be a complete bar to a recovery in the second suit."

And in Townes v. Dallas Mfg. Co. 154 Ala. 612, 45 So. 696, an action for personal injury to an employee, the court, overruling defendant's contention that the trial court's error in sustaining an objection to an amendment to the complaint after the limitation period was harmless, as the amendment would have been subject to the plea of the statute of limitations, said: "The amendment offered was within the *lis pen-* 30 L.R.A. (N.S.)

action brought to recover damages for personal injuries alleged to have been caused by defendant's negligent adoption and use of improper couplings. Reversed.

The facts are stated in the opinion.

Mr. F. M. M. Pennell, for appellant:

In permitting amendments to declarations, the cause of action must remain substantially the same.

Steffy v. Carpenter, 37 Pa. 41; Royse v. May, 93 Pa. 454.

The court will not permit a plaintiff to change or enlarge his ground by an entirely new and different cause of action, especially when, by the statute of limitations, it would work an injury to the opposite party.

Trego v. Lewis, 58 Pa. 463.

When an amendment substitutes a new

dens, and related back so as to cut off the statute of limitations, unless the original complaint was barred. The gravamen of the action is failure of the defendant to properly light its premises while the plaintiff was at work . . . which is the cause of action as set forth in the original as well as the amended complaint. It may be that counts 3 and 4 were attempted under the statute, and that the amendment is framed under the common law; but this was not necessarily such a departure as to prevent its relating back."

So, where an original complaint in an action for personal injuries stated a cause of action within a statute, based upon the negligence of an employee of defendant to whose orders plaintiff was bound to conform, and did conform, and who ordered plaintiff to work in a place of danger outside of his employment, an amendment of the complaint, after such statute has been declared unconstitutional, and after the limitation period for an original action has expired, which amounts to but a restatement of the facts in the original complaint, going to show a right of action in favor of plaintiff under the common law, relates back to the time when the action was commenced by the original complaint, and is not subject to the bar of the statute of limitations. Oolitic Stone Co. v. Ridge (Ind.) 91 N. E. 944. The court said: "Both the former and the present complaint involve the same transaction and injury. The gravamen of the action, as disclosed by both complaints, is the personal injury sustained by the appellee, due to the fact or facts that he was by appellant ordered outside of his employment, to work in an unsafe and dangerous place, without any warning or admonition in respect to that fact, and by reason thereof suffered the injuries of which he complains. It is manifest that a judgment rendered upon the former complaint would bar a recovery on the amended complaint."

But where, under an amended declaration in an action for wrongful death, based upon a statute, and alleging a cause of action in

and different cause of action, and debars the defendant of the privilege of pleading the statute of limitations, it will not be allowed.

Tyrrill v. Lamb, 96 Pa. 464; *Smith v. Smith*, 45 Pa. 403.

The original narr. and that filed under the act of assembly for treble damages set forth different causes of action.

Dunbar Furnace Co. v. Fairchild, 121 Pa. 563, 15 Atl. 656, 128 Pa. 485, 18 Atl. 443, 444, 17 Mor. Min. Rep. 242.

Although the power of amendment is given by the act of assembly, it should be exercised with due regard to the rights of both parties. It should not be allowed so as to deprive the opposite party of any valuable rights.

Tyrrill v. Lamb, supra; *Trego v. Lewis*, 58 Pa. 468; *Kaul v. Lawrence*, 73 Pa. 410; *Kille v. Ege*, 82 Pa. 102, 12 Mor. Min. Rep. 654; *Leeds v. Lockwood*, 84 Pa. 70.

The act of Congress of March 2, 1893, chap. 196, changes the common law in removing the defense of assumption of risk.

Johnson v. Southern P. Co. 54 C. C. A. 508, 117 Fed. 462.

favor of the deceased's parents, it was necessary to prove that the cause of the accident was wilful on the part of the defendant. but it was not necessary to allege or prove that deceased had exercised due care, or was not guilty of contributory negligence, a further amendment, after the limitation period had expired, making the administrator plaintiff, and basing the cause of action upon common-law liability, and under which it is necessary to allege and prove that deceased was in the exercise of due care, and had not assumed the risk or been guilty of contributory negligence, substitutes a new and different cause of action, and is subject to a plea of the statute of limitations. *Bradley v. Chicago-Virden Coal Co.* 231 Ill. 622, 83 N. E. 424.

So, where, under certain counts of a declaration as originally filed in an action for personal injuries, charging defendant with common-law negligence merely, it was necessary, in order to recover, that plaintiff prove that he himself had not assumed the risk, and was in the exercise of due care for his own safety, an amendment of such counts, made after the limitation period, under which it is incumbent upon plaintiff to prove that his injury resulted from the wilful failure of the defendant to comply with certain provisions of a statute, and under which the defenses of assumed risk and contributory negligence are not available to defendant, states a new cause of action and is to be regarded as a new suit, begun when such amendment is filed, and is subject to a plea of the statute of limitations in bar. *Henderson v. Moveaqua Coal Min. & Mfg. Co.* 145 Ill. App. 637.

And in *Wasson v. Boland*, 136 Mo. App. 622, 118 S. W. 663, where plaintiff had

Messrs. J. Howard Neely and James M. Barnett & Son, for appellee:

If the amendment is merely a restatement of substantially the same cause of action, though in a different form, the variance in form will not prevent the amendment.

Stoner v. Erisman, 206 Pa. 601, 56 Atl. 77; *Schmelzer v. Chester Traction Co.* 218 Pa. 32, 66 Atl. 1005.

The cause of action is the particular matter for which the suit is brought, and when the object of an amendment is not to forsake this, but to adhere to it, and effect a recovery upon it, it is the duty of the court, when the merits of the case cannot otherwise be reached, to permit the amendment.

Rodrigue v. Curcier, 15 Serg. & R. 81; *Erie City Iron Works v. Barber*, 118 Pa. 17, 12 Atl. 411; *Cassell v. Cooke*, 8 Serg. & R. 268, 11 Am. Dec. 610; *Yohe v. Robertson*, 2 Whart. 155; *Maus v. Montgomery*, 10 Serg. & R. 192; *Sandback v. Quigley*, 8 Watts, 460; *Steffy v. Carpenter*, 37 Pa. 41; *Knapp v. Hartung*, 73 Pa. 294.

The amendment made no change in the

filed a demand against the estate of a decedent, based on a bank certificate of deposit, alleging merely that the bank had been a copartnership and decedent the owner of stock therein, and thereafter, and after the period of limitation had expired for the presentation of claims against the estate, filed without objection an amended petition, the object of which, as of the original, was to hold the estate on the ground of partnership, but which pleaded additional facts and statutes upon which such liability of the estate of decedent was predicated, its purpose being to set forth that the former corporate life of the bank had ceased by virtue of a statute when it received the deposit while conducting the bank as a going concern, as had been done for several years, without any intention to wind up its affairs, and that by reason thereof the stockholders became merely partners, doing a banking business as a partnership, and that deceased, under another statute, was liable as one of such partners.—it was held that the amendment was the substitution of a new action and was barred by the statute of limitations. The court said: "One test constantly made is whether evidence to prove one will support the other. . . . The rule is clearly illustrated by the decision in *McHugh v. St. Louis Transit Co.* 190 Mo. 85, 88 S. W. 853, where it is held that a complaint for damages for common-law negligence and one for statutory negligence are two different causes of action, and cannot be joined in the same count, though they relate to the same injury. It can be said of this amendment . . . that 'that proof required by one petition was entirely different from the proof required by the other.

cause of action or in the law applicable to the facts of the case. The several acts of Congress formed a part of the law applicable to the case, of which the court was bound to take notice, whether pleaded or not.

Drake v. Philadelphia & R. R. Co. 5 Pa. Co. Ct. 24; Erie City v. Schwingle, 22 Pa. 390, 60 Am. Dec. 87.

Mestrczat, J., delivered the opinion of the court:

This was an action of trespass at common law, brought July 1, 1904, by the plaintiff, a brakeman in the employ of the defendant company, to recover damages for injuries received in its service while he was in the act of coupling cars. The statement was filed with the *præcipe*, and averred, *inter alia*, as follows: "It then and there was the duty of defendant corporation to adopt and use couplings for its cars of ordinary character and reasonable safety, according to the usages, habits, and ordinary risks of the business; but the defendant corporation, not regarding its duty in the premises, at or about February

29, 1904, at Juniata county aforesaid, carelessly and negligently adopted and used the pin and link coupler, a kind of coupler not then in ordinary use, but more dangerous than the usual and ordinary coupling employed by railroads, by reason whereof plaintiff, while engaged in coupling cars so as aforesaid supplied and fitted with the pin and link coupler, due to the negligence of defendant corporation, in the lawful performance of his work, and exercising due and proper care, on or about February 29, 1904, aforesaid, at the county of Juniata, was caught by the left hand between the two protruding irons, called 'bull noses,' parts of the couplings, and thereby his left hand was badly cut, bruised, lacerated, and torn," etc.

In December, 1908, a rule was granted on the defendant to show cause why the statement should not be amended; and on January 21, 1909, the rule was made absolute, and the statement was amended so as to read, *inter alia*, as follows: "That said defendant corporation at the time of committing the grievances hereinafter mentioned was engaged in interstate commerce by

And this difference was as to the character of the proof, and not as to the quantity of proof only. The entire proof required by the original petition would not have been sufficient under the amended petition."

Statute of one jurisdiction to statute of another.

Where an original declaration in an action for the wrongful death of an employee on a steamship on a voyage on the high seas was based upon statutes of the state where the action was brought, but one count thereof stated every substantial fact necessary to create a cause of action under the statutes of another state which is the domicile of the defendant corporation, an amended declaration based upon the statutes of the latter state, and filed after the limitation period fixed therein, as it does not change the essential nature of such original count, nor set up a new cause of action, relates back to the time of filing the original declaration, and avoids the bar of the limitation. *De Valle Da Costa v. Southern P. Co.* 100 C. C. A. 313, 176 Fed. 843.

But where an action for wrongful death was brought by deceased's widow, as such, under a state statute giving her alone the right of action, for her sole benefit, an amendment of the declaration changing the relation in which she sues from that of widow to that of administratrix, for the benefit of herself as widow and her children, and changing her cause of action to one under the Federal employers' liability act, giving the right of action against an interstate carrier for the death of an em-

ployee to the personal representative of deceased alone, for the benefit of his widow and children, or dependent next of kin,—while permissible, yet, if made after the limitation period against actions under the latter statute, does not relate back to the time of the commencement of the original action, so as to avoid the bar of the statute of limitations, being in effect the bringing of a new action under the Federal statute. *Hall v. Louisville & N. R. Co.* 157 Fed. 464, affirmed in 98 C. C. A. 664, 174 Fed. 1021. The court said: "A recovery in her name alone, under the state statute, would not be a bar to another action against this defendant, growing out of the same wrongful act, in a suit under the Federal statute," and "her recovery as widow would be no bar to a recovery under the Federal statute, at least, in so far as her three children are concerned, who were neither a party to, nor interested in, any suit in the name of the widow as such. . . . The amendment is a departure, therefore, from law to law. The amendment changing the beneficiary is in effect the bringing of a new suit."

And in an action in a state court, based upon a statute of the state, to recover for the death of plaintiff's intestate, which occurred in Canadian waters, and was alleged to have been caused by the negligence of defendant, a corporation of said state, a writ of mandamus will not be granted to compel the court to permit the filing of an amended declaration based upon a Canadian statute, after the expiration of the limitation periods prescribed by the latter statute. *Wingert v. Carpenter*, 101 Mich. 395, 59 N. W. 632.

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railroad and a common carrier, and did haul on its line cars used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, none of its cars being so equipped with couplers as aforesaid, in violation of act Congress, March 2, 1893, chap. 196, § 2, 27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174, and its supplements; that the train aforesaid was not composed of four-wheel cars or eight-wheel standard logging cars where the height of such cars from top of same to center of coupling does not exceed 25 inches, used exclusively for the transportation of logs." The defendant objected to the allowance of the amendment on the ground that it introduced a new and different cause of action which was barred by the statute of limitations. The first assignment alleges error in making the rule absolute and permitting the plaintiff to amend the statement of claim. As we are of opinion that this assignment must be sustained, the other assignments become immaterial and need not be considered or determined. The amendment to the statement of claim, allowed by the court, brought the case within the act of Congress of March 2, 1893, and alleges that the cars were equipped with couplers in violation of the act. This statute was enacted, as its title declares, to promote the safety of employees and travelers upon railroads engaged in interstate commerce, by compelling common carriers to equip their cars with automatic couplers, etc., and makes it unlawful for a common carrier to haul or permit to be hauled any car used in moving interstate traffic not equipped with couplers coupling automatically by impact. Section 8 of the act provides: "That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge." The original statement, as observed, was at common law, and alleges that the plaintiff's injuries resulted from the defendant company having carelessly and negligently adopted and used the pin and link coupler, more dangerous than the usual and ordinary coupling employed by railroads. Prior to the act of Congress, employees of common carriers assumed the risks and dangers naturally and ordinarily incident to their employment, which included the risks and hazards arising from the performance of their duty in

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coupling cars. If the employee was injured in the discharge of that duty, and it was a risk which he assumed, the carrier was not responsible. But the act changes the liability of the carrier when engaged in interstate commerce, and what was lawful at common law before the passage of the act is made unlawful by the act. The statute abrogates the common law *pro tanto*, and imposes a liability on the carrier different from that imposed by the common law. The latter gives the employee a right of action for an injury resulting from a negligent act exposing him to a danger which he did not assume in entering the carrier's service; but the statute deprives the carrier of the protection and defense of the risk assumed by the employee, which it had at common law. The act of the carrier in failing to equip its cars with automatic couplers is declared to be unlawful, and is forbidden under the penalty, imposed by § 8, that the employee, if injured, shall not be deemed to have assumed the risk of his employment. The act of Congress is the basis of the plaintiff's claim, as laid in the amended statement, while, in the original statement, the basis of the claim is the failure of the carrier to perform its common-law duty to him as its employee. The amendment is not a restatement, or the statement in a different form of the same cause of action, but the averment of a statutory cause of action in which the liability is different and greater than in an action at common law. It deprives the defendant of a valuable right, viz., the defense of the assumption of risk by the plaintiff, which is not permissible. *Kaul v. Lawrence*, 73 Pa. 410. We think it clear that the amendment to the statement of claim introduced a new and different cause of action, which was barred by the statute of limitations, and therefore, under the well-settled rule in this state, it should not have been allowed.

In support of the contention that the amendment did not change the cause of action, the learned counsel for the plaintiff claims that the language of the original statement was not changed in any way by the amendment, which, it is alleged, consisted simply of an addition to the original statement, and directed attention to the act of Congress, and its supplement, as being applicable to the facts of the case. But, it will be observed, in the amendment there was a departure, not only from the facts as laid in the original statement, but also from the law as applicable to the facts in the original statement. In other words, there was a departure, not only from fact to fact, but from law to law. A departure in pleading may be either in the substance

of the action or defense, or the law on which it is founded. 2 Saunders, Pl. & Ev. *807. The original statement, it is true, averred the injuries of the plaintiff and the alleged negligent act of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce, or that the defendant's cars were equipped with couplers in violation of the act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the tests in determining whether the amendment introduces a different cause of action. *Wabash R. Co. v. Bhymer*, 214 Ill. 579, 73 N. E. 879. It is apparent that, without this amendment, the act of Congress could have had no place in the case, and could not have been invoked to deprive the company of its defense that the plaintiff assumed the risks or dangers of his employment. If, however, all the facts necessary to bring the case within the act of Congress had been included in the original statement, it would have been insufficient as a statement under the act without a reference to the statute. *Bolton v. Georgia P. R. Co.* 83 Ga. 659, 10 S. E. 352. It is also true that if, as claimed by the plaintiff, all the facts necessary to sustain a recovery on the amended statement were set forth in the original statement, the amendment would still be a change or departure from the original statement, not from fact to fact, but from law to law,—from an action founded on the common law to one founded on a statute abrogating the common law, which is equally effective to prevent an allowance of the amendment. In such case the plaintiff bases his right of recovery upon other and different law, instead of other and different facts, and it constitutes a departure from the original cause of action. *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 193, 47 C. C. A. 615, 108 Fed. 116.

Our conclusion is supported by numerous decisions in this and other jurisdictions in which the same doctrine has been announced and applied. *Dunbar Furnace Co. v. Fairchild*, 121 Pa. 563, 571, 15 Atl. 656, 657, was a common-law action of trespass to recover damages for cutting and carrying away timber standing on the plaintiff's land. After the statute of limitations had run, the court allowed the plaintiff to amend his statement so as to permit him to recover treble damages under the act of March 29, 1824, for cutting and converting timber trees. This court reversed the common pleas, and held that the amendment introduced a new cause of action,

and should not have been allowed. In the opinion it is said: "It has been many times decided that, in order to recover under that act [of 1824], it is necessary to declare specially upon its terms, and that a common-law action of trespass will not suffice. . . . The difficulty with the present case is that there is not only no conclusion, 'contrary to the form of the statute,' etc., but there is no allegation of any other kind that the action is brought under the statute." The case was again in this court (*Fairchild v. Dunbar Furnace Co.* 128 Pa. 485, 498, 18 Atl. 443, 444, 17 Mor. Min. Rep. 242), and again it was held that the amendment could not be allowed. In delivering the opinion, Mr. Justice Clark said: "This action of trespass, being brought at the common law, was brought to redress the injury done, by an award of compensation; but the action under the statute is not for a redress of the injury. It is to recover a penalty prescribed by the statute, which, as a police regulation, is intended for the protection of real property from waste by those who either negligently or wilfully intrude upon the lands of others. The cause of action accruing under this statute, although arising on the same matter, is different from that accruing at common law, and whilst, perhaps, they may be joined in one action, there can be but one recovery. An amendment to a declaration will not be allowed if a new cause of action is thereby introduced."

In *Bolton v. Georgia P. R. Co.* 83 Ga. 659, 660, 10 S. E. 352, 353, an action by an employee against the defendant company, it was said, in refusing an amendment to the statement: "If, however, he commences his action and relies upon his common-law right, we do not think he can amend his common-law declaration by setting out the statute and relying upon that for his right to sue and for his recovery. In this case the original declaration was founded upon the common-law right. Nothing was even intimated therein to the effect that he relied upon the statute. According to the decision in *Exposition Cotton Mills v. Western & A. R. Co.* 83 Ga. 441, 10 S. E. 113, and cases cited therein, made at this term, this amendment would have added a new and distinct cause of action." This case also meets the argument of the plaintiff's counsel in the present case, that the language of the original statement was not changed by the amendment. The court says (page 661 of 83 Ga.): "But it is argued by counsel for plaintiff in error that all of the facts required by the Alabama statute to be pleaded were already pleaded in the declaration, and that simply to mention the statute in the amendment, and recite

the same facts therein, would not be a new cause of action. While it may be true that all the facts required by the Alabama statute had been set out in the declaration, still those facts alleged in the common-law declaration were mere surplusage and had no legal vitality, and would have been so regarded by the court trying the case. It required the pleading of the statute to give them any vitality at all. As we have seen, that statute is not mentioned or intimated in the original declaration, and hence to have allowed the amendment offered would have been allowing the introduction of a new cause of action."

Union P. R. Co. v. Wyler, 158 U. S. 285, 295, 39 L. ed. 983, 990, 15 Sup. Ct. Rep. 877, 881, was an action by an employee against a railroad company, based upon the common law of master and servant, and was brought to recover damages for an injury which had happened to the plaintiff in Kansas while on duty there. It was held that an amended petition which changes the nature of the claim, and bases it upon a statute of Kansas giving the employee in such a case a right of action against the company, in derogation of the common law, is a departure in pleading, and sets up a new cause of action. The trial court allowed the amendment, and in reversing the judgment, Mr. Justice White, in an exhaustive opinion, discusses the right to amend an original statement in such cases. He says, *inter alia*: "A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and therefore a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. . . . It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recovery were contained

in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right."

We are all of opinion that the amendment allowed by the court below introduced a new cause of action, barred by the statute of limitations. The first assignment of error must, therefore, be sustained.

The judgment is reversed, with a *venire facias de novo*.

WASHINGTON SUPREME COURT.

HUGH MONROE and Wife, Respts.,

v.

W. C. STAYT and Wife, Appts.

(57 Wash. 592, 107 Pac. 517.)

Landlord and tenant — estoppel — lease to husband — wife's community.

1. That a wife who, with her husband, was in possession of land as a community, claiming title when he took a written lease for the property from a rival claimant, refused to sign it, will not prevent its constituting an estoppel upon her right to set up the community title in an action for unlawful detainer, where she remained in possession of the property under the lease until its expiration.

Same — statutory provision — effect.

2. An estoppel on a wife, who with her husband, was in possession as a community of real estate when he took a written lease of the property from another claimant, which she did not sign, to deny the title of the landlord, is not prevented by a statute providing that he should not sell, convey or encumber the community real property unless she joined in the deed.

(March 9, 1910.)

Note. — Estoppel of tenant's wife to deny landlord's title.

It is the purpose of this note to review the cases involving a discussion of the question as to whether the estoppel of the husband as tenant to deny the landlord's title will affect the wife. And this treatment excludes cases where for any reason the rule of estoppel as between tenant and landlord would not apply to the husband tenant himself; and also cases involving the question whether particular acts of the wife, other than those in relation to the tenancy, will estop her.

APPEAL by defendants from a judgment of the Superior Court for Stevens County in plaintiffs' favor in an action brought to recover possession of certain real estate. Affirmed.

The facts are stated in the opinion.

Messrs. C. J. Webb and W. C. Stayt for appellants.

Messrs. Post, Avery, & Higgins and Joseph & Grinstead, for respondents:

In all possessory actions between landlords and tenants in respect to demised premises, a tenant, as long as he remains in possession of the demised premises, is absolutely precluded from denying the validity of the title under which he entered or agreed to hold.

Taylor, Land. & T. §§ 682, 697; Knowles

v. Murphy, 107 Cal. 107, 40 Pac. 111; Mason v. Wolff, 40 Cal. 246; Felton v. Mil-lard, 81 Cal. 540, 22 Pac. 750, 21 Pac. 533; Meyer v. Beyer, 43 Wash. 368, 86 Pac. 661; Gore v. Altice, 33 Wash. 335, 74 Pac. 556; Morris v. Healy Lumber Co. 33 Wash. 451, 74 Pac. 662; Jochen v. Tibbells, 50 Mich. 33, 14 N. W. 600; Parrott v. Hungel-burger, 9 Mont. 526, 24 Pac. 14; Willis v. Harrell, 118 Ga. 906, 45 S. E. 794.

A lease does not have to be signed by a lessee if he accepts it and pays rent, or holds possession under it.

Taylor, Land. & T. § 77.

The interest of the lessee is only a chattel interest, and the wife of the lessee does not have to join with the husband in order to effect any transfer or assignment of it.

The authorities are few, and in the main support the decision announced in *MONROE v. STAYT*.

Thus, in *Russell v. Erwin*, 38 Ala. 44, where the husband and wife jointly accepted a lease, it was held that the estoppel which precludes a tenant from denying his land-lord's title, without first surrendering the possession under the tenancy, applies equally to his wife, living with him and occupy-ing simply as his wife under the tenancy. And to the same effect is *Heister v. Brown*, 11 Lanc. Bar, 159.

And in *Taylor v. Eckford*, 11 Smedes & M. 21, it was held that, as the husband would not be permitted to buy another title to defeat the title to land which he had previously conveyed to one under whom he thereafter held as tenant, so neither could his wife defeat such title by subsequently purchasing the property under an execution against her husband on a judgment older than the deed to the landlord.

In *Lewis v. Adams*, 61 Ga. 559, it was held that the widow of one who had deeded land to plaintiff, and immediately there-after became his tenant, which relation continued until the death of the grantor, was estopped to dispute the landlord's title on ejectment brought against her by the grantee after the grantor's death, while she was remaining in the possession which the deceased husband had held, and claiming solely on his right.

In *Merki v. Merki*, 113 Ill. App. 518, af-firmed in 212 Ill. 121, 72 N. E. 9, where a widow claimed a homestead estate in land occupied by her husband at the time of his death as a tenant, the court, in holding that she could not, as against her husband's landlord, set up such an estate without first delivering up possession, said: "John Merki, Sr., by reason of his being plaintiff's tenant, was estopped from denying the title of the plaintiff, and so was the defendant after her husband's death. Whatever right of possession she had grew out of his, and terminated when he died. . . . Even assuming that she had a homestead, still, having obtained possession from the tenant, her husband, she held it in the same ca- 30 L.R.A. (N.S.)

capacity as he, and could not set up the home-stead or any paramount or adverse title without first delivering up the possession to the plaintiff."

In *Love v. Dennis*, Harp. L. 70, the wife of a tenant, remaining in possession after her husband's death, was held estopped to set up a title against the husband's land-lord. A motion for a new trial was made in this case on the ground that the above rule did not apply since, as the relation of husband and wife was dissolved by death, she must be considered as a stranger to the landlord; but the court refuted the argument, saying: "Now the defendant in this case must be considered as a tenant. When she entered, it was by virtue of the lease to her husband; she was then by law identified with him; they were one. If the term was unexpired at his death, it would inure to the benefit of the estate of the deceased. But suppose she was not tech-nically a tenant; the point cannot be dis-puted, that anyone who goes into possession by permission of another, whether as ten-ant or otherwise, must restore such posses-sion."

But in *Giles v. Pratt*, Dud. L. 54, the widow of the deceased occupant of land was held not estopped from setting up a title in herself by her own possession after the husband's death, by the fact that her husband in his lifetime acknowledged that he held under another.

And in *Shew v. Call*, 119 N. C. 450, 56 Am. St. Rep. 678, 26 S. E. 33, cited in *MON-ROE v. STAYT*, the court, in holding that a married woman was not estopped to deny the title of defendant's devisor, who was the purchaser at a void foreclosure sale of the land, which was originally owned in part by the wife and in part by her hus-band, under a mortgage which had been placed upon the land to secure the hus-band's debt, in a suit by her to set aside the void sale, by the fact that she was in possession of the land with her husband, who, subsequent to the sale, became the tenant of the purchaser, said: "We put our judgment upon the ground that the plaintiff is not the tenant of the defend-

Tibbals v. Iffland, 10 Wash. 451, 39 Pac. 102; 1 Wood, Land. & T. 2d ed. pp. 143, 149; Gear, Land. & T. § 2.

Chadwick, J., delivered the opinion of the court:

Plaintiffs brought this action to recover possession of certain town lots in the town of Kettle Falls. The property was held under a lease executed by plaintiff Hugh Monroe, who it is admitted was acting as well for his wife as for himself. The term of the lease was six months, and the stipulated rent was \$10 per month, payable in advance. The lease was signed by defendant W. C. Stayt alone, who with his wife thereafter occupied the property under the lease, paying rent for the full term. Upon its expiration they refused to pay rent for a longer time, and refused to quit or vacate the possession of the property on demand. In answer to a complaint drawn under the forcible entry and detainer statute, defendants set up the several defenses: That W. C. Stayt did not act for and in behalf of his wife in the acceptance of the lease; that she never signed the lease or agreed to its terms, and for that reason the community was not bound thereby; that at the time the lease was executed, the defendants, as a community, were in the lawful, peaceable, and quiet possession of the property as owners thereof, and at the time were disputing the ownership and rights of plaintiffs; that the lease was executed upon the express understanding that it should not affect the ownership or property rights of either party to it; that defendant Elizabeth M. Stayt refused to sign

or enter into the lease, which fact was well known to the plaintiff Hugh Monroe. The case went to trial upon these issues, and resulted in a judgment in favor of the plaintiffs. Defendants have appealed.

The rulings of the trial court were based upon the theory that appellants were estopped to deny respondent's title. While many assignments of error are made, the determination of the case must rest upon the answer to the question whether the wife, who is a member of the community, and who with her husband enters into possession of leased property, is bound by the act and agreement of her husband as evidenced by the paper writing. Appellants do not deny, but say that "where the husband leases property from a stranger, and he and his wife enter into the possession of the property under the lease, the wife cannot dispute the title of the third party from whom possession was acquired, nor can the community dispute such title, for, in such cases, not only the husband, but also the wife, and the community composed of husband and wife, have entered into the possession of the property under the lease, and in such cases the wife became the party privy to the lease, and is therefore equally bound with the husband." The point is then made that, before the respondents can recover, they must show that the relation of landlord and tenant exists between them and appellants as a community; that such relation does not grow out of the occupancy or possession, but must exist as the result of a contract; that the wife not having entered into the written contract, the community is not bound, and therefore ap-

ant. The case states that the husband rented, and paid rent to defendant's deviser. But this does not make the plaintiff his tenant. Tenancy is the result of a contract between the landlord and the tenant, whereby, in legal contemplation, the tenant admits the title of the lessor, and will not allow him to dispute this title while he still remains in possession. And it is true that this estoppel is held to apply to privies as well as to the original lessee. But it is the contract, followed by possession, that creates the estoppel. Possession without the contract will not. But the plaintiff is not affected by this rule. She made no contract with Call [defendant's deviser]. It is not contended she did. And though she is the wife of Peyton Shew [the tenant], she is no privy in estate under or through him. She claims no estate through, by, or under his contract with Call. Privy means a privy in estate,—a property right acquired from the lessee by contract or inheritance. . . . We therefore hold that the plaintiff is not the tenant of the defendant, nor is she a privy in the estate under her husband, and is not estopped to bring and prosecute this action."

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Neither did the court err in refusing to hear the testimony of a third party, to the effect that *Mrs. Stayt* had refused to sign the lease. Having occupied the premises under the contract of her husband, who was competent to contract in her behalf, it was immaterial whether she signed the lease or not. We have not overlooked the contention that the husband could not bind the wife as a lessee, under *Rem. & Bal. Code*, § 5918, wherein it is provided that the husband shall not sell, convey, or encumber the community real property, unless the wife joins in the deed or instrument evidencing the conveyance or encumbrance. This section can have no possible application to this 30 L.R.A. (N.S.)

case. The promise to pay rent for demised premises is not an encumbrance of community real property.

The judgment is affirmed.

Rudkin, Ch. J., and Gose, Fullerton, and Morris, JJ., concur.

Petition for rehearing denied.

NORTH CAROLINA SUPREME COURT.

HENDERSON LIGHTING & POWER COMPANY

v.

MARYLAND CASUALTY COMPANY, Appt.

(153 N. C. 275, 69 S. E. 234.)

Insurance — indemnity — liability to defend action — uninsured claim.

One who undertakes to indemnify a manufacturer against loss from liability imposed by law for damages on account of bodily injuries accidentally suffered by any person not employed by the assured, while at or about the work of the assured, and to defend any suit brought to enforce a claim for damages on account of an accident covered by the policy, is not liable for the costs and counsel fees and the amount paid in compromise of a suit brought by a boy injured while trespassing upon its property for the purpose of gaining a view of the interior of a theater on the adjoining property, under circumstances absolving the assured from liability for the injury.

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Note. — Liability under policy indemnifying against liability for injuries to compensate insured for expenses incurred in successful defense or compromise of action.

It may be laid down as a general rule of law accepted by the few authorities that can be found involving the question here offered for discussion, that under policies undertaking to indemnify the assured against legal liability, or, as it is sometimes expressed, against "common law or statutory liability" for injuries, the assured cannot recover his expenses incurred in successfully defending an action brought against him to recover damages for alleged injuries, since such policies do not undertake to indemnify the insured against groundless claims. *Nesson v. United States Casualty Co.* 201 Mass. 71, 131 Am. St. Rep. 390, 87 N. E. 191; *Cornell v. Travelers' Ins. Co.* 175 N. Y. 239, 67 N. E. 578; *Creem v. Fidelity & C. Co.* 132 App. Div. 241, 116 N. Y. Supp. 1042; *White v. Maryland Casualty Co.* 139 App. Div. 179, 123 N. Y. Supp. 840, all of which are sufficiently set forth in *HENDER-*

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case. The promise to pay rent for demised premises is not an encumbrance of community real property.

The judgment is affirmed.

Rudkin, Ch. J., and Gose, Fullerton, and Morris, JJ., concur.

Petition for rehearing denied.

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Insurance — indemnity — liability to defend action — uninsured claim.

One who undertakes to indemnify a manufacturer against loss from liability imposed by law for damages on account of bodily injuries accidentally suffered by any person not employed by the assured, while at or about the work of the assured, and to defend any suit brought to enforce a claim for damages on account of an accident covered by the policy, is not liable for the costs and counsel fees and the amount paid in compromise of a suit brought by a boy injured while trespassing upon its property for the purpose of gaining a view of the interior of a theater on the adjoining property, under circumstances absolving the assured from liability for the injury.

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Note. — Liability under policy indemnifying against liability for injuries to compensate insured for expenses incurred in successful defense or compromise of action.

It may be laid down as a general rule of law accepted by the few authorities that can be found involving the question here offered for discussion, that under policies undertaking to indemnify the assured against legal liability, or, as it is sometimes expressed, against "common law or statutory liability" for injuries, the assured cannot recover his expenses incurred in successfully defending an action brought against him to recover damages for alleged injuries, since such policies do not undertake to indemnify the insured against groundless claims. *Nesson v. United States Casualty Co.* 201 Mass. 71, 131 Am. St. Rep. 390, 87 N. E. 191; *Cornell v. Travelers' Ins. Co.* 175 N. Y. 239, 67 N. E. 578; *Creem v. Fidelity & C. Co.* 132 App. Div. 241, 116 N. Y. Supp. 1042; *White v. Maryland Casualty Co.* 139 App. Div. 179, 123 N. Y. Supp. 840, all of which are sufficiently set forth in *HENDER-*

APPEAL by defendant from a judgment of the Superior Court for Vance County in plaintiff's favor in an action brought to recover the amount alleged to be due on a policy of indemnity insurance. Reversed.

Statement by Walker, J.:

This action was brought on a policy of insurance to recover a loss alleged to have been sustained by the plaintiff. In October, 1907, Walter H. Briscoe was injured by falling into a sunken tub or shallow well of hot water on the land of J. H. Bridgers, in Henderson, North Carolina, a narrow strip of land 4 feet wide between the Henderson Amusement Company building or theater and the land of the Henderson Lighting & Power Company. The well was located and placed by the amusement company for its own purposes when its theater was erected, about one year before the accident. The well was placed touching the building and immediately under a window of the building to a room which was used as a dressing room of the theater. The well was under the exclusive control of the amusement company. The power company had no concern, no duty, and no responsibility in respect to it. It was not in possession of it, and did not use it for any purpose. At the time of the accident it was covered over with loose boards. There was an open space between the strip on which the well

was located and the building of the power company, which open space was the property of the power company, and is about 18 feet wide. This space is not fenced in, but opens on Spring street. Briscoe had been upon the open space belonging to the power company before, and had been ordered off by this company.

From Spring street, opposite said space, the machinery or boilers or furnaces of the power company are not visible. From the well, where the accident happened, none of the machinery, furnaces, or boilers are visible. Briscoe at the time of the accident was at the well, which is directly under the window of the amusement company, peeping in at the window, and he fell in the well and was injured. There is no evidence that Briscoe was invited to go upon the land of the Henderson Lighting & Power Company, or that he was allured, attracted, or induced to go there by the machinery of this company. There is no evidence that he went on the premises in order to view the machinery, and there would have been no danger to him in viewing the machinery through the door or window. Briscoe was not even a licensee. He was a trespasser at the time of the accident. The power company owed him no duty in respect to the well. He was a youth thirteen or fourteen years old, bright, intelligent, and bad. The public were in the habit of using

SON LIGHTING & P. Co. v. MARYLAND CASUALTY Co.

So, in *Munson v. Standard M. Ins. Co.* 84 C. C. A. 210, 156 Fed. 44, affirming 145 Fed. 957, cited in *HENDERSON LIGHTING & P. Co. v. MARYLAND CASUALTY Co.* it was held that, under a marine policy insuring a tug against legal liability for loss or damage to tows by collision or stranding, the assured could not recover the expenses of the successful defense of a suit to recover for such loss or damage.

And in *Xenos v. Fox*, L. R. 4 C. P. 665, also cited in *HENDERSON LIGHTING & P. Co. v. MARYLAND CASUALTY Co.* it was held, under a marine policy indemnifying the assured if he should become liable to "pay as damages" any sum by or in pursuance of any award if the vessel covered by insurance should run down or damage any other ship, the costs incurred by the assured in successfully defending the suit for running down another vessel were not recoverable from the insurer.

And in *Lawrence v. General Acci. Assur. Corp.* 124 App. Div. 545, 108 N. Y. Supp. 939, affirmed without opinion in 192 N. Y. 568, 85 N. E. 1112, also cited in *HENDERSON LIGHTING & P. Co. v. MARYLAND CASUALTY Co.*, the court, upon the authority of *Cornell v. Travelers' Ins. Co.* supra, without discussion, refused recovery to an assured for the expenses of maintaining a successful defense to an action brought against him for an accident covered by the policy.

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As to the right of an assured in an indemnity policy to recover the amount expended by him in compromising suits for injuries covered by his contract of insurance, where it appears that he is not in fact legally liable for the claim asserted, authority is lacking, since a search has failed to disclose any other case than *HENDERSON LIGHTING & P. Co. v. MARYLAND CASUALTY Co.* in which that specific question was discussed, though in the three following cases the right of an assured to recover the amount expended by him in compromising the suit against him was upheld, the question as to his legal liability not having been raised:

In *St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co.* 201 U. S. 173, 50 L. ed. 712, 26 Sup. Ct. Rep. 400, it was held that the amount paid by an employer in the prudent settlement of suits against it founded on the negligence of an employee might be recovered from the insurer against loss because of such negligence, who had denied all liability and refused to defend the suits as provided in the policy, although such policy contained a condition against compromising any claim without the written consent of the insurer, and provided that no action should lie against the insurer for any loss under the policy unless it should be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. Mr. Justice Holmes, in deliv-

the open space between the two buildings, and this was alleged by Briscoe in his amended complaint. Briscoe brought suit against the power company to recover damages for the injury, and this court sustained a demurrer to his complaint, and held that, according to the facts as stated in the complaint, no legal liability of the power company to Briscoe had been alleged. 148 N. C. 396, 19 L.R.A. (N.S.) 1116, 62 S. E. 600. Briscoe amended his complaint, and the power company again demurred. This demurrer was overruled, with leave to answer over, and an appeal taken, but not prosecuted. The power company thereupon compromised and settled Briscoe's claim by the payment of \$100 and the costs, and brings this action to recover the same and \$500 for counsel fees, alleging that the settlement with Briscoe was a perfectly reasonable one and was made after the casualty company had been notified to defend that suit, and had refused to do so upon the ground that the power company had failed to give notice of the claim and to comply with the other requirements of the contract respecting suits brought against it. The \$100 and the costs were paid by the power company before this action was commenced, but no counsel fees had been paid.

The policy of insurance provides as follows:

ering the opinion of the court, used the following language: "The defendant, by its abdication, put the plaintiff in its place, with all its rights. To limit its liability as if its only promise was to pay a loss paid upon a judgment is to neglect the meaning and purpose of the reference to a judgment, and even the words of the promise. The promise in form is to indemnify against loss by certain kinds of liability. The judgment contemplated in the condition is a judgment in a suit defended by the defendant in case it elects not to settle. The substance of the promise is to pay a loss which the plaintiff shall have been compelled to pay, after such precautions and with such safeguards as the defendant may insist upon. It saw fit to insist upon none. We assume that the settlement was reasonable, and that the plaintiff could not expect to escape at less cost by defending the suits. If this were otherwise, no doubt the defendant would profit by the fact. The defendant did not agree to repay a gratuity, or more than fairly could be said to have been paid upon compulsion. But a sum paid in the prudent settlement of a suit is paid under the compulsion of the suit as truly as if it were paid upon execution."

In *Southern R. News Co. v. Fidelity & C. Co.* 26 Ky. L. Rep. 1217, 83 S. W. 620, the court declared that the insured in an indemnity policy might compromise a claim against it, if it acted in good faith and

(1) The defendant will indemnify the plaintiff against loss from liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered while this policy is in force by any person or persons not employed by the assured while at or about the work of the assured, described in the schedule, during the prosecution of the said work at the place or places described in the schedule subject to the following conditions:

(2) Upon the occurrence of an accident, the assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the company's home office or to the company's authorized agent.

(3) If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall immediately forward to the company's home office every summons or other process as soon as the same shall have been served on him, and the company, at its own cost, will defend such suit in the name and on behalf of the assured, unless the company shall elect to settle the same or to pay the assured the indemnity provided for in condition A hereof.

(4) The assured shall not voluntarily assume any liability, nor shall the assured, without the written consent of the company

with reasonable prudence such as a prudent person similarly situated would have done for himself, and that this would bind the insurer to pay to the assured the loss actually sustained, of which the compromise would be evidence though not conclusive, adding that other evidence might also be admitted to show whether it was or was not a judicious and fair settlement.

And in *Bradley v. Standard Life & Acci. Ins. Co.* 46 Misc. 41, 93 N. Y. Supp. 245 (reversed in 112 App. Div. 536, 98 N. Y. Supp. 797, without reference to the question here discussed, upon the ground that there was no contract of insurance between the parties covering the injury in suit) recovery was allowed for a settlement made by the assured in good faith, where the sum was advantageous to the insurer "and for such an amount as a jury, upon the facts established, would have been warranted in awarding."

This note is confined to decisions involving indemnity insurance, and therefore does not include such cases as *Morette v. Bostwick*, 127 App. Div. 701, 111 N. Y. Supp. 1021, cited to support the conclusion reached in *HENDERSON LIGHTING & P. CO. v. MARYLAND CASUALTY CO.*, which was an action by the grantee against the grantor in a full covenant warranty deed to recover money expended by the former in extinguishing a claim against the land conveyed.

J. A. C.

previously given, incur any expense or settle any claim except at his own cost.

(5) No action shall lie against the company to recover for any loss under this policy, unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment, after trial of the issue, nor unless such action is brought within ninety (90) days after such judgment by a court of last resort against the assured has been so paid and satisfied.

The defendant moved for judgment of non-suit upon the evidence, which was overruled, and the defendant excepted. It was agreed that, subject to this exception, a jury trial should be waived, and that the court should find the facts and answer the issues in the case. This was done and the facts, as stated herein, are selected from the findings of the court as those which are essential to a decision of the case in the view taken of it by this court. The court concluded as matters of law that the Briscoe claim is covered by plaintiff's policy and that, by denying liability in its answer, the defendant had waived its right to notice of the Briscoe claim and to a judgment after trial in his action. Judgment for the amount of the compromise, attorney's fees, and costs (\$370) was rendered for the plaintiff, and the defendant appealed.

Mr. John W. Hinsdale, for appellant:

The accident to Briscoe, for which the power company was in nowise responsible, imposed no legal liability upon that company and was not covered by the policy.

Quantz v. Southern R. Co. 137 N. C. 136, 49 S. E. 79; *Briscoe v. Henderson Lighting & P. Co.* 148 N. C. 396, 19 L.R.A. (N.S.) 1116, 62 S. E. 600; *Monroe v. Atlantic Coast Line R. Co.* 151 N. C. 374, 27 L.R.A. (N.S.) 193, 66 S. E. 315; *Cornell v. Travelers' Ins. Co.* 175 N. Y. 239, 67 N. E. 578; *Nesson v. United States Casualty Co.* 201 Mass. 71, 131 Am. St. Rep. 390, 87 N. E. 191; *Munson v. Standard M. Ins. Co.* 145 Fed. 957, affirmed in 34 C. C. A. 210, 156 Fed. 44; *Egbert v. St. Paul, F. & M. Ins. Co.* 92 Fed. 517; *Wollman v. Fidelity & C. Co.* 87 Mo. App. 677; *Worcester & Suburban Street R. Co. v. Travelers' Ins. Co.* 180 Mass. 263, 57 L.R.A. 629, 91 Am. St. Rep. 275, 62 N. E. 364; *Phillipsburg Horse Car Co. v. Fidelity & C. Co.* 160 Pa. 350, 28 Atl. 823; *People's Ice Co. v. Employers' Liability Assur. Corp.* 161 Mass. 122, 36 N. E. 754; *Richards, Ins.* § 481; *Creem v. Fidelity & C. Co.* 132 App. Div. 243, 116 N. Y. Supp. 1042.

Messrs. A. C. Zollicoffer and J. H. Bridgers, for appellee:

The defendant is liable notwithstanding 30 L.R.A. (N.S.)

Briscoe did not recover a final judgment against plaintiff in a court of last resort.

St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co. 201 U. S. 173, 50 L. ed. 712, 26 Sup. Ct. Rep. 400.

The contract is not for indemnity only.

Anoka Lumber Co. v. Fidelity & C. Co. 63 Minn. 286, 30 L.R.A. 689, 65 N. W. 353; *Hoven v. Employers' Liability Assur. Corp.* (*Hoven v. West Superior Iron & Steel Co.*) 93 Wis. 201, 32 L.R.A. 388, 67 N. W. 46; 10 Am. & Eng. Enc. Law, p. 415.

Walker, J., delivered the opinion of the court:

The general rule of construction applied by the courts to all contracts of insurance is that while, like other contracts, they should be so construed as to give effect to the intention of the parties, yet, where there exists any doubt as to that intention, it is always to be resolved strictly against the insurer and in favor of the insured. *Vance, Ins.* 429. When, however, the intention is clearly stated, it should be enforced according to the will of the parties as thus expressed, for in such a case there is no room for construction. The terms of the policy in question are, we think, free from any doubt of ambiguity. The defendant undertook to indemnify against loss from the liability imposed by law upon the assured (the plaintiff) for damages on account of bodily injuries accidentally suffered by any person not employed by the assured, while at or about the work of the assured and during the prosecution of the said work at the place described in the schedule. We have held, after careful consideration of all the essential facts, that the power company is not liable in damages for the injuries to *Walter Briscoe*, resulting from his fall in the vat. *Briscoe v. Henderson Lighting & P. Co.* 148 N. C. 396, 19 L.R.A. (N.S.) 1116, 62 S. E. 600. The facts, as now presented to the court, are much stronger against his right to recover than those which we formerly considered. The clause of the policy by which the defendant agreed to defend any suit brought against the assured refers explicitly to a suit brought "to enforce a claim for damages on account of an accident covered by the policy," and, in order to determine whether the casualty company was under any duty or obligation to defend the *Briscoe* suit, we must first ascertain whether the law imposed a liability upon the power company for the accident to him, for, if it did not, his claim is plainly not covered by the policy, as it refers to a claim founded upon a liability imposed by law, and not to false or fictitious claims. The indemnity is against loss from lia-

bility, and it would be stretching, if not perverting, the meaning of the words, to extend the application of them to all suits, and require the casualty company to defend them without regard to the legal liability of the assured. An accident covered by the policy is one for which the assured is liable under the law, for it is so expressly stated in the policy. If, therefore, the casualty company refused to defend the Briscoe suit for any reason, it cannot be held liable for the expense of a defense or settlement made by the insured, unless in some way it is made to appear that the latter was liable to Briscoe. The question has been considered and decided, in a case substantially identical with ours in all of its features. In *Cornell v. Travelers' Ins. Co.* 175 N. Y. 239, 67 N. E. 578, the court, after deciding that, if the injuries did not occur under such circumstances as to impose a legal liability upon the insured therefor, they are not within the protection of the policy, thus refers to the duty of the indemnity company to defend suits. "In the next clause of the policy, the defendant became obligated to defend certain actions when brought against the plaintiff. If the defendant was bound by the contract to defend the eleven suits referred to, or any of them, there would be a legal basis for a recovery in this action to the extent of the expenses incurred by the plaintiff in making a defense which the defendant had agreed to make. But the cases which the defendant was bound to defend are carefully defined and limited by the terms of the policy. That obligation is limited to 'claims made against the insured and covered by this policy.' The defendant did not stipulate to indemnify the plaintiff against the costs and expenses of defending himself against fictitious or groundless suits. The protection afforded to the plaintiff by the policy was against some actual legal liability directly occasioned by his business operations." And again: "If the injuries embraced in the eleven suits were not covered by the indemnity clauses of the policy, and yet the defendant had assumed the obligation to defend, it must follow that it assumed the obligations to defend suits for injuries not covered by the policy. That proposition must be maintained in order to hold the defendant liable for the claims in question. It can be maintained only by disregarding the plain words of the policy, or adding to them some qualification that the parties did not express in words. The suits that the defendant stipulated to defend are very clearly defined in the contract. In the first place, they are defined as suits for injuries covered by the policy, and all agree that the injuries upon 30 L.R.A. (N.S.)

which the eleven suits were based are not, and none of them were, injuries of that character. On the contrary, they are admitted to be injuries not included in the policy at all, since no liability was imposed upon the insured in consequence. In the second place they were defined as suits which the defendant should fail to settle or pay the damages claimed therein, and surely no one will claim that the defendant assumed any obligation to settle or pay false or unfounded claims. The obligation to defend is expressly limited to cases where the insured was liable upon the facts and circumstances of the accident causing the injury. If such facts and circumstances did not exist and were not susceptible of proof, then the defendant could ignore the suits, as it did." *Cornell v. Travelers' Ins. Co.* has been cited with approval in several cases. In the recent case of *Nesson v. United States Casualty Co.* 201 Mass. 71, 131 Am. St. Rep. 390, 87 N. E. 191, an action upon a policy similar to the one now being considered, the court held that the principal agreement of the defendant was to indemnify the plaintiff against loss from actual legal liability for damages on account of accidental injuries of the kind described in the policy, but the averments of the declaration tended to show that there was no such liability on the part of the plaintiff for the accident in question, and, as there was no averment of the existence of such a liability, it was plain that the plaintiff could not recover. It was also held that the clause as to defending suits was inserted for the benefit of the insurer and that, if it elected not to defend, its liability under the provision for paying indemnity is not enlarged, but remains unchanged. To the same effect are *Munson v. Standard M. Ins. Co.* (C. C.) 145 Fed. 957, affirmed in 84 C. C. A. 210, 156 Fed. 44; *Xenos v. Fox*, L. R. 4 C. P. 665; *Lawrence v. General Acci. Assur. Corp.* 192 N. Y. 568, 85 N. E. 1112; *Creem v. Fidelity & C. Co.* 132 App. Div. 241, 116 N. Y. Supp. 1042; *Morette v. Bostwick*, 127 App. Div. 702, 111 N. Y. Supp. 1021. In *Creem v. Fidelity & C. Co.* supra, the court decided that in an action on a policy indemnifying an employer against damages for personal injuries, the insured is not entitled to recover the expenses incurred in successfully defending an action brought by the person injured, when the policy covered only claims for which the insured was legally liable. The most recent case on the subject is *White v. Maryland Casualty Co.* (June 1910) 139 App. Div. 179, 123 N. Y. Supp. 840, reported in *Ins. Law Journal*, p. 1357, where it appears that the policy was issued by the defendant in this case, and the suit of the person injured

against the the insured was settled out of court. The action was brought by the insured to recover the amount of money paid in compromise and for expenses. The court held that the insurance company was not compelled by its agreement to defend an action against the insured, unless the latter were legally liable to the plaintiff therein. The two cases are identical, and the following language, taken from the opinion in that case, states succinctly the true principle applicable to them, as established by the authorities: "The respondents' contention that 'a party indemnified may hold his indemnitor for money paid for a prudent settlement' ignores the fact that a legal liability on the part of the person indemnified must exist, and the amount paid must be reasonable. A party so paying assumes the risk of being able to prove the facts upon which his liability depends, as well as the reasonableness of the amount which he pays. *Dunn v. Uvalde Asphalt Paving Co.* 175 N. Y. 214, 218, 67 N. E. 439. This being the rule, it is necessary that facts tending to show such conditions be pleaded." A demurrer was sustained because it did not appear from the complaint that the plaintiffs were legally liable to the person injured. The decision goes beyond what it is necessary to decide in this case; for it is there held that, by the terms of the policy, the legal liability of the insurer must rest upon a judgment in the action rendered against the insured after trial of the issues.

The plaintiff relies upon *St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co.* 201 U. S. 173, 50 L. ed. 712, 26 Sup. Ct. Rep. 400, but that case is easily distinguished from this one, if the latter part of the opinion does not directly sustain our ruling. There, as stated by Justice Holmes, who delivered the opinion of the court: "The fact was that this driver was an employee of the plaintiff, and the accident and the damages were [therefore] covered by the policy." It was, of course, the duty of the indemnity company to defend such a suit. The sixth question asked by the lower court was as follows: "Under the terms of the policy may the liability of the assured to the injured person and the extent of that liability be litigated, in the first instance, in an action between the assured and the assurer, where the assurer has denied its liability under the policy, and has refused to defend an action brought against the assured by the injured person?" It was answered in the affirmative, with this qualification or comment, "so far as the question is warranted by the facts set forth," evidently referring to the admitted fact that the assured was liable to the injured person as, perhaps, rendering an an-

swer to the question unnecessary to a complete disposition of the case. The answer, though, shows that in the opinion of the court it is necessary at some stage of the controversy or of the litigation between the parties to establish the fact of such liability as a condition precedent to the insured's right of recovery against the insurer. In *Richards on Insurance*, § 481, the general rule is stated to be that the insured must show a liability on account of an injury covered by the policy, in order to maintain an action against the insurance company. See, also *Davidson v. Maryland Casualty Co.* 197 Mass. 167, 83 N. E. 407; *Wollman v. Fidelity & C. Co.* 87 Mo. App. 677; *Worcester & Suburban Street R. Co. v. Travelers' Ins. Co.* 180 Mass. 263, 57 L.R.A. 629, 91 Am. St. Rep. 275, 62 N. E. 364; *Phillipsburg Horse Car Co. v. Fidelity & C. Co.* 160 Pa. 350, 28 Atl. 823; *Biays v. Chesapeake Ins. Co.* 7 Cranch, 415, 3 L. ed. 389. Even if the view suggested by the plaintiff be an equitable one, and it admits of grave doubt, we cannot adopt it, as the parties have not so contracted, and we cannot do it for them. We have nothing to guide us but the words of a plainly expressed agreement which must be interpreted as the parties evidently intended it should be.

It is unnecessary to answer the other questions, whether the defendant waived the notice of the claim of the injured person required to be given to it, and whether the liability of the insured to such person must first be fixed by a judgment against the insured, followed by payment of the judgment, before the insured can recover of the indemnity company, or whether compliance with that provision was also waived by the company when it refused to defend. The injury to Briscoe was not one of the kind insured against by the defendant, as he was not entitled to recover damages on account of a bodily injury accidentally suffered by him while at or about the work of the assured during the prosecution of said work, as described in the schedule annexed to the policy. The defendant was not, in law or in fact, responsible for the injury to him, even in the slightest degree, and he was not "at or about the work of the assured," within the evident meaning of those words, when he was injured. There was no causal connection between the "work" of the power company or its prosecution and the injury to the boy. *Briscoe v. Henderson Lighting & P. Co.* 148 N. C. 396, 19 L.R.A. (N.S.) 1116, 62 S. E. 600.

We are therefore of the opinion that the indemnitor, not being answerable for the principal loss in this case, cannot be so for the subsequent damages, costs, and expenses

paid in the settlement of the suit between Briscoe and the plaintiff. The defendant was not bound to defend a suit upon a claim not within the terms of its policy, and especially so in the case of a groundless claim. If not required to defend, it cannot be charged with the costs and expenses of a defense, or of a settlement made by the assured for its own benefit, however reasonable that settlement may be. To hold otherwise would impose upon the defendant a liability which it not only has not assumed by its contract with the assured, but which by the very terms of the policy is excluded therefrom. The costs and expenses incurred in defending against Briscoe's claim for damages were not the result of any legal wrong done by the power company to him for which it is indemnified, but of the claim for damages pressed with commendable zeal, but misplaced confidence, by a plaintiff without a case, which would surely have judicially appeared if the power company had not settled, but defended to the end. Plaintiff was in no danger of an adverse judgment after our decision in the Briscoe Case. Briscoe achieved partial success by the weakening of the plaintiff, when it should not have been dismayed by the continued prosecution of a claim, which a little more reliance upon the former decision of this court should have convinced it was without merit.

Upon the facts found by him, the learned judge, "sitting as a jury," should have instructed himself differently as to the law, and answered the second issue, "was the said claim (of Briscoe) covered by plaintiff's policy?" in the negative, but, as there is no evidence to sustain the plaintiff's cause of action, viewing the testimony in the most favorable light for him, the non-suit should have been allowed and the action dismissed. Judgment to that effect will be entered in the court below.

Reversed.

NORTH DAKOTA SUPREME COURT.

EDWARD SOLBERG, Respt.,

v.

GEORGE SCHLOSSER, Appt.

(— N. D. —, 127 N. W. 91.)

Defective highway — use — negligence.

1. It is not negligence, as a matter of

Headnotes by MORGAN, Ch. J.

Note. — As to liability of highway contractor for dangerous conditions where municipality, county, or town is not liable, see note to *Schneider v. Cahill*, 27 L.R.A. (N.S.) 1009, in which *SOLBERG v. SCHLOSSER* is cited.
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law, for a person to drive upon a dangerous or defective highway, knowing it to be such, unless the dangerous or defective condition is such that a person of ordinary prudence would not attempt to drive over it.

Same — care required.

2. Knowledge of the dangerous condition of a highway, however, imposes a duty upon a traveler to exercise such care as the circumstances demand.

Same — condition — conflicting evidence — question for jury.

3. In case of conflict in the evidence as to the condition of a highway at a point where it is claimed to have been dangerous for travel, it is a question for the jury to determine whether it was dangerous or not.

Negligence — contributory negligence — questions for jury.

4. Where the evidence is such that different persons may reasonably reach different conclusions, the question of the negligence of the defendant and of the contributory negligence of the plaintiff is for the jury.

Action — defective highway — complaint — construction.

5. The complaint considered, and held to set forth a cause of action for a violation of a duty not to render a highway dangerous by placing and leaving dirt thereon in a negligent manner, and not to state a cause of action on a breach of contract.

Agent — independent contractor — public work.

6. A person contracting with a drainage board to construct a drain under plans and specifications, where he has sole control of the work, and the board has no control or superintendence thereof, is an independent contractor, and not the agent of the board.

Highway — obstruction — injury — liability.

7. Any person who wrongfully renders a public highway dangerous for travel by placing obstructions thereon must respond in damages to anyone injured in consequence of such obstruction.

(May 14, 1910.)

APPEAL by defendant from a judgment of the District Court for Trail County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by a defective highway, the defective condition of which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Skulason & Burtness, for appellant:

If defendant was negligent in the performance of his contract, the plaintiff's remedy is against the board of drain commissioners, or the township, or the county; and the municipality in turn has its remedy

against the defendant. The plaintiff cannot sue the defendant.

29 Cyc. Law & Proc. p. 425, and cases cited; *Albany v. Cunliff*, 2 N. Y. 175; *Curtin v. Somerset*, 140 Pa. 70, 12 L.R.A. 322, 23 Am. St. Rep. 220, 21 Atl. 244; *Fitzmaurice v. Fabian*, 147 Pa. 199, 23 Atl. 444; *Swan v. Jackson*, 55 Hun, 194, 7 N. Y. Supp. 821; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Hyams v. Webster*, L. R. 2 Q. B. 264; *Collis v. Selden*, L. R. 3 C. P. 495; *Gray v. Pullen*, 34 L. J. Q. B. N. S. 265; *Boswell v. Laird*, 8 Cal. 409, 68 Am. Dec. 345, 10 Mor. Min. Rep. 616; *Fanjoy v. Seales*, 29 Cal. 249; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, 19 Eng. Rul. Cas. 81; *Shearm. & Redf. Neg. § 8*; *Wharton*, Neg. 2d ed. § 439; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Styles v. F. R. Long Co.* 70 N. J. L. 301, 57 Atl. 448, 67 N. J. L. 413, 51 Atl. 710.

The board of drain commissioners not being liable for an action of negligence in the premises, the defendant, its agent or servant, is likewise immune from such an action.

Vail v. Amenias Twp. 4 N. D. 239, 59 N. W. 1092; *Packard v. Voltz*, 94 Iowa, 277, 58 Am. St. Rep. 396, 62 N. W. 757; *Eaton v. Fairbury Waterworks Co.* 37 Neb. 546, 21 L.R.A. 653, 40 Am. St. Rep. 510, 56 N. W. 201; *Becker v. Keokuk Waterworks*, 79 Iowa, 419, 18 Am. St. Rep. 377, 44 N. W. 694; *Vanhorn v. Des Moines*, 63 Iowa, 447, 50 Am. Rep. 750, 19 N. W. 293; *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185, 6 N. W. 126; *Mott v. Cherryvale Water & Mfg. Co.* 48 Kan. 12, 15 L.R.A. 375, 30 Am. St. Rep. 267, 28 Pac. 989.

The plaintiff was guilty of contributory negligence and cannot recover.

Crescent Twp. v. Anderson, 114 Pa. 643, 60 Am. Rep. 367, 8 Atl. 379; *Indianapolis v. Cook*, 99 Ind. 10; *Nebraska Teleph. Co. v. Jones*, 59 Neb. 510, 81 N. W. 435; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Horton v. Ipswich*, 12 Cush. 488; *Nicks v. Marshall*, 24 Wis. 139; *Fox v. Glastenbury*, 29 Conn. 204; *Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Schaeffer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *Gosport v. Evans*, 112 Ind. 133, 2 Am. St. Rep. 164, 13 N. E. 256; *Corlett v. Leavenworth*, 27 Kan. 673; *Fulliam v. Muscatine*, 70 Iowa, 436, 30 N. W. 861; *Quincy v. Barker*, 81 Ill. 300, 25 Am. Rep. 278; *Dubois v. Kingston*, 102 N. Y. 219, 55 Am. Rep. 804, 6 N. E. 273; *Centralia v. Krouse*, 64 Ill. 19; *Elliott, Roads & Streets*, § 470; *Hartman v. Muscatine*, 70 Iowa, 511, 30 N. W. 859; *Parkhill v. Brighton*, 61 Iowa, 103, 15 N. W. 853; *McCool v. Grand Rapids*, 58 Mich. 41, 55 Am. Rep. 30 L.R.A. (N.S.)

655, 24 N. W. 631; *McGinty v. Keokuk*, 66 Iowa, 725, 24 N. W. 506; *Shearm. & Redf. Neg. § 376*.

Mr. P. G. Swenson, for respondent:

The act of the defendant in obstructing the highway amounted to a nuisance.

Stafford v. Oskaloosa, 57 Iowa, 748, 11 N. W. 668; *Boltz v. Sullivan*, 101 Wis. 608, 77 N. W. 870.

It was the duty of the defendant to restore the highway to a safe condition for public travel.

Evansville & T. H. R. Co. v. Crist, 116 Ind. 446, 2 L.R.A. 450, 9 Am. St. Rep. 865, 19 N. E. 310; *Elzig v. Balos*, 135 Iowa, 208, 112 N. W. 540.

The defendant was an independent contractor, and not an agent or servant of the board.

16 Am. & Eng. Enc. Law, 2d ed. p. 187; *Shute v. Princeton Twp.* 58 Minn. 337, 59 N. W. 1050; *Herrington v. Lansingburgh*, 110 N. Y. 145, 6 Am. St. Rep. 348, 17 N. E. 728; *Hilsdorf v. St. Louis*, 45 Mo. 94, 100 Am. Dec. 352; *Bennett v. Mt. Vernon*, 124 Iowa, 537, 100 N. W. 349; *Lenderink v. Rockford*, 135 Mich. 531, 98 N. W. 4.

A person is not required to forego travel on the highway merely because he knows it to be dangerous.

McTiver v. Grant Twp. 131 Mich. 456, 91 N. W. 736; *Hunt v. Lincoln Twp.* 131 Mich. 637, 92 N. W. 288; *Overhouser v. American Cereal Co.* 118 Iowa, 417, 92 N. W. 74; *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359; *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *Henry County Turnp. Co. v. Jackson*, 86 Ind. 111, 44 Am. Rep. 274; *Evansville & T. H. R. Co. v. Crist*, supra.

The question of contributory negligence was for the jury.

Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; *Kunkel v. Minneapolis*, St. P. & S. Ste. M. R. Co. (N. D.), 121 N. W. 830.

Morgan, Ch. J., delivered the opinion of the court:

Action for damages caused by defects in a highway through the alleged negligence of the defendant. The controlling facts are included in the following summary: In October and November, 1907, the defendant was engaged in constructing a drain in Trail county, under a contract with the county drainage board of said county. The drain was to be constructed in accordance with plans and specifications which were made a part of the contract. The drain extended nearly north and south, and intersected a highway running east and west at the point where the injury occurred. At the point of intersection with the high-

way a bridge had been built over the drain by the public authorities. The drain was about 11 feet deep at the bridge. The dirt from excavating the drain was dumped on the highway. The dirt was dumped on the highway at the east approach to the bridge, and to about 45 feet from the bridge.

The allegation of the complaint in reference to the condition of the highway at this point is as follows: "That between the 20th day of October, 1907, and the 10th day of November, 1907, the defendant, while engaged in excavating said ditch or drain, placed and deposited a large quantity of dirt scraped out of said ditch, in the roadbed of the public highway running east and west between said sections 5 and 8, and at a point where said highway crosses the said ditch, near the southwest corner of section 5, in said township and range; that the defendant wholly failed and neglected to level down said dirt so placed in the roadbed of said highway, but left the same in an extremely rough and uneven condition, the dirt being deposited in mounds which had frozen solid, leaving depressions and holes in said road which rendered said public highway extremely unsafe and dangerous for public travel; that the defendant carelessly and negligently allowed the said dirt to remain in said highway and in that portion thereof used by the public in traveling, without leveling or smoothing down the same; that the depressions or holes in said highway, made by depositing dirt from said ditch, were from 12 to 18 inches in depth, and the said highway at said point was carelessly and negligently allowed by defendant to remain in said condition, causing the said highway at that point to be dangerous and unsafe for public travel." The complaint further alleges that on the 23d day of November, 1907, the plaintiff was driving along said highway in the exercise of due care, and was driving in the ordinary way, at a slow speed, and, while driving in that manner, one of the wheels of said wagon ran into a depression in said highway and partially overturned said wagon, and the plaintiff was thrown to the ground and injured, and was damaged in the sum of \$5,000.

The answer is, in effect, a general denial. The issues were submitted to a jury, and a verdict was found in favor of the plaintiff for the sum of \$1,000 and interest from the date of the injury. A motion for a new trial was made and denied. Judgment was entered on the verdict. The defendant appeals from this judgment, and presents the following contentions as a basis for the reversal of the judgment: (1) No privity of contract existed between the plain-

tiff and the defendant, therefore no duty was imposed upon the defendant to place the highway in proper condition. (2) The drainage board would not be liable for damages, as it was engaged in the performance of work of a public nature, as a state agency; therefore the defendant would not be liable for damages while engaged in that work as the agent of the drainage board. (3) The evidence fails to show that the highway was unsafe at the particular place at the time of the injury, and fails to show that the defendant ever caused it to become unsafe or dangerous for travelers. (4) The defendant was under no duty or obligation to keep the road in proper condition for travel, and his acts were not the proximate cause of the injury, and at most only the remote cause. (5) The plaintiff was guilty of negligence that contributed to the injury. No exception was taken to the instructions to the jury, nor to the admission or rejection of evidence. The appellant's contentions are that the evidence does not justify a judgment in plaintiff's favor for the foregoing reasons. We will consider these questions in the order named.

The defendant claims that the action is one for damages growing out of a breach of a contract between the defendant and the drainage board, and that damages growing out of the failure on defendant's part to comply with the contract cannot be recovered by the plaintiff, as he was not a party to that contract. In other words, no privity of contract existed between the plaintiff and the defendant.

We do not agree with the defendant's contention as to the cause of action set forth in the complaint. It is not a cause of action for damages growing out of a breach of contract. It is one for damages growing out of the defendant's tort in rendering the highway dangerous through his negligence in leaving the dirt thereon in piles and not leveled off. The contract is not set forth in the complaint nor mentioned therein. It was not offered in evidence by the plaintiff, but by the defendant. It is true, the complaint contains an allegation to the effect "that, in doing the work of excavating the said ditch or drain at the time hereinafter mentioned, the defendant placed and deposited a portion of the dirt taken from said ditch or drain in the roadbed of the public highway running east and west along the section line between sections 5 and 8, in said township and range; that it was defendant's duty, when such dirt had been placed in the roadbed of the said highway, to level down the dirt so placed there so as to make a smooth and good road for public travel." Defendant contends that this clause shows that

plaintiff claims damages for a breach of duty under the contract. We do not think that this contention can be upheld. There is no other fact or conclusion alleged in the complaint from which the inference that this refers to a duty arising from the contract can be drawn. The statement that defendant owed a duty to level the dirt after placing it on the highway harmonizes with what is a legal duty devolving upon everyone, not to obstruct or make the highway dangerous for travel. From the whole complaint, our conclusion is that the duty mentioned in this allegation of the complaint refers to a duty imposed by law, and not to the contract referred to in the evidence. Defendant relies upon *Styles v. F. R. Long Co.* 67 N. J. L. 413, 51 Atl. 710, as sustaining his contention in this regard. In that case it was held that the plaintiff was not entitled to bring the action for damages under the contract between the defendant and the board of chosen freeholders of the county of Passaic. In that case the following statement of the law in *Appleby v. State*, 45 N. J. L. 165, was approved: "A duty, the breach of which is an actionable wrong, may arise from a contract, or be imposed by positive law, independent of contract. In the first case, the party to the contract only can sue . . . in the other case, any person injured may sue if he be one of the class of persons for whose benefit the duty is imposed."

The same principle was subsequently announced by the same court in the same case, reported in 70 N. J. L. 301, 57 Atl. 448. This case is, therefore, not in point, as the cause of action was based upon a contract alone. In this case, although there existed a contract between the drainage board and the defendant, still the liability as pleaded does not depend on the contract, but arises out of a legal duty devolving upon the defendant, as well as the public in general, not to obstruct or make the highway dangerous for travel. Such a duty being to the public generally may be enforced by anyone if damages occur on account of the failure to perform that duty. The liability in this case arises by reason of the fact that the defendant negligently placed a nuisance in the highway, which rendered it dangerous for travel, and a violation of § 6641, Rev. Codes 1905. Inasmuch as the liability pleaded is not based upon a contract, it is not necessary for us to determine whether there was a breach of the contract in this case. In support of our conclusion that the complaint in this case properly alleged a cause of action growing out of a breach of duty on the part of the defendant, see *Nye v. Dibley*, 30 L.R.A. (N.S.)

88 Minn. 465, 93 N. W. 524; *Elzig v. Bales*, 135 Iowa, 208, 112 N. W. 540.

In *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 2 L.R.A. 450, 9 Am. St. Rep. 865, 19 N. E. 310, the court said: "The right to interfere with a highway is coupled with the duty to make it as safe as it was before it was disturbed; or, at least, to use reasonable care and skill to do so. This duty is violated if there is a failure to restore it to its former condition in all cases where the exercise of reasonable care and skill can effect a restoration."

The defendant also urges that he was engaged in excavating the drain as the agent of the drainage board, and contends that no liability can be upheld against him as agent, as his principal would not be liable as a matter of law. So far as this case is concerned, it is immaterial whether the drainage board could be held for damages or not, as it clearly appears that the relation of principal and agent did not exist between the defendant and the drainage board by virtue of the contract. A reading of that contract shows that the defendant independently contracted to dig the drain in accordance with plans and specifications which were made a part of the contract. The drainage board exercised no control or supervision over the work or over the defendant while engaged in doing the work. Under the contract the drainage board reserved the right to terminate the contract in case the work was not being done in accordance with the plans and specifications, and the right to cause the drain to be completed by someone else in case the defendant failed to perform the contract. In the following cases, closely similar so far as the facts are concerned, the relation between the parties was held not to be that of principal and agent: *Atkins v. Field*, 89 Me. 281, 56 Am. St. Rep. 424, 36 Atl. 375; *Hilsdorf v. St. Louis*, 45 Mo. 94, 100 Am. Dec. 352; *Bennett v. Mt. Vernon*, 124 Iowa, 537, 100 N. W. 349; *Herrington v. Lansingburgh*, 110 N. Y. 145, 6 Am. St. Rep. 348, 17 N. E. 728; *Shute v. Princeton Twp.* 58 Minn. 337, 59 N. W. 1050. See also 16 Am. & Eng. Enc. Law, 2d ed. p. 187. The cases cited by the defendant are not in point, as the principals in those cases reserved authority in themselves while the work was being done.

It is next claimed that no negligence was shown on appellant's part. The question of his negligence was submitted to the jury under instructions which were not excepted to. It cannot be maintained or claimed, as a matter of law, that no negligence was shown, or that contributory negligence was shown, as the testimony on that question is in conflict. In other words, there was such

conflict in the testimony that rendered the question of negligence one for the jury. As to the condition of the road before and after placing and leaving of the dirt thereon, the witnesses differ in their testimony. The condition of the road is variously described. Some of the witnesses described it as "pretty rough," as "hilly and uneven," and as having "high and low places." Another witness states that he had extreme difficulty in driving over this road in safety about this time. The dirt from the drain was taken therefrom in scrapers and dumped on the road, and left in piles, and it was wet, and became hard by reason of becoming frozen. Some of the depressions or low places at this point were 8 or 10 inches deep. Before dumping the dirt there, the road was smooth and even, and there was no drop from the road to the bridge. After placing the dirt there, there was a drop of about 10 inches from the road to the bridge. From this evidence we deem it too clear for debate or question that the verdict cannot be disturbed so far as the dangerous condition of the road is concerned, and that this condition was caused by the defendant is also settled by the verdict, and cannot be disturbed for the same reason. As to both grounds the verdict is amply sustained.

The evidence is not definite as to the precise point on the road where the depression was that caused the load to tumble over. The trial court, at appellant's request, submitted a special question of fact to the jury, bearing on this question, which was as follows: "Were both right-hand wheels of the wagon on the bridge when the wagon upset?" The jury answered "No." Appellant now contends that this finding is not sustained by the evidence. There are facts which tend to indicate that a contrary finding might be justified. None of the witnesses, however, saw the wagon when it tipped over. Plaintiff is therefore better enabled to know what the truth was in this regard. His evidence shows that the wagon tipped over just as the right front wheel went on the bridge. The road and bridge were not at right angles with each other at this point; hence, one front wheel struck the bridge before the other did. The sudden drop from the road to the bridge would naturally cause the team and wagon to move ahead to some extent, after the load commenced to tip, or even after the plaintiff was thrown, with the straw, into the ditch.

The plaintiff also testifies that the right hind wheel went into one of these depressions, and right after that fact the front wheel came upon the bridge and dropped

and caused the load to tip over. Whereas the testimony is contradictory as to where the wagon was after the accident happened, in reference to whether it was all on the bridge or not, it is beyond dispute that the cause of the tipping over of the wagon was a defect in the highway, which was struck just before the wagon went upon the bridge. We think the finding is sustained by the evidence, which shows that the wagon did not tip over after the two right-hand wheels were on the bridge, and that these four wheels were not on the bridge when the plaintiff was thrown from the load, and this evidence is not necessarily inconsistent with the evidence that the wagon was wholly on the bridge when the witnesses first saw it after the accident.

It is forcibly urged that the plaintiff was guilty of contributory negligence that should defeat his right to recover damages. His testimony is not clear, and in some respects is contradictory, but the question of contributory negligence was submitted to the jury under instructions not objected to. He was driving on a wagon on which was a load of flax straw, 8 feet high, which was loaded in the usual manner. The alleged contributory negligence is based on the fact that the plaintiff drove over this rough road knowing its dangerous condition. In other words, he testifies that he observed the rough condition of the road a long distance before he reached the bridge where the injury occurred, and drove over the same, notwithstanding that fact. His explanation for driving over this rough road after seeing it is that he could not turn around or otherwise avoid going over it after he saw it. The plaintiff was endeavoring to follow the tracks of those who had driven over this same road about this time. The evidence shows that he exercised the greatest care in driving the team. It seems to be well sustained by the authorities that it was not incumbent upon him to stop and forego using the road because it looked rough or dangerous. In *Elliott on Roads and Streets*, 2d ed. § 636, the rule is stated as follows: "The fact that a traveler voluntarily attempts to pass, with knowledge of the defects or obstruction, is not ordinarily conclusive evidence of a want of due care, but if he has, or ought to have, notice thereof, he must exercise such care as the circumstances demand; and if an ordinarily prudent person would not attempt to pass, under the circumstances, he will be guilty of contributory negligence."

In *McTiver v. Grant Twp.* 131 Mich. 456, 91 N. W. 736, the court said: "But the true test is, Was the danger arising from the known defect obviously of such a char-

acter that no person in the exercise of ordinary prudence would attempt to pass over the highway at that point? If not, it is not negligence, as matter of law, for one to attempt to pass over a highway known to be defective."

In *Evansville & T. H. R. Co. v. Crist*, supra, the court said: "If it were granted that the plaintiff had knowledge that she would be exposed to some danger in attempting to ride along the highway made unsafe by the defendant's wrong, that fact, of itself, would not, in such a case as this, necessarily preclude a recovery. Knowledge is not always a bar to a recovery. It is not a bar in such a case as the present, for the plaintiff was not bound to refrain entirely from using the only highway which gave her access to her home or led from it. . . . It is quite clear that it cannot be said in this case that the danger was one which the plaintiff was bound to shun, or assume, at her own peril, all the risk attending the attempt to pass it. The case is not one of plaintiff casting himself upon a known danger which a prudent person would not have encountered." See also *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359; *Ouverson v. Grafton*, 5 N. D. 281, 65 N. W. 676; *Overhouser v. American Cereal Co.* 118 Iowa, 417, 92 N. W. 74.

Whether defendant was guilty of negligence was clearly a question for the jury, in this case, as in all cases, unless the evidence is so clear that reasonable men would not reach a different conclusion therefrom. The same is true as to the question of the contributory negligence of the plaintiff. This court has recently considered these questions with the result stated above. *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; *Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co.* (N. D.) 121 N. W. 830.

It is further claimed that the board of drain commissioners should be held responsible, and not the defendant. The commissioners are not shown to have done, or caused to be done, any act that caused the injury. What the board authorized the defendant to do in reference to placing the dirt on the highway and leveling it was not unlawful or prohibited, and could not render the highway dangerous to travelers; therefore no cause of action for violation of any duty is shown against the board.

This disposes of each assignment. It follows that the judgment must be affirmed, and it is so ordered.

All concur.

Petition for rehearing denied June 18, 1910.
30 L.R.A. (N.S.)

ALABAMA SUPREME COURT.

ANNISTON CORDAGE COMPANY, Appt.,
v.
WESTERN UNION TELEGRAPH COMPANY.

(161 Ala. 216, 49 So. 770.)

Telegram — suit by addressee.

1. The addressee of a telegram may sue the company in tort for loss sustained by its alteration of the message, if it was for his benefit, and the company had express or implied knowledge of that fact.

Same — notice.

2. A telegraph company is not charged with knowledge that a message is for the benefit of the addressee by the mere fact that it reads: "Offer thirty thousand three and four ply eighths sixteen half. Quick reply."

(May 12, 1909.)

Note. — The right of addressee of telegram to sue for delay in delivery.

- I. Scope of note, 1116.
- II. The English doctrine, 1117.
- III. The American doctrine, 1121.
- IV. The theory of liability for a breach of a public duty, 1124.
- V. The theory of contract made for the benefit of the person addressed, 1126.
- VI. Effect of printed conditions on the sending form, 1129.
- VII. Special statutes authorizing actions by addressees of delayed telegrams, 1131.
- VIII. The damages recoverable.
 - a. The rules for ascertaining damages, 1133.
 - b. The recovery of pecuniary losses, 1134.
 - c. The recovery for mental suffering, 1137.
- IX. Delay and damage,—cause and effect, 1145.
- X. Conduct of recipient unaffected by delay, 1145.
- XI. Failure to establish inexcusable delay, 1147.
- XII. The quantum of damages, 1150.
- XIII. Errors in the conduct of trials, 1150.
- XIV. Conclusion, 1152.

I. Scope of note.

To make clear the right of one to whom a telegram has been sent and unduly delayed in delivery, to sue the telegraph company for damages sustained on account of the delay, it was found necessary not only to take and cite every case of the kind, whether resulting in victory or defeat, but also to state briefly the causes of the defeats. Every victory of the addressee of a delayed telegram over the telegraph company at fault, as a matter of course, affirmed the plaintiff's right to maintain the action, but all defeats by no means denied that right;

APPEAL by plaintiff from a judgment of the City Court of Anniston in defendant's favor in an action brought to recover damages for failure correctly to transmit a telegram. Affirmed.

The facts are stated in the opinion.

Messrs. Willett & Willett for appellant.

Messrs. Knox, Acker, & Blackmon and Campbell & Johnston, for appellee:

To entitle the sendee of a telegram to recover damages, it must appear by the complaint that the plaintiff either directly or *per alium* was a party to the contract.

Postal Telegr. Cable Co. v. Ford, 117 Ala. 672, 23 So. 684, 124 Ala. 401, 27 So. 409; Western U. Telegr. Co. v. Adair, 115 Ala. 441, 22 So. 73; Daughtery v. American U. Telegr. Co. 75 Ala. 168, 51 Am. Rep. 435;

Western U. Telegr. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419; Western U. Telegr. Co. v. Wilson, 93 Ala. 32, 30 Am. St. Rep. 23, 9 So. 414; Western U. Telegr. Co. v. Cunningham, 99 Ala. 314, 14 So. 579; Kennon v. Western U. Telegr. Co. 92 Ala. 399, 9 So. 200; 4 Mayfield, Dig. p. 932, § 15; Sutherland, Damages, 3d ed. § 972; Western U. Telegr. Co. v. Krichbaum, 132 Ala. 535, 31 So. 607.

The damages claimed are not recoverable, because they are not the direct and proximate result of the breach of contract which is alleged, but are remote, speculative, and dependent upon a collateral contract not communicated to the defendant at the time the contract was made.

Daughtery v. American U. Telegr. Co.

on the contrary it is not going too far to say that none did so *in toto*. This will appear quite plainly upon an examination of the citations.

The cases in which the sender of the delayed message joined the addressee in the suit, such, for example, as those concerning telegrams passing between members of partnerships or husbands and wives, were esteemed to lie outside of the scope of this note, and consequently have been omitted in its compilation.

The reader will get substantial aid in his study of the subject by reperusing the following notes, heretofore published in the L.R.A.:

The note to Western U. Telegr. Co. v. Brown, 2 L.R.A. 767, on damages for injury to feelings caused by neglect of duty to deliver message; also, damages for mental anguish alone not recoverable.

The note to Young v. Western U. Telegr. Co. 9 L.R.A. 669, on who may recover damages for delay in delivering telegram.

The note to Sweet v. Postal Telegraph-Cable Co. 53 L.R.A. 732, on liability of telegraph company sending message to office after hours of closing.

The note to Sweet v. Postal Telegraph-Cable Co. 53 L.R.A. 738, on the rule under statutes imposing penalty for delay.

The note to Swan v. Western U. Telegr. Co. 67 L.R.A. 155, on failure to find sendee.

The note to Western U. Telegr. Co. v. Lacer, 5 L.R.A. (N.S.) 751, on law governing liability of telegraph company.

The note to Western U. Telegr. Co. v. Caldwell, 12 L.R.A. (N.S.) 748, on contingencies in possible action of sendee or of some third person, as affecting liability for failure properly to transmit and deliver a telegram.

The note to McLeod v. Pacific States Teleph. & Telegr. Co. 15 L.R.A. (N.S.) 810, on the right of addressee to recover damages for failure to summon him to receive a long-distance telephone message.

The note to Cates v. Western U. Telegr. Co. 24 L.R.A. (N.S.) 1286, on liability of telegraph company accepting message after closing hour of terminal office. 30 L.R.A. (N.S.)

The note to Stone v. Postal Telegr. Co. 29 L.R.A. (N.S.) 795, on law governing liability of telegraph company.

The note to Western U. Telegr. Co. v. Price, 29 L.R.A. (N.S.) 836, on duty of telegraph company to deliver message by telephone.

The note to McMillan v. Western U. Telegr. Co. 29 L.R.A. (N.S.) 801, on negligence of telegraph company causing discontinuance of contract terminable at pleasure of other party thereto, as a ground of liability.

II. The English doctrine.

In England it is settled law that the liability of a telegraph company for damages in not delivering, negligently delaying the delivery of, or erroneously transmitting, a telegraphic message, depends wholly upon the contract it entered into upon the receipt of the message, to transmit and deliver it to the person addressed; and hence that no action for any breach of that contract lies against it except in favor of the other party to such contract.

The view of the English courts is that the obligation of a telegraph company to use due care and skill in the transmission of a despatch is one arising entirely out of the contract, and, as there is ordinarily no contract between the person to whom a message is addressed and the messenger which undertakes its delivery, there is no cause of action in the former's favor arising from the latter's negligence in performing the contract. Playford v. United Kingdom Electric Telegr. Co. L. R. 4 Q. B. 706.

The first step to be established when the recipient of a telegram sues the telegraph company for damages due to its negligence in connection with the despatch, remarked Lush, J., in Playford v. United Kingdom Electric Telegr. Co. *supra*, is that there is a contract between the defendant and the plaintiff.

No action lies in an English court against a telegraph company at the suit of a person to whom a telegram intrusted to it for transmission and delivery is addressed, for

supra; Reed Lumber Co. v. Lewis, 94 Ala. 626, 10 So. 333; Sutherland, Damages, §§ 47, 968; Dean Pump Works v. Astoria Iron Works, 40 Or. 83, 66 Pac. 605; Connersville Wagon Co. v. McFarlan Carriage Co. 166 Ind. 123, 3 L.R.A.(N.S.) 709, 76 N. E. 294; Swift v. Eastern Warehouse Co. 86 Ala. 294, 5 So. 505; Lehman v. Pritchett, 84 Ala. 512, 4 So. 601; Alabama Chemical Co. v. Geiss, 143 Ala. 591, 39 So. 255; Woodstock Iron Works v. Stockdale, 143 Ala. 550, 39 So. 335, 5 A. & E. Ann. Cas. 578; Mickelwait v. Western U. Telegr. Co. 113 Iowa, 177, 84 N. W. 1038.

The sendee of the message is not entitled to sue and recover damages by reason of the breach of contract between the telegraph company and the sender.

damages for nondelivery of, or negligent delay in delivering, the message, when there is no contract between the company and the addressee, unless possibly in case the company has been guilty of a fraud in that association. *Dickson v. Reuter's Telegr. Co.* L. R. 2 C. P. Div. 62.

We took time to consider owing to the importance of the case, said Denman, J., in *Dickson v. Reuter's Telegr. Co.* supra, but after referring to the cases cited by Mr. Herschell, we came to the conclusion that the case is, in effect, governed by the decision of *Playford v. United Kingdom Electric Telegr. Co.* supra.

The case of *Playford v. United Kingdom Electric Telegr. Co.* supra, as a matter of course, set the law for Canada, and, accordingly, was followed in *Feaver v. Montreal Telegr. Co.* 23 U. C. C. P. 150, in which a demurrer was sustained to a declaration by a plaintiff to whom a telegram was sent, and by negligence not delivered, to his damage.

In Georgia alone in the United States, it is held that in the transmission of a telegraphic message, the telegraph company is the agent of the sender, and the sender is bound by the terms of the message, and the person to whom the message is addressed must look to the sender of the message, and not to the telegraph company, for any damages which he may sustain by reason of error in transmitting the despatch. *Western U. Telegr. Co. v. Shotter*, 71 Ga. 760; *Western U. Telegr. Co. v. Flint River Lumber Co.* 114 Ga. 576, 88 Am. St. Rep. 36, 40 S. E. 815; *Brooke v. Western U. Telegr. Co.* 119 Ga. 694, 46 S. E. 826.

Of the cases of *Western U. Telegr. Co. v. James*, 90 Ga. 254, 16 S. E. 83, and *Western U. Telegr. Co. v. Waxelbaum*, 113 Ga. 1017, 56 L.R.A. 741, 39 S. E. 443, was said in *Brooke v. Western U. Telegr. Co.* 119 Ga. 694, 46 S. E. 826, that, while they contain language indicating a view contrary to the doctrine that had been announced in the cases of *Western U. Telegr. Co. v. Shotter*, 71 Ga. 760, and *Western U. Telegr. Co. v. Flint River Lumber Co.* 114 Ga. 576, 88 Am. St. Rep. 36, 40 S. E. 815, holding 30 L.R.A.(N.S.)

Postal Telegr. Cable Co. v. Ford, supra; *Western U. Telegr. Co. v. Cunningham*, 99 Ala. 316, 14 So. 579; *Western U. Telegr. Co. v. Krichbaum*, supra; *Sutherland, Damages*, § 972.

A party making an offer by telegraph is responsible for the correct transmission of his message, and is bound by it in the terms in which it is delivered to the party addressed.

9 Cyc. Law & Proc. p. 294; *Western U. Telegr. Co. v. Shotter*, 71 Ga. 760; *Western U. Telegr. Co. v. Flint River Lumber Co.* 114 Ga. 576, 88 Am. St. Rep. 36, 40 S. E. 815.

Denson, J., delivered the opinion of the court:

This is an action on the case, brought by

that in the transmission of a telegram the telegraph company was the agent of the sender, to whom, and not to it, a person to whom it was addressed must look for any damages which he should sustain by reason of an error in transmitting the message, such cases at best were only physical precedents, and made no ruling binding upon the court in conflict with the doctrine of the last-mentioned cases. "In both," it was said, "it is true, the action was maintained by the sendee of the message, but in neither was [the question of] his right to maintain an action against the telegraph company raised."

We recognize the force of the argument, said the court in *Brooke v. Western U. Telegr. Co.* 119 Ga. 694, 46 S. E. 826, that, independently of any question of agency, a telegraph company owes a duty to the public, for the neglect of which it should be held liable in damages. The general assembly, however, has not seen fit to enact any legislation on the subject, and we do not feel justified in departing from a principle of law which has been recognized by this court for many years, namely: that in transmitting a telegram the telegraph company is the agent of the sender, and the person to whom the telegram is addressed must look to the sender, and not to the telegraph company, for any damages that he may sustain by reason of an error in the despatch.

An action on contract by a person to whom a telegram is sent, brought against the company for damages for delay in delivery, is not maintainable where the relation of principal and agent did not exist between him and the sender. *Ford v. Postal Telegr. Cable Co.* 124 Ala. 400, 27 So. 409; *Western U. Telegr. Co. v. Adams*, 154 Ala. 657, 46 So. 228; *Heathcoat v. Western U. Telegr. Co.* 156 Ala. 339, 47 So. 139; *McGehee v. Western U. Telegr. Co.* (Ala.) 53 So. 205.

If the sender of a telegram is the agent of the person to whom it is sent for the purpose of sending it, then, manifestly, the person addressed is a party to the contract made by and with the telegraph company

the sendee of a telegraphic message, to recover damages of the defendant for a negligent mistake of the defendant's agents in transmitting the message from Trio Manufacturing Company, at Forsyth, Georgia, to plaintiff, at Anniston, Alabama. The message delivered at Forsyth was in this language:

Forsyth, Georgia, Oct. 2, 1906.
Anniston Cordage Company,
Anniston, Alabama.

Offer thirty thousand three and four ply eighths sixteen half. Quick reply.
[Signed] Trio Manufacturing Company.

The mistake in the transmission of the message consisted in the substitution of

for the transmission and delivery of the despatch, in the capacity of principal. The right of the person addressed, when he occupies the relation of principal to the sender, his agent, in respect of the delayed despatch, to maintain an action against the telegraph company for the damages sustained by its breach of the contract to transmit and deliver the message, appears to be beyond dispute.

In jurisdictions where the right of a person to whom a telegram is sent, and negligently delayed in delivery to his damage, is held to depend upon his privity of contract with the telegraph company, he must, in order to maintain an action against the company, certainly an action *ex contractu*, establish the existence between him and the sender of the delayed message, of the relation of principal and agent, unless in the rare case where he may have directly in person contracted with the telegraph company to transmit and deliver the delayed despatch.

When the relation of principal and agent exists, and is known by the telegraph company to exist, between the sender of a telegram and the person to whom it is addressed, the latter may maintain an action against the telegraph company for delay in delivery, if damaged thereby, and is entitled to recover at least the price paid for transmitting the message, and in any event nominal damages. *Kennon v. Western U. Teleg. Co.* 92 Ala. 399, 9 So. 200.

One to whom a telegram is addressed may maintain an action against the telegraph company for delay in delivering it, upon plea and proof that the sender was his agent and the despatch related to the agency, all of which the telegraph company knew. *Western U. Teleg. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23, 9 So. 414.

If, in delivering and paying for the message, the sender discloses the relation of the person to whom it is addressed as his principal, the principal may and should sue for damages for the breach of the contract promptly to deliver such message. *Ibid.*

The sending of a message by telegraph calling for a reply establishes a contractual

"fifteen" for "sixteen" where it occurred in the message.

The first question presented by the record is the right of the plaintiff, sendee, who was not a party or privy to the contract in pursuance of which the message was sent, to maintain an action in tort for the error committed in transmitting the message. Many questions in respect to the law applicable to the liability of telegraph companies for negligence in transmitting messages have been decided by this court; but we are not aware that the precise question now presented has ever been here determined, notwithstanding appellee's counsel seem to think the case of *Postal Teleg. Cable Co. v. Ford*, 117 Ala. 672, 23 So. 684; *Id.* 124 Ala. 401, 27 So. 409, determinative

relation between the sender and the telegraph company in respect of the answer, so as to entitle the former to maintain an action in case of delay in the delivery of the reply message. *Western U. Teleg. Co. v. Cunningham*, 99 Ala. 314, 14 So. 579.

The cases decided by this court, it was said in the opinion in *Western U. Teleg. Co. v. Adair*, 115 Ala. 441, 22 So. 73, in which the sendee of the telegram was plaintiff, were those in which the complaint showed that the plaintiff, either directly or through another, was a party to the contract; and the opinions seem to concede the proposition that if such relationship did not exist, an action for the breach of the contract could not be maintained by the sendee.

A person to whom a telegram is addressed cannot maintain an action against the telegraph company for negligence in transmitting and delivering it, without alleging and proving that he was, either directly or by his agent, a party to the contract to send and deliver the message. *Ibid.*

The person to whom a telegram is addressed has no right to recover for the failure to deliver or for the delay in delivering it, without alleging or proving a contract to which he is a party or privy, between himself or his agent and the telegraph company, when his action is based upon the contract and brought to recover damages resulting from its breach. *Postal Teleg. Cable Co. v. Ford*, 117 Ala. 672, 23 So. 684.

A person to whom a telegram is addressed, who has previously agreed with the telegraph company to have all despatches addressed in a particular way delivered to him, is entitled to maintain an action against a telegraph company for its failure promptly to deliver such a despatch to him, where he has sustained damages in consequence of the delay. *Milliken v. Western U. Teleg. Co.* 110 N. Y. 403, 1 L.R.A. 281, 18 N. E. 251, reversing 21 Jones & S. 111.

In that case, the New York court of appeals remarked that some of the authorities in the United States went to the extent of holding a telegraph company to

of the issue in appellee's favor. It will be discovered from a reading of that case that it was an action *ex contractu* by the sendee, for breach of a contract alleged to have been made by the telegraph company with the sender, for the benefit of the sendee, and as his agent. The court held against the right of recovery, on the ground that the proof failed to show that the message was sent for the benefit of the plaintiff, as alleged. Brickell, Ch. J., in the opinion, among other things, said: "The right of the sendee to maintain an action for damages against the telegraph company for failure to deliver the message or for error in the message delivered has been frequently before the courts. In England it is held that the sendee, in the absence of such facts as make him a

party or privy to the contract, has no right of action against the telegraph company." After citation of authorities the opinion continues: "In thus holding, the English courts apply to telegraph cases the principle established by them that no cause of action arises in favor of a stranger to a contract because of a breach of duty growing out of the contract." *Winterbottom v. Wright*, 10 Mees. & W. 107.

But the court left undecided the question here in hand, as that was a case *ex contractu*, and not in tort. The English doctrine, that the addressee of a telegram message cannot sue the company for error or negligence, in its transmission or delivery, because the obligation of the company springs entirely from the contract between

rest under a legal duty to the person to whom a despatch is addressed, to transmit it correctly and deliver it to him promptly, when he is the party solely interested, but added that it was unnecessary in that case to pass upon that question, and therefore it expressed no opinion upon it, because in that case the relation of the sender as agent of the recipient existed and was established.

In *Loper v. Western U. Teleg. Co.* 70 Tex. 689, 8 S. W. 600, the court reversed a judgment sustaining the company's general demurrer to a petition, and remanded the cause for trial upon the ground that, although a telegram is neither prepared, delivered, nor paid for in person by one for whose benefit it is sent, yet if it is prepared, delivered, and paid for by another or others at his special request, there is a contract between the telegraph company and him, and such company, if it has knowledge of the urgency and importance of the despatch, is liable to him in damages for its negligence in transmitting and delivering the message.

In the superior court of Montreal, in *Bell v. Dominion Teleg. Co.* 25 Lower Can. Jur. 248, Johnson, J., held the defendant liable in damages for negligence in delivery to the plaintiff of an answer to a despatch he had sent by it. The controversy in that case was concerning the effect of a printed stipulation upon the reply blank form, assented to by the sender, by which the company claimed immunity from liability for unrepeat messages. The case of *Playford v. United Kingdom Electric Teleg. Co.* L. R. 4 Q. B. 706, was not cited, but is distinguishable because in the Canadian case there was privity of contract between the plaintiff and the telegraph company.

In an action *ex contractu* against a telegraph company, by the person to whom a telegraph message was addressed and delayed in delivery, proof that he had arranged with the sender of the despatch to send it in case of the illness of his wife, which the despatch announced, and that the receiving agent of the company was informed of such arrangement when the des-

patch was handed in, is sufficient to establish the agency of the sender and the necessary contractual relation between the company and the plaintiff. *Western U. Teleg. Co. v. Rowell*, 153 Ala. 295, 45 So. 73.

An allegation in the complaint of a person to whom a telegram was addressed and delayed in delivery, in an action for a breach of the contract against the telegraph company, averring that the despatch was sent pursuant to a previous arrangement between the plaintiff and the sender, is a sufficient averment that the sender acted as the agent of the sendee in sending the message. *Western U. Teleg. Co. v. Cleveland* (Ala.) 53 So. 80.

A person to whom a telegram is sent, but not delivered promptly or within a reasonable time, cannot maintain an action against the company for damages for a breach of its contract to transmit and deliver the despatch, unless he was a party to such contract or a privy to it, as the principal of the sender. *McGehee v. Western U. Teleg. Co.* (Ala.) 53 So. 205.

If the person to whom a telegram is addressed is the one interested in its correct and diligent transmission, and is to bear the expense of sending it, he is to be regarded as the person with whom the contract is made. *De Rutte v. New York, A. & B. Electric Magnetic Teleg. Co.* 1 Daly, 547.

The courts have decided in some cases that when the person to whom a negligently delayed despatch was addressed was an undisclosed and unknown principal of the sender, he could not maintain an action against the company, nor recover damages for its breach of contract. These decisions were so plainly unsound that many of the courts which rendered them recanted, and afterwards held there was no difference between a known and an undisclosed principal in such cases.

The rule that a principal may maintain suit upon a parol contract made by his agent with a third person, although the agency is not disclosed at the time of the

it and the sender, and the sendee is not a party or privy thereto, does not prevail generally in this country. The cases are not in harmony upon the question. We have examined them, and conclude that the weight of authority is to the effect that the addressee of a message may sue the telegraph company in his own name, and recover such damages as he may have sustained by reason of its negligence, when the message was intended for his benefit, and the company either had knowledge of that fact or had notice of such facts as would be the equivalent of knowledge. 2 Shearm. & Redf. Neg. 5th ed. § 543; Gray, Communication by Teleg. § 65; Thomp. Electricity, § 427; Joyce, Electric Law, § 1008; 21 Enc. Pl. & Pr. p. 509; *Frazier v. Western U. Teleg.*

making of the contract, applies in actions against telegraph companies. *Milliken v. Western U. Teleg. Co. supra.*

The person to whom a telegram is addressed and negligently delayed in delivery is entitled to maintain an action against the telegraph company for the damages which he has sustained by reason of such delay, where the sender of the message was his agent for the purpose of sending it, and sent it for his benefit, although the telegraph company had no knowledge that the relation of principal and agent existed between the recipient and the sender. *Ibid.*

A principal to whom a telegram has been sent by his agent, and negligently delayed in transmission or delivery, may maintain an action for damages upon the contract against the telegraph company, notwithstanding the agency was not disclosed to the company, and was unknown at the time of the sending of the despatch. *Manker v. Western U. Teleg. Co. 137 Ala. 292, 34 So. 839.*

The Alabama supreme court in the case of *Manker v. Western U. Teleg. Co. supra*, in an action *ex contractu* by the recipient of a telegraphic message sent by her brother, and summoning her to the bedside of her dying father, and delayed in delivery, overruled the cases of *Western U. Teleg. Co. v. Allgood*, 125 Ala. 712, 27 So. 1024, and *Lucas v. Southern R. Co. 122 Ala. 529, 25 So. 219*, which had held that an undisclosed principal could not recover for a breach of contract made by his agent, and, in so doing, remarked: "These cases followed and were based upon expressions contained in *Daughtery v. American U. Teleg. Co. 75 Ala. 168, 51 Am. Rep. 435*; *Western U. Teleg. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. 419; *Kenyon v. Western U. Teleg. Co. 92 Ala. 399, 9 So. 200*, and *Western U. Teleg. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23, 9 So. 414. A review of these later cases leads us to the conclusion that what was stated in those cases with regard to showing by the proof that the agency was disclosed was nothing more than *dictum*. Upon more mature consideration, we are not able to see any sufficient reason

Co. 2 A. & E. Ann. Cas. 396, and notes (45 Or. 414, 67 L.R.A. 319, 78 Pac. 330).

The case of *Frazier v. Western U. Teleg. Co. supra*, is a well-considered one by the supreme court of Oregon, and we adopt a part of the opinion in that case as tersely expressing our own views of the law governing the question: "A telegraph company is not a common carrier in the sense that it is an insurer against mistakes in the transmission of messages, or delay in their prompt delivery; but it is an instrument of commerce and a public service corporation. It therefore owes the duty to those for whose benefit it undertakes to transmit and deliver messages, to transmit and deliver them without unreasonable delay. For a violation of this duty, or for

for holding that a principal may not maintain an action on a contract made by his agent, though such principal be not disclosed in the making of the contract. . . . We are therefore of the opinion that what was said in the cases of *Daughtery*, *Henderson*, *Kenyon*, and *Wilson*, *supra*, upon this question, should be disapproved, and the cases of *Allgood* and *Lucas*, *supra*, should be overruled."

The action of *Harkness v. Western U. Teleg. Co. 73 Iowa, 190, 5 Am. St. Rep. 672, 34 N. W. 811*, was brought by the undisclosed principal of both the sender and the recipient of a telegram which was unreasonably and negligently delayed in delivery, to the damage of the plaintiff, and a judgment against the telegraph company was affirmed. It was contended in behalf of the telegraph company that the contract was made with the sender, and that he could only recover thereon the amount paid for the message, and this was all that the plaintiff could recover, because she was unknown to the company in the transaction. We do not concur in this proposition, said the court, but think that, as the telegram was sent and received for the benefit and use of the plaintiff, she may recover such damages as she has sustained, subject only to any payments in liquidation of damages made by the company to the sender of the message before it had knowledge that it was for her use, and that she was the principal in the transaction.

III. The American doctrine.

Under the English rule, the person to whom is sent a telegram altered in transmission, never delivered, or inexcusably delayed in delivery, no matter what damages he thereby sustains, may not maintain suit against the delinquent telegraph company, unless he entered into the contract with it either directly in person, or as principal through the sender as his agent.

But under the rule prevailing in the United States an action against a telegraph company for damages resulting from a negligent delay in delivering a telegram may

a negligent performance thereof, it is responsible to the party for whose benefit the contract was made, whether it be the sender or the addressee. . . . But the right of an addressee to recover is necessarily grounded upon the contract between the company and the sender, whether the action be in form technically for a breach of contract or one sounding in tort. Without the contract under which the message was forwarded as a foundation for the cause of action, no recovery whatever could be had. In order for the addressee to sue, it is essential, therefore, that it appear that he was to be benefited by the contract for sending the message, and that fact was known to the company when it received the message for transmission, either from its language or otherwise."

There is not pretense, by averment in either count of the complaint, that the defendant at the time it received the message for transmission, was given any information that it was for the benefit of the sendee. The question then arises: Is the language of the message sufficient to convey such in-

formation? We think it easy of demonstration that it is not; and it suffices to say, without entering into a discussion of the point, that this court holds that the message, in its wording, is not such as would charge the transmitting company with the information that the sendee is the party for whose benefit it is sent.

Upon the foregoing considerations, it follows that the complaint fails to show any duty owing from the defendant to the plaintiff, or any breach of such a duty. Therefore no error was by the trial court committed in sustaining the demurrer to the several counts of the complaint. It is needless to discuss any other question presented. On the question of damages, however, see *Frazier v. Western U. Teleg. Co.* supra, the cases there cited, and the notes to the opinion.

Let the judgment of the City Court be affirmed.

Dowdell, Ch. J., and Simpson and Mayfield, JJ., concur.

be maintained either by the sender of the despatch or the person to whom it is addressed, if either of them sustains damage. *Chapman v. Western U. Teleg. Co.* 90 Ky. 265, 13 S. W. 880.

It is well settled in the United States, according to the court in *Western U. Teleg. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4, that the receiver of a telegraphic despatch may maintain an action against the telegraph company through whose negligence the message has been altered or changed, for such loss as he has sustained by reason of having been led to act upon the despatch.

In England, said the court in *Yunker v. Western U. Teleg. Co.* (Iowa) 125 N. W. 577, where the action against the telegraph company is regarded as *ex contractu*, the addressee of a message may not sue, no matter what his damages. Some few American courts follow the English doctrine, but the great majority of them hold that as a general rule an addressee may recover the damages suffered by him.

While it seems to be the prevailing rule in England, said the court in *Fererro v. Western U. Teleg. Co.* 9 App. D. C. 455, 35 L.R.A. 548, that the carrier of a telegram is under no legal obligation to one to whom it has been directed by another, although altered before delivery, and acted upon by him to his injury, and that the recipient is without remedy, that doctrine has rarely, if ever, met with approval by the courts of this country.

The English cases deny the right of the person to whom a telegram is sent to recover damages for default either in its transmission or its delivery, on the ground that there is no privity of contract between him and the telegraph company. Many of 30 L.R.A. (N.S.)

the American cases, however, according to the court in *Hadley v. Western U. Teleg. Co.* 115 Ind. 191, 15 N. E. 845, give a more liberal construction in favor of the person to whom a despatch is sent, and this more liberal construction has been adopted as the better and more reasonable rule by this court.

It is the doctrine of the English courts that the receiver of a telegram may not maintain suit against the telegraph company, on the ground that the obligation of the company springs entirely from contract and that the contract for the transmission of the message is with the sender of it. This doctrine, however, said the court in *Western U. Teleg. Co. v. Dubois*, supra, has never prevailed in the United States.

The supreme court of Iowa in *Herron v. Western U. Teleg. Co.* 90 Iowa, 129, 57 N. W. 690, in affirming a judgment recovered against a telegraph company by the person to whom a despatch was addressed, and not delivered, said: There were no contractual relations between the company and the plaintiff, and some authorities hold that in such cases the person injured may not recover, but the rule which seems to prevail generally in this country is to allow the person to whom a despatch is sent, even though sent by a person under no obligation to send it, to recover of the telegraph company damages caused by delay in the transmission.

It is well settled in England, said the court in *Western U. Teleg. Co. v. Allen*, 66 Miss. 549, 6 So. 461, that the person to whom a telegram is sent may maintain no action for the negligence of the company in delivering the message, even though he acts upon the message finally delivered and sustains a pecuniary loss. But in

America the contrary rule is announced where injury results to the addressee of the message, although the courts are not agreed upon the principle upon which the action rests. While it may be difficult to reply to the criticisms of the grounds upon which the American decisions rest, it must be regarded as settled by an almost unbroken current, that the telegraph company is under responsibility to the sendee, at least in those cases in which injury results from the delivery of an altered message.

The view taken by the English courts, that the liability of a telegraph company to the recipient of a message arises only from its negligence, that there can be no negligence unless it owes a duty to the party aggrieved, and that such duty must arise either out of a contract or by some rule of law, and that the sender has, but the person to whom the message is sent has not, a contract with the company, so that the supposed duty does not arise out of contract, and the law has imposed none out of consideration of public policy, is a view that has never been accepted in this country, according to the court in *Elsey v. Postal Telegr. Co.* 15 Daly, 58, 3 N. Y. Supp. 117, but the doctrine prevails in the United States that persons who receive messages without any contract with the company may be compensated in damages for injuries which they sustain by the negligence of the company in transmitting or delivering the despatches.

It is held in England, according to the court in *McLeod v. Pacific Teleph. Co.* 52 Or. 22, 15 L.R.A. (N.S.) 810, 94 Pac. 568, 16 A. & E. Ann. Cas. 1239, rehearing denied in 52 Or. 28, 18 L.R.A. (N.S.) 954, 95 Pac. 1009, 16 A. & E. Ann. Cas. 1241, that the obligations of a telegraph company arise entirely from the contract between it and the sender of the message, and that the addressee, not being a party or privy to such contract, may not sue thereon; but this rule does not prevail in this country, and here the courts have, with practical unanimity, sustained the right of the addressee to sue and recover such damages as he may have suffered by reason of the negligence of the company in not delivering the message.

In *Western U. Telegr. Co. v. Woodard*, 84 Ark. 323, 105 S. W. 579, 13 A. & E. Ann. Cas. 354, it was insisted that there could be no recovery because there were no contractual relations between the company and the plaintiff, to whom the delayed telegram was addressed. This, said the court in reply, is the English rule upon the subject, and there are a few cases in America that have followed the English courts. But the great weight of authority, in fact, almost all of the American authorities, are against the rule. It has become so thoroughly established that it is called the "American doctrine" on the subject, to allow the addressee of the telegram to recover for damages flowing from a failure to deliver or correctly deliver the telegram sent him. . . . This court early aligned

itself with the American decisions. Recently it reiterated the right of the addressee to recover under the mental anguish statute (citing *Western U. Telegr. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528).

The question whether a telegraph company owes any duty to the person to whom a telegram is addressed, in the transmission of the message, inasmuch as it sustains towards him no contractual relation, and such persons only as sustain such a relation to the company may have a remedy against it, is one of very great importance to the public and the telegraph companies, said the court in *Wolfskehl v. Western U. Telegr. Co.* 46 Hun, 542, 12 N. Y. S. R. 555, and neither the elementary writers nor the adjudicated cases furnish much assistance in its solution, for they are quite inharmonious and unsatisfactory, and throw but little light upon the question.

Circumstances in which a person to whom a telegraphic despatch is sent may recover damages for a mistake or default in the transmission of the despatch, or for an unreasonable delay in its delivery, or for its nondelivery, are, according to the court in *Hadley v. Western U. Telegr. Co.* 115 Ind. 191, 15 N. E. 845, various and incapable of an exact hypothetical definition, applying alike to all cases that may occur.

While the right of the addressee of a telegram to recover for a delay in its delivery is almost universally recognized in America, said the court in *Western U. Telegr. Co. v. Woodard*, supra, yet the grounds of recovery are variously sustained; some of the courts holding that the contract of the sender inures to the benefit of the addressee, and others holding that the suit is an action of tort, and others holding that it is one for a breach of public duty.

While it may be regarded as the settled rule in this country that the addressee of a telegram may maintain an action against the company for any damage he may have suffered by reason of the company's negligence in not delivering the message, the courts have not agreed upon a common reason for it, according to the court in *McLeod v. Pacific Teleph. Co.* supra. Some of them hold that the sender of a message is the agent of the addressee, and the latter, as principal, can maintain an action for breach of the contract, or for tort if he is injured by negligence in the performance of the contracted duty. Others maintain that where the contract discloses that it is for the benefit of the addressee, he may sue for a breach of it, under the rule that a third person has a right of action upon a promise made for his benefit, although a stranger both to the promise and the consideration. Others are of the opinion that the company is a bailee, and the message is the property of the party to whom it is addressed, in analogy to the consignee of goods. Others, and perhaps the majority, seem to rest the doctrine upon the public duty which the company owes to any person beneficially interested in the message or

service which it undertakes to transmit or perform, whether the sender or the receiver, or both.

The court in *Yunker v. Western U. Tele. Co.* (Iowa) 125 N. W. 577, gave the reasons for the rule adopted by a majority of the American courts, that the person to whom a telegram is addressed may recover of the telegraph company damages that he has sustained in consequence of the negligence of the company in transmitting or delivering the despatch, as follows:

(1) A telegraph company is a public agency, and responsible, as such, to anyone injured by its negligence, or, at least, it is the common agent of the sender and receiver, and responsible to each for any injury sustained by them, respectively, by its negligence. (2) Where the receiver is the beneficiary of the contract, the injury, if any, caused by the company's negligence, must be to him. (3) The message is the property of the person addressed, in analogy to a consignee of goods. (4) Where it appears upon the face of the message that the sender is the agent of the receiver, the latter, as the principal, may maintain an action for breach of the contract, or for a tort if injury is done him by negligence in the performance of the duty contracted to be done.

The supreme court of North Carolina in *Young v. Western U. Tele. Co.* 107 N. C. 370, 9 L.R.A. 689, 22 Am. St. Rep. 883, 11 S. E. 1044, summed up the reasons for holding a telegraph company responsible for its negligence in delivering a despatch, to the recipient of the telegram, as follows:

(1) That a telegraph company is a public agency, and responsible, as such, to anyone injured by its negligence, or, at least, it is the common agent of sender and receiver, and responsible to each for any injury sustained by them, respectively, by its negligence; (2) that in a case like this, the receiver is the beneficiary of the contract, and the injury, if any, caused by the company's negligence, must be to him; (3) the message is the property of the party addressed, in analogy to a consignee of goods; (4) that upon the face of a message summoning the person to whom it is addressed to attend his dying wife, the sender is the agent of the receiver, and the latter, as the principal, may maintain an action for breach of the contract, or for a tort if injury is done him by negligence in performance of the duty contracted to be done.

IV. The theory of liability for a breach of a public duty.

A telegraph company is a public agent and exercises a public employment. *Western U. Tele. Co. v. Short*, 53 Ark. 434, 9 L.R.A. 744, 14 S. W. 649.

It is a public servant, bound to exercise due diligence in transmitting and delivering messages to the persons to whom they are addressed. *Western U. Tele. Co. v. Cleaver*, 13 Ky. L. Rep. 301.

Bound, also, to act whenever called upon and paid or tendered its reasonable char-

ges. *Western U. Tele. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109, 21 N. E. 4.

Telegraph companies are like common carriers in that the law imposes upon them a duty which they are bound to discharge. *Ibid.*

By virtue of its public employment, it is the duty of a telegraph company, for a reasonable consideration, to receive and transmit over its wires messages, with that integrity, skill, and diligence which appertains to the business of telegraphy. *Western U. Tele. Co. v. Short*, supra.

A telegraph company, in analogy to a common carrier, is under the obligation and duty to the public to perform the service it undertakes in a prompt and skillful manner, and for any breach of such obligation and duty it is liable to the person injured. *Western U. Tele. Co. v. Hope*, 11 Ill. App. 289.

A telegraph company, being a common carrier for the transportation of intelligence for hire, owes a duty in reference to its business to the public, and may be held liable for a breach of that duty. *Butler v. Western U. Tele. Co.* 62 S. C. 222, 89 Am. St. Rep. 893, 40 S. E. 162.

The business of a telegraph company, like that of a common carrier, is in the nature of a public employment, because it holds out to the public its readiness and willingness to transmit intelligence for anybody and everybody upon the payment of its charges. *De Rutte v. New York, A. & B. Electric Magnetic Tele. Co.* 1 Daly, 547.

While a telegraph company is not charged with the absolute liability of a common carrier, yet it is engaged in a public employment for hire, and is bound to exercise care and diligence adequate to the obligations it assumes, to transmit messages safely and correctly and to avoid errors and mistakes; and in this respect it is a common carrier, and much of the law of carriers applies to it. *Wolfskehl v. Western U. Tele. Co.* 46 Hun, 542, 12 N. Y. S. R. 555.

A telegraph company, while not an insurer, and hence not responsible for errors beyond its control, is, like a common carrier, a public servant, bound to exercise care and diligence adequate to discharge the duties it has undertaken, and for a negligent, inexcusable failure to do so, is liable in damages to persons injured in consequence. *Abraham v. Western U. Tele. Co.* 11 Sawy. 28, 23 Fed. 315.

In an action against a telegraph company for a breach of its public duty as a common carrier for the transportation of intelligence for hire, a contractual relation between the plaintiff and the defendant is not essential. *Butler v. Western U. Tele. Co.* supra.

The gist of an action by the person to whom a telegram is addressed is the negligence of the defendant company in failing to perform a duty imposed upon it by law. *Western U. Tele. Co. v. Burris*, 102 C. C. A. 386, 179 Fed. 92.

The reason generally assigned by the

courts in the United States which decline to follow the English rule, for holding a telegraph company liable to the person to whom the telegram is addressed, for negligent delay in transmitting and delivering it, is that such company is a public agency, and as such is bound to exercise ordinary care in receiving, transmitting, and delivering messages, and therefore is responsible to anyone injured by its negligence in the discharge of its public duties. *Ibid.*

A majority of the American courts, according to the court in *Fererro v. Western U. Teleg. Co.* 9 App. D. C. 455, 35 L.R.A. 548, have rested the rule so generally adopted by them, recognizing the right of the recipient of a telegram to maintain an action against the telegraph company in case of damage by the negligent alteration of the message in the course of transmission, upon the idea that the telegraph company is engaged in exercising a public franchise having relation to the commerce of and between the states, and, consequently, that it owes to the sender of the message a double duty, one arising out of the contract and the other by virtue of the general obligation to perform the undertaking assumed, and, to the person addressed, a single duty by virtue of the same general obligation.

In *Gulf, C. & S. F. R. Co. v. Levy*, 59 Tex. 563, 46 Am. Rep. 278, the court reversed a judgment overruling the railroad company's demurrer to a petition alleging negligence in failing to transmit and promptly to deliver a telegram sent over a telegraph line owned and operated by the railroad company, announcing the sudden death of the wife and child of the plaintiff's son; but the court in so doing put it upon the ground that the plaintiff had not, by the default alleged, sustained any damages that he was entitled to recover in the action, although it recognized the fact that, by reason of the public character of the employment which the railroad company had assumed, a duty existed upon its part to deliver the message to the plaintiff without unnecessary delay, and that the failure to perform such duty, if attended by at least normal damages to the plaintiff, gave him a sufficient ground for an action, even in the absence of a contract to which he was a party.

It was contended in *Western U. Teleg. Co. v. Fenton*, 52 Ind. 1, that the person to whom a telegram was addressed which the telegraph company had negligently delayed delivering, and who had lost employment in consequence, was not entitled to maintain an action, because there was no privity between him and the company, whose contract was wholly with the sender of the message; and in support of that contention the English case of *Playford v. United Kingdom Electric Teleg. Co.* L. R. 4 Q. B. 706; *Allen, Teleg. Cases*, 437, was cited. If, said the Indiana tribunal, we are to regard the decision in the case referred to as the law applicable to this case, there was no valid cause of action. but it seems to us 30 L.R.A. (N.S.)

that this may be too narrow a view of the question. A telegraph company, exercising corporate franchises, whose business it is to transmit and deliver messages, owes certain duties to the public, and among those duties is that of delivering without unreasonable delay messages which are thus transmitted. For a violation of that duty, the company, it would seem, ought to be responsible to the party injured. But however this may be in the absence of any statute on the subject, we have a statute clearly broad enough to authorize a person to whom a despatch is sent to recover in a proper case, though the relation of contractors does not exist between him and the company.

In *Western U. Teleg. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528, while the action was brought by the person to whom the delayed telegram was addressed, the right of action rested upon the statute of the state of Arkansas (*Kirby's Dig.* 7947) providing that "all telegraph companies doing business in this state shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss, for negligence in receiving, transmitting, or delivering messages; and in all actions under this section, the jury may award such damages as they conclude resulted from the negligence of the said telegraph company." It will be observed, said the court in reference to the question of the right of the plaintiff to maintain the action, that our statute does not make the right to recover such damages depend upon any contractual relation existing between the telegraph company and the person injured by its negligence, but declares in broad terms that all telegraph companies doing business in the state shall be liable for mental anguish, for negligence in receiving, transmitting, or delivering messages. In fact, the right of an addressee to recover damages at all is not based upon contract, as none exists. The court thereupon proceeded to quote from *Thompson on Electricity*, § 427, as follows: "The true view which seems to sustain the right of action in the receiver of the message, or in the person addressed where it is not delivered, is one which elevates the question above the plane of mere privity of contract, and places it where it belongs, upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender or his principal, where he is agent, or the receiver or his principal, where he is the agent."

In *Western U. Teleg. Co. v. Hope*, 11 Ill. App. 289, an action by the person to whom a telegram was addressed, to recover damages for delay in delivering it, it was insisted by the company that there was no contract between it and the plaintiff, and that the liability of the company was wholly with the sender of the message, who alone had any right of action; and in support of that proposition there was cited the English case of *Playford v. United Kingdom Electric Teleg. Co.* L. R. 4 Q. B. 706, Al-

len, Teleg. Cas. 437, as to which the court said: That case does so hold, but in the note following the case in Allen, it is said that this is not the American rule on the subject, but that the company is a public servant in many respects like a common carrier, and is under a duty to perform the service it undertakes, in a prompt and skillful manner, and that for a breach of this duty, it is answerable to the party injured by its neglect, whether that party be the sender or the receiver of the message.

. . . In many instances the transaction with a telegraph company is wholly for the benefit of the receiver, and not for that of the sender. So it was in this case, and it would be unjust that the telegraph company should escape liability for its negligence upon the ground that no injury had been sustained by the person with whom the contract was made; and, if liable at all, it should be held for all the actual, proximate damages occasioned by its negligence.

Where the relation of principal and agent does not exist between the sender of a telegram and the person to whom it is sent, the latter may maintain an action against the telegraph company for negligence in transmitting or delivering the despatch only *ex delicto*. *McGehee v. Western U. Teleg. Co. (Ala.)* 53 So. 205.

No contract relation exists between a telegraph company and the person to whom a telegram is addressed, and the latter, for any damages which he may have suffered by the negligence of the company in transmitting or delivering the despatch, must sue in tort, and not upon contract. *Webbe v. Western U. Teleg. Co.* 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670.

With apparent unanimity the courts of our states, said the court in *Fererro v. Western U. Teleg. Co.* 9 App. D. C. 455, 35 L.R.A. 548, have upheld the right of a receiver of a telegram to maintain an action on the case as for a tort committed, whenever he shall have sustained actual damage without his own fault, in consequence of the negligent alteration of the message in the process of transmission.

A person to whom a telegram is addressed, and who suffers damage by the failure of the company to deliver it with promptitude, may maintain an action either *ex contractu* or *ex delicto*. He may maintain the former by relying upon a breach of the contractual obligation to deliver the message, or the latter by relying upon a breach of duty in failing to deliver, whether that duty arose out of the contract or was one imposed by law. *Western U. Teleg. Co. v. Krichbaum*, 132 Ala. 535, 31 So. 607.

This doctrine was applied to a demurrer for misjoinder, in *Western U. Teleg. Co. v. Waters*, 139 Ala. 652, 36 So. 773.

In *Western U. Teleg. Co. v. Jackson*, 163 Ala. 9, 50 So. 316, the rule which requires the person to whom a telegram is addressed, to establish the agency of the sender in order to recover damages for a breach of the company's contract by negligently delaying

its delivery, was held not to apply to actions *ex delicto*, upon the authority of the principal case, but a recovery was overthrown in consequence of errors by the trial court in instructing the jury.

In *Western U. Teleg. Co. v. Cooper*, 2 Ga. App. 376, 58 S. E. 517, the court, in reversing the judgment, declared that the case was controlled by the decision of the supreme court in *Brooke v. Western U. Teleg. Co.* 119 Ga. 695, 46 S. E. 826, in which it had been held that in the transmission of a telegram the telegraph company was the agent of the sender, and that the recipient must look to him, and not to the company, for damages arising out of an error in the transmission of the message. In another paragraph of the syllabus, however, the court seemed not to rest upon such a proposition, but to hold that if the action was for a breach of the contract, the terms of the contract between the sender and the company would be controlling, but that it would be otherwise in an action *ex delicto*, for a breach of public duty.

The court, in *Whitehill v. Western U. Teleg. Co.* 136 Fed. 499, conceded that some authorities based the American rule of the liability of telegraph companies to persons to whom messages were sent and negligently delayed in transmission or delivery, upon grounds other than that of contract, and held that the action is based upon the negligence of the company in performing its duty in its public capacity as a common carrier of messages; but, it added, the Supreme Court of the United States having held otherwise, the decisions of that court were conclusive upon all the Federal courts, regardless of what the state courts have decided.

V. *The theory of contract made for the benefit of the person addressed.*

The rule that one for whose benefit other persons have entered into a contract may recover the damages he has suffered by a breach of such contract, from the person in default, has in several cases in the United States been invoked successfully to obtain and uphold a recovery of damages against a telegraph company for its failure to deliver, or delay in the delivery of, a telegram addressed to the plaintiff.

The liability of a telegraph company for a breach of its public duty to transmit intelligence arises in instances where the contract is made for the benefit of the plaintiff. *Butler v. Western U. Teleg. Co.* 62 S. C. 222, 89 Am. St. Rep. 893, 40 S. E. 162.

Upon the principle that a person for whose benefit a promise to another, upon a sufficient consideration, is made, may maintain an action on the contract in his own name against the promisor, the person to whom a telegram is addressed, sent by another for his benefit, may maintain an action against a telegraph company for damages sustained in consequence of the failure of the company to deliver the de-

spetch. *West v. Western U. Teleg. Co.* 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807.

The person to whom a telegram is sent, and for whose benefit it is sent, is entitled to recover direct damages resulting to him from the negligent failure of the telegraph company to transmit and promptly to deliver the despatch. *Western U. Teleg. Co. v. Woods*, 56 Kan. 737, 44 Pac. 989.

Where the person to whom a telegram is addressed is the sole beneficiary of the message, and the contract with the company to transmit and deliver it is made for his benefit, he may maintain an action against the company for damages in case of a negligent failure promptly to deliver the despatch. *Chapman v. Western U. Teleg. Co.* 90 Ky. 265, 13 S. W. 880.

The party who in fact was to be served by the transmission and delivery of a telegram, and who has suffered damage by the negligent and inexcusable delay of the telegraph company in transmitting and delivering it, is authorized to maintain an action against the company, and it is wholly unimportant as to whose agent the sender of the message was, or whether he was previously instructed to send it. *Western U. Teleg. Co. v. Cook*, 45 Tex. Civ. App. 87, 99 S. W. 1131.

A telegraph company undertakes the performance of a particular service for a stipulated reward paid either by the sender or the recipient of the telegram, and the service and duty is undertaken for the benefit of both. Either party, therefore, who sustains damage from the negligent performance of such duty, has a remedy by action against the company. *Wolfskehl v. Western U. Teleg. Co.* 46 Hun, 542, 12 N. Y. S. R. 555.

A person to whom a telegram is sent, and for whose benefit it is transmitted, announcing the death of his son and asking for directions as to the disposal of the corpse, is entitled to recover damages of the telegraph company in case of a negligent and inexcusable delay in delivering, or failure to deliver, the despatch. *Western U. Teleg. Co. v. Jump*, 8 Ky. L. Rep. 531.

Upon the principle that an action lies upon a contract made by the defendant for the benefit of plaintiff with a third party, without the plaintiff's being privy to the consideration, an action lies by the person to whom a telegram is sent to recover damages for negligence in delivering it, by virtue of § 887 of the Revised Statutes of Missouri, which provides that "telephone or telegraph companies shall be liable for special damages occasioned by the failure or negligence of their operators or servants in receiving, copying, and delivering despatches." *Markel v. Western U. Teleg. Co.* 19 Mo. App. 80.

The addressee of a telegram may maintain an action against a telegraph company for a violation of its duty, or negligent performance of it, in respect of such despatch, only upon the theory that he was the person intended to be benefited by the 30 L.R.A. (N.S.)

contract between the company and the sender of the despatch, and that he has been injured by the failure of the company to perform such contract. *Frazier v. Western U. Teleg. Co.* 45 Or. 414, 67 L.R.A. 319, 78 Pac. 330, 2 A. & E. Ann. Cas. 396.

It is not essential to the right of the addressee of a telegram sent for his benefit, to a recovery of damages when he is injured by the negligence of the company in transmitting or delivering the despatch, to allege or prove that the contract between the sender and the company was for his sole and exclusive benefit, but merely that he was to be benefited by the performance of such contract. *McLeod v. Pacific Teleph. Co.* 52 Or. 22, 15 L.R.A. (N.S.) 810, 94 Pac. 563, 16 A. & E. Ann. Cas. 1239, rehearing denied in 52 Or. 28, 18 L.R.A. (N.S.) 954, 95 Pac. 1009, 16 A. & E. Ann. Cas. 1241.

A person for whose benefit a telegram is sent, and negligently not delivered, or inexcusably delayed in delivery, is entitled to recover exemplary damages for mental anguish, where the telegram announced the serious illness of his daughter, upon allegations and proof that the failure or delay to deliver was wholly wanton and grossly negligent on the part of the telegraph company. *Butler v. Western U. Teleg. Co.* 62 S. C. 222, 89 Am. St. Rep. 993, 40 S. E. 162.

A person to whom a telegram is sent announcing the mortal illness of his brother is a beneficiary of the contract between the sender and the telegraph company, for its transmission and delivery, and, if the telegraph company unreasonably and inexcusably neglects or delays the delivery of the despatch, is entitled to recover damages. *Western U. Teleg. Co. v. Hale*, 11 Tex. Civ. App. 79, 32 S. W. 814.

A telegram from a daughter to her mother informing the latter of the former's illness is sent for the benefit of the mother, as well as for that of the daughter, and if the company negligently and inexcusably delays its transmission and delivery, the mother, to whom the despatch was addressed, is entitled to maintain an action against the company as the beneficiary of the contract between it and the sender, for the transmission and delivery of the message. *Western U. Teleg. Co. v. Clark*, 14 Tex. Civ. App. 563, 38 S. W. 225.

It is a rule in England and in some of the courts in this country that the person to whom a telegram is addressed cannot maintain an action against the company for delay in delivering the message, upon the ground that there was no privity of contract between him and the telegraph company in the absence of notice to the company that the contract was made for his benefit; but in most of the states, said the court in *Western U. Teleg. Co. v. Burris*, 102 C. C. A. 386, 179 Fed. 92, it is held that a person to whom a telegram is sent for his benefit or information has a right of action against the company for negligent delay in its transmission and delivery.

Some of the American courts, according to the court in *Fererro v. Western U. Teleg. Co.* 9 App. D. C. 455, 35 L.R.A. 548, take the ground that the person to whom a telegram is addressed may be the beneficiary of the contract made upon the delivery of the message to the telegraph company for transmission, and that his right of action against the company does not depend upon whether the sender had been constituted his agent for the purpose, but upon the question who was to be served in the transaction and who has been damaged.

The rule adopted in Indiana, which recognizes the right of the person to whom a telegram is addressed to recover damages which he may have sustained by the neglect of the company in transmitting and delaying to deliver the despatch, according to the court in *Hadley v. Western U. Teleg. Co.* 115 Ind. 191, 15 N. E. 845, does not rest alone upon the doctrine of breach of duty of the telegraph company to the public as a public corporation, but receives much support from the equitable doctrine that one person may contract with another in such a way as to inure to the benefit in whole or in part of a third person, who may, at his option, enforce so much of the contract as was intended to be for his benefit or demand compensation for its non-performance.

The question was raised by a demurrer to the petition in *Barrack v. Postal Teleg. Co.* 12 Ohio, S. & C. P. Dec. 78, whether or not the receiver of a business telegram was entitled to recover damages for the failure of the company or its unreasonable delay to deliver a telegram, and the court disposed of it in overruling the demurrer, by saying: The rule in England has always been that the right of action against a telegraph company is founded upon the contract of sending, and therefore that the addressee could not recover, not being a party to the contract: that that right would belong to the sender alone, except perhaps in a case of fraud, or where the sender was the agent of the addressee. But this view of law has never been adopted in this country, but the receiver or addressee has always been allowed to maintain his action where he could prove actual damage; the courts holding that the addressee, while not an actual party to the contract of sending, comes within the rule that where two parties contract for the benefit of a third, the third party may sue for damages resulting from the breach of the contract. The addressee is the beneficiary of the contract of sending, and is entitled to sue in his own right for damages when, by the negligence of the company, he is deprived of the benefit he would otherwise have received.

In *Western U. Teleg. Co. v. Sweetman*, 19 Tex. Civ. App. 435, 47 S. W. 676, there was affirmed a judgment against the telegraph company for mental anguish suffered by the plaintiff in consequence of the inexcusable negligence and delay of the company in the delivery of a despatch announcing that his wife was dying, and it 30 L.R.A. (N.S.)

was contended in behalf of the telegraph company that, having made no contract with the plaintiff, it was under no liability to him, to which contention the court replied: It is well settled in Texas "that the person for whose benefit a telegraph message is sent, and who is named in the message, or of whose interest therein notice is given to the company at the time, may sue upon it in case of injury from the negligence of the telegraph company," and "that the company receiving the message must take notice of the purposes for which the message was sent, as disclosed by the language of the message, and in case of messages relating to serious sickness or death, it must be held to know that the person for whose benefit it is sent has a serious interest in the prompt delivery of it." The court added that it is not an open question in Texas, but has been settled through numerous decisions that mental anguish is a proper basis for damages in such cases.

Whatever may be the true reason for the rule which prevails in the United States, that the person to whom a telegram is addressed may maintain an action against the telegraph company, if injured by its negligence in transmitting or delivering the despatch, it is established, according to the court in *McLeod v. Pacific Teleg. Co.* 52 Or. 22, 15 L.R.A. (N.S.) 810, 94 Pac. 568, 16 A. & E. Ann. Cas. 1239, rehearing denied in 52 Or. 28, 18 L.R.A. (N.S.) 954, 95 Pac. 1009, 16 A. & E. Ann. Cas. 1241, that when an addressee will be benefited by the contract between the sender and the company, and, with knowledge of that fact, the company attempts the performance of the service, it is bound to exercise reasonable and proper care to discharge the duty thus assumed, and will be liable to the addressee for such damages as he may suffer by reason of the negligent performance of such duty.

The English rule, declared the court in *Whitehill v. Western U. Teleg. Co.* 136 Fed. 499, is that the addressee of a telegram cannot maintain an action against the company at all, as there is no contract between the parties. The English cases hold that the contract being with the sender, he alone can recover of a telegraph company for its breach in failing correctly to transmit and diligently to deliver the message; but the American courts, with practical unanimity, have declined to follow this rule, and have held that the addressee may recover. The grounds upon which the American rule is based is that where two persons make a contract for the benefit of a third person, the latter may maintain an action thereon if it is broken.

There seems to be a small class of cases, said the court in *Western U. Teleg. Co. v. Adams*, 154 Ala. 657, 46 So. 228, where the sender can sue *ex contractu*; that is, where the sender employs the telegraph company to communicate a message solely to benefit the person to whom the message is directed. But if the sender sends the

message for his own benefit, notwithstanding it may benefit the sendee also, there is no ground for the imputation that he intends to part with his right of action for a breach of the contract.

The mere fact that the contract between the sender of a message by telegraph and the telegraph company, if fully performed, will benefit the person to whom it is addressed, does not of itself entitle such person to maintain an action to recover damages resulting from the failure promptly to deliver such telegram to him. *Postal Teleg. Cable Co. v. Ford*, 117 Ala. 672, 23 So. 684.

When the contract between a telegraph company and the sender of a telegram is made for the benefit of the sender alone, and not for the benefit of the recipient, the person to whom the telegram is addressed is not entitled to recover damages against the telegraph company for a delay in delivering the despatch, where the only damage claimed is for mental distress and suffering. *Curd v. Cumberland Teleph. & Teleg. Co. (Ky.)* 119 S. W. 746.

A telegraph company owes a duty to transmit and deliver messages only to persons of whose beneficial interest in the telegram the company receives information either from the face of the telegram itself or from other sources. *Western U. Teleg. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486.

The person to whom a telegram is addressed, and negligently delayed in transmission or delivery, may not maintain an action against the telegraph company for damages, unless the company knows or is chargeable with notice that the message was for his benefit. *Frazier v. Western U. Teleg. Co.* 45 Or. 414, 67 L.R.A. 319, 78 Pac. 330, 2 A. & E. Ann. Cas. 396.

Inasmuch as in any case the right of the person to whom a telegram is addressed to maintain an action against the telegraph company is founded upon the contract between the company and the sender, it is essential, in order that he may recover, that it appear that he was the beneficiary of such contract, and that the fact that he was to be benefited by its performance was known to the company when it received the message for transmission, either from its language or extraneously. *Ibid.*

In *Rutner v. Western U. Teleg. Co.* 2 Okla. 234, 4 Inters. Com. Rep. 770, 37 Pac. 1087, it was held that the person to whom a telegram is addressed may not maintain an action against a telegraph company for its neglect, delay, or failure to deliver a telegram, in the absence of evidence that it was sent by his agent or was sent for his benefit, and that the telegraph company had actual or constructive notice that it was sent for his benefit. In that case, however, the message was one announcing a death, and damages claimed were for mental pain and suffering alone, and nothing appeared in the message indicating the relationship between the deceased and the person to whom the message was addressed. 30 L.R.A. (N.S.)

VI. Effect of printed conditions on the sending form.

Assuming that the stipulations and conditions which telegraph companies print upon the blank forms on which they require messages they are employed to transmit and deliver to be written constitute provisions in the contract between the sender and the company, the question of the effect of such stipulations and conditions upon the rights of the person to whom the telegram is addressed, and who sues for damages sustained in consequence of the negligence of the company in delaying its delivery, has frequently engaged the attention of the courts, and been productive of considerable differences of judicial opinion.

The recipient of a telegraph message is bound by the terms of the agreement made by the sender with the telegraph company. *Western U. Teleg. Co. v. Short*, 53 Ark. 434, 9 L.R.A. 744, 14 S. W. 649.

While the person to whom a telegram is addressed has a right of action against the telegraph company for damages sustained in consequence of neglect or failure promptly to deliver the message, he is none the less bound by the terms of the contract between the company and the sender of the despatch, for its transmission. *Russell v. Western U. Teleg. Co.* 57 Kan. 230, 45 Pac. 598.

A person to whom a telegram is addressed has a right of action against a telegraph company for any damage he may sustain in consequence of its negligence in transmitting or delivering the message to him, but is none the less bound by the terms and conditions of the contract made between the company and the sender of the despatch. *Western U. Teleg. Co. v. Waxelbaum*, 113 Ga. 1017, 56 L.R.A. 741, 39 S. E. 443.

If the right of the addressee of a telegram to maintain an action against the telegraph company for failure or inexcusable delay to transmit and deliver the message depends, as it does depend in the opinion of the court in *Whitehill v. Western U. Teleg. Co.* 136 Fed. 499, upon the contract made between the company and the sender, that right is, of course, subject to the terms of that contract.

The right of the person to whom a telegram is addressed to recover of the telegraph company damages sustained by him for a violation of its duty, or an inexcusably negligent performance of its duty, promptly to transmit and deliver a despatch, is necessarily grounded upon the contract between the company and the sender, according to the court in *Frazier v. Western U. Teleg. Co.* 45 Or. 414, 67 L.R.A. 319, 78 Pac. 330, 2 A. & E. Ann. Cas. 396, whether the action be in form technically for a breach of contract or one sounding in tort.

While it is competent for a telegraph company to make proper rules and regulations for the transaction of its business af-

fairs, which will bind those who transact business with it in the line of its duty, yet it may not by such rules and regulations limit any common-law or statutory right, or absolve itself from any legal obligation. *Western U. Telegr. Co. v. Meek*, 49 Ind. 53.

The person to whom a telegram is addressed, and who sustained special damages in consequence of the neglect of the telegraph company promptly to deliver it, is entitled to maintain an action for damages, under the Indiana statute (Rev. Stat. 1881 § 4177), and is not bound by the terms and conditions imposed by the telegraph company upon the sender as a part of the contract for transmitting the message. *Western U. Telegr. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894.

Whatever may be the correct view, said the court in *Webbe v. Western U. Telegr. Co.* 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670, of the conditions printed by a telegraph company upon blank forms used for the sending of despatches, as being regulations or contracts, when the controversy is between the sender of the despatch and the telegraph company, we are of the opinion that the distinctions have no application when the controversy is between the company and the receiver of the despatch, they afford no proof of contract between the telegraph company and the person to whom the message is addressed, and he therefore may not be held bound by such conditions or stipulations.

A judgment against a telegraph company recovered by a person to whom a telegram sent by his wife, informing him of the serious illness of his child, and requesting his presence, and inexcusably and negligently delayed in transmission and delivery, was affirmed in *Gulf, C. & S. F. R. Co. v. Wilson*, 69 Tex. 739, 7 S. W. 653, against the contention of the company, first, that the failure to deliver was excusable because of inability to find the addressee after a proper and reasonable effort, and, second, because of stipulations printed upon the blank upon which the message was written, exempting the company from liability for mistake or delay in transmission or delivery or for the nondelivery of any unrepeatable message, whether by negligence of its servants or otherwise.

In *Manville v. Western U. Telegr. Co.* 37 Iowa, 214, 18 Am. Rep. 8, a judgment recovered by the person to whom a telegram was addressed and unreasonably delayed in delivery, against the telegraph company, was affirmed. In that case the only questions contested related to the binding character of the condition printed upon the telegraph blank with respect of unrepeatable messages, and the proper measure of damages recoverable.

The negligence of a telegraph company in delivering to the plaintiff a reply telegram, in answer to a despatch he had previously sent to the sender calling for such reply, was held by Johnson, J., of the superior court, of Montreal, in *Bell v. Dominion* 30 L.R.A. (N.S.)

Telegr. Co. 25 Lower Can. Jur. 248, not excused by a printed indorsement on the reply blank form assented to by the sender, relieving the company from liability for an unrepeatable message.

It was held in *Monsees v. Western U. Telegr. Co.* 127 App. Div. 289, 111 N. Y. Supp. 53, that an action would not lie against a telegraph company by the person to whom a despatch was sent, and delayed in delivery because of a mistake in changing the spelling of the recipient's name, for a sum beyond the amount of toll paid, where the message had been written upon a blank of the company stipulating for exemption of liability in case of unrepeatable messages, and the despatch was not repeated.

A judgment against a telegraph company, in favor of the recipient of a telegram negligently delayed in delivery, was affirmed in *Hendricks v. Western U. Telegr. Co.* 126 N. C. 304, 78 Am. St. Rep. 659, 35 S. E. 543, where the controversy was over the question of fact as to negligent delay, and whether or not the liability of the company had not been avoided by certain rules and regulations printed upon the despatch.

In *Beasley v. Western U. Telegr. Co.* 39 Fed. 181, an action by a brother for damages for delay in delivering a message sent him by his sister, announcing a turn for the worse in the illness of a relative and summoning the addressee to attend at once, was submitted by the court to the jury, with liberty to find a verdict for the plaintiff, under instructions directed almost wholly to the question as to whether there had been in fact any delay not excusable, and as to whether or not the printed stipulations relieving the company of liability were binding in the particular case by reason of the message having been written originally upon a paper which did not contain them, and copied by the defendant's agents upon a regular blank. The theory of that case was that the sender of the message was the agent of the plaintiff who sent it.

A telegraph company sued for damages by a person to whom a telegram was addressed which it negligently delayed delivering has sometimes succeeded in escaping liability on the ground that the claim in suit had not been presented to it within sixty days, and was therefore barred by printed stipulation upon the blank used in sending the despatch.

It was held in *Eaker v. Western U. Telegr. Co.* 75 S. C. 97, 55 S. E. 129, that a judgment in favor of the person to whom a despatch announcing the mortal illness of his father had been addressed, and which was delayed for twenty-seven hours in delivery, should be reversed because of the failure to present the claim within sixty days stipulated for when the despatch was received for transmission.

The telegraph company was successful in an action brought by a person to whom a telegram was addressed announcing that his son had run away from school, in *Baldwin v. Western U. Telegr. Co.* (Tex.

Civ. App.) 33 S. W. 890, upon the ground that the claim had not been presented to the telegraph company within the time limited by a printed stipulation upon the back of the message.

A judgment against a telegraph company, in favor of a woman to whom a despatch had been sent announcing her brother's death, and the purpose to bury the body the same day unless otherwise instructed, and which had been unreasonably and inexcusably delayed in delivery, was reversed in *Western U. Teleg. Co. v. Vanway* (Tex. Civ. App.) 54 S. W. 414, chiefly upon the ground that the claim for damages had not been presented to the company within ninety days, as required by a stipulation printed upon the despatch, which the court held to be a reasonable one.

A client who sued the telegraph company for damages for its negligent delay to deliver to him a business telegram from his attorney was defeated in *Manier v. Western U. Teleg. Co.* 94 Tenn. 442, 29 S. W. 732, upon the double ground that the delay in delivering the telegram had not resulted in his damage, and that he was bound by the stipulation of the sender of the despatch exempting the company from liability for damage claims unless the claim should be presented within sixty days.

In *Davis v. Western U. Teleg. Co.* 107 Ky. 527, 92 Am. St. Rep. 371, 54 S. W. 849, the company had succeeded in the court below upon a demurrer to the action by the person to whom a telegram was sent announcing the death of his brother and the time of the funeral, which had been negligently delayed in delivery, upon the ground that a stipulation in the contract for the transmission of the despatch required the presentation in writing of the claim for damages to be filed with the company within sixty days, and had not been complied with; but this ruling was reversed by the court of appeals, and the cause remanded for trial on the merits upon the ground that, at least, as between the company and the addressee of a telegram, such stipulation was void as contrary to public policy.

The courts are divided in opinion, according to the court in *Western U. Teleg. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339, as to whether a stipulation between the sender of a message and the company, providing that a claim for damages shall be presented within a day named, or within a reasonable time, may be entered into and upheld as a contract. Instead of being a reasonable business regulation, we think the condition named and annexed to the message was an effort on the part of the company to restrict its legal liability to sixty days. It would introduce into the local jurisprudence of every state, territory, or country in which it is sued, a species of private statute of limitation or nonclaim. It would avoid the policy of the state or territory in the matter of the time in which actions both in tort and contract should be brought. But aside from this we think there can be

no sound reason for holding that in cases where no contract for total immunity from legal responsibility may be made, one may be made for a conditional release or discharge, because public policy alike denies the power to contract on the subject in either instance.

The telegraph company in *Western U. Teleg. Co. v. Snodgrass*, 94 Tex. 284, 86 Am. St. Rep. 851, 60 S. W. 308, contested its liability to plaintiff, whose agent had sent him a despatch which had been unreasonably delayed in delivery, upon the ground that the message had not been paid for because the sender was in the employ of the telegraph company, but was held liable notwithstanding.

VII. Special statutes authorizing actions by addressees of delayed telegrams.

In several states there have been enacted special statutes making telegraph companies liable either to a definite money penalty or in damages, for negligence in transmitting and inexcusable delay in delivering telegrams intrusted to them. The statutes which impose specific money penalties are esteemed generally to inure to the benefit alone of senders of despatches, and to afford recipients no rights of action. The statutes which merely enable persons to bring suits against telegraph companies in case they sustain damages are held by most courts simply to confer rights to maintain suits for such damages as are recoverable at common law. There have been enacted in some of the states, however, statutes which authorize recoveries to be had where the damages suffered were mental anguish unaccompanied by physical injury or pecuniary loss.

The generally accepted doctrine both in this country and in England, said the court in *Hadley v. Western U. Teleg. Co.* 115 Ind. 191, 15 N. E. 845, has so far been that it is only the sender of a despatch who occupies that privity of contract or relation with the telegraph company which is necessary to the maintenance of a suit for a penalty imposed by statute for neglect or error in receiving, transmitting, or delivering a telegram.

An act of the legislature of Mississippi, approved March 18, 1886 (p. 91), provided that if any telegraph company shall neglect, fail, or refuse to transmit and deliver within a reasonable time, without good and sufficient excuse, any message delivered to it for such purpose, the injured person shall recover the sum of \$25 in addition to such damages as are now allowed by law; and it was held that under this statute the person to whom a telegram is addressed, as well as the sender of it, is entitled to maintain an action and recover damages for an inexcusable and negligent delay of the telegraph company to deliver the despatch. *Western U. Teleg. Co. v. Allen*, 66 Miss. 549, 6 So. 461.

Only the sum fixed in the Mississippi

statute (March 18, 1886, p. 91) is recoverable by the person to whom a telegram is addressed, for a breach of the telegraph company's contract promptly to deliver the despatch, unless the language of the message or extraneous information is such as to advise the company that additional damages were contemplated by the parties. *Western U. Teleg. Co. v. Clifton*, 68 Miss. 307, 8 So. 746.

The person to whom a telegram is addressed, and not delivered or negligently delayed in delivery, whether or not entitled to recover damages in proper case, is not entitled to recover the penalty of \$100 imposed by New York Laws of 1890, ch. 566, § 103, since that applies only to the sender of the despatch. *Thompson v. Western U. Teleg. Co.* 40 Misc. 443, 82 N. Y. Supp. 675.

The statute of New York (Laws 1890, p. 1152, chap. 566, § 103) which provides that "every such corporation shall receive despatches from and for other telegraph or telephone lines or corporations, and from and for any individual, and, on payment of the usual charges by individuals for transmitting despatches, as established by the rules and regulations of such corporation, transmit the same with impartiality and good faith and in the order in which they are received; and if it neglects or refuses so to do, it shall pay \$100 for every such refusal or neglect to the person or persons sending or desiring to send any such despatch, and entitled to have the same so transmitted," affords a remedy only to the sender of a despatch, and not to the recipient. *Ibid.*

The statute of California imposing a duty upon telegraph companies promptly to deliver telegrams was construed by the court as entitling the person to whom a message was addressed to recover if damaged by a failure to deliver the despatch; but the plaintiff to whom a telegram was addressed, and grossly and inexcusably delayed for nearly a month, was denied a recovery in *Pacific Pine Lumber Co. v. Western U. Teleg. Co.* 123 Cal. 428, 56 Pac. 103, upon the ground that the only damage alleged was a damage to the sender of the despatch, and not to himself.

The statute of Indiana (1 Gavin & H. § 2, p. 611) enacts that telegraph companies shall be liable for special damages occasioned by failure or negligence of their operators or servants in receiving, copying, transmitting, or delivering despatches. *Western U. Teleg. Co. v. Meek*, 49 Ind. 53.

Under the Indiana statute (1 Gavin & H. § 2, p. 611) making telegraph companies liable for special damages which result from the failure or negligence of their operators or servants in receiving, copying, transmitting, or delivering despatches, a telegraph company is liable to the person to whom a telegram is addressed, for special damages sustained by him in consequence of its negligence in transmitting or delivering the message. *Ibid.*; *Western U. Teleg. Co. v. Fenton*, 52 Ind. 1; *Western 30 L.R.A.(N.S.)*

U. Teleg. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894.

Telegraph companies are held in *Hadley v. Western U. Teleg. Co.* 115 Ind. 191, 15 N. E. 845, to be liable under the Indiana statute (Rev. Stat. 1881, § 4177) and also upon the general principles of the common law, for special damages due to failure or negligence in receiving, copying, transmitting, or delivering messages.

There can be no doubt, said the court in *Herron v. Western U. Teleg. Co.* 90 Iowa. 129, 57 N. W. 606, under these authorities (after citing certain cases) and the sections of the Code of Iowa, to wit: "1328. Any person employed in transmitting messages by telegraph must do so without unreasonable delay, and anyone who wilfully fails thus to transmit them . . . is guilty of a misdemeanor" and "1329. The proprietor of a telegraph [company] is liable for all mistakes in transmitting messages made by any person in his employment, and for all damages resulting from a failure to perform any other duties required by law," that the right of plaintiff (the addressee) to recover does not depend upon a contract made by or for him.

Our statute, said the court in *Yunker v. Western U. Teleg. Co.* (Iowa) 125 N. W. 577, citing Iowa Code, § 2163, makes a telegraph company liable for all damages resulting from failure to perform its duties, and we have held that an addressee may sue and recover the damages sustained by him.

In *Graham v. Western U. Teleg. Co.* 109 La. 1069, 34 So. 91, the trial court had dismissed an action against a telegraph company for failure to deliver a message to a mother announcing the mortal illness and approaching death of her son, upon the ground that there was no cause of action in such case for mental pain and anguish, unattended by an injury to a person's property, health, or reputation. This dismissal was reversed upon the ground that the statute law of Louisiana (Civil Code, art. 1934) authorized a recovery of damages for a breach of contract having for its object the gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification, although there was no pecuniary loss or depreciation by the parties in money.

A statute of Minnesota (Laws 1885, chap. 208, § 5) provides that, if any person or company owning or operating a telegraph line in that state shall fail to transmit a message within a reasonable time, or shall fail to deliver the same to the party to whom the message is addressed, if known, within a reasonable time after the arrival at its destination, or if it is shown due diligence has not been exercised after reception thereof for that purpose, they "shall be liable in a civil action at the suit of the party injured, for all actual damages sustained by reason of such neglect or omission." The object of this statute, accord-

ing to the court in *Francis v. Western U. Teleg. Co.* 58 Minn. 252, 25 L.R.A. 406, 49 Am. St. Rep. 507, 59 N. W. 1078, was to establish the rule, first, that the party injured, whether sender or addressee, may maintain an action; and, second, that the company should be liable for all actual damages proximately resulting from the breach of its contract, regardless of whether or not it was advised of the nature of the subject-matter of the message; but it does not enable the person to whom a telegram is sent, and not delivered, or unreasonably delayed in delivery, to maintain an action to recover damages solely for mental pain and suffering.

After the decision in the case of *Lewis v. Western U. Teleg. Co.* 57 S. C. 325, 35 S. E. 556, denying a recovery to a plaintiff summoned by his brother to attend upon his dying father, for damages for mental suffering and distress, unconnected with bodily injury or pecuniary loss, for the negligent delay of the company in delivering the message, the legislature of South Carolina, by an act approved February 20, 1901, made telegraph companies doing business in that state, from and after the passage of the statute, liable in damages for mental anguish or suffering, even in the absence of bodily injury, for negligence in receiving, transmitting, or delivering messages. That statute was held constitutional in *Simmons v. Western U. Teleg. Co.* 63 S. C. 425, 57 L.R.A. 607, 41 S. E. 521.

A statute of the state of Virginia (Va. Code, § 2900) providing that any person injured by the violation of a statute may recover damages from the offender that he has sustained by reason of the violation, although a penalty or forfeiture for such violation should be imposed, unless expressly mentioned to be in lieu of damages, was construed by the court in *Tyler v. Western U. Teleg. Co.* 54 Fed. 634, as not affording the addressee of a sickness or death telegram a right of action for mental anguish caused by the delay of the company to deliver the despatch, notwithstanding the statute (Va. Code, § 1292) prescribing the duties of telegraph and telephone companies, and penalizing their neglect or failure to perform such duties. The argument of the court was that the purpose of § 2900 was simply to preserve to an injured person who already had an action at common law, the right to maintain the action, notwithstanding the wrongdoer might have paid the penalty for his wrongdoing under a penal statute of the state.

The courts, in the absence of statutes, it was said in the opinion in *Rowan v. Western U. Teleg. Co.* 149 Fed. 550, are not agreed upon the question of the right of an addressee of a message, who does not stand in any contract relation with the telegraph company, to recover damages sustained by him for the negligent failure to deliver the despatch; and the statute of Iowa (Code 1897, § 2163) providing that the proprietor of a telegraph or telephone line is liable for all mistakes in transmit-

ing or receiving messages made by any person in his employ, or for any unreasonable delay in their transmission or delivery, and for all damages resulting from failure to perform that or any other duty required by law, the provisions of any contract to the contrary notwithstanding, makes the company liable only to any party who sustains damages because of its neglect, and creates no right of action for damages not previously recognized as recoverable.

VIII. The damages recoverable.

a. The rules for ascertaining damages.

The principles governing courts in awarding damages for breaches of contracts analogous to contracts to transmit and deliver telegrams were clearly stated by Baron Alderson in the well-known case of *Hadley v. Baxendale*, 9 Exch. 341, 5 Eng. Rul. Cas. 502. "Where two parties," said he, "have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as to the probable result of the breach of it. Now," he continued, "if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances. . . . For, had the special circumstances been known, the parties might have specially provided for the breach of the contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

Although *Hadley v. Baxendale*, supra, was an action against a common carrier for a breach of contract to transport and deliver goods, and common carriers of goods and telegraph companies are not under the same rule of responsibility (*Western U. Teleg. Co. v. Short*, 53 Ark. 434, 9 L.R.A. 744, 14 S. W. 649), nevertheless, the courts generally, but not unanimously, agree that the stated rules apply in actions against telegraph companies for breaches of contracts to transmit accurately and promptly deliver telegraphic messages.

While the duties of a telegraph company, said the court in *Western U. Teleg. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877, are similar to those of ordinary common carriers, and so much so as to make it proper to call them, and in many respects treat them, as quasi common carriers, yet as their charges are based on the number of words, and not on weight, as carriers of ordinary freight, or on value, as express companies, the rule of liability should not be the same, as respects notice or no notice of the value of the despatch.

The courts in New York, Minnesota, Maryland, Wisconsin, Massachusetts, Nevada, and Maine, according to the court in *Western U. Teleg. Co. v. Hyer Bros.* 22 Fla. 637, 1 Am. St. Rep. 222, 1 So. 129, following the case of *Hadley v. Baxendale*, supra, hold that only nominal damages may be recovered from a telegraph company undertaking to send a telegram, unless the sender informs the operator of the special circumstances which constitute its importance and the need of its correct and prompt transmission. These cases, continued the court, are decided upon the theory that the principles of law regulating the conduct of common carriers applies equally to the transmission of messages by the electric telegraph system. The business of one is to transport from one locality to another some tangible object of weight and dimension. Experience does not suggest in such a transaction any other liability than compensation for its value if lost or destroyed in the transportation, or such damages for its delay as the object itself might suggest. The business of the other is the transmission from one to another, and from one locality to another, of information or intelligence, nothing in itself, but, as the basis and groundwork that is to influence the conduct of others, is in this respect of the very first importance. One is limited to the transportation of tangible things, the other to the transmission of the intangible. There is no similarity in the services to be performed, in the nature of the things to be transported or transmitted, or the purposes to be effected, and, as a consequence, none as to the measure of damages for failure to perform their respective agreements.

b. The recovery of pecuniary losses.

In England, where, as already stated, no action against a telegraph company by a person to whom a telegram is sent lies, save where a contractual relation exists between him and the company, he cannot recover even a pecuniary and direct loss, in the absence of the element of privity of contract.

A person who offers by telegraph merchandise for sale to a prospective customer, who in turn names a price which he is willing to pay, cannot recover damages from a telegraph company consequent upon its mistake in naming the price offered in the reply despatch, because the liability of the company rests wholly upon its contract

with the sender of the message, and there is no privity between it and the person to whom the message is sent. *Playford v. United Kingdom Electric Teleg. Co.* L. R. 4 Q. B. 706.

In the state of Alabama, where the English rule has prevailed to a certain extent, an applicant for employment summoned by telegraph to report for duty cannot maintain an action *ex contractu* against the telegraph company, which has negligently delayed delivering the message from the employer, because, according to the court in *Ford v. Postal Teleg. Cable Co.* 124 Ala. 400, 27 So. 409, the sender of the message did not sustain the relation of agent toward the person to whom it was sent.

In all jurisdictions where the right has been recognized of the person to whom a telegram has been sent to maintain at all an action against the telegraph company, to recover the damages he has sustained by the negligence of the company in respect of the despatch, the courts are accordant as to his right to recover pecuniary loss.

A telegraph company is liable to the person to whom a telegram is addressed, for damages to him resulting naturally and in the usual course of business, from its failure to send or deliver a despatch correctly and promptly, regardless of the disclosing by the sender of its importance to the receiving agent of the company. *Western U. Teleg. Co. v. Hyer Bros.* 22 Fla. 637, 1 Am. St. Rep. 222, 1 So. 129.

A telegram in the words, "Have work, come at once," was held in *Western U. Teleg. Co. v. Hines*, 96 Ga. 688, 51 Am. St. Rep. 159, 23 S. E. 845, sufficiently definite and explicit to put the telegraph company on notice as to the character of the damage that the person to whom it was addressed would probably sustain by negligence of the company in unreasonably delaying the delivery of it, and to entitle such person, where the company had negligently failed promptly to deliver the despatch, to recover damages.

For the failure by gross negligence of a telegraph company to deliver for several days a telegram from a prospective employer to a traveling salesman, closing a contract of employment for the ensuing year as the culmination of previous negotiations, so that the contract is lost, the telegraph company is liable to such salesman in damages amounting to the difference between the agreed price to be paid for his services and the amount he was able to earn during the time the contract would have run if made. *Western U. Teleg. Co. v. Valentine*, 18 Ill. App. 57.

A person who has lost employment in consequence of the negligent delay of a telegraph company to deliver a telegram addressed to him by the prospective employer is entitled to recover damages from the telegraph company, according to the Indiana supreme court, in *Western U. Teleg. Co. v. Fenton*, 52 Ind. 1, upon the general principle that the defendant exercises corporate franchises, and is charged with public ob-

ligations, and therefore is liable to any member of the public who sustains damages by its failure to discharge a public duty. But, in Indiana at all events, it is liable under a statute embodying that principle with respect to the transmission and delivery of telegrams.

One who has lost employment in consequence of the failure of a telegraph company to deliver within a reasonable time a telegram to him from his prospective employer is entitled to maintain an action for damages under the Indiana statute (Rev. Stat. 1881, § 4177), *Western U. Teleg. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894.

The court in *McPeck v. Western U. Teleg. Co.* 107 Iowa, 356, 43 L.R.A. 214, 70 Am. St. Rep. 205, 78 N. W. 63, affirmed a judgment against the telegraph company for damages in favor of the person to whom a telegram was addressed and negligently delayed in delivery, where the delay prevented the plaintiff from arresting a fugitive criminal, and earning a public reward offered for his apprehension. The court held that the action was based on the negligence of the telegraph company in the performance of a duty in its public capacity as a common carrier of messages.

The inexcusable and negligent omission of a telephone company to call a person to whom a long-distance message is addressed to receive a message offering him employment, which to the company's knowledge will be beneficial to him, entitles him to maintain an action and recover damages against the company for the loss that he sustains in consequence. *McLeod v. Pacific Teleph. Co.* 52 Or. 22, 15 L.R.A. (N.S.) 810, 94 Pac. 568, 16 A. & E. Ann. Cas. 1239, rehearing denied in 52 Or. 28, 18 L.R.A. (N.S.) 954, 95 Pac. 1009, 16 A. & E. Ann. Cas. 1241.

The delay and negligence of a telegraph company to deliver a message sent to one who has applied for employment and has been accepted, summoning him to the place of work to begin his duties, renders the company liable in damages to the addressee of the despatch, where it appears that, in consequence of his failure to receive it, another person was employed in his stead. *Stumm v. Western U. Teleg. Co.* 140 Wis. 528, 122 N. W. 1032.

The negligent delay of a telegraph company to deliver a message to a lawyer, summoning him to attend court to defend a person charged with crime, entitles the person to whom the message is addressed to recover of the telegraph company the penalty given by the Mississippi statute and, in addition, the fee that he would have earned, and has lost in consequence of the delay in the delivery of the message, because the nature and urgency of the case is apparent upon the face of the despatch. *Western U. Teleg. Co. v. McLaurin*, 70 Miss. 26, 13 So. 36.

A physician and surgeon summoned by telegraph to attend a suffering patient is entitled to recover damages from the telegraph company for its unreasonable delay

and inexcusable negligence in delivering the despatch to him, whereby he was prevented from attending the call until after the patient had died. *Fairley v. Western U. Teleg. Co.* 73 Miss. 6, 18 So. 796; *Western U. Teleg. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339.

A physician to whom is addressed, but not delivered, a telegram summoning him to attend a patient professionally, is entitled under the statute of Wisconsin making a telegraph company liable for all damages occasioned by failure to transmit and deliver telegrams intrusted to it, to maintain an action against the company for loss of the fees which he would have earned by rendering the service the telegram called upon him to do. *Barker v. Western U. Teleg. Co.* 134 Wis. 147, 14 L.R.A. (N.S.) 533, 126 Am. St. Rep. 1017, 114 N. W. 439.

The action of *Mood v. Western U. Teleg. Co.* 40 S. C. 524, 19 S. E. 87, was brought by a physician to recover damages for the loss of compensation for services which he would have earned but for the delay of the telegraph company in delivering a telegram addressed to him, and its failure altogether to deliver another telegram addressed to him summoning him to attend an injured patient; but the court held the complaint bad on demurrer for failure properly to set out special and consequential damages, and notice to the company of the damages in contemplation, and, reversing a judgment in the physician's favor, ordered a new trial upon that ground.

A telegraph company which has unreasonably and negligently delayed the delivery of a despatch addressed to a ship broker is liable to him in damages for the loss of his commissions due to a failure to receive the despatch in time. *Western U. Teleg. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877.

A cotton broker commissioned to buy cotton, who has telegraphed his principal for instructions concerning a particular purchase, is entitled to recover damages from the telegraph company which he has sustained in consequence of gross and inexcusable delay to deliver an answering despatch containing such instructions in cryptic language. *Western U. Teleg. Co. v. Weiting*, 1 Tex. App. Civ. Cas. (White & W.) 444.

A broker in lands is entitled to maintain an action against the telegraph company for damages in delaying inexcusably a telegram addressed to him, where, by reason of such delay, he has lost a sale, and his commissions thereon, of real estate which he was employed to sell. *Harper v. Western U. Teleg. Co.* 111 Mo. App. 269, 86 S. W. 904.

In *Hise v. Western U. Teleg. Co.* 137 Iowa, 329, 113 N. W. 819, the person to whom a telegram was erroneously addressed by the sender, and delayed in delivery, was held entitled to recover damages for the loss of his commission upon the sale of real estate, notwithstanding the error on the part of the sender, and not-

withstanding also that a subsequent sale of the property was made, by which he received a larger commission.

The Oregon supreme court in *Frazier v. Western U. Tele. Co.* 45 Or. 414, 67 L.R.A. 319, 78 Pac. 330, 2 A. & E. Ann. Cas. 396, held that the plaintiffs, who were real-estate brokers, were not entitled to recover damage for the loss of commissions upon the sale of real estate consequent upon the failure of the telegraph company to deliver a despatch from the owner of property listed with them for sale, directing the acceptance of an offer previously made, and put the decision on the ground that the telegraph company did not know, either expressly or impliedly that the addressees were land brokers, and consequently did not contemplate such damages as consequential upon its negligence in delaying delivery of the despatch. The court declared that an exhaustive examination of the cases holding that the addressee of a telegram might sue the company for negligence had disclosed that in all of them the company knew or was chargeable with knowledge that the message was for his benefit, and that no case had come under its observation in which the addressee was permitted to recover in any other circumstances.

For inexcusable negligence in delivering a message, a telegraph company is liable in damages to the person to whom the message was addressed, where the message contained information of the acceptance of a business proposition made by the recipient to the sender, and which failed of being carried into effect because of such delay. *Western U. Tele. Co. v. Kemp Bros.* 55 Ill. App. 583.

A person to whom a telegram is addressed, calling for his presence at the place from which it is sent on a particular day, is entitled to recover damages from the telegraph company covering the reasonable expenses of his journey and the value of his time lost in making it, if, by the negligence of the company, the telegram by error specifies the wrong date. *Western U. Tele. Co. v. Short*, 53 Ark. 434, 9 L.R.A. 744, 14 S. W. 649.

The plaintiff in *Western U. Tele. Co. v. Oastler*, 90 Ark. 268, — L.R.A. (N.S.) —, 119 S. W. 285, was refused a recovery for more than a small amount which she had paid for traveling expenses on account of a telegram from her husband received on Saturday erroneously announcing his expectation of being at home that day when he had written Sunday, the next day, where the despatch was corrected on Sunday, and the sender of it arrived at the time designated.

A client to whom a telegram sent by his attorney has been inexcusably delayed in delivery, and who in consequence has suffered damage, is entitled to recover such damage from the telegraph company, upon the ground of its negligence. *Martin v. Western U. Tele. Co.* 1 Tex. Civ. App. 143, 20 S. W. 860.

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in favor of a partnership, for the failure promptly to deliver a business telegram sent to it, was affirmed in *Postal Tele. Co. v. Levy* (Tex. Civ. App.) 102 S. W. 134.

In *Brewster v. Western U. Tele. Co.* 65 Ark. 537, 47 S. W. 560, the senders of the telegram and the person to whom it was addressed were all partners in business, and the telegram related to business of the partnership. The action was brought by the firm as partners, and the negligent delay of the telegraph company was not controverted, the only question being as to the measure of damages, and whether any damages beyond the price paid for the telegram could be recovered at all.

A judgment in favor of the person to whom a telegram was addressed, for the value of cattle drowned by a river flood which he failed to guard against in consequence of not receiving in time advice from his agent, the sender of the telegram, of the rising of the river, was affirmed in *Western U. Tele. Co. v. Pauley*, 157 Ala. 615, 47 So. 654.

The person to whom a telegram was addressed notifying him of the condition of the live stock market at the place where the sender of the despatch was, and advising him to delay shipping cattle for a time, and who sustained a loss in consequence of the negligence and delay of the telegraph company in delivering the despatch, was held entitled to recover damages against the telegraph company, in *Western U. Tele. Co. v. Woods*, 56 Kan. 737, 4 Pac. 989.

A person to whom a telegram is addressed and sent by a previous arrangement between him and the sender, advising him to ship cattle for sale in the sender's market as soon as possible, and which is unreasonably and inexcusably delayed in delivery by the negligence of the telegraph company, is entitled to recover damages from the telegraph company, which he has sustained in consequence of such delay, by the loss of a sale, for depreciation in the price of cattle in the market because of the lapse of time. *Whittemore v. Western U. Tele. Co.* 71 Fed. 651.

A judgment against a telegraph company which negligently delayed the delivery of a despatch sent to the plaintiffs, announcing a shipment of cattle for reshipment by them to Europe, in favor of the persons to whom the telegram was addressed, was affirmed in *Western U. Tele. Co. v. Lehman*, 105 Md. 442, 66 Atl. 266.

A judgment against a telegraph company recovered by a ranchman, for damages for delay in delivering a telegram to him announcing a sale of a herd of cattle that had been rounded up awaiting the receipt of a despatch, and which had been turned loose on the range in consequence of its nondelivery, so that it was necessary again to round up the beasts, was affirmed in *Pruett v. Western U. Tele. Co.* 6 Tex. Civ. App. 533, 25 S. W. 794.

The telegraph company was held liable, and a judgment against it affirmed, for the failure to deliver a despatch accepting the

plaintiff's offer, previously made by letter, to purchase a number of head of cattle, and asking him to come quickly, notwithstanding the contention that the plaintiff had an adequate remedy upon his contract of purchase with the owner of the cattle, who had sold the beasts to another purchaser because of not hearing from the plaintiff, in *Western U. Teleg. Co. v. Snow*, 31 Tex. Civ. App. 275, 72 S. W. 250.

The telegraph company in *Mitchell v. Western U. Teleg. Co.* 12 Tex. Civ. App. 262, 33 S. W. 1016, successfully contended upon the trial that the plaintiff, to whom it had negligently delayed delivering a telegram from his son announcing a failure of the water supply upon his ranch and requesting instructions for the care of his cattle, was not entitled to recover, because the damages which he claimed were not so much due to its negligence in delivering the despatch as to his own negligence in not making proper provision for the watering of his stock before leaving home; but the judgment in favor of the company obtained upon this theory was reversed by the court of civil appeals, and the cause remanded for a new trial.

The court in *Western U. Teleg. Co. v. True*, 101 Tex. 236, 106 S. W. 315, held that the facts established beyond controversy the liability of the telegraph company to the person to whom a despatch was addressed and inexcusably and negligently delayed in delivery, for such damages as he could prove by proper evidence, and that the only question before the court upon an appeal from the judgment against the telegraph company was whether the messages and attending circumstances charged the company with such notice of the nature of the transaction to which the despatch referred as to make it liable for the damages to the plaintiff consequent upon the failing of a negotiation for the purchase of cattle, and, as the court concluded that the company did not have the requisite notice to render it liable, the judgment was reversed.

In *Fisher v. Western U. Teleg. Co.* 119 Wis. 146, 96 N. W. 545, the plaintiffs had sent a despatch to a person having a stock of tobacco for sale, accepting conditionally an offer of sale and requesting an answer, and sued for damages for a delay in delivering the reply, which closed the transaction by a refusal to accept the suggested condition. The court held that, notwithstanding the Wisconsin statute making telegraph companies liable for all damages occasioned by failure or negligence of their employees in receiving, copying, transmitting, or delivering messages (Stat. 1898, § 1778), there could be no recovery because no legal damages were shown as the proximate result of the breach of the company's duty to deliver. The precise ground upon which the trial was decided did not appear, and in opening the opinion affirming the judgment, Marshall, J., writing for the court, said that while there was much authority to the effect that the addressee of a telegram, the sender not being his agent

nor making a contract for his benefit, must sue for the breach of duty constituting actionable negligence or not at all, and could not maintain an action for a breach of contract, that question need not then be decided.

In *Swan v. Western U. Teleg. Co.* 67 L.R.A. 153, 63 C. C. A. 550, 129 Fed. 318, the plaintiff sought to recover of the telegraph company damages on account of having lost an opportunity to purchase mining stock, because of not receiving, until after a close of the stock exchange on the day that the message was sent, a telegram addressed to him by a mining expert advising the purchase; but in that case, by stipulation between the parties and their attorneys, it was agreed that no claim against the company was made by the plaintiff on account of negligent delay in transmitting and delivering the message, and that that question might be considered by the court as eliminated from the case, the ground of recovery resting on the addition by the company to the signature of the sender of the figures and initials, "3.27 P. M.," thus misleading him in respect of the time the despatch had been sent. The court upon error reversed the trial court, and ordered judgment in favor of the plaintiff for the difference in the price between the market rate of the stock upon the day the despatch was sent and the amount paid by the plaintiff the next day.

c. The recovery for mental suffering.

It is hornbook law that for a wrong without a legal injury no cause of action accrues, and no remedy is afforded by the courts. It is therefore of prime importance in the investigation of the subject in hand to ascertain whether the negligence of the telegraph company sued for damages resulting from its delay in delivering a message inflicted any legal injury upon the plaintiff. In by far the greater number of cases where the question was debated whether or not legal damage had ensued, the controversy waged concerning the right to recover for mental anguish unaccompanied by physical suffering. The courts are in hopeless conflict upon this question, and all that can be done for the student of the subject is to spread before him in detail their discordant decisions.

If the plaintiff in an action against a telegraph company based upon its delay to deliver a despatch has sustained no legal damage by such delay, he must fail in the action, whether he was the sender of the telegram or the person to whom it was sent. Hence, in jurisdictions where mental suffering and anguish, unconnected with physical injury or pecuniary loss, are not esteemed legal damage, the company escapes liability even when inexcusably negligent.

In *Russell v. Western U. Teleg. Co.* 3 Dak. 315, 19 N. W. 408, the action was brought by the person to whom a telegram was addressed, announcing the death of his sister and the time fixed for the funeral, on

account of a delay of five days in delivering it, but, inasmuch as the only damage alleged in the complaint was mental distress and anguish, the court held the complaint demurrable for failure to allege legal damage.

In the following cases brought against telegraph companies by persons to whom telegrams were addressed and negligently delayed in delivery, the plaintiffs were refused judgments because the only damages they claimed were grounded in mental suffering and distress, unconnected with physical or pecuniary injury, and the courts held these were not recoverable. The question of the right of the plaintiffs to maintain suit was left out of view.

Blount v. Western U. Tele. Co. 126 Ala. 105, 27 So. 779; Western U. Tele. Co. v. Blocker, 138 Ala. 484, 35 So. 468; Peay v. Western U. Tele. Co. 64 Ark. 538, 39 L.R.A. 463, 43 S. W. 965; Western U. Tele. Co. v. Ferguson, 157 Ind. 64, 54 L.R.A. 846, 60 N. E. 674, 1080; Western U. Tele. Co. v. Briscoe, 18 Ind. App. 22, 47 N. E. 473; Western U. Tele. Co. v. Adams, 28 Ind. App. 420, 63 N. E. 125; Western U. Tele. Co. v. Rogers, 68 Miss. 748, 13 L.R.A. 859, 24 Am. St. Rep. 300, 9 So. 823; Connell v. Western U. Tele. Co. 116 Mo. 34, 20 L.R.A. 172, 38 Am. St. Rep. 575, 22 S. W. 345; Morton v. Western U. Tele. Co. 53 Ohio St. 431, 32 L.R.A. 735, 53 Am. St. Rep. 648, 41 N. E. 689; Kester v. Western U. Tele. Co. 55 Fed. 603; Kline v. Western U. Tele. Co. 3 Ohio N. P. 143; Lewis v. Western U. Tele. Co. 57 S. C. 325, 35 S. E. 556; Davis v. Western U. Tele. Co. 46 W. Va. 48, 32 S. E. 1026; Tyler v. Western U. Tele. Co. 54 Fed. 634; Alexander v. Western U. Tele. Co. 126 Fed. 445; Rowan v. Western U. Tele. Co. 149 Fed. 550.

In Clay v. Western U. Tele. Co. 81 Ga. 285, 12 Am. St. Rep. 316, 6 S. E. 813, the person to whom a despatch was addressed, asking him to meet a certain train for the purpose of arranging for the shipment further on of a corpse, failed to recover because the court held he had not sustained any damage by the failure of the company to deliver the despatch in time to enable him to meet the train.

A person to whom a telegraph message announcing the dying condition of his brother was sent, but by gross negligence of the company not delivered promptly, and who consequently was unable to reach his brother's bedside before death had occurred, was held in Chapman v. Western U. Tele. Co. 88 Ga. 763, 17 L.R.A. 430, 30 Am. St. Rep. 183, 15 S. E. 901, not entitled to recover more than nominal damages simply for mental suffering; but the right of the recipient of the despatch to maintain the action was not questioned. This case was followed and its doctrine reiterated in Giddens v. Western U. Tele. Co. 111 Ga. 824, 35 S. E. 638.

The question litigated, and decided in favor of the defendant, in International Ocean Tele. Co. v. Saunders, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148, was as to the right 30 L.R.A. (N.S.)

to recover damages for mental pain and suffering in an action against the telegraph company for failure promptly to transmit and deliver a telegraph despatch announcing the mortal illness of the plaintiff's wife. The case, however, conceded the right of the plaintiff, who was the person to whom the despatch was addressed, to recover at least nominal damages.

It was decided in Curtin v. Western U. Tele. Co. 16 Misc. 347, 38 N. Y. Supp. 58, reversing 14 Misc. 459, 72 N. Y. S. R. 200, 36 N. Y. Supp. 1111, that a person to whom a telegram announcing the death and time of the funeral of a brother was addressed, and inexcusably delayed in delivery, was entitled to recover damages from the telegraph company; but that decision was reversed in 13 App. Div. 253, 42 N. Y. Supp. 1109, upon the ground that mental suffering, the only damage alleged and proved in the case, afforded no legal basis for the recovery of pecuniary damages.

In Kightlinger v. Western U. Tele. Co. 20 Pa. Co. Ct. 630, a demurrer was sustained to a declaration in an action against a telegraph company by the person to whom a despatch was addressed, informing him of the serious and dangerous illness of his father, and which the company negligently delayed in delivering, where the only averment of damage was that the plaintiff had been by such delay "hindered and prevented from seeing his father alive, and ministering to his wants and comfort," the court being of the opinion that this allegation did not set forth actionable damage, or even allege mental anguish and grief.

One to whom a telegram has been addressed and promptly delivered announcing the serious illness of his wife's mother, and who has in return sent another despatch to the sender asking as to the condition of the sick woman and whether the presence of his wife was necessary, was held not entitled to recover damages from the telegraph company for its failure to deliver a third despatch announcing an improvement and that the illness was not dangerous, where the only damage alleged was continued anxiety and mental distress. Rowell v. Western U. Tele. Co. 75 Tex. 26, 12 S. W. 534.

The plaintiff in Western U. Tele. Co. v. Kuykendall, 99 Tex. 323, 89 S. W. 965, to whom a telegram had been addressed and unreasonably delayed in delivery, which announced the death of her brother and that the sender was coming with the corpse, was denied a recovery against the telegraph company for mental anguish alleged to have been suffered because, on account of the delay, the coffin could not be opened so as to enable her to review the remains, on the ground that such damages were not reasonably to be contemplated by the company as consequent upon delay in delivering the message.

In De Voegler v. Western U. Tele. Co. 10 Tex. Civ. App. 229, 30 S. W. 1107, the plaintiff, a youth away from home, was held not entitled to recover damages

against the telegraph company for mental distress consequent upon its failure promptly to deliver to him money which his mother had transmitted to him by telegraph at his request.

The humiliation suffered by a sister because her brother had died at a distant place, and was buried at the cost of strangers on account of leaving no means, is not a proper ground of recovery against a telegraph company for its delay in promptly delivering the telegraphic message announcing the death and asking instructions as to the disposal of the corpse. *Western U. Teleg. Co. v. McNairy*, 34 Tex. Civ. App. 389, 78 S. W. 969.

A judgment against a telegraph company in favor of the person to whom a telegram was addressed, announcing the death and the time of the funeral of his father, and which was negligently delayed in delivery, was reversed in *Western U. Teleg. Co. v. Butler*, 45 Tex. Civ. App. 28, 99 S. W. 704, upon the ground that the plaintiff's mental distress due to his inability to be present and comfort his mother in her bereavement was not a proper element of damage in such a case.

The negligent delay of a telegraph company to deliver a message to parents announcing that their son, who had been seriously ill, was better, affords the parents no ground of action to recover for mental anxiety and distress alone. *McCarthy v. Western U. Teleg. Co.* (Tex. Civ. App.) 56 S. W. 568.

A judgment against a telegraph company for negligent and inexcusable delay in delivering a message addressed to the plaintiff, announcing the illness of his daughter, in consequence of which he missed a train that he might have taken to his daughter's home six hours earlier, was reversed in *Western U. Teleg. Co. v. Barrett* (Tex. Civ. App.) 118 S. W. 1089, upon the ground that there had been included in the judgment damages for mental distress consequent upon the nondelivery of a reply to a telegram the plaintiff had sent inquiring as to the then present condition of his daughter, when the proof showed that that was unchanged.

The court in *Goodhue v. Western U. Teleg. Co.* (Tex. Civ. App.) 122 S. W. 41, affirmed a judgment in favor of a telegraph company in an action instituted by a daughter to recover damages for mental distress consequent upon the negligent delay of the company to deliver a despatch informing her of the mortal illness of her father, upon the curious ground that the delay to deliver the despatch had not produced her anxiety and mental distress, but had only prolonged the suffering which already existed, and arose from a great desire to reach her father and home at the earliest possible moment.

In *Connelly v. Western U. Teleg. Co.* 100 Va. 51, 56 L.R.A. 663, 93 Am. St. Rep. 919, 40 S. E. 618, the plaintiff was defeated in an action against the telegraph company to recover damages for negligent delay in delivering a telegram addressed to him, an-

nouncing the death of his father. His right to maintain the action apparently was not contested, since there was a statute at that time in the state of Virginia providing a penalty of \$100 to the addressee of a telegram for the failure to transmit and deliver a despatch, and a further statute permitting any person injured by a violation of that act to recover such damages as he might sustain, notwithstanding the imposition of a statutory penalty or forfeiture; but the court reached its conclusion upon the ground that only mental distress and suffering were alleged as damages, and for these, when unaccompanied by pecuniary injury or physical pain, no recovery could be had.

In *Summerfield v. Western U. Teleg. Co.* 87 Wis. 1, 41 Am. St. Rep. 17, 57 N. W. 973, the court reversed a judgment in favor of the person to whom a despatch announcing that his mother was dying, and requesting his presence, was sent and unreasonably delayed in delivery, upon the ground that damages for mental suffering alone were not recoverable in that state. There was, however, a statute (Laws of 1885, chap. 171, Sanborn & B. Anno. Stat. § 1770b) which made telegraph companies "liable for all damages occasioned by failure or negligence" of their servants in receiving, copying, transmitting, or delivering messages, and Cassoday, J., dissenting from the conclusion of the court upon the ground that the statute gave a right of action in such cases, said pertinently: "If the statute gives no right of action for any damages except such as were recoverable at common law, then its enactment was an idle ceremony."

In sustaining a demurrer by the telegraph company to a declaration in an action wherein the plaintiff alleged negligence in a telegraph company in delaying the delivering of a message to him from his sister, which prevented him from reaching the deathbed of his brother-in-law, the court in *Chase v. Western U. Teleg. Co.* 10 L.R.A. 464, 44 Fed. 554, said: "The negligence of the defendant is sufficiently averred; and it seems to be settled in this country, contrary, however, to the English cases, that the receiver of a telegram may recover damages actually sustained by negligent delay in delivery. An examination of the adjudged cases, however, shows that the great weight of authority is against recovery in a case like this for mental suffering alone."

The person to whom a telegram is addressed, and negligently and inexcusably delayed in delivery by the agents of the telegraph company, it was held in *Crawson v. Western U. Teleg. Co.* 47 Fed. 544, may not recover for mental suffering alone, unaccompanied by other injuries. The court intimated in that case, however, that the action would be maintainable if the negligence of the company had been so gross as to indicate malice, and if there were any physical pain and suffering so that the mental distress might be taken into con-

sideration as a natural and proximate result of the physical pain.

It was held in *Western U. Teleg. Co. v. Wood*, 21 L.R.A. 706, 6 C. C. A. 432, 13 U. S. App. 317, 57 Fed. 471, that a person to whom a telegram was addressed might not recover of the company damages for failure to deliver the message, where he was not a party to the contract under which it was sent, and where the company was not informed, either by the language of the message or otherwise, that the contract was for his benefit; but in that case the damages claimed were for mental distress and suffering alleged to be due to the negligence of the company in failing promptly to deliver to the plaintiff a telegram announcing the dangerous illness of his father, and the reasoning of the court is directed generally to the proposition that such damages, when not accompanied by physical or pecuniary injury to the plaintiff, do not constitute a cause of action.

In *Gahan v. Western U. Teleg. Co.* 59 Fed. 433, an action at law to recover damages from a telegraph company for failure to deliver to the plaintiff a message from his brother announcing the death and time of burial of another brother, the court said in beginning the opinion: The case is somewhat new, and yet it has been pretty well adjudicated, and, outside of the decision of Judge Maxey, in *Beasley v. Western U. Teleg. Co.* 39 Fed. 181, every time it has been touched by the Federal courts, it has been clearly and unequivocally held that the action may not be maintained. He was referring to damages for mental anguish alone. The court, however, in that case, put the actual decision upon the ground that the statute of Minnesota had provided in clear and unequivocal terms that no action should be maintained except for actual damages, and construed the phrase "actual damages" to exclude damages for mental suffering and distress.

In *Western U. Teleg. Co. v. Sklar*, 61 C. C. A. 281, 126 Fed. 295, the plaintiff, to whom had been addressed and unreasonably and negligently delayed in delivery a telegram announcing the death of her daughter, and asking instructions as to the disposition of the corpse, was held not entitled to recover of the telegraph company for mental suffering and distress alone, notwithstanding the provisions of the state statute (*Shannon's Code [Tenn.] §§ 1837, 1838*) requiring all telegraph messages to be delivered without unreasonable delay, and making the telegraph company liable in damages to the party aggrieved for the violation of its duty in that respect, and notwithstanding also that the state courts of Tennessee had construed such statute as affording the right of action, which the Federal court denied.

A telegraph company is liable for special damages resulting from a negligent delay in transmitting or delivering a telegram only when notice of the facts which give rise to such damages is received by such company, either from the face of the tele-

gram or from other sources. *Western U. Teleg. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486.

A judgment against a telegraph company in favor of a father to whom had been sent a telegram announcing the fact that his wife was about to be confined, and which telegram was negligently delayed, so that the plaintiff was unable to be present with his wife at the birth of the child, or to attend the funeral, where the infant subsequently died, was reversed in *Western U. Teleg. Co. v. Craven* (Tex. Civ. App.) 95 S. W. 633, because the proof was lacking that the infant's death occurred at the time of birth, and therefore that the company could not be charged with notice such as to make it liable for damages with respect of the inability of the father to be present at the subsequent death and funeral of the child.

A telegraph company which has negligently and inexcusably delayed the delivery of a telegram announcing illness or death has frequently escaped a judgment in a suit by the person to whom the delayed message was addressed, because the relationship between the plaintiff and the person who was ill or had died was not so close that the damages claimed to have resulted from the delay could fairly be said to have been contemplated by the company at the time it contracted to transmit and deliver the despatch, and the contents of the message itself did not imply or give notice of such damages, nor did the company have any extrinsic knowledge concerning them.

In *Davidson v. Western U. Teleg. Co.* 21 Ky. L. Rep. 1292, 51 S. W. 830, the court affirmed the judgment in favor of the company, denying a recovery of damages for negligent delay in delivering a telegram announcing the death of the mother of one of the plaintiffs and mother-in-law of the other, the plaintiffs being husband and wife. The ground taken by the court was that, inasmuch as the wife was not a party to the message, or mentioned in it, or known by the telegraph company to exist, she could not maintain the action, and that her husband, as son-in-law of the deceased, was not a relative near enough to be entitled to recover damages for mental anguish brought about by inability to attend the deceased in her last moments.

In *Lee v. Western U. Teleg. Co.* 130 Ky. 202, 113 S. W. 55, the person to whom a telegram was addressed announcing the death of a relative, and which was unreasonably and negligently delayed in delivery, was denied a recovery against the telegraph company upon the ground that the relationship between himself and the deceased was not sufficiently near to entitle him to recover for mental distress. The court laid down the rule that where damages are sought for the failure to send or deliver a telegram announcing the sickness or death of a relative, a recovery may not be had unless the relationship between the parties is that of parent and child, husband and wife, sister and brother, or grandparent and grandchild. This rule was admitted to be an arbitrary

one, but was defended upon the theory that the peculiar and speculative nature of the doctrine upon which the right of recovery rests in cases of this character makes it necessary that there should be limitations placed upon it. The court conceded that the restrictions named by it were not satisfactory, but that, as the line must be drawn somewhere, it seemed appropriate to put it at the point where the parties were united by close blood relation or marriage ties.

Under the rule adopted in the state of Kentucky, allowing actions by the persons to whom telegrams are addressed and delayed in delivery to blood relatives or husbands and wives, where the message announces death or mortal illness, and mental suffering and distress alone are relied upon as damages, a recovery was denied the plaintiff in *Randall v. Western U. Teleg. Co.* 32 Ky. L. Rep. 859, 15 L.R.A. (N.S.) 277, 107 S. W. 235, because the only relationship between him and the deceased person named in the message was a betrothal of marriage.

The controversy in *Holler v. Western U. Teleg. Co.* 149 N. C. 336, 19 L.R.A. (N.S.) 475, 63 S. E. 92, an action by the person to whom a telegram was addressed, to recover damages for negligence in delaying its delivery, which resulted in the defeat of the plaintiff, was wholly over the question of the right of the plaintiff to recover damages for mental suffering, where his relationship to the person whose death the despatch announced was not disclosed by the terms of the message, or otherwise known to the company.

A judgment against a telegram company for mental distress suffered by the recipient of a despatch announcing the serious illness of his daughter-in-law, and unreasonably delayed in delivery, was reversed in *Amos v. Western U. Teleg. Co.* 79 S. C. 259, 128 Am. St. Rep. 845, 60 S. E. 660, upon the ground that the statute of that state allowing recovery for mental anguish caused by delays in delivering telegrams did not authorize a recovery by the plaintiff, without specific allegations and proof of notice to the telegram company of such a tender affection between the recipient and the person whose illness was announced in the despatch, as was not to be implied from an ordinary relation of father-in-law and daughter-in-law.

A judgment against a telegram company in favor of a person to whom a telegram was addressed, announcing the death and time of burial of his brother-in-law, was reversed in *Western U. Teleg. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896, upon the ground that the relationship between the deceased and plaintiff was not such in and of itself as to entitle the plaintiff to the recovery of special damages, and to give notice of their contemplation to the telegram company, without express allegations and express extrinsic disclosure.

The telegram company was excused from liability and damages for the negligent delay in delivering a telegram announcing the

death and time of funeral of the plaintiff's niece, in *Western U. Teleg. Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482, upon the ground that no such relation existed between uncle and niece, without express notice to the telegram company, as would imply that mental anguish would ensue, so as to be within the contemplation of the parties to the despatch, from failure or delay promptly to transmit and deliver the message.

A judgment recovered against a telegram company by the addressee of the telegram delayed in delivery, which announced the death of her brother-in-law, was reversed in *Western U. Teleg. Co. v. McMillan* (Tex. Civ. App.) 30 S. W. 298, upon the ground that, the deceased not being related by blood to the plaintiff, damages for mental anguish, in the absence of express notice, were not contemplated by the company as a consequence of delay in delivering the message.

The court in *Western U. Teleg. Co. v. Garrett* (Tex. Civ. App.) 34 S. W. 649, reversed a judgment against a telegram company recovered by a person who was prevented by its negligent delay in delivering a despatch addressed to him, from visiting his dying stepfather, upon the ground that the relationship of stepfather and stepson was not sufficient in and of itself, without notice to the company, to make the company liable for mental distress and suffering.

In *Western U. Teleg. Co. v. Wilson* (Tex. Civ. App.) 76 S. W. 600, the supreme court having laid down the rule that mental anguish of the person to whom a telegram was addressed, announcing the death of his niece, and negligently delayed in delivery, did not constitute a basis for recovery, because the relationship between the parties was not sufficient to put the company upon notice that such damages would be claimed in consequence of its delay in delivering the despatch, thereupon a judgment against the company which the uncle had recovered was reversed, and final judgment dismissing the action was rendered in its favor, by the court of civil appeals.

A telegram company has occasionally escaped a judgment when sued for damages resulting from its negligence in not promptly delivering a telegram announcing the serious illness or death of the spouse of, or a close relation by blood to, the plaintiff, upon the ground that it had no knowledge, either from the language of the message or otherwise, of the relationship, and, hence, that it could not be said that the damages claimed were in law within its contemplation as consequent upon its default.

A judgment recovered by a husband and wife against a telegram company for delay in delivering a despatch addressed to the wife, sent by her father announcing the death of her mother, was reversed in *Kirby v. Western U. Teleg. Co.* 77 S. C. 404, 122 Am. St. Rep. 580, 58 S. E. 10, upon the ground that the damages recovered were not of such a character as to be within the contemplation of the telegram company as

consequent upon the delay in delivering the despatch.

In *Western U. Teleg. Co. v. Kirkpatrick*, 76 Tex. 217, 18 Am. St. Rep. 37, 13 S. W. 70, a married woman was denied a recovery against the telegraph company for its negligence in failing to deliver with promptitude a despatch to her husband announcing the serious illness of a third person, upon the ground that there was nothing in the wording of the despatch to put the company upon notice that such married woman was a relative of the person said to be ill (she was in fact his daughter), or that she was present at the place to which the despatch was addressed, or that her presence at the bedside of the sick was desired.

There was, according to the court in *Southwestern Teleg. & Teleph. Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686, nothing in a telegram which had been unreasonably delayed in delivery sufficient to give notice to the telegraph company that the mental suffering of the plaintiff's wife, the death of whose father, it announced, was within the contemplation of the parties to the despatch, the wife not being named in or addressed by the message, and therefore a judgment in the plaintiff's favor was reversed, and the cause remanded for a new trial.

In *Western U. Teleg. Co. v. Brown*, 71 Tex. 723, 2 L.R.A. 766, 10 S. W. 323, the right of a person to whom a telegram announcing the death of his brother and the time appointed for the funeral, to maintain an action against the telegraph company for inexcusable delay in delivering the message, was admitted, but the plaintiff in that case was held not entitled to recover the damages alleged in his complaint, because the language of the despatch was not such as to import any family relationship between himself and the deceased, so as to charge the telegraph company with notice of its urgency and importance.

The case of *Western U. Teleg. Co. v. Brown*, supra, in so far as it laid down the doctrine that to warrant a recovery against a telegraph company by a person to whom a death message is sent, and not promptly delivered, the relationship of the addressee and the deceased should appear from the language of the despatch, was overruled in *Western U. Teleg. Co. v. Carter*, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 961, reversing (Tex. Civ. App.) 20 S. W. 834, in which the trial court had followed the overruled case.

A judgment against a telegraph company was reversed, and a new trial ordered, in the case of *Arial v. Western U. Teleg. Co.* 70 S. C. 418, 50 S. E. 6, upon the ground that the plaintiff, who had sent messages summoning his father's brothers to the bedside of his dying father, the reply to one of which was negligently delayed in delivery, so that he was uncertain whether his uncle was coming or not, was not entitled to recover damages under the mental anguish statute of South Carolina because the terms of the despatch which had been delayed in

delivery were such as to leave it uncertain whether the uncle intended to come or not.

The right of a person to whom a telegram is addressed, and not delivered, or inexcusably delayed in delivery, by the negligence of the telegraph company, has been recognized, and judgments in favor of such persons against the company have been affirmed in a very large number of cases throughout the United States. In some of these cases a right to maintain an action against a telegraph company was given by statute to whosoever might suffer damage by the company's negligence in transmitting and delivering a telegram; in others the right of the person to whom a telegram was addressed, to maintain an action in such circumstances, rested upon general principles; in none of these cases, however, so far as the reports disclose, did the company controvert the abstract right to maintain the suit, but it relied in each upon other grounds of defense.

It is the established doctrine in Texas that damages for mental anguish caused by the failure of a telegraph company to deliver promptly a telegram announcing the mortal illness of a near relative of the person addressed are recoverable in an action by such person against the telegraph company. *Western U. Teleg. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760.

In cases where telegrams are sent announcing to the person addressed that a parent or child, husband or wife, brother or sister, is seriously ill, dying, or dead, and calling for the addressee's presence at the bedside of the sick or the funeral of the dead, notice to the company is implied, and the company is held to contemplate that substantial damages will be suffered, and great distress of mind experienced, by the person addressed, if such a telegram is unduly, negligently, and inexcusably delayed in transmission or delivery.

In the following cases this doctrine was applied, and judgments recovered against telegraph companies by recipients of telegrams unduly delayed in delivery were severally affirmed:

Western U. Teleg. Co. v. Blackmer, 82 Ark. 526, 102 S. W. 366; *Western U. Teleg. Co. v. Todd* (Ind. App.) 53 N. E. 194; *Western U. Teleg. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 752, 28 L.R.A. 72, 57 Am. St. Rep. 294, 62 N. W. 1; *Hurlburt v. Western U. Teleg. Co.* 123 Iowa, 295, 98 N. W. 794; *Potter v. Western U. Teleg. Co.* 138 Iowa, 406, 116 N. W. 130; *Western U. Teleg. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283; *Western U. Teleg. Co. v. Gilstrap*, 77 Kan. 191, 94 Pac. 122; *Western U. Teleg. Co. v. Fisher*, 107 Ky. 513, 54 S. W. 830; *Western U. Teleg. Co. v. McIlvoy*, 107 Ky. 633, 55 S. W. 428; *Postal Teleg. Cable Co. v. Pratt*, 27 Ky. L. Rep. 430, 85 S. W. 225; *Thomas v. Western U. Teleg. Co.* 120 Ky. 194, 85 S. W. 760; *Western U. Teleg. Co. v. Teague*, 134 Ky. 601, 121 S. W. 484; *Western U. Teleg. Co. v. Smith*, 15 Ky. L. Rep. 334; *Western U. Teleg. Co. v. Par-*

sons, 24 Ky. L. Rep. 2008, 72 S. W. 800; Western U. Teleg. Co. v. Watson, 82 Miss. 101, 33 So. 76; Young v. Western U. Teleg. Co. 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044; Lyne v. Western U. Teleg. Co. 123 N. C. 129, 31 S. E. 350; Meadows v. Western U. Teleg. Co. 132 N. C. 40, 43 S. E. 512; Bryan v. Western U. Teleg. Co. 133 N. C. 603, 45 S. E. 938; Cogdell v. Western U. Teleg. Co. 135 N. C. 431, 47 S. E. 490; Edwards v. Western U. Teleg. Co. 147 N. C. 126, 60 S. E. 900; Bailey v. Western U. Teleg. Co. 150 N. C. 316, 63 S. E. 1044; Pierson v. Western U. Teleg. Co. 150 N. C. 559, 64 S. E. 577; Battle v. Western U. Teleg. Co. 151 N. C. 629, 66 S. E. 661; Marsh v. Western U. Teleg. Co. 65 S. C. 430, 43 S. E. 953; Martin v. Western U. Teleg. Co. 81 S. C. 432, 62 S. E. 833; Talbert v. Western U. Teleg. Co. 83 S. C. 68, 64 S. E. 862, 916; Jones v. Western U. Teleg. Co. 70 S. C. 539, 50 S. E. 198; Smith v. Western U. Teleg. Co. 77 S. C. 378, 58 S. E. 6, 12 A. & E. Ann. Cas. 654; Glover v. Western U. Teleg. Co. 78 S. C. 502, 59 S. E. 526; So Relle v. Western U. Teleg. Co. 55 Tex. 308, 40 Am. Rep. 805; Stuart v. Western U. Teleg. Co. 66 Tex. 580, 59 Am. Rep. 623, 18 S. W. 351; Western U. Teleg. Co. v. Adams, 75 Tex. 531, 6 L.R.A. 844, 16 Am. St. Rep. 920, 12 S. W. 857; Western U. Teleg. Co. v. Feegles, 75 Tex. 537, 12 S. W. 860; Western U. Teleg. Co. v. Moore, 76 Tex. 66, 18 Am. St. Rep. 25, 12 S. W. 949; Western U. Teleg. Co. v. Rosentreter, 80 Tex. 406, 16 S. W. 25; Western U. Teleg. Co. v. Jones, 81 Tex. 271, 16 S. W. 1006; Western U. Teleg. Co. v. Beringer, 84 Tex. 38, 19 S. W. 336; Western U. Teleg. Co. v. Swearingin, 97 Tex. 293, 104 Am. St. Rep. 876, 78 S. W. 491; Western U. Teleg. Co. v. Erwin (Tex.) 19 S. W. 1002; Western U. Teleg. Co. v. Ward, 4 Tex. App. Civ. Cas. (Willson) 553, 19 S. W. 898; Western U. Teleg. Co. v. Zane, 6 Tex. Civ. App. 585, 25 S. W. 722; Western U. Teleg. Co. v. May, 8 Tex. Civ. App. 176, 27 S. W. 760; Western U. Teleg. Co. v. Kinsley, 8 Tex. Civ. App. 527, 28 S. W. 831; Western U. Teleg. Co. v. Boots, 10 Tex. Civ. App. 542, 31 S. W. 825; Western U. Teleg. Co. v. Drake, 14 Tex. Civ. App. 601, 38 S. W. 632; Western U. Teleg. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367; Western U. Teleg. Co. v. Gahan, 17 Tex. Civ. App. 657, 44 S. W. 933; Western U. Teleg. Co. v. Davis, 24 Tex. Civ. App. 427, 59 S. W. 46; Western U. Teleg. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; Western U. Teleg. Co. v. Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427; Western U. Teleg. Co. v. Davis, 30 Tex. Civ. App. 590, 71 S. W. 313; Western U. Teleg. Co. v. Belew, 32 Tex. Civ. App. 338, 74 S. W. 799; Western U. Teleg. Co. v. Shaw, 33 Tex. Civ. App. 395, 77 S. W. 433; Western U. Teleg. Co. v. Anderson, 34 Tex. Civ. App. 14, 78 S. W. 34; Western U. Teleg. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052; Western U. Teleg. Co. v. Shaw, 40 Tex. Civ. App. 277, 90 S. W. 58; Western U. Teleg. Co. v. Ford, 40 Tex. Civ. App. 30 L.R.A. (N.S.)

474, 90 S. W. 677; Western U. Teleg. Co. v. Gulick, 48 Tex. Civ. App. 78, 106 S. W. 698; Western U. Teleg. Co. v. Johnsey, 49 Tex. Civ. App. 487, 109 S. W. 251; Western U. Teleg. Co. v. Clark (Tex. Civ. App.) 25 S. W. 990; Western U. Teleg. Co. v. Porter (Tex. Civ. App.) 26 S. W. 866; Western U. Teleg. Co. v. Grigsby (Tex. Civ. App.) 29 S. W. 406; Western U. Teleg. Co. v. Russell (Tex. Civ. App.) 31 S. W. 698; Western U. Teleg. Co. v. Guest (Tex. Civ. App.) 33 S. W. 281; Western U. Teleg. Co. v. Smith (Tex. Civ. App.) 33 S. W. 742; Western U. Teleg. Co. v. Randles (Tex. Civ. App.) 34 S. W. 448; Western U. Teleg. Co. v. Teague (Tex. Civ. App.) 36 S. W. 301; Western U. Teleg. Co. v. Warren (Tex. Civ. App.) 36 S. W. 314; Western U. Teleg. Co. v. Anderson (Tex. Civ. App.) 37 S. W. 619; Western U. Teleg. Co. v. Edmonson (Tex. Civ. App.) 40 S. W. 622; Western U. Teleg. Co. v. Cain (Tex. Civ. App.) 40 S. W. 624; Western U. Teleg. Co. v. Wilson (Tex. Civ. App.) 51 S. W. 521; Western U. Teleg. Co. v. Rice (Tex. Civ. App.) 61 S. W. 327; Phillips v. Western U. Teleg. Co. (Tex. Civ. App.) 60 S. W. 997; Western U. Teleg. Co. v. Pierce (Tex. Civ. App.) 70 S. W. 360; Rich v. Western U. Teleg. Co. (Tex. Civ. App.) 110 S. W. 93; Western U. Teleg. Co. v. Rich (Tex. Civ. App.) 126 S. W. 686; Western U. Teleg. Co. v. Moran (Tex. Civ. App.) 113 S. W. 625; Western U. Teleg. Co. v. Parsley (Tex. Civ. App.) 121 S. W. 226.

And in virtually every one of such cases the only damages claimed and recovered were for mental anguish, suffering, or distress.

In Western U. Teleg. Co. v. Boots, 10 Tex. Civ. App. 542, 31 S. W. 825, the alleged delay in delivering a despatch addressed to the plaintiff, announcing that his wife was dying and summoning him to her at once, was only some thirty minutes, but was just sufficient to make him miss a train, and the court affirmed a verdict in his favor, against the contention of the telegraph company that the actual delay was not negligent upon its part.

In Western U. Teleg. Co. v. Todd (Ind. App.) 53 N. E. 194, the person to whom a telegram announcing the death of his father was addressed, and unreasonably delayed in delivery, was permitted to recover damages for mental anguish on the ground that such damages were recoverable where other nominal damage was shown to have been sustained, and the nature of the message was such as to indicate to the telegraph company the probable distress and mental suffering of the recipient, if it were not delivered. As we understand the rule, said the court in reaching this conclusion, it is that where the sender or the addressee of a telegraphic despatch can show himself entitled to nominal damages by reason of the violation of his legal right under the statute providing for special damages, he may recover for mental anguish suffered by him as the effect of a breach of duty, if the message be one which on its face indi-

cates to any person of ordinary intelligence that such injury will result to an average person so wronged.

A very similar result was reached in *Western U. Telegr. Co. v. Newhouse*, 6 Ind. App. 422, 33 N. E. 800, in an action by a person to whom a despatch had been sent by his daughter, announcing the mortal illness of his mother, and delayed in delivery.

The decisions of this court, said Hoke, J., in delivering the opinion of the supreme court of North Carolina in *Dayvis v. Western U. Telegr. Co.* 139 N. C. 79, 51 S. E. 898, have established the principle that the addressee of a telegram, where there has been a wrongful failure to deliver or negligent error in transmitting the message, may, in certain circumstances, recover compensatory damages for mental anguish, where the message is for his benefit or concerns his domestic or social interest, and this independent of any bodily or substantial pecuniary injury; and in that case a judgment recovered by a husband for the failure of a telegraph company to deliver a telegram from his wife, announcing that she had taken the wrong train by mistake and would be delayed a day in reaching him, was affirmed.

Upon the question whether the recipient could maintain an action against a telegraph company for gross negligence in delaying for several days the delivery of a message announcing that his wife was at the point of death, the supreme court of North Carolina in *Young v. Western U. Telegr. Co.* 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 883, 11 S. E. 1044, adopted the view expressed in *Shearman & Redfield on Negligence* (§ 560), that a telegraph company is responsible for its negligence to a person to whom a message is addressed as well as to the sender, and added that there was ample authority to the same effect, and that, although this was not the English rule, it was stated in several text-books of authority to be the invariable rule in this country.

In *McInturf v. Western U. Telegr. Co.* 81 Kan. 476, 106 Pac. 282, a judgment against a telegraph company in favor of a married woman, for damages sustained by an unreasonable delay to deliver, and an alteration of the date in, a telegram to her announcing the death of a relative, on account of which she made unnecessarily a fruitless journey, was affirmed. The right of an addressee of a telegram to maintain the action was not challenged, but the controversy was over the question of the right of the plaintiff as a married woman to maintain the action in her own name, the principal loss having been that of her husband in being deprived of the services of his spouse during her absence on the journey.

A judgment in favor of a telegraph company in an action brought by a husband and wife to recover damages for mental anguish sustained in consequence of the negligent delay of the company to deliver

a despatch addressed to the wife, announcing the death of her sister, was reversed in *Brown v. Western U. Telegr. Co.* 85 S. C. 405, 67 S. E. 146, upon the ground that the trial court was in error in directing a verdict for the company upon the ground that the South Carolina statute did not apply to a message deliverable outside the state.

In *Wadsworth v. Western U. Telegr. Co.* 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. 574, a telegraph company demurred to the declaration of a husband and wife in a suit for negligent and unreasonable delay in delivering two telegrams addressed to the wife, one announcing that her brother was dying and the other his death, upon the ground that no pecuniary or physical injury was alleged, and that mental suffering alone would not sustain the action. The demurrer having been sustained in the first instance, the supreme court on appeal (Lurton, J., and Folkes, J., dissenting), reversed the judgment, and held the suit maintainable. "Clearly," said the court in the majority opinion, "the declaration discloses a cause for some damage, and to this extent it must be conceded the action in sustaining the demurrer was erroneous."

The doctrine of the foregoing cases has been applied to sustain judgments against telegraph companies recovered by persons to whom telegrams negligently delayed in delivery were addressed, announcing illness or death of a grandparent or grandchild, a parent-in-law or child-in-law.

A judgment against a telegraph company for damages due to the failure and negligent delay in delivering a telegram to the plaintiff, from her father announcing that her grandmother was dying, was affirmed in *Poulnot v. Western U. Telegr. Co.* 69 S. C. 545, 43 S. E. 622.

A judgment against a telegraph company in favor of a person to whom a despatch was sent, announcing the mortal illness of his grandmother, and which was never transmitted at all, was affirmed in *Western U. Telegr. Co. v. Blake*, 29 Tex. Civ. App. 224, 68 S. W. 526, notwithstanding the contention of the company that the contract had been made in another state, the law of which did not allow damages for mental anguish in such cases.

A judgment against a telegraph company for negligently delaying the delivery of a telegram addressed to the plaintiff, announcing the death of his grandchild, was affirmed in *Cobb v. Western U. Telegr. Co.* 85 S. C. 430, 67 S. E. 549.

A judgment against a telegraph company in favor of a grandmother who was prevented by the negligent and inexcusable delay of the company in delivering a telegram to her announcing the death, of her grandchild, from seeing the remains and attending the funeral, was affirmed in *Western U. Telegr. Co. v. Porterfield* (Tex. Civ. App.) 84 S. W. 850, and a rehearing of the case was afterwards denied. A note by the reporter states that a writ of error was granted by the supreme court, but, at the time of

writing this note, the action of the supreme court upon such writ of error, if granted, has not been reported.

The court in *Western U. Teleg. Co. v. Griffin*, 92 Ark. 219, 122 S. W. 489, affirmed a judgment, and denied a rehearing of an appeal, in an action charging negligence in delivering to the plaintiff a telegram from his father-in-law, announcing the death of his mother-in-law and summoning him to attend the funeral at once. The only contest in the case was over the plaintiff's right to recover damages for mental suffering and anguish under the Arkansas statute, in view of the lack of a closer relationship between the plaintiff and the deceased.

The person to whom a telegram was addressed and negligently delayed in delivery was successful in obtaining and holding a judgment against the telegraph company, in *Bennett v. Western U. Teleg. Co.* 128 N. C. 103, 38 S. E. 294, but the only question made was whether his relationship as father-in-law was sufficient to entitle him to recover damages for mental suffering because of inability, consequent upon the delay of the telegraph company, to attend the funeral of his daughter-in-law.

In *Herring v. Western U. Teleg. Co.* (Tex. Civ. App.) 127 S. W. 882, a judgment in favor of the telegraph company in an action by the recipient of a telegram which the company had negligently failed to transmit and deliver, notifying him of the death of his father-in-law, was reversed and a new trial ordered for error on the part of the trial court in instructing the jury.

The entire controversy in *Hunter v. Western U. Teleg. Co.* 135 N. C. 458, 47 S. E. 745, was over the right of the plaintiff, the recipient of a telegram announcing the death and time of funeral of his second cousin, to recover damages against the telegraph company for mental suffering on account of its negligence in delay in delivering the message, and not at all over the right of the plaintiff to maintain the action; and a judgment recovered by the plaintiff against the telegraph company was affirmed.

IX. Delay and damage,—cause and effect.

To entitle anyone to maintain a suit against a telegraph company for damages alleged to have been sustained by reason of the inexcusable delay of the company to deliver a telegram, such delay must have been the proximate cause of the damage. There are several cases in which a judgment recovered against a telegraph company, by a person to whom a telegram negligently delayed in delivery was addressed, was reversed because the reviewing court deemed the damages too remote and speculative to be attributed to the delay as their proximate cause. Such decisions necessarily admit the abstract right of the plaintiffs to maintain their actions.

The court in *Johnson v. Western U. Teleg. Co.* 79 Miss. 58, 89 Am. St. Rep. 584, 29 So. 787, an action by the person to whom

a telegram was addressed, to recover damages for failure to deliver it, was of the opinion that the damages sued for were altogether too remote and speculative to be recoverable in such an action. The right of the plaintiff to maintain the action was not challenged.

A judgment against a telegraph company recovered by a woman to whom a telegram had been sent on Sunday announcing the apprehended death of her sister, and which was negligently delayed in delivery, was reversed in *Smith v. Western U. Teleg. Co.* 72 S. C. 116, 51 S. E. 537, but upon the ground that the evidence adduced upon the trial was not sufficient to establish that the delay in delivering the telegram was the proximate cause of the plaintiff's alleged mental anguish.

In *Western U. Teleg. Co. v. Linn*, 87 Tex. 7, 47 Am. St. Rep. 58, 26 S. W. 490, reversing (Tex. Civ. App.) 23 S. W. 895, the action by the person to whom a telegram was addressed, announcing the mortal illness of his sister and asking him to come and bring another sister, was held maintainable, but the damages claimed and recovered in the trial court, notwithstanding their recovery had been affirmed by the court of civil appeals, were deemed by the supreme court to be not the proximate result of the failure of the telegraph company promptly to deliver the message, and therefore too remote to constitute a cause of action.

The delay of a telegraph company in not promptly delivering money sent through its agency to a person who, in consequence of its not being received in time, is ejected from her home for nonpayment of rent, does not entitle the person to whom the despatch was addressed to maintain an action against the telegraph company to recover damages for mental distress, unaccompanied by a physical injury; neither is such an eviction a proximate result of the delay. *Stansell v. Western U. Teleg. Co.* 107 Fed. 668.

X. Conduct of recipient unaffected by delay.

If, notwithstanding a delay in delivering a telegram, even when that delay has been due to the negligence of the company, the person to whom the telegram is sent is able to do all that he might have done, had the message been delivered with the utmost diligence and promptitude, no legal damage has resulted from the delay, and therefore neither the sender nor the recipient of the despatch has a cause of action.

In each of the following cases, in which the suit was brought by the person to whom the delayed telegram was addressed, it appeared that the plaintiff neither refrained, nor was prevented, from doing aught that he might or would have done, had there been no delay in delivering the despatch; hence, that he had suffered no legal injury by the delay, and therefore was not entitled to recover in the action:

A judgment in favor of the recipient of a telegram announcing the mortal illness of a brother was reversed in *Western U. Tele. Co. v. Gulledege*, 84 Ark. 501, 106 S. W. 957, because the evidence showed that, while the company had unduly delayed the delivery of the despatch, yet the plaintiff himself received it in time to have reached his brother before the latter's death, and himself unreasonably delayed starting.

A judgment in favor of the telegraph company against the person to whom a telegram was addressed was affirmed in *Tharpe v. Western U. Tele. Co.* (Ark.) 127 S. W. 730, because the testimony in the case showed that, notwithstanding some delay on the part of the telegraph company in delivering the despatch, its recipient could not, even if he had received it in time, have been present at the funeral of his mother, whose death the message announced, and therefore that the delay in delivering the despatch had not occasioned any legal injury.

A person to whom a telegram is addressed, announcing the dangerous illness of his son, is not entitled to recover damages for mental suffering consequent upon his not seeing his son before death, notwithstanding the negligence of the company in delivering the despatch, if he could not in any event have reached his son in time, if the despatch had been delivered promptly. *Howard v. Western U. Tele. Co.* 119 Ky. 625, 84 S. W. 764, 86 S. W. 982, 7 A. & E. Ann. Cas. 1065.

A judgment in favor of the recipient of a telegram which the company negligently failed to deliver because he lived outside of its free delivery limits, notwithstanding the expense of making special delivery had been guaranteed by the sender, which notified him of a depressed state of the cattle market and advised against shipments of cattle, was reversed in *Reynolds v. Western U. Tele. Co.* 81 Mo. App. 223, upon the ground that the negligence of the company in delaying delivery did not damage the plaintiff, because he had from other sources fuller and confirmatory information as to the actual state of the market, and shipped his cattle notwithstanding.

A judgment against a telegraph company in favor of the person to whom a despatch was addressed and negligently delayed in delivery was affirmed in *Hughes v. Western U. Tele. Co.* 72 S. C. 516, 53 S. E. 107, where the despatch announced the death of the plaintiff's brother, but did not name the time of the funeral, and where, in point of fact, the funeral had been appointed for a time at which the plaintiff could not have attended even if the despatch had been delivered promptly, but where, upon the face of the despatch, it did not appear but that the plaintiff, if he had received the despatch in time, might in all probability have reached his deceased brother's household before the burial.

A judgment against a telegraph company for its negligent failure promptly to deliver to the plaintiff a telegram announcing

that her sister was dying was reversed in *Roberts v. Western U. Tele. Co.* 73 S. C. 520, 114 Am. St. Rep. 100, 53 S. E. 985, because the court was held to have erroneously refused a request by the telegraph company to instruct the jury that if the jury found that the plaintiff had no intention of attending the funeral of her sister, even if she had been informed in time to have enabled her to do so, she had suffered no damage from the delay, and the verdict should be for the company; the court being of the opinion that upon the facts disclosed it would have been impossible for the plaintiff to have reached her sister before death, even if the telegram had been promptly delivered, and if she had no intention of attending the funeral, she was not injured by the delay.

The court, while reversing the judgment in *Cumberland Teleph. Co. v. Brown*, 104 Tenn. 56, 50 L.R.A. 277, 78 Am. St. Rep. 906, 55 S. W. 155, upon the ground that the trial court erred in refusing to charge, as requested by the company, that the plaintiff must establish by the evidence his intention and ability to be present at his daughter's bedside before her death, where the despatch announced her mortal illness, in case it had been promptly delivered, conceded the right of the plaintiff to maintain the action.

In *Western U. Tele. Co. v. Hendricks*, 26 Tex. Civ. App. 366, 63 S. W. 341, a judgment recovered by a father against a telegraph company for negligence and delay in delivering a despatch announcing that his son was dying was reversed upon the ground that the court, in charging the jury, authorized it to find a verdict for damages because the plaintiff had failed to reach the presence of his son before death, when the evidence showed that he could not have reached him in time if the despatch had been delivered with the utmost promptitude. The error was avoided upon a second trial of the case, and a judgment recovered by the plaintiff against the company was affirmed on the second appeal, in 29 Tex. Civ. App. 413, 68 S. W. 720.

The court, in *Western U. Tele. Co. v. McFadden*, 32 Tex. Civ. App. 582, 75 S. W. 352, reversed a judgment in favor of the person to whom a telegram was sent, announcing the illness of her daughter and requesting her to call the sender by telephone, where the facts showed that the despatch had been negligently delayed in delivery, but that, notwithstanding, the plaintiff had employed the telephone and summoned her daughter home, upon the ground that there was nothing in the wording of the despatch to sustain a claim for damages for mental suffering in the plaintiff's not being able to go and bring her daughter.

A person who is not prevented from attending the funeral of her sister by the delay of a telegraph company in delivering a telegram to her announcing the sister's death, but who is distressed only for the time requisite to procure a postponement

of the funeral so as to enable her to be present, is not entitled to maintain an action for damages against the telegraph company on account of its delay. *Western U. Teleg. Co. v. Reed*, 37 Tex. Civ. App. 445, 84 S. W. 296.

A judgment against a telegraph company for failure promptly to deliver a message announcing the death of a brother of the plaintiff's wife was reversed in *Western U. Teleg. Co. v. Bell*, 42 Tex. Civ. App. 462, 92 S. W. 1036, because it did not appear to have been alleged in the petition, neither was it proved, that if the message had been promptly delivered, the wife not only could but would have journeyed to the place of her brother's funeral and reached it in time, which allegation and proof the court deemed essential to the making out of the cause of action.

Where a person to whom a telegram announcing the mortal illness of her father is sent and delayed in delivery would not have had the time and opportunity to be present at her father's death and attend his funeral, if the telegram had been delivered with the utmost promptitude, she sustains no damage from the delay, and therefore is not entitled to recover substantial damages for mental anguish and distress upon the theory that the funeral would have been postponed if the despatch had been delivered in time. *Western U. Teleg. Co. v. Motley* (Tex. Civ. App.) 27 S. W. 51.

If, in an action against a telegraph company by a person to whom a telegram has been sent, announcing the death of his mother, and unreasonably and inexcusably delayed in delivery, it is established that the recipient would not, had the despatch been delivered promptly, have been able to reach the place where the funeral was held, he is not entitled to recover damages for mental suffering and distress because of the delay in delivering the despatch, notwithstanding his testimony to the effect that a prompt delivery of the telegram would have enabled him to procure a postponement of the funeral. *Western U. Teleg. Co. v. Stone* (Tex. Civ. App.) 27 S. W. 144.

When a telegram to a father of a dying child simply announcing a change for the worse in her condition was unreasonably delayed in delivery, but notwithstanding such delay he acquired knowledge from other sources which enabled him to be present at the funeral, he was held not to be entitled to recover damages from the telegraph company on account of such delay, upon the ground that he was unable by reason thereof to take with him his wife and daughter. *Weatherford, M. W. & N. W. R. Co. v. Seals* (Tex. Civ. App.) 41 S. W. 841.

A judgment in favor of a father against a telegraph company for its negligent delay in delivering a telegram to him announcing the impending death of his child, so that he was unable to be present and attend the funeral, was affirmed in *Western U. Teleg. Co. v. Waller* (Tex. Civ. App.) 47 S. W. 396, despite the contention of the 30 L.R.A. (N.S.)

company, first, that the plaintiff did not have the money to pay his railroad passage, and, second, that he could not have reached the place of funeral in time to attend it, if the despatch had been promptly delivered, where the testimony showed that a debtor owed him money and that the funeral was actually postponed to await the arrival of the train upon which he could have traveled, had the despatch been delivered to him promptly.

A prima facie case is made out by the plaintiff in an action against a telegraph company for damages in delaying the delivery of a message announcing the mortal illness and expected death of his father, by proof that he could and would have reached his father's home in time for the funeral, on the second day after the message was sent, if it had been delivered promptly, and therefore it is prejudicial error in such a case for a trial court to direct a verdict for the telegraph company. *Lawrence v. Western U. Teleg. Co.* (Tex. Civ. App.) 95 S. W. 26.

The principal contention relied upon by the defendant to reverse a judgment against it in favor of a person to whom a telephone call was sent, and not transmitted or delivered until after an inexcusable and negligent delay, where the message announced the dying condition of the plaintiff's father and requested his presence, was that the plaintiff, when he got the message, might have proceeded by wagon, or taken an earlier freight train instead of the train that he did take, and thus have reached his father before he became unconscious; but the court held the contention not sufficient to overturn the judgment, because the plaintiff was entirely ignorant concerning the freight train, and the ill health of his wife made it imprudent and dangerous to proceed by wagon. *Southwestern Teleg. & Teleph. Co. v. Taylor*, 26 Tex. Civ. App. 79, 63 S. W. 1076.

XI. Failure to establish inexcusable delay.

If a delay in delivering a telegram was not due to any negligence of the telegraph company, or was excusable, no recovery may be had against such company for damages sustained by reason of such delay, irrespective of whether the injured plaintiff was the sender of the message or the person to whom it was addressed.

In each of the following cases, in which suit was brought by the person to whom a delayed telegram was sent, the company successfully controverted the charge of negligence, and excused the delay, without contesting the right of the plaintiff to maintain the action:

The contest in *Western U. Teleg. Co. v. Merrill*, 144 Ala. 618, 113 Am. St. Rep. 66, 39 So. 121, was not over the right of the person to whom a telegram was addressed to recover of the telegraph company upon suffering damage from the failure promptly to deliver, but was entirely taken

up with the question as to whether or not, in the circumstances disclosed, the company had really inexcusably delayed transmission and delivery as a question of fact.

In *Western U. Teleg. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528, a judgment in favor of the recipient of a telegram delayed in delivery was affirmed, but the controversy was waged over the question of whether or not the delay was excusable in consequence of the arrival of the despatch at the receiving office on New Year's Day, when the regulations of the company provided for the suspension of the business of delivery; and, while the court held that the regulation was a reasonable one, the company was denied the advantage of it, for failure to permit its request for an instruction in such form as clearly to present the question.

A judgment in favor of the person to whom a telegram was addressed was reversed in *Western U. Teleg. Co. v. Crenshaw* (Ark.) 125 S. W. 420, upon the ground that the evidence failed to establish any negligence on the part of the company in delivering the message.

The right of the person to whom a telegram is addressed to maintain an action against the telegraph company for delay in delivering the despatch was conceded in *Western U. Teleg. Co. v. Van Cleave*, 107 Ky. 464, 92 Am. St. Rep. 366, 54 S. W. 827, but the plaintiff was defeated in that case because the court was of the opinion that, as a matter of law, there had been no delay in the delivery of the particular despatch.

The right of a person to whom a telegram was addressed announcing the death of her daughter and the time appointed for the funeral, to maintain an action for damages against the telegraph company in case of inexcusable delay in delivering the despatch, until too late for the recipient to attend the funeral, was not contested in *Western U. Teleg. Co. v. Cross*, 116 Ky. 5, 74 S. W. 1038, 76 S. W. 162, but the plaintiff in that case was defeated upon the ground that the company had used proper diligence to deliver the despatch, and was not chargeable with any negligence.

A judgment against a telegraph company for damages for alleged negligence in failing to deliver a telegram, recovered by the person to whom a message was addressed informing him of the death of his father, was reversed in *Western U. Teleg. Co. v. Cox*, 20 Ky. L. Rep. 941, 96 S. W. 594, upon the ground that negligence in delivery had not been proved, because no evidence was submitted respecting the time at which the company received the message.

The entire controversy in *Harper v. Western U. Teleg. Co.* 92 Mo. App. 364, was over the question as to whether the company was liable in damages for its failure to deliver a despatch to the person to whom it was addressed, at a place specially designated by him for such delivery, when the despatch was addressed by the sender to and promptly delivered at another place. The right of

the plaintiff to maintain the action, if the facts were as contended by him, was not controverted.

In *Cranford v. Western U. Teleg. Co.* 138 N. C. 162, 50 S. E. 585, a joint action by the recipient of a despatch and his wife, the plaintiffs were defeated in their action, because they failed to make out a case of negligence against the company.

The trial court dismissed, upon the ground that there was no evidence of actionable negligence, and action by the person to whom a telegram was addressed against the telegraph company for delay in delivering it, where the message announced the death of his brother, in *Woods v. Western U. Teleg. Co.* 148 N. C. 1, 128 Am. St. Rep. 581, 61 S. E. 653; but this was held to be error, and the judgment was reversed upon appeal and a new trial ordered.

In *Sweet v. Postal Teleg. & Cable Co.* 22 R. I. 344, 53 L.R.A. 732, 47 Atl. 881, the plaintiff was the person to whom a telegram was addressed, and the issue was upon the fact of negligent delay in delivering the despatch, which arrived at the terminal office late at night after closing hours, and was not delivered until the next morning. The court held that, as a matter of law, there was no negligent delay on the part of the company, and hence no cause of action.

The defense of a telegraph company to an action by the addressee of a despatch announcing the death and time of funeral of his mother, which was delayed in transmission and delivery until too late to enable the plaintiff to attend the funeral, was based altogether upon the theory that such delay as there was had been caused by the act of God in grounding the wires through a falling tree; but the judgment was affirmed upon the ground that the evidence did not show that the act of God was the sole cause of the proved delay. *Fail v. Western U. Teleg. Co.* 80 S. C. 207, 60 S. E. 697, rehearing denied in 80 S. C. 213, 61 S. E. 258.

A judgment in favor of a telegraph company, dismissing the action of the person to whom a despatch was addressed and delayed for ten days in delivery, was affirmed in *Lewis v. Western U. Teleg. Co.* 84 S. C. 54, 65 S. E. 941, upon the ground that the addressee, a married woman, was named in the despatch by her individual Christian name and was only known by the name of her husband, so that the delay was held excusable.

In *Western U. Teleg. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439, a person to whom a telegram was addressed announcing the death of his mother was held entitled to maintain an action against the telegraph company for delay, but was denied a recovery in that particular case, because the lapse of time between the reception of the despatch and its delivery was held to be excusable, being simply during the hours of the night.

It is not an unreasonable delay, which affords a right of action against a tele-

graph company, to hold a telegram sent as a night message and received after office hours until the next morning. *Western U. Teleg. Co. v. DeJarles*, 8 Tex. Civ. App. 109, 27 S. W. 792.

The right of the person to whom telegrams were sent announcing the illness and death of his sister, to maintain an action against the telegraph company for inexcusable delay in delivering the messages, was recognized in *Western U. Teleg. Co. v. DeJarles*, supra, but the plaintiff in that case was held not entitled to recover, because, as a matter of law, there had been no negligent delay in delivering the despatches.

In *Western U. Teleg. Co. v. Terrell*, 10 Tex. Civ. App. 60, 30 S. W. 70, despatches announcing the serious illness of the plaintiff's daughter failed promptly to reach the plaintiff, but the telegraph company was held not liable, because the messages were in fact delivered promptly to the person in whose care they had been addressed.

The only contention made by the telegraph company against the judgment in *Western U. Teleg. Co. v. Gahan*, 17 Tex. Civ. App. 657, 44 S. W. 933, was based upon the theory that it had been excused by the sender of the message from making any particular effort to find the addressee and deliver the despatch, by a statement at its receiving office made by the sender to the effect that the addressee might not be at the place to which the despatch was sent, because the family had not heard from him for some time.

A judgment against a telegraph company in favor of a plaintiff to whom was addressed a telegram announcing the death of his mother, which he did not receive in time to attend her funeral, was reversed in *Western U. Teleg. Co. v. McConico*, 27 Tex. Civ. App. 610, 66 S. W. 592, upon the ground that the company was not guilty of any negligent and inexcusable delay, because the despatch arrived on Sunday when its receiving office was closed about half past one, and was delivered within fifteen or twenty minutes after it reopened at four o'clock in the afternoon.

A telegraph company is not chargeable with delay or negligence in delivering a despatch addressed in care of a person other than the one for whom it is intended, where it promptly tenders a delivery to such person and he refuses to receive it. *Western U. Teleg. Co. v. Thompson* (Tex. Civ. App.) 31 S. W. 318.

In *Hargrave v. Western U. Teleg. Co.* (Tex. Civ. App.) 60 S. W. 687, the parents were defeated in an action against the company upon the ground of its delay in delivering a despatch announcing the death of their daughter, upon the ground that the facts showed proper and diligent effort on the part of the company to find the addressee and deliver the despatch, and that, as a matter of law, the company was not negligent.

A telegraph company which promptly delivers at the place where it is addressed

a message announcing the very serious illness of the mother of the person to whom it is addressed is not negligent and not liable in an action by the addressee simply because no inquiry was made by the messenger or other persons as to the then present whereabouts and accessibility of the addressee, he being absent from the place to which the telegram was sent. *Western U. Teleg. Co. v. Redinger* (Tex. Civ. App.) 63 S. W. 156.

In *Davis v. Western U. Teleg. Co.* 46 W. Va. 48, 32 S. E. 1026, the court reversed a judgment against a telegraph company, recovered by a plaintiff to whom a telegram summoning him to the funeral of his mother had been addressed and delayed in delivery, upon the ground that the evidence showed the delay to be simply that occasioned by the observance of reasonable office hours on the part of the telegraph company at its terminal office, and therefore it was not negligently dilatory, and also, upon the ground that damages were simply those for mental suffering and distress, which in that state did not afford a cause of action when unaccompanied by other injury, physical or pecuniary.

Ross v. Western U. Teleg. Co. 28 C. C. A. 564, 52 U. S. App. 290, 81 Fed. 676, was a unique case. It was an action brought by a widow against the telegraph company to recover damages because of its failure to deliver promptly to her deceased husband a message sent to him warning him that four men were in pursuit of him with the purpose of killing him. The message was not promptly delivered, because the operator at the terminal office, who was also the mayor of the town, received at the same time a message from a judge asking him not to permit the deceased to get away, and assumed that deceased had been guilty of some crime and should be arrested. The court held that under the facts of the case negligence on the part of the company as a matter of law was not established, and that the death of the plaintiff's husband could not be said to be the proximate result of the company's failure to deliver the message of warning.

The court in *Western U. Teleg. Co. v. Simms*, 30 Tex. Civ. App. 32, 69 S. W. 464, in an action by the person to whom a despatch was sent calling her to the deathbed of her mother, reversed a judgment against the company, upon the ground that the evidence showed no negligence on its part in transmitting and delivering the despatch.

The telegraph company is not liable in damages to the person to whom a death message is addressed in care of another, for a delay in delivering it to the person in whose care it is sent, where it was agreed that such person was merely named for the purpose of enabling the company at the terminal office to ascertain the real address of the principal, which was known to be outside of the free delivery limits of the office, and for which a special delivery fee was charged, but neither paid nor tendered.

Western U. Teleg. Co. v. Bryant, 35 Tex. Civ. App. 442, 80 S. W. 406.

When the addressee of a telegram announcing the death of her son resides outside of the free delivery limits of the terminal office, and no contract is made for the delivery of the despatch beyond such limits, and when such despatch merely announces the death, no sufficient case is made against the telegraph company of negligence in delaying the delivery, and no notice to it can be implied that the addressee would and could have attended the funeral at another and different place from that which the telegram was sent. *Western U. Teleg. Co. v. Ayers*, 41 Tex. Civ. App. 627, 93 S. W. 199.

XII. The quantum of damages.

There are numerous decisions in which a judgment recovered against a telegraph company by a person to whom a telegram was sent, and not delivered, or delayed in delivery, through the negligence of the company to the plaintiff's damage, has been reversed or reduced because the court of review deemed the amount of recovery too large. Every such case, of course, recognizes and upholds the plaintiff's right to maintain the action and to recover some damages, more or less, from the company. In the cases of *Western U. Teleg. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486; *Western U. Teleg. Co. v. Cain*, 14 Ind. App. 115, 42 N. E. 655; and *Newport News & M. Valley R. Co. v. Griffin*, 92 Tenn. 694, 22 S. W. 737, judgments against telegraph companies in favor of persons to whom telegrams were sent and negligently delayed in delivery were reversed for awarding excessive damages.

In *Bowers v. Western U. Teleg. Co.* 135 N. C. 504, 47 S. E. 597, the person to whom a business telegram was addressed had recovered a judgment against the telegraph company for its negligence in delivering the despatch, but the judgment was reversed upon the ground that it included damages for mental suffering and distress, not recoverable in such a case.

The only controversy in the case of *Harrison v. Western U. Teleg. Co.* 143 N. C. 147, 55 S. E. 435, 10 A. & E. Ann. Cas. 476, brought by the recipient of a telegram negligently delayed in delivery, related to the damages which the plaintiff was entitled to recover, and a new trial was ordered because damages not recoverable had been allowed.

A judgment against a telegraph company in favor of a woman who had been prevented by the negligent delay in delivering a despatch announcing the death and time of funeral of her sister, from attending the funeral, was reversed in *Western U. Teleg. Co. v. Thompson*, 18 Tex. Civ. App. 609, 45 S. W. 429, upon the ground that the verdict included damages for both mental and physical suffering, and there was no testimony in the record of any physical injury.

The contention in *Western U. Teleg. Co.* 30 L.R.A.(N.S.)

v. Frith, 105 Tenn. 167, 58 S. W. 118, was over the amount of damages recoverable against the telegraph company for its gross and inexcusable negligence in delivering to the plaintiff a telegram announcing the sudden death of his child at a distant but accessible place, and the court reduced the amount of the verdict nearly one half, but affirmed the judgment for the reduced amount.

A recovery by the person to whom a despatch was sent announcing the serious illness of his wife's father, and which was delayed so that death occurred before he could be reached, was affirmed, after striking out certain improper items of damage, and a rehearing was denied, in *Western U. Teleg. Co. v. Jobe*, 6 Tex. Civ. App. 403, 409, 25 S. W. 168, 1036.

A judgment against a telegraph company awarding damages to a married woman for the failure promptly to deliver a second despatch announcing the death of her brother from a contagious disease, where she had, in response to an earlier message, journeyed to the place of her brother's death, was modified by striking out certain items of damage claimed, and affirmed as to the balance, and a motion for a rehearing was denied, in *Western U. Teleg. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549.

Upon a second trial in the case of *Arkansas & L. R. Co. v. Stroude*, 77 Ark. 109, 113 Am. St. Rep. 130, 91 S. W. 18, the judgment recovered on the first trial having been reversed for error in instructing the jury, the plaintiff obtained a verdict of the jury assessing his damages at \$500, upon which judgment was entered by the court for the amount of the verdict plus interest from the date of the despatch, and upon a second appeal, 82 Ark. 117, 100 S. W. 760, that judgment was modified by striking out the allowance of interest, and in other respects was affirmed.

XIII. Errors in the conduct of trials.

The right of persons to whom telegrams are addressed, and not delivered, or inexcusably delayed in delivery, to maintain actions for damages against the telegraph company, has been recognized in a great number of cases in the United States, in which, however, the judgments against the telegraph companies have been reversed either for deficiencies in the pleadings, errors in the reception or exclusion of evidence, or in the instructions of the trial courts to the juries.

A judgment recovered by the person to whom a telegram was addressed, against a telegraph company, for failure promptly to deliver the despatch, was reversed in *Western U. Teleg. Co. v. McNair*, 120 Ala. 99, 23 So. 801, for error on the part of the trial court in omitting to charge, upon request, upon the question of the plaintiff's contributory negligence, the general right of the plaintiff to recover, if not contributorily negligent, being conceded.

A judgment in favor of a person to whom

a telegram was sent, against the telegraph company, for failure to deliver the message, was reversed in *Western U. Teleg. Co. v. Prevatt*, 149 Ala. 617, 43 So. 106, for the refusal of the trial court to charge certain propositions as requested by the defendant company. The controversy was not over the right of an addressee of a telegram to recover, but whether the relation of the plaintiff in the particular case entitled him to recover for mental suffering, and whether or not the action was barred under one of the conditions printed upon the back of the message. *Western U. Teleg. Co. v. Heathcoat*, 149 Ala. 623, 43 So. 117.

In *Arkansas & L. R. Co. v. Stroude*, 77 Ark. 109, 113 Am. St. Rep. 130, 91 S. W. 18, the action was brought by a husband against a railroad company operating a telegraph line, for wanton and negligent delay in delivering a despatch sent him by a relative announcing the mortal illness of his wife, and grounded upon a statute (act of March 7, 1903, Kirby's Dig. § 7947) enacted by the legislature of Arkansas after the decision of the court in *Peay v. Western U. Teleg. Co.* 64 Ark. 538, 39 L.R.A. 463, 43 S. W. 965, authorizing recoveries to be had in such actions for mental anguish and suffering unaccompanied by bodily injury or pecuniary loss. The question as to the right of the person to whom a telegram was addressed to recover damages on account of delay in delivering it was not debated, but a judgment for the plaintiff was reversed for errors of the trial court in instructing the jury.

A judgment recovered against a telegraph company by the person to whom a telegram was addressed and unreasonably delayed in delivery was reversed in *Hendershot v. Western U. Teleg. Co.* 106 Iowa, 529, 68 Am. St. Rep. 313, 76 N. E. 828, for error of the trial court in instructing the jury. The despatch announced the dangerous illness of a valuable horse in charge of the plaintiff's agent, and called for the attendance of the plaintiff and a skilled veterinary surgeon. In consequence of the delay in delivery of the despatch, the ailment of the horse had gained headway, so that in spite of the treatment he died; and the action was brought to recover its value. The right of the plaintiff to maintain the action, and the delay of the telegraph company to deliver the despatch, were not disputed. The contest was over the question as to whether the delay was the proximate cause of the death of the horse.

Errors in the instruction of the trial court to the jury upon the question of damages brought about a reversal of a judgment in favor of the persons to whom a telegram announcing a shipment of live stock was addressed and delayed in delivery, against the telegraph company, in *Western U. Teleg. Co. v. Lehman*, 106 Md. 318, 67 Atl. 241, 14 A. & E. Ann. Cas. 736.

The person to whom a telegram was addressed, but not delivered, was defeated in his action, in *Macpherson v. Western U. Teleg. Co.* 20 Jones & S. 232, because he

had failed to allege payment or tender of the toll for transmitting the despatch, or a waiver of it in the contract between the parties.

Error in the admission of evidence was the ground of a reversal of a judgment recovered against a telegraph company, by a husband to whom a despatch was sent announcing the serious illness of his wife, in *Hamrick v. Western U. Teleg. Co.* 140 N. C. 151, 52 S. E. 232.

A judgment against a telegraph company upon a second trial, after a reversal at first because of errors in the charge of the trial judge, in favor of the person to whom a telegram was addressed announcing the death of his father, was affirmed in *Harrison v. Western U. Teleg. Co.* 75 C. S. 267, 55 S. E. 450.

The contest made by the telegraph company in *Western U. Teleg. Co. v. Waller*, 96 Tex. 589, 97 Am. St. Rep. 936, 74 S. W. 751, against its liability to the plaintiff for negligent failure to deliver a message addressed to him announcing that his mother was dying, was entirely over the question of the admissibility of testimony concerning the requests and inquiries of the dying woman for the presence of the plaintiff, her son, and the court held this evidence inadmissible, and accordingly reversed the judgment.

The court in *Western U. Teleg. Co. v. Lovett*, 24 Tex. Civ. App. 84, 58 S. W. 204, reversed a judgment recovered by a man to whom a telegram had been sent announcing the very serious illness and expected death of his child, upon the ground that, by the testimony and charge to the jury, there had erroneously been included in the damages the mental suffering of his wife on account of his absence when the child died.

The court in *Western U. Teleg. Co. v. Waller*, 37 Tex. Civ. App. 515, 84 S. W. 695, after affirming a judgment in favor of the person to whom a message was addressed announcing the mortal illness of his mother, and which did not reach him in time to enable him to be present with his mother during the last hours of her life, on a rehearing reversed the judgment, and remanded the case for a new trial, upon the ground that testimony showing the efforts made by the company's messenger to deliver the despatch had been erroneously excluded.

A judgment against a telegraph company for negligent delay in delivering a message to a sister announcing the fatal shooting of her brother was reversed in *Western U. Teleg. Co. v. Campbell*, 41 Tex. Civ. App. 204, 91 S. W. 312, for error on the part of the trial court in instructing the jury upon conflicting testimony respecting the time when the company received the message for transmission.

A judgment against a telegraph company recovered by a father for damages suffered by him because of his inability to reach the bedside of his dying child prior to its death, due to the negligent delay of the

company in delivering the message, was reversed in *Western U. Teleg. Co. v. De-Andrea*, 45 Tex. Civ. App. 395, 100 S. W. 977, for prejudicial error on the part of the trial court in giving its instructions to the jury.

The right of a person to whom a telegram was sent announcing the dangerous illness of her sister, to maintain an action against the telegraph company for damages for failure promptly to deliver the message, was conceded in *Western U. Teleg. Co. v. Neel* (Tex. Civ. App.) 25 S. W. 661, but the judgment in her favor was reversed on account of error in the trial court in refusing to instruct the jury as requested by the company.

A judgment against a telegraph company in favor of a husband to whom a message had been sent announcing the mortal illness of his wife, and so long delayed in delivery that he was unable to be present and talk with her before she died, was reversed in *Western U. Teleg. Co. v. Stacy* (Tex. Civ. App.) 41 S. W. 100, upon the ground that, inasmuch as the evidence showed a lapse of the dying woman into unconsciousness, it was error on the part of the court to refuse a request to charge that if she was conscious when her husband arrived, he was not entitled to recover damages.

The person to whom a telegram was addressed asking a question as to the number of cattle he had, and which message was obviously a business one, was held in *Western U. Teleg. Co. v. Williford*, 2 Tex. Civ. App. 574, 22 S. W. 244, entitled to maintain an action against the telegraph company for damages consequent upon inexcusable delay in delivering the despatch; but the judgment in his favor was reversed for error in the admission of proof of certain items of damage which the court held were not recoverable.

A judgment against a telegraph company in favor of the person to whom the despatch was addressed, for negligent failure seasonably to deliver a message announcing the mortal illness of his mother, was reversed in *Hellams v. Western U. Teleg. Co.* 70 S. C. 83, 49 S. E. 12, upon the ground of error in the instructions of the trial court to the jury.

In *Mott v. Western U. Teleg. Co.* 142 N. C. 532, 55 S. E. 363, a judgment against the company in favor of the recipient of a despatch negligently delayed in delivery was affirmed. The company's brief in that case relied for reversal solely upon exceptions to the trial judge's charge, in which the court held there was no error.

XIV. Conclusion.

It is indisputable that anybody may maintain an action upon a contract he has made, either in person or by an agent, to recover damages from the other contracting party, upon the latter's breach of it. A contract accurately to transmit and diligently to deliver a telegram affords no exception to this rule. The conclusion therefore is incontrovertible that when a con-

tractual relation existed arising directly or indirectly between the telegram company and the person to whom by its agency a telegram was sent, both in England and the United States, such person, if he has sustained a legal damage by the negligence of the company either in failing to deliver the message to him or inexcusably delaying to do so promptly, may maintain suit against the company to recover such damage, provided it was the proximate result of the company's conduct, and was contemplated at the inception as a probable consequence of a breach of the contract to transmit and deliver the despatch. The English courts and those which follow them decline to go any further. The principle that one for whose express benefit others have knowingly and intentionally made a contract may recover from the party in default damages that he may suffer by its breach has obtained the widest possible acceptance in English and American jurisprudence. It may be asserted with confidence that such principle applies to a contract between the sender of a telegram and the telegraph company he employs to transmit and deliver the message, and will support an action by the person addressed, if he comes fairly and clearly within the principle.

The doctrine is well established and widely approved in the United States that a public service corporation, holding a public franchise, organized for private profit and operating a virtual monopoly in its field, is charged with the duty to serve the public, and is liable to whosoever of the public may suffer damage in consequence of its neglect or violation of that duty. That doctrine has been invoked and held to sustain the right of action of a person to whom a telegram has been sent, against a telegraph company which has failed in its obligation faithfully and diligently to transmit and deliver the message. It is difficult to see any logical ground upon which a telegraph company should be made an exception among public service corporations, and be immune from the consequences of its negligence in the stated circumstances.

The question of the nature of the damages for which the addressee may recover is one not falling within the purview of this note. It is a question free from difficulty when the damages are merely pecuniary losses of business transactions, easily ascertainable and referable to the delay in delivering the telegram. In every such case the delay being proved and being inexcusable, the loss being definite and attributable to such delay, and the suit being technically correct in form and conduct, judgment follows. When, however, sentiment alone is involved, and the injury done, though real, is intangible, the courts are hopelessly divided over the right to maintain the action. In several states the legislature with more or less success has endeavored to confer or make certain the right of action by statute. It is not needful to add aught to the very many citations above of cases in point upon this branch of the subject. J. B. G.

UNITED STATES SUPREME COURT.

JESSIE E. THOMPSON, Plff. in Err.,
v.

CHARLES N. THOMPSON.

(218 U. S. 611, 54 L. ed. 1180, 31 Sup. Ct.
Rep. 111.)**Husband and wife — actions between
— assault.**

The common-law relation between husband and wife was not so far modified as to give the wife a right of action to recover damages from her husband for an assault and battery committed by him upon her person by a statute authorizing married women "to sue separately for the recovery,

security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried."

(Mr. Justice Harlan, Mr. Justice Holmes, and Mr. Justice Hughes dissent.)

(December 12, 1910.)

ERROR to the Court of Appeals of the District of Columbia to review a judgment affirming a judgment of the Supreme Court dismissing an action brought to recover damages for an assault and battery. Affirmed.

The facts are stated in the opinion.

**Note. — Right of wife to sue husband
for personal tort.**

The earlier cases on this question are gathered in a note to *Strom v. Strom*, 6 L.R.A. (N.S.) 191. Since the date of that note, aside from *THOMPSON v. THOMPSON*, but few cases of importance have been found.

A case of recent date is *Sykes v. Speer* (Tex. Civ. App.) 112 S. W. 422, where it was held, following *Nickerson v. Nickerson*, 65 Tex. 281, that a wife cannot sue her husband for torts committed against her person while the marriage relation existed. The court said: "The reason for this holding is that there is no liability, not merely that the wife is incapable of maintaining an action against her husband; for even if she should be divorced on the next day after the injuries were inflicted, and even if the result of the injuries should be perpetuated long after the time of their infliction and after her rights as a *feme sole* had been fully restored, still she would not be allowed a recovery for such injuries. The adjudications which sustain this view place their holdings upon public policy, which refuses to permit any liability for such conduct on the part of the husband committed under such conditions. While the law may and does provide for a criminal prosecution for such violence toward the wife, still there can be no civil liability. It would seem to the writer that if a husband can be held responsible criminally for an unjustifiable assault upon one whom the law has placed under his care and protection, and who has for his sake surrendered so many of her civil rights and given up the legal status which she otherwise might sustain, certainly the same considerations of policy would permit her to recover compensation for damages which his brutality may have inflicted upon her, when sought in a proceeding after the dissolution of the marriage relation. But the holdings of the courts which we are compelled to follow have adjudged otherwise, and our duty is plain."

In *Tinkley v. Tinkley*, 24 Times L. R. 691, affirmed in 25 Times L. R. 264, it was 30 L.R.A. (N.S.)

held that a woman who is in domestic service, and who, because of her husband's malicious prosecution and false imprisonment of her, loses her situation, has no right of action for damages against him therefor, since such action cannot be regarded in any sense as an action for the protection and security of property.

That in Scotland a husband or a wife cannot sue the other for slander seems, according to *Butterworth's Digest*, vol. 2, p. 163, to have been held in *Young v. Young* (1903) 5 F. 330—Ct. of Sess.

Another case which may be added here, although also not strictly within the scope of this note, is *Decker v. Keddy*, 79 C. C. A. 305, 148 Fed. 681, holding that a wife, whether divorced or not, cannot maintain an action for damages against her husband for his failure to supply her during the married relation with the necessities of life. The court said: "It is true that the statutes of Alaska, as do those of many of the states, remove certain disabilities which at common law attend the wife during her coverture, and declare that neither the husband nor the wife shall have an interest in the property of the other, provide that should either obtain the possession of the property of the other the latter may maintain an action therefor in the same manner and to the same extent as if they were unmarried, and make further provision that neither shall be liable for the other's debts. Such statutes do not mean that the husband is answerable to the wife in damages for failure to supply her with the necessities of life, or for any other act or failure of duty connected with or arising from the marital relation, and it has never been so held. Such a right of action, it is enough to say, has not been conferred by the statutes of Alaska, is wholly at variance with the theory of the marital relation, and is unknown to English or American jurisprudence."

The husband's right to sue wife for personal tort is discussed in a note to *Peters v. Peters*, 23 L.R.A. (N.S.) 699.

For right of wife to sue husband on contract, see note to *Mathewson v. Mathewson*, 5 L.R.A. (N.S.) 611.

G. V.

Mr. William M. Lewin, for plaintiff in error:

Prior to the enactment of the District of Columbia Code, it was essentially and in its nature a tort for a man to assault his wife. The effect of the provisions of the Code with respect to her right to sue is to remove a common-law obstacle to the remedy.

Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 538, 18 Sup. Ct. Rep. 105.

These provisions will be literally construed, for it is the duty of every state to provide, in the administration of justice, for the redress of private wrongs; if there be a civil right, there must be a legal remedy.

Missouri P. R. Co. v. Humes, 115 U. S. 512, 521, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110; *Bank of United States v. Owens*, 2 Pet. 537, 539, 7 L. ed. 511, 512.

And protection against tort is as necessary as the enforcement of contract.

Wills v. Jones, 13 App. D. C. 497.

As redress cannot be obtained in equity, because of the essential character of the case, the remedy must be by a suit at law.

Van Norden v. Morton, 99 U. S. 378, 380, 25 L. ed. 453, 454.

The reasoning of the New York case upon which the court of appeals relies has long since been repudiated.

Freethy v. Freethy, 42 Barb. 641; *Bronson v. Brady*, 28 App. D. C. 262; *Stickney v. Stickney*, 131 U. S. 227, 237, 33 L. ed. 136, 142, 9 Sup. Ct. Rep. 677; *Baltimore & P. R. Co. v. Sixth Presby. Church*, 19 Wall. 62, 65, 22 L. ed. 79, 98; *Bryan v. Kennett*, 113 U. S. 179, 196, 28 L. ed. 908, 914, 5 Sup. Ct. Rep. 407; *Washington Market Co. v. Hoffman*, 101 U. S. 112, 115, 116, 25 L. ed. 782, 783, 784; *Luhrs v. Hancock*, 181 U. S. 567, 571, 45 L. ed. 1005, 1007, 21 Sup. Ct. Rep. 726.

A change in phraseology creates a presumption of a change in intent; and no word of the change should be held insignificant.

Crawford v. Burke, 195 U. S. 176, 190, 49 L. ed. 147, 152, 25 Sup. Ct. Rep. 9; *Washington Market Co. v. Hoffman*, 101 U. S. 115, 116, 25 L. ed. 783, 784.

Even under the act of 1869 a wife could contract with her husband.

Sykes v. Chadwick, 18 Wall. 141, 143, 148, 21 L. ed. 824, 825, 826.

And now she may sue him, even in tort; for that construction will be followed which commends itself to the judgment of the court.

May v. May, 9 Neb. 25, 31 Am. Rep. 399, 2 N. W. 221; *Rice, S. & Co. v. Sally*, 176 Mo. 130, 75 S. W. 398; *Coulam v. Doull*, 30 L.R.A.(N.S.)

133 U. S. 216, 233, 33 L. ed. 596, 601, 10 Sup. Ct. Rep. 253.

The right to her earnings necessarily implies the right to maintain her capacity to earn. The right to sue anyone (the husband not excepted) for impairment of that capacity is incidental thereto.

Traer v. Clews, 115 U. S. 528, 540, 29 L. ed. 467, 471, 6 Sup. Ct. Rep. 155; *Seybert v. Pittsburg*, 1 Wall. 272, 17 L. ed. 553.

This would follow from the construction of D. C. Code, § 1151 (31 Stat. at L. 1373, chap. 854), *in pari materia* with § 1155.

Western U. Teleg. Co. v. Lipscomb, 22 App. D. C. 113; *Washington Asphalt Block & Tile Co. v. Mackey*, 15 App. D. C. 417; *Stickney v. Stickney*, 131 U. S. 227, 237, 33 L. ed. 136, 142, 9 Sup. Ct. Rep. 677.

Messrs. A. E. L. Leckie, Creed M. Fulton, Joseph W. Cox, and John A. Kratz, Jr., for defendant in error:

Statutes enabling the wife to sue and be sued as a *feme sole* do not authorize either husband or wife to bring an action against the other.

21 Cyc. Law & Proc. pp. 1515, 1518; *Alward v. Alward*, 15 N. Y. Civ. Proc. Rep. 151, 2 N. Y. Supp. 42; *Smith v. Gorman*, 41 Me. 408; *Small v. Small*, 129 Pa. 372, 18 Atl. 497.

In some of the states, actions are allowed by the wife against the husband in cases of wrongs done her property, but it is believed that in most such instances where such actions have been allowed they are expressly authorized by the statute.

21 Cyc. Law & Proc. pp. 1517-1519.

The following will serve as illustrations of the class of cases in which such actions have been allowed.

Larison v. Larison, 9 Ih. App. 31; *Re Deaner*, 126 Iowa, 701, 106 Am. St. Rep. 374, 102 N. W. 825; *Jones v. Jones*, 19 Iowa, 236; *Greer v. Greer*, 24 Kan. 101; *Manning v. Manning*, 79 N. C. 293, 28 Am. Rep. 324.

Neither a husband nor wife may maintain an action for tort committed by either against the other during coverture under the statute.

Peters v. Peters, 42 Iowa, 182; *Heacock v. Heacock*, 108 Iowa, 540, 75 Am. St. Rep. 273, 79 N. W. 353; *Decker v. Keddy*, 79 C. C. A. 305, 148 Fed. 681; *Main v. Main*, 46 Ill. App. 106; *Libby v. Berry*, 74 Me. 286, 43 Am. Rep. 589; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Bandfield v. Bandfield*, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; *Schultz v. Schultz*, 27 Hun, 26, reversed in 89 N. Y. 644; *Abbe v. Abbe*, 22 App. Div. 483, 48 N. Y. Supp. 25; *Strom v. Strom*, 98 Minn. 427, 6 L.R.A.(N.S.) 192, 116 Am. St. Rep. 387, 107 N. W. 1047.

Mr. Justice Day delivered the opinion of the court:

This case presents a single question, which is involved in the construction of the statutes governing the District of Columbia. That question is, Under that statute may a wife bring an action to recover damages for an assault and battery upon her person by the husband?

The declaration of the plaintiff is in the ordinary form, and in seven counts charges divers assaults upon her person by her husband, the defendant, for which the wife seeks to recover damages in the sum of \$70,000. An issue of law being made by demurrer to the defendant's pleas, the supreme court of the District of Columbia held that such action would not lie under the statute. Upon writ of error to the court of appeals of the District of Columbia, the judgment of the supreme court was affirmed. 31 App. D. C. 557, 14 A. & E. Ann. Cas. 879.

At the common law the husband and wife were regarded as one,—the legal existence of the wife during coverture being merged in that of the husband; and, generally speaking, the wife was incapable of making contracts, or acquiring property, or disposing of the same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other. In pursuance of a more liberal policy in favor of the wife, statutes have been passed in many of the states looking to the relief of a married woman from the disabilities imposed upon her as a *feme covert* by the common law. Under these laws she has been empowered to control and dispose of her own property free from the constraint of the husband, in many instances to carry on trade and business, and to deal with third persons as though she were a single woman. The wife has further been enabled by the passage of such statutes to sue for trespass upon her rights in property, and to protect the security of her person against the wrongs and assaults of others.

It is unnecessary to review these statutes in detail. Their obvious purpose is, in some respects, to treat the wife as a *feme sole*, and to a large extent to alter the common-law theory of the unity of husband and wife. These statutes, passed in pursuance of the general policy of emancipation of the wife from the husband's control, differ in terms, and are to be construed with a view to effectuate the legislative purpose which led to their enactment.

It is insisted that the Code of the District of Columbia has gone so far in the direction of modifying the common-law relation of husband and wife as to give to

her an action against him for torts committed by him upon her person or property. The answer to this contention depends upon a construction of § 1155 of the District of Columbia Code. [31 Stat. at L. 1374, chap. 854.] That section provides:

"Sec. 1155. Power of wife to trade and to sue and be sued.—Married women shall have power to engage in any business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made before or during marriage, and for wrongs independent of contract, committed by them before or during their marriage, as fully as if they were unmarried; and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence, without his participation or sanction: Provided, That no married woman shall have power to make any contract as surety or guarantor, or as accommodation drawer, acceptor, maker, or indorser."

In construing a statute the courts are to have in mind the old law and the change intended to be effected by the passage of the new. Reading this section, it is apparent that its purposes, among others, were to enable a married woman to engage in business and to make contracts free from the intervention or control of the husband, and to maintain actions separately for the recovery, security, and protection of her property. At the common law, with certain exceptions, not necessary to notice in this connection, the wife could not maintain an action at law except she be joined by her husband. *Barber v. Barber*, 21 How. 582, 589, 16 L. ed. 228, 228. For injuries suffered by the wife in her person or property, such as would give rise to a cause of action in favor of a *feme sole*, a suit could be instituted only in the joint name of herself and husband. 1 Cooley, Torts, 3d ed. 472, and cases cited in the note.

By this District of Columbia statute the common law was changed, and, in view of the additional rights conferred upon married women in § 1155 and other sections of the Code, she is given the right to sue *separately* for redress of wrongs concerning the same. That this was the purpose of the statute, when attention is given to

the very question under consideration, is apparent from the consideration of its terms. Married woman are authorized to sue separately for "the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried." That is, the limitation upon her right of action imposed in the requirement of the common law that the husband should join her was removed by the statute, and she was permitted to recover separately for such torts, as freely as if she were still unmarried. The statute was not intended to give a right of action as against the husband, but to allow the wife, in her own name, to maintain actions of tort which, at common law, must be brought in the joint names of herself and husband.

This construction we think is obvious from a reading of the statute in the light of the purpose sought to be accomplished. It gives a reasonable effect to the terms used, and accomplishes, as we believe, the legislative intent, which is the primary object of all construction of statutes.

It is suggested that the liberal construction insisted for in behalf of the plaintiff in error in this case might well be given, in view of the legislative intent to provide remedies for grievous wrongs to the wife; and an instance is suggested in the wrong to a wife rendered unable to follow the avocation of a seamstress by a cruel assault which might destroy the use of hand or arm; and the justice is suggested of giving a remedy to an artist who might be maimed and suffer great pecuniary damages as the result of injuries inflicted by a brutal husband.

Apart from the consideration that the perpetration of such atrocious wrongs affords adequate grounds for relief under the statutes of divorce and alimony, this construction would, at the same time, open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander, and libel, and alleged injuries to property of the one or the other, by husband against wife, or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the lawmaking power hesitate to enact it. But these and kindred considerations are addressed to the legislative, not the judicial, branch of the government. In cases like the present, interpretation of the law is the only function of the courts.

An examination of this class of legislation will show that it has gone much further

in the direction of giving rights to the wife in the management and control of her separate property than it has in giving rights of action directly against the husband. In no act called to our attention has the right of the wife been carried to the extent of opening the courts to complaints of the character of the one here involved.

It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the legislature to make this alteration in the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or property as though they were strangers, thus emphasizing and publishing differences which otherwise might not be serious, it would have been easy to have expressed that intent in terms of irresistible clearness.

We can but regard this case as another of many attempts which have failed, to obtain by construction radical and far-reaching changes in the policy of the common law, not declared in the terms of the legislation under consideration.

Some of the cases of that character are: *Bandfield v. Bandfield*, 117 Mich. 80, 40 L.R.A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27; *Schultz v. Schultz*, 89 N. Y. 644; *Freethy v. Freethy*, 42 Barb. 641; *Peters v. Peters*, 42 Iowa, 182.

Nor is the wife left without remedy for such wrongs. She may resort to the criminal courts, which, it is to be presumed, will inflict punishment commensurate with the offense committed. She may sue for divorce or separation and for alimony. The court, in protecting her rights and awarding relief in such cases, may consider, and, so far as possible, redress, her wrongs and protect her rights.

She may resort to the chancery court for the protection of her separate property rights. 21 How. 582, 590. Whether the wife alone may now bring actions against the husband to protect her separate property, such as are cognizable in a suit in equity when brought through the medium of a next friend (21 How. supra), is a question not made or decided in this case.

We do not believe it was the intention

of Congress, in the enactment of the District of Columbia Code, to revolutionize the law governing the relation of husband and wife as between themselves. We think the construction we have given the statute is in harmony with its language, and is the only one consistent with its purpose.

The judgment of the Court of Appeals of the District of Columbia will be affirmed.

Mr. Justice Harlan dissenting:

This is an action by a wife against her husband to recover damages for assault and battery. The declaration contains seven counts. The first, second, and third charge assault by the husband upon the wife on three several days. The remaining counts charge assaults by him upon her on different days named,—she being at the time pregnant, as the husband then well knew.

The defendant filed two pleas,—the first that he was not guilty, the second that, at the time of the causes of action mentioned, the plaintiff and defendant were husband and wife, and living together as such.

The plaintiff demurred to the second plea, and the demurrer was overruled. She stood by the demurrer, and the action was dismissed.

The action is based upon §§ 1151 and 1155 of the Code of the District [31 Stat. at L. 1373, 1374, chap. 854], which are as follows:

"Sec. 1151. All the property, real, personal, and mixed, belonging to a woman at the time of her marriage, and all such property which she may acquire or receive after her marriage from any person whomsoever, by purchase, gift, grant, devise, bequest, descent, in the course of distribution, by her own skill, labor, or personal exertions, or as proceeds of a judgment at law or decree in equity, or in any other manner, shall be *her own property as absolutely as if she were unmarried*, and shall be protected from the debts of the husband, and shall not in any way be liable for the payment thereof: Provided, That no acquisition of property passing to the wife from the husband after coverture shall be valid if the same has been made or granted to her in prejudice of the rights of his subsisting creditors."

"Sec. 1155. Married women shall have power to engage in *any* business, and to contract, whether engaged in business or not, and to sue separately upon their contracts, and also to sue separately for the recovery, security, or protection of their property, and for torts committed against them, *as fully and freely as if they were unmarried*; contracts may also be made with them, and they may also be sued separately upon their contracts, whether made

before or during marriage, and for wrongs independent of contract, committed by them before or during their marriage, as fully as if they were unmarried; and upon judgments recovered against them execution may be issued as if they were unmarried; nor shall any husband be liable upon any contract made by his wife in her own name and upon her own responsibility, nor for any tort committed separately by her out of his presence without his participation or sanction: Provided, That no married woman shall have power to make any contract as surety or as guarantor, or as accommodation drawer, acceptor, maker, or indorser."

The court below held that these provisions did not authorize an action for *tort* committed by the husband against the wife.

In my opinion these statutory provisions properly construed, embrace such a case as the present one. If the words used by Congress lead to such a result, and if, as suggested, that result be undesirable on grounds of public policy, it is not within the functions of the court to ward off the dangers feared or the evils threatened simply by a judicial construction that will defeat the plainly expressed will of the legislative department. With the mere policy, expediency, or justice of legislation the courts, in our system of government, have no rightful concern. Their duty is only to declare what the law is, not what, in their judgment, it ought to be, leaving the responsibility for legislation where it exclusively belongs; that is, with the legislative department, so long as it keeps within constitutional limits. Now, there is not here, as I think, any room whatever for mere construction, so explicit are the words of Congress. Let us follow the clauses of the statute in their order. The statute enables the married woman to take, as her own, property of any kind, no matter how acquired by her, as well as the avails of her skill, labor, or personal exertions, "*as absolutely as if she were unmarried*." It then confers upon married women the power to engage in any business, no matter what, and to enter into contracts, whether engaged in business or not, and to sue separately upon those contracts. If the statute stopped here, there would be ground for holding that it did not authorize this suit. But the statute goes much farther. It proceeds to authorize married women "*also*" to sue separately for the recovery, security, or protection of their property; still more, they may sue separately "*for torts committed against them, as fully and freely as if they were unmarried*." No discrimination is made, in either case, between the persons charged with committing the tort. No ex-

ception is made in reference to the husband, if he happens to be the party charged with transgressing the rights conferred upon the wife by the statute. In other words, Congress, by these statutory provisions, destroys the unity of the marriage association as it had previously existed. It makes a radical change in the relations of man and wife as those relations were at common law in this District. In respect of business and property, the married woman is given absolute control; in respect of the recovery, security, and protection of her property, she may sue separately in tort, as if she were unmarried; and in respect of herself, that is, of her person, she may sue separately as fully and freely as if she were unmarried, "for torts committed against her." So the statute expressly reads. But my brethren think that, notwithstanding the destruction by the statute of the unity of the married relation, it could not have been intended to open the doors of the courts to accusations of all sorts by husband and wife against each other; and therefore they are moved to add, by construction, to the provision that married women may "sue separately . . . for torts committed against them, as fully and freely as if they were unmarried," these words: "Provided, however, that the wife shall not be entitled, in any case, to sue her husband separately for a tort committed against her person." If the husband violently takes possession of his wife's property and withholds it from her, she may, *under the statute*, sue him, separately, for its recovery. But such a civil action will be one in tort. If he injures or destroys her property, she may, *under the statute*, sue him, separately, for damages. That action would also be one in tort. If these propositions are disputed, what becomes of the words in the statute to the effect that she may "sue separately for the recovery, security, and protection" of her property? But if they are conceded,—as I think they must be,—then Congress, under the construction now placed by the court on the statute, is put in the anomalous position of allowing a married woman to sue her husband separately, in tort, for the recovery of her property, but denying her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person. I will not assume that Congress intended to bring about any such result. I cannot believe that it intended to permit the wife to sue the husband separately, in tort, for the recovery, including damages for the detention, of her property, and at the same time deny her the right to sue him, separately, for a tort committed against her person.

30 L.R.A. (N.S.)

I repeat that with the policy, wisdom, or justice of the legislation in question this court can have no rightful concern. It must take the law as it has been established by competent legislative authority. It cannot, in any legal sense, make law, but only declare what the law is, as established by competent authority.

My brethren feel constrained to say that the present case illustrates the attempt, often made, to effect radical changes in the common law by mere construction. On the contrary, the judgment just rendered will have, as I think, the effect to defeat the clearly expressed will of the legislature by a construction of its words that cannot be reconciled with their ordinary meaning.

I dissent from the opinion and judgment of the court, and am authorized to say that Mr. Justice Holmes and Mr. Justice Hughes concur in this dissent.

WASHINGTON SUPREME COURT.

RUTH MASON, Appt.,

v.

JOHN A. YEARWOOD and Wife, Respts.

(58 Wash. 276, 108 Pac. 608.)

Water — appropriation — springs.

1. Where the doctrine of riparian rights prevails the water of springs appearing on land which has passed out of government ownership is not subject to appropriation.

Same — right of owner.

2. The owner of land on which a new spring breaks out may make such use of the water as he pleases, notwithstanding it

Note. — Right to water of new spring.

Aside from *MASON v. YEARWOOD*, but one other case has been found in which was in issue the right to the water of a new spring, that is, one which did not exist from time immemorial. The case referred to is *Vanderwork v. Hewes* (N. M.) 110 Pac. 567. In this case seepage water or spring water appeared on certain land, from some unknown source, at a place where there had been no seepage or spring water for at least five years previous; the spring continued to flow in various quantities, until a portion was permitted to flow on adjacent property; about this time a stranger filed an application in the office of the territorial engineer for a permit to appropriate the water, claiming it to be subject to appropriation under a statute, one section of which granted the territorial engineer supervision of the apportionment of the water in the territory according to the licenses issued by him and his predecessors and the adjudications of the court, and another section of which provided that in case of seepage water from any constructed works, the owner of the works should have the

would, if unmolested, cause a stream to flow across the land of another.

Same — prescriptive right.

3. One who uses water flowing from springs on another's land, through a ditch constructed to connect it with his own land, for a period sufficient to secure an easement in the land of another, has a prescriptive right to such flow.

Same — increased flow.

4. One who has secured by prescription the right to the water flowing from another's spring has no right to an increase in the flow of the spring beyond that to which his prescriptive right attached.

(May 4, 1910.)

A PPEAL by plaintiff from a judgment of the Superior Court for Kittitas County in favor of defendants in an action brought to enjoin the diversion of water. Affirmed.

The facts are stated in the opinion.

Mr. O. O. Felkner for appellant.
Messrs. Hovey & Hale for respondents.

Fullerton, J., delivered the opinion of the court:

This is an action to enjoin the diversion of water. From the record it is gathered that the appellant, who was plaintiff below, owns land situated in sections 12 and 13 in township 18 N., of range 17 E., of the Willamette meridian; that the respondents own land in section 11 in the same township and range. To the south of the respondents' land, and in the same section, is

first right to the use thereof, but that if the owner should not file an application to the territorial engineer within a year after the completion of the works, or the appearance on the surface of such seepage water, any party might make an application therefor. The court, after holding the first-named section of the statute could not be held to relate to waters held in private ownership or by prior appropriation, but must be held to relate to public and unappropriated waters within the territory, and that the term "constructed works," in the other section, could have no application to seepage or spring water arising on land from an unknown source, continued: "The appellant, under his permit from the territorial engineer, claims all of the water which reaches the lands of Dean in this way, notwithstanding Dean, with the consent of Hewes, has constructed a ditch or ditches to receive and conduct any surplus water which may reach his land, and claims the right to its use upon 50 acres of his land, and he has undoubtedly the better right to it as a prior appropriator as between himself and Vanderwork. It would be doing violence to the act of 1907 to hold that the territorial engineer was empowered by it to authorize another applicant to go upon lands held in private ownership, construct

land belonging to one Haywood. In 1879 one Alanson T. Mason filed a homestead application for the lands now owned by the appellant, together with that owned by Haywood, and thereafter procured title to the same under the homestead laws of the United States. The appellant and Haywood have obtained their titles through mesne conveyances from Alanson T. Mason. The land owned by the respondents was first settled upon prior to 1880. The claim passed from one to another until it reached one Pardee, who settled thereon in March 1884, and in due time obtained title thereto from the government. The respondents derive their title through him. The lands mentioned have a general slope to the east and southeast, and are arid in the sense that they require irrigation to produce crops. Some time in the year 1882 or 1883 springs broke out on the southwest corner of the land now owned by the respondents, which caused a swamp to form immediately below and surrounding them, which drained down through a draw extending across the land now owned by Haywood, but which belonged to Alanson T. Mason, onto the land now owned by the appellant. In 1884 Mason caused a ditch to be dug through this draw to a point on his own land immediately below the swamp formed by the springs, through which he took the water from the swamp across the Haywood land to the land now owned by the appellant, where he put it to a beneficial use. This ditch he and his successors in interest have maintained until the present time. In

ditches and appropriate seepage water or waters from snows, rain, or springs, not traceable to or forming a stream or water course, or from constructed works, as the limitations contained in §§ 1 and 53, defining the waters over which the engineer has been given jurisdiction, plainly indicate. In our opinion, therefore, if any surplus water exists after Hewes has appropriated to a beneficial use all he desires, and is permitted to enter the lands of Dean, he has a perfect right to appropriate it also to a beneficial use; but the rights of Dean are subject to the prior right of Hewes to apply all of the water to a beneficial use on his lands. As to the water in controversy in this case, any surplus which may in future exist beyond the necessities of Hewes and Dean would not be subject to appropriation and distribution under chapter 49, Laws 1907, but, if subject to appropriation at all without the consent of Hewes and Dean, it would be governed by the general law of prior appropriation which is applicable to the arid lands of the West.

The question of correlative rights in percolating waters is discussed in notes in 64 L.R.A. 236, 17 L.R.A.(N.S.) 650, 23 L.R.A.(N.S.) 331, and 25 L.R.A.(N.S.) 465.

G. V.

1890 or 1891 the respondent dug a small ditch leading from the springs to his house, and took water therefrom for stock and domestic purposes. In 1902 the respondents, for the purpose of draining the swamp formed by the springs, constructed a ditch on the east side of the swamp, conveying the water to their south line, where it entered a ditch constructed on the Haywood land. Subsequently the appellant connected this with her own ditch, and from that time until the spring of the year 1908 the water therefrom continually flowed down onto her premises, where she used it for purposes of irrigation. On the last date mentioned the respondents constructed a new ditch from this latter ditch eastward on their own land, which had the effect of diverting a considerable part of the water from the springs away from the appellant's ditch. It is to restrain this diversion that the present action is prosecuted.

At the trial there was evidence tending to show that the springs which give rise to the marsh or swamp on the respondents' lands had no existence prior to the year 1882, or, if they flowed at all, it was only for a short time in the spring of the year, when the snow of the winter was melting; that what is now swamp and marsh land was then dry, so that it could be ridden or driven over at any season of the year. In fact witnesses testified to cutting hay thereon with a mower as early as the month of June. It was given in evidence also that the springs began to be active only after the owners of the lands to the west and above the springs began to irrigate their lands, and the flow increased as irrigation increased, and that this increase has been continuous; there being much more water flowing from the springs now than did flow therefrom even a few years ago. It appears also that the swamp itself is constantly increasing in size, being much larger now than it was even ten years ago. It does appear, however, that for more than twenty-five years a continuous stream has flowed from the springs into the swamp and from the swamp into the drainage and irrigating ditches of the appellant, and from there to her lands, where it has been used continuously for the purposes of irrigation. Moreover, it appears that all of the water coming from the springs, except the small quantity taken by the respondent in 1901, which he uses for domestic and household purposes, has been so used, and that its use was without interruption until the respondents made the diversion which gave rise to this action.

The appellant, on this appeal, makes three principal contentions. She contends, first, that she is entitled to the water from

these springs in virtue of a prior appropriation; second, that she is a riparian proprietor on the stream that flows from the springs and is entitled as such to have the same flow onto her lands as it was wont to flow in a state of nature, without waste or unnecessary diminution by the land proprietors on the stream above her land; and, third, that she is entitled to the water by prescription, since she has had the open and notorious possession and use of the same for a period of time longer than the time of the statute of limitations, all the while claiming the right to such possession and use adversely against all the world.

The trial judge, passing on the contentions made in the court below, held that neither the first nor second was maintainable under the evidence, and we think his conclusions in that regard were just. As we held in *Nesalhou v. Walker*, 45 Wash. 621, 88 Pac. 1032, the common-law doctrine of riparian rights prevails in this state, and that where rights to lands across which a stream of water flows are acquired or initiated prior to any appropriation of the waters of the stream, the rights of the riparian proprietors are determined by the rules of the common law relating to riparian proprietors, and not by any rule of prior appropriation. The same rules would apply to springs, whether existing from time immemorial or of new creation. They could only be appropriated if existing or appearing on land to which no title has been acquired from the government, or initiated looking to such acquirement. So, in this case it seems to us clear that the appellant's predecessor in interest made no appropriation of the waters of these springs until long after initiatory steps had been taken by the respondents' grantors to acquire title to the land on which they appeared. Such being the case, the respondent is entitled to hold them and claim the waters therein as against any claim of prior appropriation.

The contention that the appellant can enjoin a diversion of the water, on the ground that she is a riparian proprietor on the stream flowing from the marsh, is also without foundation. While one may have riparian rights in a stream even though its source be a spring upon the land of another (*Hollett v. Davis*, 54 Wash. 326, 103 Pac. 423; *Miller v. Wheeler*, 54 Wash. 429, 23 L. R.A.(N.S.) 1065, 103 Pac. 641), yet it must be a stream that was wont to flow from time immemorial. The owner of land upon which a new spring breaks out may make such use of the waters as he pleases, notwithstanding it would, if unmolested, cause a stream to flow across another's land. Any other rule would make his estate in-

voluntarily servient to a use to which it was not subject when he acquired it.

The third contention is not discussed in the written opinion filed by the trial judge, and we are not advised as to the reasons which prompted him to deny relief on that ground. It has seemed to us that the appellant can justly claim a right by prescription to a portion of the flow from these springs. It is clear from the evidence that the appellant and her predecessors in interest have appropriated and used the waters flowing from the springs, with the exception of that before mentioned, which the respondents have diverted for domestic uses, for a period of nearly twenty-five years. While there is no direct statute governing the matter, the courts generally hold that an easement is acquired in the lands of another by an adverse user for the period of the statute of limitations. *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777; *Ricard v. Williams*, 7 Wheat. 110, 5 L. ed. 410. So, in this case the appellant is entitled to the continuous use of so much of the waters flowing from these springs as she has had the continuous adverse use of for a period of ten years immediately preceding the time the respondents diverted it. This does not mean all of the water flowing through her flumes at the time of the diversion, but a quantity equal to the quantity that was wont to flow thereon ten years prior to that time. Since the spring has materially increased in size and flow during the last ten years, the respondents are entitled to check it if they may, or appropriate to their own use the increase of flow. Their state in their lands needs stand servient only to the easement they are estopped to dispute from lapse of time. They are not estopped to interfere with the increase of flow occurring within the ten-year period, for otherwise their whole estate might become servient to this particular use.

The appellant cites *Dickey v. Maddux*, 48 Wash. 411, 93 Pac. 1090, to the point that a right to a use of waters arising from springs on the land of another cannot be acquired by adverse use, but this point was not decided in that case. It was the opinion of the writer that the question was there presented, and should have been met and determined, but the court determined the question on other grounds. The doctrine that prescriptive rights in the use of waters flowing across or arising on the land of another may be acquired by adverse user has been repeatedly recognized, if it has not been expressly decided, by this court. *Rigney v. Tacoma Light & Water Co.* 9 Wash. 576, 26 L.R.A. 425, 38 Pac. 147; *Spring Hill Irrig. Co. v. Lake Irrig. Co.* 42 Wash. 379, 85 Pac. 6; *Matheson v. Ward*, 30 L.R.A. (N.S.)

24 Wash. 407, 85 Am. St. Rep. 955, 64 Pac. 520; *Hollett v. Davis*, *supra*.

The record, however, is not sufficiently complete to enable us to direct the proper judgment to be entered. While it shows that the respondent in 1908 diverted a considerable proportion of the waters then flowing from the springs, probably greater than he was entitled to as of right, it fails to show what the excess was. This could only be determined by ascertaining the quantity of water flowing into the appellant's ditches and flumes at a time ten years prior to the time of the diversion, and subtracting that quantity from the quantity now flowing from the springs; but there is nothing in the evidence that enables us to do this, as the appellant seemingly tried her case on the theory that she was entitled to all of the waters flowing from the springs. This was, of course, the fault of the appellant, but we do not think that she should, because thereof, lose her right to recover such proportion of the water as is legally her due. Nor do we think the respondents should be obligated to bear the burden of the cost of the trial of the cause or its appeal to this court. The judgment of the court will be, therefore, that the judgment appealed from stand affirmed, but without prejudice to the right of the appellant to bring a new action for the ascertainment of the quantity of water she is entitled to by prescription, and to perpetually enjoin the respondents from interfering therewith. No costs will be allowed either party in this court.

Rudkin, Ch. J., and Chadwick and Gose, JJ., concur.

KENTUCKY COURT OF APPEALS.

LIZZIE KIPPES, Appt.,

v.

CITY OF LOUISVILLE.

(140 Ky. 423, 131 S. W. 184.)

Municipal corporation — flushing street — negligent injury — liability.

A city, in flushing its streets for the promotion of the health, comfort, and safety

Note. — Liability of municipal corporation for injuries inflicted by the negligence of employees engaged in the repair or construction of highways.

For earlier cases involving the repair or construction of highways, see note to *Barree v. Cape Girardeau*, 6 L.R.A. (N.S.) 1090.

As to the liability of municipal corporations for fire set by sparks from a steam roller engaged in repairing a street, see

of the general public, acts in its governmental capacity, and is therefore not liable for injuries to a passer-by by the bursting of a hose through the negligence of its employees.

(October 26, 1910.)

APPEAL by plaintiff from a judgment of the Common Pleas Branch, Second Division, of the Circuit Court for Jefferson County, dismissing the petition in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Joseph Sollinger for appellant.

Mr. Clayton B. Blakey, with Mr. Huston Quin, for appellee:

In matters pertaining to the public health, safety, and comfort, the municipality acts in its public or governmental capacity.

Owensboro v. Com. 105 Ky. 344, 44 L.R.A. 202, 49 S. W. 320; Having v. Covington,

25 Ky. L. Rep. 1617, 78 S. W. 431; Twyman v. Frankfort, 117 Ky. 518, 64 L.R.A. 572, 78 S. W. 446, 4 A. & E. Ann. Cas. 622; Schwalk v. Louisville (Columbia Finance T. Co. v. Louisville) 135 Ky. 570, 25 L.R.A. (N.S.) 88, 122 S. W. 800; Jones, Neg. Mun. Corp. § 30; Parker & W. Public Health & Safety, § 161; Shearm. & Redf. Neg. § 295.

The fact that the sprinkling of the city streets is under the jurisdiction of the board of public works does not alter the general rule as to the municipality's nonliability.

Thomp. Neg. § 5824, and note 31 to § 5823.

The flushing and sprinkling of the city streets is a public necessity,—a duty pertaining to the public health,—and within the exercise of a purely governmental function; and for the negligence of an employee in performing said services the municipality is not liable; especially where no compensation or remuneration is charged or received by the city in the performance of said services.

note in 6 L.R.A. (N.S.) 1094; and for the liability of a municipality for injuries inflicted by its servant while engaged in removing ashes or garbage, see note in 5 L.R.A. (N.S.) 1005.

Few cases within the scope of this note have been found, and they show the same conflict in results as appears in the cases in the earlier note. As there stated, however, and as appears in *KIPPES v. LOUISVILLE*, the liability of the municipality depends, in each case, upon whether the work in which the employee was engaged at the time is a public duty undertaken by the city in the exercise of its governmental functions, for the benefit of its people and the public generally, or a service performed by the municipality for private or corporate purposes, as distinct from its duty to the public generally.

Thus, in *Conelly v. Nashville*, 100 Tenn. 262, 46 S. W. 565, the court said: "The authorities recognize the difference between governmental duties, or those duties the municipality owes the public, and corporate or ministerial duties, in the discharge of which the individual citizen is interested. For any injury consequent upon the negligence of the municipal agent in discharging duties of the first class, the corporation is not liable; but it is otherwise as to the result of neglect in the performance of duties of the second class."

And in *Denver v. Maurer*, 47 Colo. 209, 135 Am. St. Rep. 210, 106 Pac. 875, the court said: "The authorities agree that two classes of general duties are imposed upon a municipal corporation. One is governmental, and the municipality is not liable for negligence of employees occurring in the performance thereof. The other is private and corporate, and the municipality is liable for negligence of employees occurring in the performance thereof."

30 L.R.A. (N.S.)

But as said in *KIPPES v. LOUISVILLE*: "It must be admitted that many of the distinctions that this court as well as other courts of last resort have made between what are designated the public and private powers, duties, and liabilities of municipal corporations, are difficult to understand." On this distinction, in general, between public and private functions of a municipality, as affecting liability for negligence of its agents, see the note in 1 L.R.A. (N.S.) 665.

In *Conelly v. Nashville*, supra, it was held that a municipal corporation is not liable for the negligence of the driver of a street sprinkling cart in its service, in colliding with a buggy, causing the overturning thereof and injury to the occupant, as the employee is in such case engaged in the performance of a governmental, and not a mere ministerial, duty. The court said: "The right or power of the corporation of Nashville to sprinkle its streets does not rest, as was argued at the bar, upon subsec. 9 of § 17 of its charter, which authorizes the city 'to make appropriations to open, alter, abolish, widen, extend, . . . clean, and keep in repair, streets,' etc., but rather upon subsec. 7 of § 17, which provides that the corporate authorities may 'make regulations to secure the general health of the inhabitants, and to prevent and remove nuisances.' An ordinance of the city directing the sprinkling of the streets in pursuance of this charter provision is one that is sanitary in its character, passed in view of the health and comfort of the general public. While engaged in doing work under such an ordinance, the municipality is discharging a governmental duty, and is not responsible for the carelessness of the agent or agencies so employed."

But in *Denver v. Maurer*, supra, where the plaintiff was injured through the negli-

Maydwell v. Louisville, 116 Ky. 885, 63 L.R.A. 655, 105 Am. St. Rep. 245, 76 S. W. 1091; Conelly v. Nashville, 100 Tenn. 262, 46 S. W. 565.

Carroll, J., delivered the opinion of the court:

The appellant, who was the plaintiff below, averred, in a petition filed by her against the appellee to recover damages for personal injuries, that she was injured by the negligence and carelessness of the agents and employees of the city, who were at the time engaged in flushing the streets with a hose that was in such an unsafe and defective condition that it burst and threw water upon her, thereby causing her to contract a severe cold that impaired her health.

In the third paragraph of its answer the appellee city alleged that the flusher referred to in the petition, and the other street flushers owned and operated by it, were used for the promotion and preserva-

tion of the health of the people of the city, and were necessary for this purpose, as well as for the comfort and safety of the general public; that at the time of the accident complained of the employees of the city, or one of its departments, in charge of the flusher, were engaged in flushing the streets of the city, and that for this service the city did not receive or charge any remuneration or profit, but did the work solely for the promotion of the health, safety, and comfort of the inhabitants of the city and the general public; and that in using the flusher it was exercising a governmental function of the city. To this paragraph a demurrer was interposed, and overruled. Thereupon the plaintiff, properly conceiving that the facts set up in this paragraph, if it presented a defense, as the lower court ruled it did, would defeat a recovery, elected to stand by her demurrer, and the petition was dismissed.

It will thus be seen that the only question presented is whether or not the flush-

gence of employees of the municipality while engaged in flushing a storm sewer, the city was held liable, the court saying: "The authorities are practically agreed in placing certain general duties in the class that is governmental, and among those is the general duty of the preservation of the public health. . . . There is considerable conflict among the authorities when it comes to the application of the general rule to specific cases. . . . To the ordinary mind this storm sewer formed a part of the improvement of the street and pertained primarily to the care of the street. Obviously, as the water flowed into the catch basin, it would carry with it refuse from the street, some of which would remain. At other times refuse would be blown, or otherwise forced, through the opening into the basin. This refuse would remain to breed disease and noxious odors, if not removed. One more act was necessary to keep the street in a reasonably fit and suitable condition for use, and that act was the flushing of the storm sewer to remove this menace to the health and comfort of the people. How, in reason, can the act of flushing that sewer, under these circumstances, be anything more than a detail in the performance of the general duty of the city to care for its streets? . . . When the city, acting in its private corporate character, by means of that sewer, created on its streets a condition that menaced the health and comfort of the community, no authorities need be cited to show that it was its private corporate duty to remove that condition from its streets. It follows, therefore, that the flushing of that sewer, though done to preserve health and comfort, was not done primarily in the performance of the governmental duty relating to the preservation of health, but was done in the discharge of the general duty of caring for the streets."

30 L.R.A. (N.S.)

In *Barree v. Cape Girardeau*, 132 Mo. App. 182, 112 S. W. 724, where a street commissioner of a city, who was also a special policeman, while engaged as agent of the city in making and superintending repairs on a street by hauling and spreading gravel thereon, outside of and up to the rails of a street railway, assaulted the plaintiff, who was rightfully operating a car on the street, and was at the time engaged in removing from the rails gravel which, in being dumped on the street, had been permitted to cover the rails in places, so as to make it dangerous to drive the car over it, to which removal the street commissioner objected, the municipality was held liable for injuries resulting from the assault, as its agent, while engaged in repairing the street, was in the performance of an act for the private benefit of the city, and could not at the same time act as a police officer in the discharge of a function for the good of the public, especially as the occasion did not demand or require a rightful exercise of such agent's powers as a policeman.

And in *Burke v. South Omaha*, 79 Neb. 793, 113 N. W. 241, it is held that where cities are granted special privileges for the benefit of their inhabitants in the control of the streets within their corporate limits, and it is their statutory duty to keep such streets in repair and safe for travel, for which purpose they have all necessary powers and authority from the state, such duty is a corporate duty of the municipality, and it is liable to an employee engaged in the repair of one of its streets for an injury resulting from the negligence of the foreman in charge of the work, through which the employee, by the action of an uncontrollable and vicious team, was thrown into a deep washout which was being filled.

A. C. W.

ing the streets of the city was a public duty, undertaken by the city in the exercise of its governmental functions, for the benefit of its people and the public generally, or a service performed by the municipality for private or corporate purposes, as distinct from its duty to the public generally. It must be admitted that many of the distinctions that this court, as well as other courts of last resort, have made between what are designated the public and private powers, duties, and liabilities of municipal corporations, are difficult to understand. Nevertheless the line of demarcation has been drawn with more or less precision, and it is generally ruled that service similar in purpose and effect to that the city was performing when the appellant was injured falls within what are called the public or governmental duties of a city. In fact, we have expressly held that sprinkling the streets of a city is essential to the health, comfort, and safety of its inhabitants, as well as the public generally, who use its streets. Putting the service the agents of the city, or one of its departments, were performing at the time the plaintiff was injured, upon the ground mentioned, the decision of the lower court is supported by a number of opinions delivered by this court, as well as the weight of authority in other jurisdictions. Having *v. Covington*, 25 Ky. L. Rep. 1617, 78 S. W. 431; *Twyman v. Frankfort*, 117 Ky. 518, 64 L.R.A. 572, 78 S. W. 446, 4 A. & E. Ann. Cas. 622; *Park Comrs. v. Prinz*, reported in 127 Ky. 470, 105 S. W. 948 (but cited by counsel for appellee as being in 32 Ky. L. Rep. 359); *Maywell v. Louisville*, reported in 116 Ky. 885, 63 L.R.A. 655, 105 Am. St. 245, 76 S. W. 1091 (but cited by counsel for appellee as being in 25 Ky. L. Rep. 1062); *Conelly v. Nashville*, 100 Tenn. 262, 46 S. W. 565.

Wherefore the judgment of the lower court is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

ROBERT S. POLLET, Bankrupt, Appt.,
v.
JULIUS COSEL.

(103 C. C. A. 68, 179 Fed. 488.)

Bankruptcy — dismissal of proceeding — effect on right to discharge.

The dismissal of a voluntary petition in bankruptcy for laches on the part of the bankrupt in prosecuting the proceedings will prevent his discharge in subsequent proceedings from debts which could have been proved in the former one.

ceedings from debts which could have been proved in the former one.

(May 18, 1910.)

APPEAL by a bankrupt from an order of the District Court of the United States for the District of Massachusetts, refusing him a full discharge. Affirmed.

The facts are stated in the opinion.

Argued before Colt, Putnam, and Lowell, Circuit Judges.

Mr. Marvin M. Taylor for appellant.

Mr. Nathan B. L. Cosel, for appellee:

The dismissal of the bankrupt's petition for a discharge, for want of prosecution, in the former proceeding, is in substance and effect a judgment denying the discharge.

Remington, Bankr. art. 2436; Re Weintraub, 13 Am. Bankr. Rep. 711; Re Wolff,

Note. — Binding effect of judgment refusing discharge in bankruptcy.

This question was discussed in *Bluthenthal v. Jones*, 13 L.R.A. (N.S.) 629, and the note thereto appended. The cases there cited seem to mark a settlement of the question, for the later cases do little more than follow them without discussion.

Thus the court in *Re Kuller* (Second Circuit) 93 C. C. A. 671, 168 Fed. 1021, 22 Am. Bankr. Rep. 289, merely followed without discussion its decision on a former appeal of the case (80 C. C. A. 508, 151 Fed. 12, cited in the earlier note) where it held that the refusal to discharge in one proceeding rendered the question of the right to discharge *res judicata* as to those debts provable therein, and that in a subsequent proceeding which included the same debts, it was binding, but that the bankrupt was not included as to new debts, at least where a reasonable time had elapsed since the original proceedings.

Where the application in the original proceeding is made in time, but the order denying it is not entered, an appeal from an order in a subsequent proceeding, involving the same indebtedness, in which a discharge is denied upon the ground that the original order is *res judicata* will not be determined until the bankrupt has had an opportunity to enter the original order and appeal from it. *Re Elkind* (Second Circuit) 99 C. C. A. 86, 175 Fed. 64, 23 Am. Bankr. Rep. 166.

It will be noted that in *POLLER v. COSEL* the application for a discharge was expressly denied. On first thought there would seem to be a different question involved where there is no order expressly denying a discharge, but the right thereto has lapsed through failure to make timely application for it. However, the courts invariably apply the same rules in the latter circumstance as those which govern the *Kuller* Case.

Thus it is held that a bankrupt who has failed to apply for his discharge within the time prescribed in the bankruptcy act cannot thereafter, by filing a second petition,

13 Am. Bankr. Rep. 95; Re Semons, 15 Am. Bankr. Rep. 822; Re Kuffler, 11 Am. Bankr. Rep. 469; Re Bramlett, 20 Am. Bankr. Rep. 402; Kuntz v. Young, 12 Am. Bankr. Rep. 505; Gilbert v. Hebard, 8 Met. 129; Re Drisko, 2 Low. Dec. 430, Fed. Cas. No. 4,090; Re Herrman, 102 Fed. 753.

The proper procedure for a creditor to take in order to protect his rights is by opposing the bankrupt's application for a discharge in his second proceeding. Otherwise the debt is discharged fully and completely, and the rights of the creditor are lost.

Bluthenthal v. Jones, 208 U. S. 64, 52 L. ed. 390, 28 Sup. Ct. Rep. 192, 51 Fla. 396, 13 L.R.A.(N.S.) 629, 120 Am. St. Rep. 181, 41 So. 533; Remington, Bankr. art. 2080.

Putnam, Circuit Judge, delivered the opinion of the court:

This was an appeal by a bankrupt against

an order of the district court in bankruptcy giving him only a qualified discharge. The bankruptcy proceedings in the present case were commenced by a petition filed in the district of Massachusetts on August 6, 1908. The bankrupt petitioned for discharge, and the creditor, now the appellee, duly filed his specification of objections thereto, setting out the proceedings in a previous bankruptcy where he had been a creditor. The result was a judgment giving a limited discharge, the limitation being covered by the following words: "Excepting also such debts as were provable in certain proceedings in bankruptcy in the district court of the United States for the southern district of New York, wherein on May 18, 1905, said Robert S. Pollet was duly adjudged a bankrupt."

This exception reserved from this discharge the debt of the appellee, as the same was not only provable in the prior proceedings described, but was therein duly proved.

obtain a discharge from the debts which were provable in the original proceedings. Re Silverman (Second Circuit) 85 C. C. A. 224, 157 Fed. 675, 19 Am. Bankr. Rep. 460; Re Levenstein (D. C. Conn.) 180 Fed. 957, 24 Am. Bankr. Rep. 822.

So, it is held that a judgment perfected against a bankrupt subsequently to the expiration of the time during which he was entitled, but failed, to apply for a discharge, cannot be made the basis of subsequent proceedings, where it is founded upon a debt provable in the original proceeding. Re Schnabel (D. C. E. D. N. Y.) 166 Fed. 383, 23 Am. Bankr. Rep. 22; Re Kuffler, *supra*.

By proving their claims in the subsequent proceedings, creditors whose claims were provable in the original proceedings are not estopped to contest the discharge. Re Elby (D. C. N. D. Iowa) 157 Fed. 935, 19 Am. Bankr. Rep. 734.

The courts adopt the view that the failure to apply for the discharge, and the approval of the record of the proceedings without granting a discharge, are in effect a judgment by default in favor of his then existing creditors that the bankrupt was not entitled to a discharge; and that such judgment is *res judicata* in subsequent proceedings. Re Bramlett (D. C. N. D. Ga.) 161 Fed. 588, 20 Am. Bankr. Rep. 402; Re Pullinan (D. C. E. D. Tenn.) 171 Fed. 595, 22 Am. Bankr. Rep. 513; Re Stone (D. C. Or.) 172 Fed. 947, 23 Am. Bankr. Rep. 24 (it appeared in this case that the failure to apply for a discharge was due to the neglect of the bankrupt's attorney, but no stress was laid upon this fact). On the application of the rule *res judicata* it is said in Re Von Borries (D. C. E. D. Wis.) 168 Fed. 718, 21 Am. Bankr. Rep. 849: "At first blush it would seem that the doctrine of *res judicata* cannot logically be applied in a case where no application for a dis-

charge had been made by the bankrupt, and therefore no opportunity furnished for judicial consideration; but a broader view of the scheme embodied in the present act seems to remove the difficulty. A voluntary petition under the act of 1898 (act July 1, 1898, chap. 541, § 1, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418) is virtually a bill in equity, praying, first, a distribution of assets; second, a discharge of the bankrupt. In the instant case there were no assets for distribution, and therefore the sole scope and purpose of the petition was to secure such discharge. The jurisdiction to award a discharge rested upon the petition, while the formal motion for a discharge had no other function than to fix a time for the exercise of such jurisdiction. The same statute that confers the power to grant a discharge limits its exercise to a period of one year, unless by special order such period is enlarged for six months. At the end of the eighteen months the jurisdiction of the court has lapsed. . . . Therefore reason and authority seem to concur that as to the parties who were before the district court for the northern district of Illinois on the original petition, the question of a discharge was practically and conclusively settled when the statutory period had expired, and cannot now be considered or reviewed in this court, and as to such claims the petition must be denied."

Debts incurred subsequently to the filing of the petition in the original proceedings in which there was no motion for a discharge may be discharged in subsequent proceedings. *Ibid*.

And in case new creditors are listed in the second proceeding, the court should in its order of discharge expressly except all debts provable in the first proceeding. Re Pullinan, *supra*.

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The present appeal arose out of this limitation.

In the prior proceedings the discharge was not in form refused, but the petition therefor was dismissed on the ground that the bankrupt had failed to prosecute, and to appear for examination; laches being apparently specifically assigned.

We are of the opinion that the judgment of the district court appealed from was correct; and, aside from our own conclusions in the matter, we should feel called on to sustain it in accordance with our practice of following the courts of appeals in other circuits.

At the outset we note the fact that § 14 of the bankruptcy statute of 1898 (act July 1, 1898, chap. 541, 30 Stat. at L. 550, U. S. Comp. Stat. 1901, p. 3427) provides that "Any person, may, after the expiration of one month, and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge." It also provides that, if it appears that the bankrupt was unavoidably prevented from filing his application within twelve months, "it may be filed within, but not after, the expiration of the next six months." Here is a positive limitation of eighteen months given by statute within which an application for a discharge may be made. If the position of the bankrupt in this case is correct, it amounts to a repeal of this statutory limitation. The fact that it is by indirection, instead of by a delayed application in the original proceeding, is immaterial, because in the indirect form the result would be quite as effectual to the defeat of the clear letter and intention of the statute as if otherwise accomplished. However, we do not let the case rest on this proposition, because the authorities to which we will refer are conclusive on more general grounds.

The bankrupt relies on *Bluthenthal v. Jones*, 208 U. S. 64, 66, 52 L. ed. 390, 392, 28 Sup. Ct. Rep. 192, decided on January 6, 1908. There is nothing in it which helps him. It contains a declaration which is, of course, so far as this case is concerned, a *dictum*, but which is positively opposed to the appellant. There the creditor, who was the same creditor in both the first and second bankruptcy proceedings, failed to appear in the second proceeding to object to the discharge, as otherwise the creditor has done here. Therefore in the second proceeding there was a clean discharge. This was offered as a discharge in the state court against the creditor, and was held to be efficient. The Supreme Court sustained the judgment of the state court, but solely on the ground, to put it briefly, that there must be at least plea in legal

proceedings. The opinion, however, used the following phraseology: "Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy finally determines, for all time and in all courts, between those parties or privies to it, the facts upon which the refusal is based."

This as the expression of the learned judge who wrote the opinion, and of the other judges who concurred therein, would be sufficient to bar the appellant here, if there had been an adjudication on the prior proceeding, or anything beyond a mere dismissal. Where there is only a mere dismissal for want of prosecution, it is so often held that parties are not fully estopped thereby that the language we have quoted does not necessarily apply here. Nevertheless, the questions we have here, in one form or another, have been before circuit courts of appeals in other circuits three times: First, in *Re Fiegenbaum*, in the circuit court of appeals for the second circuit, decided on February 25, 1903, 57 C. C. A. 409; 121 Fed. 69; second, in *Kuntz v. Young*, in the circuit court of appeals for the eighth circuit, decided on July 28, 1904, 65 C. C. A. 477, 131 Fed. 719; and, third, again in the circuit court of appeals for the second circuit in *Re Kuffler*, 80 C. C. A. 508, 151 Fed. 12, decided January 7, 1907. In the first case a discharge had been refused. In the second and third cases the petition for a discharge had been dismissed for want of prosecution, the same as here. And yet the same result was reached practically in each case, all in support of the judgment of the district court now appealed from. In the last case the precise form of discharge which was granted here was approved in advance. Therefore, both on principle and on authority, we accept the conclusions of the district court.

The judgment appealed from is affirmed, and the appellee recovers his costs of appeal.

MICHIGAN SUPREME COURT.

PEOPLE OF THE STATE OF MICHIGAN
v.

PETER KEMPPAINEN.

(— Mich. —, 128 N. W. 183.)

Abatement — bastardy proceeding — death pending appeal.

A bastardy proceeding abates upon the death of the defendant, although it occurs pending a proceeding by him to review an adverse judgment.

(November 11, 1910.)

CERTIORARI to the Circuit Court for Houghton County to review a judgment denying a motion for a new trial in a bastardy proceeding. Proceeding annulled.

The facts are stated in the opinion.

Messrs. John Kilskila and P. H. O'Brien for defendant.

Mr. William J. MacDonald for the People.

McAlvay, J., delivered the opinion of the court:

Defendant was adjudged to be the father of an illegitimate child, before the circuit court for the county of Houghton, and to stand charged with its maintenance until it arrived at the age of fourteen years. The order and judgment provided for the

payment of money, the furnishing of a bond, and other details usual in such cases, and, in default of compliance therewith, he to be committed to jail until such bond was given. A motion for a new trial was denied, and the case was removed by defendant to this court for review upon writ of certiorari. Sixty days after the return to the writ was made to this court, there was filed a notice to the prosecuting attorney of the suggestion of the death of the defendant upon the record of the court in this cause, which notice further states: "And it is hereby ordered that Andrew Bram be and is hereby substituted as defendant in said cause, instead of Peter Kemppainen, deceased." The intention, without doubt, was to suggest of record

Note. — Abatement of bastardy proceedings by death.

The question as here annotated includes three classes of cases; namely, those in which the defendant died before final judgment; those which involve the effect of death of the complainant *pendente lite*; and those in which the reputed bastard child was born dead or died after birth, but before final judgment. The various classes will be taken up in the order mentioned, and any general discussion deemed necessary will be found under the particular subdivision relating thereto.

Death of defendant.

The few decisions discussing the effect of the death of the defendant in bastardy proceedings, while not all reaching the same conclusion as does *PEOPLE v. KEMPPAINEN*, may, with one exception, be considered as laying down rules in accordance with the principles therein announced.

Thus, in *Clements v. Durham*, 52 N. C. (7 Jones, L.) 100, cited in *PEOPLE v. KEMPPAINEN*, it was held that proceedings in bastardy cannot, in the absence of statute so providing, be instituted against the personal representatives of the putative father, in order to subject his estate to the maintenance of the child. And *McKenzie v. Lombard*, 85 Me. 224, 27 Atl. 110, which is sufficiently set out in the *KEMPPAINEN CASE*, is to the same effect.

But in Indiana, as is stated in *PEOPLE v. KEMPPAINEN*, the right of action was held in *State ex rel. Wilson v. Williams*, 8 Ind. 191, to survive generally the death of the putative father, under the bastardy act of 1852, § 22, which provides that "in case of the death of the putative father of such child, either before or after the commencement of prosecution . . . the right of action shall survive and may be prosecuted against the personal representatives of the deceased with like effect as if such father were living, except that no arrest of such personal representatives shall take place or bond be required." And the right to institute bastardy proceedings against the

administrator of the estate of the deceased putative father under this statute was recognized, or at least unquestioned, in *State ex rel. Shoemaker v. Han*, 23 Ind. 539.

In *Monohan v. Oke*, 1 Ont. App. Rep. 208, a right of action under *Consol. Stat. Upper Can. chap. 77, § 4*, giving a right of action against the father of an illegitimate child for necessities furnished it during his lifetime, was held to survive the death of the putative father, and to lie against his representative.

Death of complainant.

In most jurisdictions which have decided the question, the death of the complainant is held, unless the letter of the statute permits a continuance or revival, to abate the action, although, in some instances, this is due to the wording of the statutes involved, which must be strictly construed in favor of the reputed father, for the reason that, at common law, the duty to support a bastard child was cast wholly upon the mother.

In *R. v. Armitage*, L. R. 7 Q. B. 773, it was held that a bastardy order could not issue in a proceeding instituted by the mother, where she died before the hearing, under a statute providing that the justices shall hear the evidence of the mother and such other evidence as she may produce, and if the evidence of the mother be corroborated in some material particular by other testimony, to their satisfaction, they may adjudge the defendant to be the putative father of the bastard child. This decision was upon the ground that, under the statute, it was necessary that the mother be called as a witness, especially as it allowed no one else to take proceedings against the supposed father.

In *State v. Sullivan*, 12 R. I. 212, where the statute authorized the overseer of the poor to bring bastardy complaints, it was held that the death of such complaining officer pending the proceedings, and before the trial, required the abatement of the complaint. It was also held that the new overseer could not revive the proceedings, as the statute did not provide therefor.

the death of defendant, with permission to Bram to defend as his legal representative, and it will be so treated by this court.

The question of the effect of the defendant's death upon this action is not discussed in the briefs. To a suggestion to the attorney general that a brief upon the question would be received, a reply has been returned that he had no desire to be heard. The question presented is whether the right of action under chapter 153, Comp. Laws, survived. In the investigation of the authorities in the United States, we find two cases where practically the exact question was involved under proceedings provided by statutes similar to chapter 153, Comp. Laws 1897; both holding that bastardy proceedings abate upon the death of the defendant. *McKenzie v. Lombard*, 85 Me. 224, 27 Atl. 110; *Clements v.*

Durham, 52 N. C. (7 Jones, L.) 100. In the Maine case, the death occurred during the pendency of the proceedings, but before trial. That court said: "No judgment is sought for or obtainable against property. The process, though held to be a civil proceeding, is criminal in form, and is an extraordinary means to compel a father to assist in the support of his illegitimate child, or suffer imprisonment as a penalty for his neglect to do so. There is no fitness in the proceeding that would adapt itself to the principle of survivorship. If the pending action survives, then the cause of action would survive as well, and the process could be originally instituted against the administrator of the deceased. . . . The incongruities that would beset such a proceeding would be obvious enough. It would be a strange sight to see

And in *Rolline v. Chalmers*, 49 Vt. 515, it was held that a complaint for bastardy does not survive the death of the prosecutrix, and that the town could not prosecute after her death, where no statute provided for such procedure.

In *Dodge County v. Kemnitz*, 28 Neb. 224, 44 N. W. 184, where the mother of an illegitimate child instituted proceedings against the putative father, but died before trial, it was held that the action abated as in any case of the death of a sole party to an action *pendente lite*. However, upon motion of the county attorney, the action was revived in the name of the county as plaintiff, under a statute providing that where a woman has a bastard child, and neglects to bring a suit for its maintenance, or brings a suit and fails to prosecute it to final judgment, the county commissioners may bring suit in behalf of the county, against the putative father, and may take up and prosecute a suit begun by the mother of the child.

And in *Colby v. Storrs*, cited in *R. R. v. J. M.* 3 N. H. 141, where the complainant died at the time the child was born, the town was permitted to prosecute and the defendant found chargeable. It does not appear from the case as here cited whether or not there was a statute permitting the town to revive the action.

But in *People v. Nixon*, 45 Ill. 353, it was held that the death of the mother does not abate a bastardy proceeding, the court saying: "The object is to compel the putative father to secure the public, as well as the mother, against liability for the support of the child, by a proceeding in the name of the people. The mother is not a party to the record, although allowed to control the suit, and made liable for the costs, in case the defendant is discharged. The mother not being a party, there is no technical reason for the abatement of the suit, and its prosecution may be more important to the public than if the mother had not died." And *People v. Smith*, 17 Ill. App. 597, is to the same effect. 30 L.R.A. (N.S.)

Death of child.

The weight of authority undoubtedly is to the effect that the prosecution of the reputed father of a bastard child born alive does not abate under the bastardy acts by the death of the child pending the prosecution. *Hauskins v. People*, 82 Ill. 193, 2 Am. Crim. Rep. 178; *Malson v. State*, 75 Ind. 143; *Smith v. Lint*, 37 Me. 546; *Meredith v. Wall*, 96 Mass. 155; *Hanisky v. Kennedy*, 37 Neb. 618, 56 N. W. 208; *People ex rel. Moore v. Beehler*, 63 Hun. 42, 17 N. Y. Supp. 418; *State v. Beatty*, 66 N. C. 648; *Hinton v. Dickinson*, 19 Ohio St. 583; *Jerde v. State*, 36 Wis. 170.

These decisions have been based upon various grounds, as is shown by the following abstracts:

Thus, in *Smith v. Lint*, *supra*, where the object of the bastardy act was to compel the putative father to aid in supporting his illicit offspring, the court, in holding that the death of the child pending the complaint, but before trial, did not abate the proceeding, said: "The expenses for the maintenance of an illegitimate child commence at its birth. They include what may be necessary for its support and comfort. The liability of the father is coextensive with that of the mother, and relates to the past as well as the future. The order of court, charging him with maintenance, embraces expenses which have been, as well as those which may be, incurred. The death of the child relieves the father from future support, but furnishes no discharge as to the past."

And in *People ex rel. Moore v. Beehler*, *supra*, it was said that it would be a miscarriage of justice if the defendant, by fleeing from justice and remaining out of the jurisdiction of the court until his offspring died, could thereby thwart the purpose of a statute enacted to compel the father of a bastard to indemnify the town for the expenses incurred for its support and burial.

And in *Hauskins v. People*, *supra*, where

an administrator arrested, required to give a bond, be put on trial, and perhaps imprisoned for an act of bastardy committed by the party officially represented by him." The reasoning of the North Carolina case is along the same lines. In that case the proceedings were instituted against the representatives of the deceased putative father, being in fact the suppositious case used by the court in *McKenzie v. Lombard*, above quoted, but a better illustration, as there were two representatives who were proceeded against.

Such a right of action would not survive at the common law. "The true test was whether the injury on which the cause of action was based affected property rights, or affected the person alone. In the former case the cause of action survived, while in

the latter it abated." 21 Enc. Pl. & Pr. p. 313, and cases there cited. There is no statute in Michigan which provides for such survival. In our investigation, we have found in one state (Indiana) by statute such right of action survives, "with like effect as if such father were living, except that no arrest of such personal representatives shall take place, or bond be required." See *State ex rel. Wilson v. Williams*, 8 Ind. 191. In the absence of a statute, we find no authority holding that the right of action in this case would survive. Upon the death of defendant it abated, and these proceedings, and the order and judgment brought here for review by reason thereof, became of no force and effect.

A judgment will be entered accordingly.

it was urged that after the death of the child, the state no longer had an interest in the prosecution of the action, the court said: "The statute required the defendant to pay a certain amount, for a certain number of years, for the purpose of supporting the child. The fact that the money had not been collected for the time the child had lived did not, upon the death of the child, abate the action, or in any manner release the defendant from his liability for the support during the life of the child."

In *Meredith v. Wall*, supra, where the bastardy act expressly provided for indemnity from all "charges that have accrued" for the maintenance of the child, as well as those which may be incurred in the future, it was held that a complaint for the support of a bastard child during its life may be commenced and maintained after its death.

So, the death of the reputed bastard child, pending the proceedings, and after issue joined, gives the defendant no right to demand a dismissal, as the death of the child does not show that the proceeding was wrongfully instituted. In such case the death of the child would be proper matter for a plea *quis darrein continuance*. *Satterwhite v. State*, 32 Ala. 578.

And proceedings against the father of a bastard child born alive do not abate by the death of the child pending the prosecution, under a statute providing that, upon conviction by a jury, the defendant shall stand charged with the maintenance of such child, the term "maintenance" being construed to include the necessary expenses incident to the birth of the child, such as the employment of nurse, midwife, and physician, and a decent burial of the child. *Hanisky v. Kennedy*, supra.

Where the child is stillborn, different rules seem to apply; but the cases are conflicting, since each depends to a great extent on the construction to be given the particular statute or statutes involved.

Thus, where the sole object and purpose of the remedy offered by the bastardy act is the maintenance of the child, an action commenced before delivery abates upon delivery

of a dead fetus or embryo child. *Helfer v. Nelson*, 7 Ohio C. C. 203.

And in *State v. Beatty*, 61 Iowa, 307, 16 N. W. 149, it was held that a bastardy proceeding begun before the delivery of the child abated upon the birth of a dead child, under a statute the only penalty for breach of which was the charging of the accused with the maintenance of the child. See also *State ex rel. Hawk v. Harris*, 112 Iowa, 589, 84 N. W. 681.

And in New York, bastardy proceedings begun before the birth of the child abate, under § 806 of the Code of Criminal Procedure, except as to costs, where the child is stillborn. *Burnham v. Tyrone*, 112 App. Div. 769, 98 N. Y. Supp. 600.

In *State v. Addington*, 143 N. C. 683, 57 S. E. 398, 11 A. & E. Ann. Cas. 314, where the bastardy statutes provide for an allowance to the mother as well as for a bond of indemnity to the state, it was held that upon the delivery of a stillborn child, the action should abate as to the giving of the bond to the state, but that the mother was entitled to reimbursement for expenses consequent upon the defendant's unlawful act.

In Indiana, where it is provided by statute (Rev. Stat. 1881, § 997) that the death of a bastard child shall not be cause of abatement or bar to any prosecution for bastardy, if the prosecution is commenced before the birth of the child, its death *in utero* and subsequent birth before judgment will not abate the action. *Robinson v. State*, 128 Ind. 397, 27 N. E. 250. And the same is true where the delivery of a stillborn child occurs after the verdict. *Evans v. State*, 58 Ind. 587. But if the prosecution is commenced after the birth of the reputed bastard child, the action should be abated upon proof that the prosecutrix was delivered of a stillborn child, for in such case the action is construed as for the benefit of the child, and the birth of a child having an existence separate and apart from the prosecutrix must be shown. *Canfield v. State*, 56 Ind. 168. This distinction is expressly recognized in *Robinson v. State*, supra.

G. J. C.

ILLINOIS SUPREME COURT.

PROVIDENCE-WASHINGTON INSURANCE COMPANY

v.

WESTERN UNION TELEGRAPH COMPANY, Appt.

(247 Ill. 84, 93 N. E. 134.)

Telegraph — care required.

1. A telegraph company must use a high degree of care and skill in the correct and prompt transmission of messages.

Proximate cause — failure to transmit telegram — canceling insurance.

2. Failure to deliver a telegram from an insurance company, canceling a policy, which prevents the cancellation of the policy before the insured property is destroyed by fire, is the proximate cause of the loss to the insurance company.

Telegraph — cancellation of insurance policy — failure to deliver — liability.

3. The tender by an insurer of a telegram at a transmission office, addressed to a place only a comparatively short distance away, directing the cancellation of an insurance policy, is sufficient notice of the importance of the message to charge the company with liability, in case it fails to deliver the message, for the amount which the insurer is compelled to pay because of destruction of the property after the policy would have been canceled had the message been delivered, but before the cancellation could be otherwise effected.

Damages — failure to cancel insurance — amount of loss.

4. The damages for which a telegraph company from the failure of a telegraph from an insurer, canceling a policy, so that the property is destroyed before the policy is canceled, is liable, are the amount which the insurer is compelled to pay for the loss, and not merely the difference between the reasonable value of carrying the risk for the additional time and the amount of unearned premium on the policy.

(October 28, 1910.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Municipal Court of Chicago, in plaintiff's favor, in an action brought to recover damages alleged to have resulted from nondelivery of a telegram. Affirmed.

Note. — The above decision seems to be one of first impression upon the question of the proximate cause of loss to an insurance company from the failure of a telegraph company to deliver a message canceling a fire insurance policy before the insured property burned, as an extensive search has failed to disclose any other case involving that specific point.

30 L.R.A. (N.S.)

Statement by Farmer, J.:

This action was brought by appellee, against appellant, to recover damages alleged to have resulted to the appellee from a breach of appellant's contract to deliver a message. Appellee had written a policy of insurance on a paper mill in Newark, Ohio, belonging at the time to Frank B. Silk. The property subsequently passed to the Newark Paper Company, and on January 2, 1902, the policy was, by the consent of appellee, assigned to the Newark Paper Company. The policy contained a clause authorizing its cancellation at any time, upon the request of the insured, or by the insurer, upon giving five days' notice of the cancellation. April 29, 1902, between 11 and 12 o'clock in the morning, F. W. Ransom, state agent of appellee, delivered to appellant's agent at Van Wert, Ohio, for transmission to M. J. Reese, appellee's local agent in Newark, Ohio, the following message:

Van Wert, Ohio, April 30, 1902.

M. J. Reese, Agt.,

Providence-Washington Ins. Co.

Regret must cancel paper-mill line. Daily was passed inadvertently.

F. W. Ransom.

This telegram was never delivered to appellee's agent at Newark, Ohio, but was sent to New York city, and delivered to appellee's agent there, finally reaching its manager at Chicago through the mails. On May 2, 1902, Mr. Reese, appellee's agent at Newark, Ohio, received instructions by mail to cancel the policy on the Newark Paper Company's property, and the paper company claimed the right to the five days' notice provided for in the policy. Before the expiration of the five days, the property was burned, and the paper company sued appellee, and recovered a judgment for \$1,036.04, which was afterwards compromised, and \$1,200 paid by appellee in full satisfaction of the judgment. This action was brought to recover the \$1,200 and interest from the time of its payment. The case was tried before the court without a jury, and a judgment rendered in favor of appellee for \$1,365. The appellate court for the first district affirmed that judgment, and granted a certificate of importance, upon which the case is brought to this court for review.

Messrs. George H. Fearons and Francis Raymond Stark, with Messrs. West, Eckhart, & Taylor, for appellant:

The liability of one who has failed to fulfil his contract is limited to such damages as may reasonably be supposed to have been in the contemplation of both parties

at the time the contract was made, as the probable result of the breach of it.

Hadley v. Baxendale, 9 Exch. 341; 5 Eng. Rul. Cas. 502; *Squire v. Western U. Teleg. Co.* 98 Mass. 232, 93 Am. Dec. 157; *Western U. Teleg. Co. v. Sullivan*, 82 Ohio St. 14, 91 N. E. 867.

Damages, to be recoverable, must be the direct and proximate result of the alleged negligence or breach of contract. A person who has broken his contract is liable for only those consequences which he might reasonably be supposed to have foreseen and expected as the probable result of such breach.

McRae v. Hill, 126 Ill. App. 349; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *McLane, S. & Co. v. Botsford Elevator Co.* 136 Mich. 604, 112 Am. St. Rep. 384, 99 N. W. 875; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 223-237, 35 L. ed. 154-158, 11 Sup. Ct. Rep. 554; *Gilman v. Noyes*, 57 N. H. 627; 13 Cyc. Law & Proc. p. 27; 2 Parsons, Contr. 9th ed. 297; *Dubuque Wood & Coal Asso. v. Dubuque*, 30 Iowa, 170; *Squire v. Western U. Teleg. Co.* 98 Mass. 232, 93 Am. Dec. 157.

A telegraph company is not a common carrier, and has no insurer's liability.

Ellis v. American Teleg. Co. 95 Mass. 226; *Grinnell v. Western U. Teleg. Co.* 113 Mass. 290, 18 Am. Rep. 485; *Leonard v. New York A. & B. Electric Magnetic Teleg. Co.* 41 N. Y. 544, 1 Am. Rep. 446; *Breese v. United States Teleg. Co.* 48 N. Y. 132, 8 Am. Rep. 526; *New York & W. Printing Teleg. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338.

The kind of article and the amount thereof which a message directs to be purchased or sold must appear to have been known by the agent of the telegraph company before the damages caused by the rise or fall of the market on that article can be recovered from the company.

Beaupre v. Pacific & A. Teleg. Co. 21 Minn. 155; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; *United States Teleg. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Candee v. Western U. Teleg. Co.* 34 Wis. 471, 17 Am. Rep. 452; *Stevenson v. Montreal Teleg. Co.* 16 U. C. Q. B. 530; *Kinghorne v. Montreal Teleg. Co.* 18 U. C. Q. B. 60; *Landsberger v. Magnetic Teleg. Co.* 32 Barb. 530.
30 L.R.A.(N.S.)

Messrs. Bates, Harding, Edgerton & Bates, for appellee:

Appellant was guilty of gross negligence in not transmitting and delivering the telegram, and for this negligence it is liable to appellee.

Wald v. Pittsburg, C. C. & St. L. R. Co. 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888; *Joliet v. Shufeldt*, 144 Ill. 403, 18 L.R.A. 750, 36 Am. St. Rep. 453, 32 N. E. 969; *Rock Falls v. Wells*, 65 Ill. App. 557; *Houren v. Chicago, M. & St. P. R. Co.* 236 Ill. 620, 20 L.R.A.(N.S.) 1110, 127 Am. St. Rep. 309, 86 N. E. 611; 3 *Sutherland, Damages*, 3d ed. § 970; 2 *Sedgw. Damages*, 8th ed. § 891.

Telegraph companies are responsible for all direct damages which follow their failure to transmit a telegram when the telegram shows on its face that it is of business of importance, even though it does not disclose the extent of liability.

Tyler v. Western U. Teleg. Co. 60 Ill. 421, 14 Am. Rep. 38; *Postal Teleg. Co. v. Lathrop*, 131 Ill. 575, 7 L.R.A. 474, 19 Am. St. Rep. 55, 23 N. E. 583; *Western U. Teleg. Co. v. Harris*, 19 Ill. App. 347; *United States Teleg. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *Western U. Teleg. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500; *Northern Packing & Provision Co. v. Western U. Teleg. Co.* 70 Ill. App. 276; *Garrett v. Western U. Teleg. Co.* 83 Iowa, 258, 49 N. W. 88; *Western U. Teleg. Co. v. Houston Rice Mill Co.* (Tex. Civ. App.) 93 S. W. 1094; *Wolfskehl v. Western U. Teleg. Co.* 46 Hun, 542; *Wallingford v. Western U. Teleg. Co.* 60 S. C. 201, 38 S. E. 443, 629; *Western U. Teleg. Co. v. Shumate*, 2 Tex. Civ. App. 429, 21 S. W. 109; *Western U. Teleg. Co. v. Crawford*, 110 Ala. 460, 20 So. 111; *Barker v. Western U. Teleg. Co.* 134 Wis. 147, 14 L.R.A.(N.S.) 533, 126 Am. St. Rep. 1017, 114 N. W. 439; *Jones, Teleg. & Teleph. Co.* § 535, p. 542.

Farmer, J., delivered the opinion of the court:

Appellant contends (1) that its failure to deliver the message was not the proximate cause of the damage sustained by appellee; that the fire was the proximate cause, and, although the failure to transmit and deliver the message to appellee prevented the cancelation of the policy before the fire occurred, such failure is too remote to charge appellant with liability for the loss appellee sustained on account of the fire; (2) the breach of contract to deliver the message not being the proximate cause of the injury, the damages to be recovered are such, only, as, according to the usual course of things result from the breach; that the fire could not have been

foreseen by or in the reasonable contemplation of the parties to the contract as a probable result of the breach; (3) that the damages not arising in the usual and due course of things as a probable result of the failure to deliver the message, but out of circumstances peculiar to the special case they are not recoverable, unless the special circumstances were known, or may necessarily be supposed to have been known, to appellant at the time it accepted the message.

In support of the contention that the failure to deliver the message could not in any sense be considered as the proximate cause of the injury, appellant relies upon *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695, *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645, *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106, and other cases from other jurisdictions. The *Morrison Case* and the *Denny Case* were referred to and commented upon in *Wald v. Pittsburg, C. C. & St. L. R. Co.* 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888. The rule announced in those cases is that where, on account of the delay of the carrier in transporting goods delivered to it, they were destroyed or damaged by floods beyond the power of the carrier's control, the proximate cause of the injury is the flood, and the carrier is not liable. The rule announced by those cases was relied upon in this court in the *Wald Case*. In that case *Wald* bought a ticket over the defendant company's railroad from Cincinnati to New York City, by the limited express, and checked his baggage for transportation on the same train. The railroad company negligently failed to put the baggage on that train, but sent it on a later train, and it was destroyed by the Johnstown flood. The limited express upon which *Wald* rode, and which should have carried his baggage, reached its destination in safety. This court refused to follow the rule announced in the *Morrison* and *Denny Cases*, and said: "A loss or injury is due to the act of God when it is occasioned exclusively by natural causes, such as could not be prevented by human care, skill, and foresight; and where property committed to a common carrier is brought by the negligence of the carrier under the operation of natural causes that work its destruction, or is by the negligence of the carrier exposed to such cause of loss, the carrier is responsible." The court quoted and approved the statement of the rule made by the supreme court of Missouri in *Wolf v. American Exp. Co.* 43 Mo. 421, 97 Am. Dec. 406, in the following language: "The act of God which excuses the carrier must not only be the proximate cause of the loss, but the better

opinion is that it must be the sole cause; and where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible." Many authorities are cited, holding this to be the rule.

Appellant says the *Wald Case* dealt with the rule as applicable to common carriers, and that a telegraph company is not a common carrier. So, also, were the courts dealing with common carriers in the *Morrison Case* and the *Denny Case*, cited by appellant. While the weight of authority is that telegraph companies are not common carriers, and therefore insurers of the correct and prompt transmission and delivery of messages, it is held that they exercise a quasi public employment, with duties analogous to those of common carriers and are required to use a high degree of care and skill in the correct and prompt transmission of messages. *Tyler v. Western U. Tele. Co.* 60 Ill. 421, 14 Am. Rep. 38. The principle of the rule in the *Wald Case* has been applied by this court in other cases not involving common carriers and loss resulting from the act of God. *Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440; *Heuren v. Chicago, M. & St. P. R. Co.* 236 Ill. 620, 20 L.R.A.(N.S.) 1110, 127 Am. St. Rep. 309, 86 N. E. 611; *Joliet v. Shufeldt*, 144 Ill. 403, 18 L.R.A. 750, 36 Am. St. Rep. 453, 32 N. E. 969.

In support of the second and third propositions of appellant's defense, it relies chiefly upon *Hadley v. Baxendale*, 9 Exch. 341, 5 Eng. Rul. Cas. 502; but we are of opinion the facts of this case bring it within the rule of *Postal Tele. Cable Co. v. Lathrop*, 131 Ill. 575, 7 L.R.A. 474, 19 Am. St. Rep. 55, 23 N. E. 583. The message sent by appellee to its agent related to an important business transaction. It disclosed the nature of the business to be the cancellation of insurance on paper-mill property. Appellant's agent could not have been ignorant of the fact that the prompt delivery of the message was an important matter. The mere fact that the telegraph was resorted to, instead of the mails, between points in the same state no farther apart than the cities from which and to which it was sent, was sufficient to inform the agent of appellant that it was important to appellee's rights that the message be delivered with all reasonable speed, and that if this was not done it was liable to result in injury to appellee. Appellant had all the information necessary to charge it with damages resulting directly from a failure to deliver the message, and under the rule announced in the cases in this state, the appellee's loss is deemed to be the direct result of the negligence of appellant in fail-

ing to transmit and deliver to the sendee the message. That appellant was negligent is conceded; and its counsel in their brief assume that if the appellant had performed its duty, the message would have been delivered early in the afternoon of the day it was sent; that the insurance would have been terminated before the fire occurred; and that appellee would have sustained no loss by reason of the fire.

Considering the loss of appellee as the direct result of the negligence of appellant, which we think must be done, under the decisions in this state, the liability would be the amount of the loss sustained by appellee, and not, as contended by appellant, the difference between the reasonable value of carrying the risk for the additoinal number of days and the amount of the unearned premium on the policy. In the Lathrop Case the court said (page 586, 131 Ill.): "We think the reasonable rule, and one well sustained by authority, is that where a message, as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it, as written, within a reasonable time, unless such negligence is in some way excused." Hadley v. Baxendale, *supra*, was relied upon by the telegraph company in that case as requiring the application of a different rule. In the opinion of the court in the Lathrop Case a large number of cases are cited and commented upon, and while the decision is criticized and sought to be distinguished by appellant, in our opinion we could not adopt the rule insisted upon by it without overruling the Lathrop Case, and we are not convinced that we would be justified in doing this.

In our opinion, appellant was liable for appellee's loss, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

Petition for rehearing denied December 8, 1910.

PENNSYLVANIA SUPREME COURT.

RE ESTATE OF AGNES J. STINSON,
Deceased.

ANNIE J. STROUD et al., Appts.

(228 Pa. 475, 77 Atl. 807.)

Will — signature — end of will.

A signature at the end of testator's dis-
30 L.R.A.(N.S.)

position of his property complies with a statute requiring signatures at the end of the will, and a signature is therefore sufficient, although the writing in logical order proceeds from the first to the third page and then back to the second, so that the signature is upon the second rather than the third page.

(July 1, 1910.)

APPEAL by Annie J. Stroud et al. from a decree of the Orphans' Court of Montgomery County dismissing an appeal from a decision of the register of wills admitting a testamentary writing to probate. Affirmed.

The facts are stated in the opinion.

Messrs. J. Morris Yeakle and James Gay Gordon, for appellants:

The circumstances of the present will, its condition, the double manner of reading its pages, and the total absence of evidence as to the testatrix's intention or the time of writing the third page, make it impossible for the court to include the third page of the document in the will, except by exercising a mere arbitrary guess.

Baker's Appeal, 107 Pa. 381, 52 Am. Rep. 478.

The doctrine of "incorporation by reference" has no application to the present case.

Crocker v. Hertford, 4 Moore, P. C. C. 365; Smart v. Prujean, 6 Ves. Jr. 561; Allen v. Maddock, 11 Moore, P. C. C. 427, 25 Eng. Rul. Cas. 439; Magoohan's Appeal, 117 Pa. 238, 2 Am. St. Rep. 660, 14 Atl.

Note. — When will deemed to have been signed or subscribed at the end.

The early cases upon this question are dealt with in the note to *Sears v. Sears*, 17 L.R.A.(N.S.) 353, and the supplemental note thereto, accompanying *Mader v. Apple*, 23 L.R.A.(N.S.) 515.

But one case has been disclosed which has considered the question since the writing of the latter note.

In *Re De Hart*, 67 Misc. 13, 122 N. Y. Supp. 220, the requirement that the will shall be subscribed by the testator at the end was held sufficiently to be complied with in the case of a holographic will, where the testatrix wrote her name and date in the body of the attestation clause, which immediately followed, and was a part of the same paragraph as, the clause appointing the executrix, thus: "The above written instrument was subscribed by Mary A. De Hart, March 10th . . ." (the remainder of the paragraph being a continuation of the usual attestation clause, and followed by the signature of the witnesses).

As to whether writing name in body of a will is a signature thereto, see note to *Meads v. Earle*, 29 L.R.A.(N.S.) 63.

J. T. W.

816; Bryan's Appeal, 177 Conn. 240, 68 L.R.A. 353, 107 Am. St. Rep. 34, 58 Atl. 748, 1 A. & E. Ann. Cas. 393.

"At the end thereof" means the spatial physical end.

Vernon v. Kirk, 30 Pa. 218; Wineland's Appeal, 118 Pa. 37, 4 Am. St. Rep. 571, 12 Atl. 301; Harrison's Estate, 196 Pa. 576, 46 Atl. 888; Knox's Estate, 131 Pa. 220, 6 L.R.A. 353, 17 Am. St. Rep. 798, 18 Atl. 1021; Parslow's Goods, 5 Notes of Cases, 112; Ayres v. Ayres, 5 Notes of Cases, 375; Wakeling's Goods, 1 Notes of Cases, 236; 1 Jarman, Will, 6th Am. ed. 109-111; 1 Williams Exrs. 6th Am. ed. 105 et seq.; Royle v. Harris [1895] P. 163; Sweetland v. Sweetland, 4 Swabey & T. 6; Re O'Neil, 91 N. Y. 516; Re Conway, 124 N. Y. 455, 11 L.R.A. 796, 26 N. E. 1028; Sisters of Charity v. Kelly, 67 N. Y. 409; Dennett v. Taylor, 5 Redf. 561; Re Andrews, 162 N. Y. 1, 48 L.R.A. 662, 76 Am. St. Rep. 294, 56 N. E. 529; Irwin v. Jacques, 71 Ohio St. 395, 69 L.R.A. 422, 73 N. E. 683; Walker's Estate, 110 Cal. 387, 30 L.R.A. 460, 52 Am. St. Rep. 104, 42 Pac. 815; Re Seaman, 146 Cal. 455, 106 Am. St. Rep. 53, 80 Pac. 700, 2 A. & E. Ann. Cas. 730.

Messrs. Irvin P. Knipe, Montgomery Evans, and Nicholas H. Larzelere, for appellees:

The end of the will is not the spatial end, rather than the end or conclusion of the actual writing.

Heise v. Heise, 31 Pa. 246; Saunders v. Samarreg Co. 205 Pa. 632, 55 Atl. 763; Teed's Estate, 225 Pa. 633, 133 Am. St. Rep. 896, 74 Atl. 646.

The test is whether the fragments are connected by their internal sense by coherence or adaptation of parts.

Wikoff's Appeal, 15 Pa. 281, 53 Am. Dec. 597; Fosselman v. Elder, 98 Pa. 159; Baker's Appeal, 107 Pa. 381, 52 Am. Rep. 478; Birt's Goods, 24 L. T. N. S. 142; Swire's Estate, 225 Pa. 188, 73 Atl. 1110.

Brown, J., delivered the opinion of the court:

The requirement of the act of April 8. 1833 (P. L. 249), is that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof." The question raised on this appeal is whether the paper which was admitted to probate by the register of wills of Montgomery county, as the last will and testament of Agnes J. Stinson, had been signed by her at the end thereof. On appeal to the orphans' court of the county from the action of the register, the president judge of the orphans' court of Berks county, specially presiding, held, in a well-30 L.R.A. (N.S.)

considered opinion, that the will had been so signed. The document admitted to probate consists of a single sheet of legal cap paper, folded in the middle in the usual way along the short dimension, making four pages of equal size. There is no writing on the fourth page. The writing in issue appears upon the first, second, and third pages of the paper. The document is holographic, and the signature of Agnes J. Stinson appears about the middle of the second page, following the usual in testimonium clause, and to the left of her signature are those of two subscribing witnesses.

The learned counsel who, in the court below, represented the appellant from the decree of the register, admitted, with characteristic candor, that the testatrix, after writing the first page, proceeded to the third, then wrote last what appears on the top of the second page, and, after the completed expression of her testamentary intention, signed her name. Application was made to the court below for a rehearing, on the ground that counsel had no authority, either from the appellant from the decree of the register, or from any other contestant of the will, to make such admission, and on this appeal it is one of the grounds of complaint. No testimony of any kind was offered as to the order in which the pages of the will were written at the time the testatrix signed it. Both the attesting witnesses were dead, and counsel for the present appellants admit that the issue which they raise "must be determined wholly by an inspection of the alleged will itself." Our inspection of the document has satisfied us that the testatrix, after having written the first page, skipped the second, proceeded to the third, and, having reached the bottom of it, returned to the second, and, when she had completed the disposition of her estate, at about the middle of that page, signed her name there in the presence of two witnesses. The admission of counsel, complained of by the appellants, is therefore wholly eliminated from the case. The question before us, reduced to one of great simplicity, is whether the end of a will is, as counsel for appellants contend, "the physical end of the writing, the point which is spatially farthest removed from the beginning," or is the logical end of the testator's disposition of his property, wherever that end manifestly appears on the paper.

A will is the legal declaration of a man's intention, which he wills to be performed after his death. Such declaration must, under our wills act, be in writing and signed at the end thereof by the testator, unless prevented by an absolute inability. His written declaration is his *animus testandi*. When it is fully expressed, his will is fin-

ished, and the end of it reached. It is there that his signature must appear as evidence that it is his will. What he regards as the end of his will, and what must manifestly be regarded as the end of it, from an inspection and reading of the writing, is the end of it under the statute, which contains nothing about the spatial or physical end of it. The will before us, admittedly written by the testatrix herself, bears upon its face the unmistakable sequence which she intended to give to her writing. She started on the first page, and when she reached the bottom of it, turning the paper over, skipped to the third, and there continued her writing, at the top of which, on the first line, the unbroken disposition of her property is continued. When the bottom of that page was reached, she turned to the second, and, on the first line of it, continued in clear words the clause relating to the provisions on the third page for the Women's Christian Association of Norristown. She then proceeded to appoint her executors, and, having done so, reached the end of her will, and there signed her name. From the beginning of the first page, continuing on the third, and ending on the second, there is connected internal sense, containing a clear expression of testamentary intention, and the only conclusion to be reached from an inspection of the writing is that the testatrix signed her name at the place which she regarded as the end of her will. She signed her name at the end of her written act, which she intended to be her will; and, as it clearly so appears from the paper itself, her execution of it is not to be declared invalid because she failed to follow the sequence of the pages. The sequence of her will is unbroken from the first line on the first page to the place where she signed her name on the second, which was the end.

While no one of our cases where the question in which the 6th section of the act of 1833 was passed upon is precisely like the one now before us, *Baker's Appeal*, 107 Pa. 381, 52 Am. Rep. 478, is similar to it, and what was there said is here controlling. In that case a will was written on the first and third pages of a sheet of paper, and signed at the end of the third page. In a devise to A., written on the third page, numbered "4th," certain words describing the property devised were erased, and the words "see next page" were there interlined. On the fourth page of the same sheet of paper was written an unsigned clause, numbered "4th," making a bequest to A., and also additional bequests to other beneficiaries. The scrivener who drew the will testified that the erasure and interlineation were made by him by testator's direction, and he identified the writing on the fourth page

as the subject of the said reference in the will, and as having been written by him at the testator's direction prior to the signing by the latter. In holding that the writing on the fourth page was to be read into the will as constituting the fourth clause thereof, and that the entire instrument, with said clause incorporated therein, should be admitted to probate as the testator's will, we said: "Thus, the general principle has been clearly established that a will is to be read in such order of pages or paragraphs as the testator manifestly intended, and the coherence and adaptation of the parts clearly require. In writing a will upon the pages of foolscap paper, a testator may or may not conform to the order of the consecutive pages of the folio. There is no law which binds him in this respect. He may begin upon the fourth page of the folio, and conclude upon the first, or he may commence upon the first, continue upon the third, and conclude upon the second. In whatever order of pages it may be written, however, it is to be read, as in *Wikoff's Appeal*, 15 Pa. 281, 53 Am. Dec. 597, according to their internal sense, their coherence or adaptation of parts. The order of connection, however, must manifestly appear upon the face of the will. It cannot be established by extrinsic proof. Whilst, therefore, the end of the writing in point of space may in most cases be taken as the end of the disposition, it does not follow that in all cases the signature must, of necessity, be there written, if it be written at the end of the will according to such connection and arrangement of the pages or sheets as the obviously inherent sense of the instrument requires."

To the same effect is the following from what was said by Mitchell, Ch. J., in *Swire's Estate*, 225 Pa. 188, 73 Atl. 1110: "The statute requires that a will shall be in writing, and signed by the testator 'at the end thereof.' The end meant by this provision is the logical end of the language used, which shows that the testamentary purpose has been fully expressed. The position of the signature with regard to the bottom or end of the page is only evidence on the question whether the testator has completed the expression of his intention. Prima facie that is the natural place for the signature to be placed to show the full expression of the testator's wishes, and therefore is presumptively the right place for it; but it is only evidence, and must give way to evidence of a different intent. . . . In the present case the connected sense of the text is entirely clear, though it does not follow the usual order of arrangement. But it does not

deviate from it more than many letters written in the style of the present day, where the writing jumps from the first to the third page, and then back to the second. The full substance of the testatrix's intent and its expression are there, and the signature is at what she intended and regarded as the end of her will. Where that is manifest, the continuity of sense, and not the mere position on the page, must determine the statutory 'end thereof,' as the place for the signature."

The requirement of the English acts is similar to that of our act of 1833, as to where a will is to be signed. In *Coomb's Goods*, L. R. 1 Prob. & Div. 302, a will filled the first and third pages of a sheet of foolscap paper, leaving no room at the bottom of the third page for the signatures of the testator and the attesting witnesses. These were written on the second page, and it was held that the will was duly executed under Stat. 1 & 15 Vict., which require wills to be signed "at the foot or end" thereof. In *Wotton's Goods*, L. R. 3 Prob. & Div. 159, a testatrix procured the form of a will lithographed on the first side of a sheet of foolscap paper, and wrote her will on the second and third pages of it, ending near the bottom of the third. The fourth was blank. She signed her name in the presence of witnesses at the foot of the lithographed form, on the first page, and it was held that the will was signed at the foot or end thereof, as required by the acts; Sir J. Hannen saying: "The true way to look at the transaction seems to be that, as the will was begun on the second and continued on the third side of the paper, these must be taken to be the first and second pages of the will, and so we are brought round to what, under ordinary circumstances, would be called the first page, but which, upon these facts, must be treated as the last page of the will, as I hold it was when executed."

It is urged by the learned counsel for appellants that their contention, that the end of a will is the physical end of the writing,—the point spatially farthest removed from the beginning,—has been sustained by the New York court of appeals in *Re Andrews*, 102 N. Y. 1, 48 L.R.A. 662, 76 Am. St. Rep. 294, 56 N. E. 529. But that case differed in very important particulars from this. There the will was written upon a printed blank, folded in the middle so as to make four consecutive pages, with the attestation clause at the top of the second page. At that point it was signed by the testator and the subscribing witnesses, and the first two pages made a complete will. The third page contained other and complete dispositions

of property, in no manner connected with what appeared on the first and second pages, except that the third page was numbered "2d page" and the second page "3d page." In addition, the will was not in the handwriting of the testatrix, but in that of a person to whom the bulk of the estate was given as the residuary beneficiary. The case cannot be regarded as authority at all for the question now before us, which was properly disposed of by the court below; and its decree is affirmed, at appellants' costs.

UNITED STATES SUPREME COURT.

LING SU FAN, Plff. in Err.,

v.

UNITED STATES OF AMERICA.

(218 U. S. 302, 54 L. ed. 1049, 31 Sup. Ct. Rep. 21.)

Appeal — questions reviewable on writ of error — review of facts.

1. Assignments of error which challenge the sufficiency of the evidence to warrant a conviction cannot be considered by the Federal Supreme Court on a writ of error to the supreme court of the Philippine Islands, to review a judgment affirming such conviction, where it is not contended that there was no evidence of guilt, since only errors of law can be considered upon a writ of error.

Constitutional law — due process of law — prohibiting exportation of Philippine coin — police power.

2. The owner of Philippine silver coin is not deprived of his property therein without due process of law, contrary to the act of July 1, 1902, by the prohibition against the exportation of such coin from the Philippine Islands, under penalty of forfeiture and fine or imprisonment, which is made by Philippine law No. 1411, enacted by the Philippine Commission in the exercise of the power under the act of Congress of March 2, 1903 (32 Stat. at L. 952, chap. 980, U. S. Comp. Stat. Supp. 1909, p. 893), § 6, to adopt such measures as are deemed proper, not inconsistent with the organic act, to maintain the parity between gold and silver pesos, but such statute is within the limits of the police power.

(November 14, 1910.)

ERROR to the Philippine Islands Supreme Court to review a judgment of the Court of First Instance of the City of Manila convicting defendant of export-

Note. — A search has disclosed no other cases involving the power to prevent exportation or importation of coin or currency.

ing Philippine silver coins from the Philippine Islands in violation of law. Affirmed.

The facts are stated in the opinion.

Mr. J. M. Vale, with Messrs. Marlon Butler and Lional D. Hargis, for plaintiff in error:

To justify the state in interposing its authority in behalf of the public, first, it must appear that the interests of the public generally, as distinguished from those of a particular class, require the interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton v. Steele, 152 U. S. 133-143, 38 L. ed. 385-391, 14 Sup. Ct. Rep. 499.

The effect of the inhibition to export pesos from the Philippine Islands is to legislate the difference in exchange out of the pocket of the owner of the pesos, and into that of the money broker.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 235, 41 L. ed. 984, 17 Sup. Ct. Rep. 581.

Assistant Attorney General Fowler, for defendant in error:

There is nothing in the act prohibiting the exportation of the silver pesos coined by the Philippine government, which is inconsistent with any clause contained in the act of July 1, 1902, and especially with the due process of law clause.

Patterson v. The Eudora, 190 U. S. 169, 174, 176, 47 L. ed. 1002, 1006, 1007, 23 Sup. Ct. Rep. 821; Frisbie v. United States, 157 U. S. 160, 165, 39 L. ed. 657, 658, 15 Sup. Ct. Rep. 586; United States v. Holliday, 3 Wall. 407, 18 L. ed. 182; United States v. 43 Gallons of Whiskey, 93 U. S. 188, 23 L. ed. 846; Buttfield v. Stranahan, 192 U. S. 470, 493, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349.

Mr. Justice Lurton delivered the opinion of the court:

The plaintiff in error has been convicted of the offense of "exporting from the Philippine Islands Philippine silver coin," in violation of Philippine law No. 1411, being §§ 1998 and 1999, Compiled Acts of the Philippine Commission, title 3, chapter 194, Sections 1 and 2 of law No. 1411 read as follows:

"Section 1. The exportation from the Philippine Islands of Philippine silver coins, coined by authority of the act of Congress approved March 2d, 1903 [32 Stat. at L. 952, chap. 980, U. S. Comp. Stat. Supp. 1909, p. 893], or the bullion made by melting or otherwise mutilating such coins, is hereby prohibited, and any of the aforementioned silver coins or bullion which is exported, or of which the exportation is at-

tempted subsequent to the passage of this act, and contrary to its provisions, shall be liable to forfeiture, under due process of law, and one third of the sum or value of the bullion so forfeited shall be payable to the person upon whose information, given to the proper authorities, the seizure of the money or bullion so forfeited is made, and the other two thirds shall be payable to the Philippine government, and accrue to the gold standard fund. Provided, that the prohibition herein contained shall not apply to sums of P. 25 or less, carried by passengers leaving the Philippine Islands.

"Section 2. The exportation or attempt to export Philippine silver coin or bullion made from such coins from the Philippine Islands, contrary to law, is hereby declared to be a criminal offense, punishable, in addition to the forfeiture of the said coins or bullion, as above provided, by a fine not to exceed P. 10,000, or by imprisonment for a period not to exceed one year, or both, in the discretion of the court."

We may pass over the assignments of error which challenge the sufficiency of the evidence to warrant a conviction, inasmuch as it is not contended that there was no evidence. This is a writ of error, and upon such a writ the error to be considered must be confined to error of law.

The substantial question is as to whether a law which prohibits the exportation of Philippine silver coin from the Philippine Islands is a law which deprives the owner of his property in such coins without due process of law, in violation of that prohibition of the organic act of July 1, 1902, which provides that "no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law." 32 Stat. at L. 692, chap. 1369. The authority for the law is found in the act of Congress of July 1, 1902, §§ 76 et seq., 32 Stat. at L. 691, 710, chap. 1369, U. S. Comp. Stat. Supp. 1909, p. 890, which authorizes the Philippine government to establish a mint in the city of Manila for coinage purposes and to enact laws for its operation, and for the striking of certain coins. By the later act of Congress of March 2, 1903 (chap. 980, 32 Stat. at L. 952, U. S. Comp. Stat. Supp. 1909, p. 893), it was provided that the gold peso, consisting of 12.9 grains of gold, nine tenths fine, should be the unit of value in the islands. The second section of that act provided as follows:

"That in addition to the coinage authorized for use in the Philippine Islands by the act of July first, nineteen hundred and two, entitled, 'An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Is-

lands, and for Other Purposes,' the government of the Philippine Islands is authorized to coin to an amount not exceeding seventy-five million pesos, for use in said islands, a silver coin of the denomination of one peso, and of the weight of four hundred and sixteen grains, and the standard of said silver coins shall be such that of one thousand parts, by weight, nine hundred shall be of pure metal and one hundred of alloy, and the alloy shall be of copper."

Section 6 of the same act of March 2, 1903, provided:

"That the coinage authorized by this act shall be subject to the conditions and limitations of the provisions of the act of July first, nineteen hundred and two, entitled, 'An Act Temporarily to Provide for the Administration of the Affairs of Civil Government in the Philippine Islands, and for Other Purposes,' except as herein otherwise provided; and the government of the Philippine Islands may adopt such measures as it may deem proper, not inconsistent with said act of July first, nineteen hundred and two, to maintain the value of the silver Philippine peso at the rate of one gold peso."

In a subsequent part of the same section, the issuance of certificates of indebtedness, bearing interest, was authorized as a specific measure for maintaining the parity between the silver and gold peso.

The law of the Philippine Commission, above set out, under which the conviction of the plaintiff in error was secured, must rest upon the provision of § 6, above set out, as a means of maintaining "the value of the silver peso at the rate of one gold peso." Passing by any consideration of the wisdom of such a law prohibiting the exportation of the Philippine Islands silver pesos as not relevant to the question of power, a substantial reason for such a law is indicated by the fact that the bullion value of such coin in Hong Kong was some 9 per cent greater than its face value. The law was therefore adapted to keep the silver pesos in circulation as a medium of exchange in the islands and at a parity with the gold peso of Philippine mintage.

The power to "coin money and regulate the value thereof, and of foreign coin," is a prerogative of sovereignty and a power exclusively vested in the Congress of the United States. The power which the government of the Philippine Islands has in respect to a local coinage is derived from the express act of Congress. Along with the power to strike gold and silver pesos for local circulation in the islands was granted the power to provide such measures as that government should "deem proper," not inconsistent with the organic law of July 1, 30 L.R.A. (N.S.)

1902, necessary to maintain the parity between the gold and silver pesos. Although the Philippine act cannot, therefore, be said to overstep the wide legislative discretion in respect of measures to preserve a parity between the gold and silver pesos, yet it is said that if the particular measure resorted to be one which operates to deprive the owner of silver pesos of the difference between their bullion and coin value, he has had his property taken from him without compensation, and, in its wider sense, without that due process of law guaranteed by the fundamental act of July, 1902.

Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange. As an incident, government may punish defacement and mutilation, and constitute any such act, when fraudulently done, a misdemeanor. Rev. Stat. §§ 5189, 5459, U. S. Comp. Stat. 1901, pp. 3484, 3684.

However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin. To justify the exercise of such power it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest, and are not an arbitrary interference with private rights of contract or property. The law here in question is plainly within the limits of the police power, and not an arbitrary or unreasonable interference with private rights. If a local coinage was demanded by the general interest of the Philippine Islands, legislation reasonably adequate to maintain such coinage at home as a medium of exchange is not a violation of private right, forbidden by the organic law. Obviously, if the Philippine government had power to prohibit the exportation or melting of Philippine silver pesos, it had the power to make the violation of the prohibition a misdemeanor. The proceedings for the enforcement of the law included the ordinary process in criminal cases lawful in the islands, and not forbidden by the act of July, 1902.

Judgment affirmed.

UNITED STATES SUPREME COURT.

DELIA MOFFITT et al., Plffs. in Err.,
v.

M. J. KELLY, County Treasurer.

(218 U. S. 400, 54 L. ed. 1086, 31 Sup. Ct. Rep. 79.)

Constitutional law — impairing contract obligations — inheritance tax.

1. The enactment of a state statute subjecting to an inheritance tax the rights of a surviving wife in the community property does not violate the contract clause of the Federal Constitution, even if such rights, as they existed when the marriage was celebrated, are contractual, so that they may not be essentially changed or modified by subsequent legislation without impairing contract obligations.

Error to state court — scope of review — statutory construction.

2. Whether or not the rights of a surviving wife in the community property as they existed when the marriage was celebrated were correctly subjected to a state inheritance tax law subsequently enacted cannot be reviewed by the Federal Supreme Court when determining, on writ of error to a state court, the validity of such statute under the contract clause of the Federal Constitution.

Same — question of local law.

3. The nature and character of the rights of the surviving wife in the community property are peculiarly local questions, not open to review by the Federal Supreme Court when determining, on a writ of error to a state court, whether the imposition of an inheritance tax under the state laws denies to the wife the equal protection of the laws.

(November 28, 1910.)

ERROR to the California Supreme Court to review a judgment affirming a judgment of the Superior Court for Alameda County subjecting the rights of a surviving wife in the community property to an inheritance tax. Affirmed.

Statement by Mr. Justice White:

James Moffitt was married in California in the year 1863, and there resided with his wife until his death, on October 25, 1906. He left a large amount of property, all of which formed part of the community which existed between himself and his wife. By a will, duly admitted to probate, Moffitt disposed of all his estate to his wife and chil-

dren in the same proportions as if he had died intestate.

The probate court held that "the interest of the widow in the community property of herself and her deceased husband" was subject to be taxed under a law of California of 1905, which taxed all property passing by will or in case of intestacy from any person who may die seised or possessed of the same. A tax of \$20,684.57 was thereupon assessed as against Mrs. Moffitt's one-half interest in the estate, and an order was entered directing payment of the tax by the executors. An appeal was taken to the supreme court of California. The single question presented by the appeal, as stated in the opinion of the supreme court, was "whether the surviving wife's share of the community property is subject to this inheritance tax." The question was answered in the affirmative. In an opinion denying an application for a rehearing, the court also adversely disposed of the contention that the enforcement of the tax would violate the contract clause or the equal protection and due process clauses of the Constitution of the United States: 153 Cal. 359, 20 L.R.A.(N.S.) 207, 95 Pac. 653, 1025. The case was then brought to this court.

Mr. Warren Olney, for plaintiffs in error:

Community property does not belong solely to the husband.

Warburton v. White, 176 U. S. 484, 44 L. ed. 555, 20 Sup. Ct. Rep. 404; Ballinger, Community Property, §§ 10, 11, 16-18, 74, 87; Panaud v. Jones, 1 Cal. 488; Dye v. Dye, 11 Cal. 169; Beard v. Knox, 5 Cal. 252, 63 Am. Dec. 125; Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538; Scott v. Ward, 13 Cal. 469; Guice v. Lawrence, 2 La. Ann. 226; Dixon v. Dixon, 4 La. 188, 23 Am. Dec. 478; Ord v. de la Guerra, 18 Cal. 67; Payne v. Payne, 18 Cal. 201; Hart v. Robertson, 21 Cal. 346; Fuller v. Ferguson, 26 Cal. 546; Godey v. Godey, 39 Cal. 157; Broad v. Broad, 40 Cal. 493; Broad v. Murray, 44 Cal. 228; Galland v. Galland, 38 Cal. 265.

The right of wife to community property is a vested right, which cannot be disestablished by legislation.

Re Chavez, 80 C. C. A. 451, 149 Fed. 73; Dixon v. Dixon, supra; Marshal's Succession, 118 La. 212, 42 So. 778; Re Wilmerding, 117 Cal. 282, 49 Pac. 181; Re Stanford, 126 Cal. 112, 45 L.R.A. 788, 58 Pac. 462; United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Ren. 1073; McKay, Community Property, §§ 504, 515, 517.

Messrs. Robert A. Waring and Snook

Note. — For a discussion of the question of the liability of community property to succession tax, see note appended to the California supreme court's opinion in this case, 20 L.R.A.(N.S.) 208, affirmed by the above decision.

As to succession tax on dower and curtesy, statutory homestead or allowance, see the note to Re Kennedy, 29 L.R.A.(N.S.) 428.

30 L.R.A.(N.S.)

& Church, with Mr. U. S. Webb, Attorney General, for defendant in error:

During coverture a wife's community interest is not a vested interest, and therefore, upon the death of the husband, is subject to the collateral inheritance tax.

Spreckels v. Spreckels, 116 Cal. 346, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228; Fallbrook Irrig. Dist. v. Abila, 106 Cal. 362, 39 Pac. 794; Packard v. Arellanes, 17 Cal. 539; Van Maren v. Johnson, 15 Cal. 311; Boyer's Succession, 36 La. Ann. 506; Ballinger, Community Property, pp. 29, 36, 328; Panaud v. Jones, 1 Cal. 515; Re Burdick, 112 Cal. 393, 44 Pac. 734; Sharp v. Loupe, 120 Cal. 92, 52 Pac. 134, 586; Cunlia v. Hughes, 122 Cal. 112, 68 Am. St. Rep. 27, 54 Pac. 535. A wife takes her interest in community property by succession, or as an heir. Van Maren v. Johnson, *supra*; Greiner v. Greiner, 58 Cal. 119; Fallbrook Irrig. Dist. v. Abila; Re Burdick; Packard v. Arellanes, *supra*; Sharp v. Loupe, 120 Cal. 93, 52 Pac. 134, 586; Spreckels v. Spreckels, 116 Cal. 342, 36 L.R.A. 497, 58 Am. St. Rep. 170, 48 Pac. 228; Scott v. McNeal, 154 U. S. 49, 38 L. ed. 902, 14 Sup. Ct. Rep. 1108.

Mr. Justice White, delivered the opinion of the court:

While the plaintiffs in error rely on both the contract clause and the equal protection clause of the Constitution, the latter contention is in substance but an incident, and the former is the fundamental proposition counted on to procure a reversal. We come, however, separately to consider the two contentions.

1. *The alleged violation of the contract clause.*—Considered merely subjectively, the contention is that the rights vested in the wife as a partner in the community existing by virtue of the constitution and laws of the state of California governing at the time of the marriage were contractual rights of such a character that they could not be essentially changed or modified by subsequent legislation without impairing the obligations of the contract, and thereby violating the Constitution of the United States. But even although this theoretical proposition be fully conceded, for the sake of the argument, it is apparent that it is here a mere abstraction, and is therefore irrelevant to the case to be decided. We say this because there is no assertion of the giving effect to any law enacted subsequent to the contracting of the marriage which purports to essentially modify the rights of the wife in and to the community, as those rights existed at the time the marriage was celebrated. This is so because the state law the enforcement of which it is asserted will impair the obligation of

the contract is merely a law imposing a tax. It is evident, therefore, when the contention is concretely considered, it involves but a single proposition; that is, that the state of California could not, without violating the Constitution of the United States, impose a tax on the share of the wife in the community property on the occasion of the cessation by the death of the husband of his dominion and control over the common property, and the consequent complete vesting in enjoyment of such share in the wife. But, in every conceivable aspect, this proposition must rest upon one or both of two theories: either that the nature and character of the right or interest were such that the state could not tax it without violating the Constitution of the United States, or that, if it could be generically taxed without violating that instrument, for some particular reason the otherwise valid state power of taxation could not be exerted without violating the Constitution of the United States. The first conception is at once disposed of by saying that it is elementary that the Constitution of the United States does not, generally speaking, control the power of the states to select and classify subjects of taxation, and hence, even although the wife's right in the community property was a vested right which could not be impaired by subsequent legislation, it was nevertheless within the power of the state, without violating the Constitution of the United States, in selecting objects of taxation, to select the vesting in complete possession and enjoyment by wives of their shares in community property, consequent upon the death of their husbands, and the resulting cessation of their power to control the same and enjoy the fruits thereof. And this also disposes of the second conception, since, if the state had the power, so far as the Constitution of the United States was concerned, to select the vesting of such right to possession and enjoyment as a subject of taxation, clearly the mere fact that the wife had a pre-existing right to the property created no exemption from taxation if the selection for taxation would be otherwise legal. It follows, therefore, that the mere statement of the contention demonstrates the mistaken conception upon which, in the nature of things, it rests.

It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the state of California has imposed an inheritance tax upon the share of the wife in the community, and thereby taxed her as an heir to her husband, when, if the laws existing at the time of the celebration of the marriage be properly construed, and be held

to be contractual, she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property was deferred, and arose only on his death. But, for the purpose of enforcing the Constitution of the United States, we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because, in determining whether the imposition of the tax complained of violated the Constitution of the United States, we are solely confined to considering whether the state had the lawful power, without violating the Constitution of the United States, to levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's right of possession and enjoyment, arising upon the death of her husband, was subject to be taxed by the state, so far as the Constitution of the United States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern. To make this, if possible, clearer by an illustration, we say that our view just expressed as to the operation and effect of the Constitution of the United States upon the tax in question would not be in the slightest degree changed, although it were to be hypothetically conceded that, on an analysis of the Constitution and laws of California concerning the community between husband and wife, in force at the time of the marriage of the Moffitts, we should conclude that the nature and character of the rights of the wife in the community property, if correctly interpreted, were such that, on the death of the husband, the share coming to the wife would not be liable to taxation under a taxing law like the one under consideration. This would be the case, because, as there was state power to tax, so far as the Constitution of the United States was concerned, the question whether or not the wife's interest under the circumstances was correctly subjected to the tax was a purely state question, not involving any violation of the Constitution of the United States, and which therefore we have no right to review. The controlling effect of the reasoning which we have just stated was pointed out, and the mistaken conception upon which the contentions of the plaintiffs in error rest was indicated, in *Castillo v. McConico*, 168 U. S. 674, 683, 42 L. ed. 622, 625, 18 Sup. Ct. Rep. 229.
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2. The contention pressed in argument as to the equal protection of the law clause substantially denies the right of the state to impose any tax on the share of the wife in the community property, resulting from the termination of the community by the death of the husband, or in substance assumes that we have the right to review the action of the state court in deciding that the tax law which it enforced was applicable. We say this because the entire argument proceeds upon the contention that, as the share of the wife in the community property was a vested interest during the life of the husband, it could not, on the death of the husband, be taxed differently from any other property,—*viz.*, according to value,—without violating the Constitution of California, and creating an inequality repugnant to the Constitution of the United States. But this merely rests upon the mistaken conception previously disposed of, since the nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question, which we have no power to review.
Affirmed.

IOWA SUPREME COURT.

GEORGE JENKINS

v.

HAWKEYE COMMERCIAL MEN'S ASSOCIATION, Appt.

(— Iowa, —, 124 N. W. 199.)

Pleading — amendment — consent.

1. In the absence of an answer, a petition may be amended without leave.

Venue — transfer — action for insurance.

2. Where, by a statute, an action upon an insurance policy is maintainable in the county where the loss occurred, the insurer

Note. — May death or injury from substance taken internally be deemed to have been caused by external means.

The principal governing the decision in the above case, that death or bodily injury accidentally occasioned by a substance taken internally is caused by external means, is well established, as but one case (as will hereafter appear) can be found which in any manner questions this proposition. In view of this unanimity of opinion, it is sufficient merely to cite the cases enunciating this rule of law, showing parenthetically the means of the death or bodily injury giving rise to the actions. *Bayless v. Travellers' Ins. Co.* 14 Blatchf. 143, Fed. Cas. No. 1,138 (taking larger dose of opium than prescribed); *Miller v. Fidelity & C. Co.* 97 Fed. 836 ("swallowing certain hard, pointed, and resistant substances of food"); *Fidelity & C. Co. v. Loewenstein*, 46 L.R.A. 450, 38 C. C. A. 29, 97 Fed. 17 (unconsciously and unintentionally inhaling illuminating gas while asleep); *Healey v.*

has no right to a transfer of the cause to the county where its principal office is located, although the action might have been brought there in the first instance.

Insurance — accident — external means — blood poisoning.

3. Death from blood poisoning due to perforation of the rectum by a bone, presumably swallowed with food, is caused by external, violent, and accidental means, within the meaning of those terms in an insurance policy.

Appeal — immaterial error — pleadings.

4. Erroneous rulings on the pleadings will not require reversal where, on the merits, judgment was entered for the right party.

Mutual Acci. Asso. 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52, reversing 35 Ill. App. 17 (accidentally drinking "poison"); Metropolitan Acci. Asso. v. Froiland, 161 Ill. 30, 52 Am. St. Rep. 359, 43 N. E. 766, affirming 59 Ill. App. 522 (taking chloral); Mutual Acci. Asso. v. Tuggle, 39 Ill. App. 509, reversed on other grounds in 138 Ill. 428, 28 N. E. 1066 (overdose of laudanum); Travelers' Ins. Co. v. Dunlap, 59 Ill. App. 515, affirmed in 160 Ill. 642, 52 Am. St. Rep. 355, 43 N. E. 765 (taking carbolic acid); Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 673 (overdose of morphine); American Acci. Co. v. Reigart, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191 (food passing into windpipe in attempt to swallow it); Gardner v. United Surety Co. 110 Minn. 291, 26 L.R.A. (N.S.) 1004, 125 N. W. 264 (injection by physician of antitetanus serum into the assured's arm); Dezell v. Fidelity & C. Co. 176 Mo. 253, 75 S. W. 1102 (overdose of morphine); Renn v. Supreme Lodge, K. P. 83 Mo. App. 442 (overdose of morphine); Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, affirming 45 Hun, 313, 10 N. Y. S. R. 306 (inhalation of gas while asleep); Menneiley v. Employer's Liability Assur. Corp. 148 N. Y. 596, 31 L.R.A. 686, 51 Am. St. Rep. 716, 43 N. E. 54, reversing 72 Hun, 477, 25 N. Y. Supp. 230 ("accidentally and involuntarily breathing" illuminating gas while asleep); Bailey v. Interstate Casualty Co. 8 App. Div. 127, 40 N. Y. Supp. 513, affirmed without opinion in 158 N. Y. 723, 53 N. E. 1123 (injection of morphine into his leg by assured himself, a physician); Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871 (inhalation of deadly gas in a well into which the assured descended).

Upon the same principle, in Driskell v. United States Health & Acci. Ins. Co. 117 Mo. App. 362, 93 S. W. 880, the court declared that the death of the assured, resulting from the chance injection of scalding water into his ear, was "certainly" accidental, violent, and external.

And in McClother v. Provident Mut. Acci. Co. 32 C. C. A. 318, 60 U. S. App. 705, 89 30 L.R.A. (N.S.)

Same — notice — sufficiency.

5. A requirement of an accident insurance policy that claimant must give affirmative proof in writing of the death, and of its being the proximate result of external and accidental means, is satisfied if the beneficiary makes a prima facie showing that the death had occurred, and had resulted from the causes stated.

(January 11, 1910.)

APPPEAL by defendant from a decree of the District Court for Dubuque County in plaintiff's favor in a suit to require defendant to levy certain assessments, and to pay the amount thereof on a certain benefit certificate. Affirmed.

Fed. 685, in which it appeared that the death of the assured in an accident policy resulted from poison taken under the mistaken belief that it was a harmless medicine, it was stated that such death was an accident, and there could be a recovery upon the policy had it not been for the exception of death from poison, contained therein.

It will be noticed that the liability of an insurer in an accident policy for injuries resulting from substances taken internally is not within the scope of this note, except so far as it turns upon the specific question whether or not such means are external. Attention, however, may be called to the following cases, in which recovery was allowed for death caused by the inhaling of illuminating gas while asleep, under policies insuring against death through external, violent, and accidental means, though the question here discussed was not raised: Lowenstein v. Fidelity & C. Co. 88 Fed. 474; Fidelity & C. Co. v. Waterman, 161 Ill. 632, 32 L.R.A. 654, 44 N. E. 283; Travelers' Ins. Co. v. Avers, 217 Ill. 390, 2 L.R.A. (N.S.) 168, 75 N. E. 506, affirming 119 Ill. App. 402; United States Mut. Acci. Asso. v. Newman, 84 Va. 52, 3 S. E. 805.

Nor was this question discussed in Modern Woodmen v. Lawson, 110 Va. 81, 135 Am. St. Rep. 927, 65 S. E. 509, in which recovery was allowed under an accident policy for death occasioned by drinking wood alcohol by mistake for grain alcohol.

The only case to question the principle of law established by the foregoing cases is Hill v. Hartford Acci. Ins. Co. 22 Hun. 187, in which it was held that death resulting from the drinking of a poisonous mixture by mistake for water was not effected through external, violent, and accidental means, within the meaning of an accident policy; but this decision is no longer of any authority whatever, since it was specifically disapproved in Paul v. Travelers' Ins. Co. supra.

As to liability on accident policy for sickness or death caused by blood poisoning, see note to Cary v. Preferred Acci. Ins. Co. 5 L.R.A. (N.S.) 926.

As to liability under accident policy for death or injury caused by medical treatment, see note to Gardner v. United Surety Co. 26 L.R.A. (N.S.) 1004, J. A. C.

Statement by Ladd, J.:

Action in equity to require defendant to levy an assessment on its members and pay the proceeds thereof to plaintiff, as beneficiary named in a certificate of insurance. Decree was entered as prayed. The defendant appeals.

Messrs. Bradford & Johnson for appellant.

Messrs. Hurd, Lenahan, & Kiesel for appellee.

Ladd, J., delivered the opinion of the court:

On August 20, 1906, George Jenkins became a member of the Hawkeye Commercial Men's Association. This entitled him, in event of being injured "through external violent, and accidental means," to certain specified benefits. If the bodily injuries so received "resulted in death within twenty-six weeks from said accident, the beneficiary named in his application for membership, or his heirs, if no beneficiary is named therein, shall be paid the proceeds of one assessment of \$2 upon each member in good standing, but in no case shall such payment exceed the sum of \$5,000." He died August 26, 1907, and the defendant having refused to levy an assessment or make any provision for the payment of the indemnity, this action to enforce compliance with the articles and by-laws of the association was begun in the district court of Dubuque county, April 22, 1908. As no answer had been filed, the plaintiff had the right to amend his petition without leave; and having done so, the court rightly considered the petition as amended in passing on the motion for change of venue. *Kay v. Pruden*, 101 Iowa, 60, 69 N. W. 1137. And as the loss occurred in Dubuque county, the action was maintainable there, and the application to transfer the cause to Marshall county, the location of defendant's main office, was rightly overruled. See § 3499, Code; *Prader v. National Acci. Asso.* 95 Iowa, 149, 63 N. W. 601; *Matt v. Iowa Mut. Aid Asso.* 81 Iowa, 135, 25 Am. St. Rep. 483, 46 N. W. 857. See *Grimes v. Northwestern Legion of Honor*, 97 Iowa, 315, 64 N. W. 806, 66 N. W. 183.

2. The assured was sixty-one years of age, and in good health. He first complained of a severe pain in the rectum at about 7 o'clock in the morning of April 22, 1906, when at his son's residence in Chicago, Illinois, saying that something must have lodged there. He cleansed his hand, and, putting vaseline on his finger, inserted it in the rectum and withdrew therefrom the rib of a fish, 1½ inches in length, and as large as a darning needle, tapering toward the end. Upon extracting his finger, it and the bone were bloody. He was a

traveling passenger agent, and left on business about an hour later, though still complaining of pain, which his appearance indicated. He reached Dubuque the following day, and, on examination, Dr. Greene discovered a laceration of about three eighths of an inch in length inside of the rectum, and through the mucous membrane. Dropping a bit of absorbent cotton in a solution of equal parts of chloride hydrate, tincture of iodine, and carbolic acid, he touched the wound with it, and advised the patient that he saw no cause for apprehension of serious danger, but that he should not move about more than necessary. Deceased returned the next day, complained that he had been obliged to attend to some business, was suffering pain, and asked for something to relieve him. This was given, with directions, and with advice to remain at home. The day following, the physician found him in a high fever, unable to pass urine, with the parts surrounding the anus swollen, and suffering great pain. Two days later Dr. Lewis was called in consultation, and both physicians testified on the trial that death resulted from blood poisoning due to infection from the fish bone or deceased's finger in removing it. Conceding the facts to be as recited, defendants contends that they do not show death to have been the result "of external, violent, and accidental means." It is to be kept in mind that the means, not the injury, must have been of the nature stated.

In *Healy v. Mutual Acci. Asso.* 133 Ill. 556, 9 L.R.A. 371, 23 Am. St. Rep. 637, 25 N. E. 52, death by poison accidentally taken was held to be by violent and external means, and a like conclusion was reached in *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347, where the assured died from the accidental inhalation of illuminating gas. In *American Acci. Co. v. Reigart*, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191, while the assured was eating, a piece of meat lodged in the wind pipe, causing death, and this was held to be through violent and external means. In *Maryland Casualty Co. v. Hudgins* (Tex. Civ. App.) 72 S. W. 1047, the assured ate two raw oysters before discovering they were unsound, and his death was caused by these lodging in the upper part of the intestines, inflaming the mucous membrane, and causing the same to enlarge and obstruct the passage. The eating was held to be accidental, the court quoting with approval from 1 Cyc. Law & Proc. p. 249: "Where, however, the effect is not the natural and probable consequence of the means which produce it,—an effect which does not ordinarily follow, and cannot be reasonably anticipated from the use of the means, or an

effect which the actor did not intend to produce, and which he cannot be charged with a design of producing,—it is produced by accidental means.” See definitions collected in *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683. In *Miller v. Fidelity & C. Co.* (C. C.) 97 Fed. 836, the assured swallowed “certain hard, pointed, and resistant substances of wood,” which so perforated the intestinal canal, the tissue of which had been weakened by illness, as to cause death; and the court declared these “to have been external, violent, and accidental means, for they originated outside of the body, and were accidentally violent, although the accidental effect took place within. The insurance is not, by the first clause quoted, limited to an external effect, nor to one beginning at the surface. The accidental operation of external means may be wholly internal.” These decisions and others which might be cited are sufficient warrant for a like decision in the case at bar. They proceed on the theory that the design of this provision of the policy is to guard the insurer against a liability upon a fraudulent claim of the insured for indemnity for bodily injuries of which the only evidence might be the word of the person, and that, as the terms of the policy are to be construed most strongly against the insurer, the means coming from outside the body, though the injury be internal, should be regarded as external. There was no evidence of how the fish bone came to be in the rectum, and therefore it is presumed that it reached there in the ordinary course of nature as other excretions, through the alimentary canal. If it was likely to cause injury, then, as the assured is presumed to have given heed to the instincts of self-preservation, it is not to be inferred that he swallowed the bone voluntarily. See *Stephenson v. Bankers' Life Asso.* 108 Iowa, 641, 79 N. W. 459; *Tackman v. Brotherhood of American Yeoman*, 132 Iowa, 64, 8 L.R.A.(N.S.) 974, 106 N. W. 350. But, regardless, of whether, in eating fish, he may have carelessly swallowed the bone and all, it is to be said that indigestible materials ordinarily pass out of the system without injury or inconvenience. That this bone caught in the rectum and inflicted the wound was so out of the ordinary course of things as to constitute an accident. The effect was one which does not ordinarily follow, could not reasonably have been anticipated, and cannot be charged to have resulted from design. Manifestly, then, it was within the well-recognized definitions of accident. Nor is this conclusion obviated by the circumstance that death resulted from septicemia, or blood poisoning. Without the accidental 30 L.R.A.(N.S.)

wound by the fish bone, blood poisoning would not have ensued, and therefore that disease was incidental to the wound. *Central Acci. Ins. Co. v. Rembe*, 220 Ill. 151, 5 L.R.A.(N.S.) 933, 110 Am. St. Rep. 235, 77 N. E. 123, 5 A. & E. Ann. Cas. 155; *Martin v. Manufacturers' Acci. Indemnity Co.* 151 N. Y. 94, 45 N. E. 379; *Western Commercial Travelers' Asso. v. Smith*, 29 C. A. 223, 56 U. S. App. 393, 85 Fed. 401; *Ætna L. Ins. Co. v. Fitzgerald*, 165 Ind. 317, 1 L.R.A.(N.S.) 422, 112 Am. St. Rep. 232, 75 N. E. 262, 6 A. & E. Ann. Cas. 551; *Cary v. Preferred Acci. Ins. Co.* 127 Wis. 67, 5 L.R.A.(N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 A. & E. Ann. Cas. 484.

3. Our conclusion on the merits of the case obviates the necessity of reviewing the rulings on the motion to strike portions of the answer, and on the demurrer to other portions thereof; for, were any of these found to be erroneous, they could not have been prejudicial. That the notice and proofs of loss were furnished in time appears from *Connell v. Iowa State Traveling Men's Asso.* 139 Iowa, 444, 116 N. W. 820, and the affidavits furnished defendant constituted affirmative proof in writing of the death, and of its being the proximate result of external and accidental means.” By affirmative proof is meant such evidence of the truth of the matters asserted as tends to establish them, and this regardless of the character of the evidence offered. The clause exacting such proof as a condition precedent merely required the matters mentioned to be shown affirmatively; that is, that the beneficiary make a *prima facie* showing that death had occurred and had resulted as stated. This was done.

Affirmed.

Petition for rehearing denied.

IOWA SUPREME COURT.

J. J. SMITH LUMBER COMPANY, Appt.,

v.

SCOTT COUNTY GARBAGE REDUCING & FUEL COMPANY et al.

STROHBEHN & PICKLUM, Interveners, Appts.

MUELLER LUMBER COMPANY,
Garnishee.

(— Iowa, —, 128 N. W. 389.)

Garnishment — failure to notify principal — effect on garnishee.

1. Failure to give notice of a garnishment proceeding to the principal does not entitle the garnishee to a discharge or dismissal of the proceeding, under a statute providing that no judgment shall be entered against the garnishee until notice has been given to the principal defendant.

Sale — rescission — insolvency of buyer.

2. Mere insolvency of the buyer at the time of a sale of chattels is not ground for rescission on the part of the seller.

Set-off — purchase price — garnishment.

3. One who, after selling chattels to an insolvent, seizes and sells them to another, may, upon being garnished for their value by a judgment creditor of the buyer, set off against the claim his account against the buyer for the unpaid purchase price.

(November 17, 1910.)

APPEAL by the plaintiff and interveners from an order of the District Court for Scott County, discharging the garnishee in a garnishment proceeding in which the Mueller Lumber Co. was garnished on a judgment held by plaintiff against the Scott County Garbage Reducing & Fuel Co. et al. Affirmed.

The facts are stated in the opinion.

Messrs. Helmick & Boudinot, William Theophilus, and Henry Thuenen, for appellants:

The title to the lumber sold and delivered to the principal defendant by the garnishee passed to such principal defendant, and the garnishee had no further right to it or claim upon it.

Warder v. Hoover, 51 Iowa, 491, 1 N. W. 795; Franklin Sugar Ref. Co. v. Collier, 89 Iowa, 69, 56 N. W. 279; Bentley v. Snyder, 101 Iowa, 8, 69 N. W. 1023; Kramer v. Messner, 101 Iowa, 88, 69 N. W. 1142.

Creditors may follow property or its value in the hands of third parties.

Risser & Co. v. Rathburn, 71 Iowa, 113, 32 N. W. 198; Thomas v. McDonald, 102 Iowa, 564, 71 N. W. 572.

The liability of a garnishee to the execution creditor may be greater than his liability to the principal defendant.

Kenosha Stove Co. v. Shedd, 82 Iowa, 540, 48 N. W. 933; Citizens' State Bank v. Council Bluffs Fuel Co. 89 Iowa, 618, 57 N. W. 444; Thomas v. McDonald, supra; Jordan v. Crickett, 123 Iowa, 576, 99 N. W. 163; Swett v. Brown, 5 Pick. 178; Allen v. Hall, 5 Met. 263.

Note. — Right of one garnished in respect of property wrongfully taken from the debtor, to set off his own claim against the latter.

Aside from J. J. SMITH LUMBER CO. v. SCOTT COUNTY GARBAGE REDUCING & FUEL CO., the only case found upon this question is Allen v. Hall, 5 Met. 263, which is sufficiently set out in the former. Cases where the wrongful possession of the property was obtained by the garnishee by a conveyance, fraudulent as against other creditors, involve distinctive questions, and have not been included, since they would be of little or no value in determining the question here under discussion. G. J. C.

30 L.R.A. (N.S.)

Mr. Alfred C. Mueller, for Mueller Lumber Company, appellee:

The court has no jurisdiction over the subject-matter of this cause of action, as the record fails to show that any notice of garnishment proceedings was served upon the principal defendant.

Code of Iowa, Supplement, § 3947; Diltz v. Chambers, 2 G. Greene, 479; Hodges v. Hodges, 6 Iowa, 78, 71 Am. Dec. 388; Hakes v. Shupe, 27 Iowa, 465; Williams v. Williams, 61 Iowa, 612, 16 N. W. 718; Wise v. Rothschild, 67 Iowa, 84, 24 N. W. 603; Schaller v. Marker, 136 Iowa, 575, 114 N. W. 43.

The plaintiff in garnishment proceedings stands in the shoes of the original defendant, and the garnishee is not to be placed in a worse condition than if the defendant himself were enforcing his claim.

Smith v. Clarke, 9 Iowa, 244; Thomas v. Hillhouse, 17 Iowa, 67; Fairfield v. McNary, 37 Iowa, 75; Des Moines Cotton Mill Co. v. Cooper, 93 Iowa, 654, 61 N. W. 1084; Streeter v. Gleason, 120 Iowa, 703, 95 N. W. 242.

Deemer, Ch. J., delivered the opinion of the court:

Plaintiff and interveners obtained their several judgments against the defendants the Scott County Garbage Reducing & Fuel Company on September 15, 1908. On the same day executions were issued which were levied immediately by garnishing the Mueller Lumber Company. The garnishee appeared and denied all liability. Issue was taken upon such denial, a jury waived, and the case tried to the court upon the following agreed statement of facts: "The parties admit that the garnishee sold and delivered to the Scott County Garbage Reducing & Fuel Company lumber to the amount of \$806.03, which lumber was received and accepted by said garbage company on July 20, 1906; that thereafter, on July 28, 1906, said garnishee, Mueller Lumber Company, went upon the property of said defendant garbage company, and hauled away lumber formerly by it delivered, lumber to the amount of \$678.34, without the consent or permission or knowledge of the defendant garbage company, and without any legal process, and the account of the said garbage company was credited to that amount. Said lumber has since been commingled with other lumber and sold by the Mueller Lumber Company, and been converted by the Mueller Lumber Company to its own use. It is further stipulated that there has been ordered in this cause heretofore that the sheriff collect all the assets of said defendant garbage company, and that the same be applied in the order as provided in said decree, of record page 505, in Record 47. It

is further agreed that the said decree of distribution of assets that may be collected may be modified in that \$30 of Strohbehn & Picklum shall take precedence of Smith Lumber Company. That at the time the Mueller Lumber Company hauled away said lumber, the Scott County Garbage Reducing & Fuel Company, the principal defendant in said case, was insolvent, and such taking and appropriation of the said lumber was never ratified by the said garbage company."

The trial resulted in an order finding no indebtedness from the garnishee to the principal debtor, dismissing the garnishment, and discharging the garnishee. We are asked on this record to reverse the judgment on the theory that, according to the agreed statement of facts, garnishee was a wrongdoer in taking the property of the principal debtor, and that it either holds the property so taken, or the proceeds thereof, for the principal debtor, and that it cannot offset its claim for the purchase price against its liability to the principal debtor in this proceeding, but, being a wrongdoer, must respond to the judgment creditor. Appellee disputes this proposition, claims that the garnishee has the right to rescind the sale of the goods to the principal debtor on the ground of fraud; that it did rescind, and is entitled to hold the goods and the proceeds. It also says that, in any event, as the principal debtor is also indebted to it in a larger sum than the value of the property taken, plaintiff and intervenor acquired nothing by their garnishment. It further claims that no notice has been served upon the principal debtor, and that for this reason neither the district nor this court has any jurisdiction of the garnishment proceedings.

1. We shall first dispose of the jurisdictional question. Section 3947 of the Code Supplement of 1907, provides that no judgment shall be entered in the garnishment proceedings "until the principal defendant shall have had ten days' notice of the garnishment proceedings." Under this provision it is clear, of course, that without notice to the principal defendant no judgment can be entered against the garnishee; but it is equally clear, we think, that lack of such notice is no reason for discharging the garnishee or dismissing the proceedings. In other words, the notice is not jurisdictional in the sense that the proceedings are void, or nugatory until such notice is given. The garnishee cannot ordinarily obtain a discharge because no notice is given to the principal defendant. He may insist, however, that no judgment can properly be rendered against him until such notice is given. This proposition does not seem to have been raised in the district court, and there is really nothing in the record to

show whether or not such notice was given. None of the cases relied upon by appellee upon this proposition are in point. See *Schaller v. Marker*, 136 Iowa, 575, 114 N. W. 43. As supporting our conclusion, see *Iowa Business Men's Bldg. & L. Asso. v. Fitch*, 142 Iowa, 329, 120 N. W. 694.

2. The general rule as to garnishment is that the plaintiff in garnishment stands in the shoes of the original defendant, and that he can have no greater rights than the judgment defendant, and the garnishee is not to be placed in any worse condition than if the defendant himself were enforcing his claim. *Streeter v. Gleason*, 120 Iowa, 703, 95 N. W. 242; *Des Moines Cotton Mill Co. v. Cooper*, 93 Iowa, 654, 61 N. W. 1084; *Smith v. Clarke*, 9 Iowa, 244, and cases cited. To this general rule there are some exceptions, as *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540, 48 N. W. 933; *Citizens' State Bank v. Council Bluffs Fuel Co.* 89 Iowa, 618, 57 N. W. 444; *Thomas v. McDonald*, 102 Iowa, 564, 71 N. W. 572; *Jordan v. Crickett*, 123 Iowa, 576, 99 N. W. 163. In the *Citizens' State Bank Case*, supra, it is said: "Now, while it is the general rule that the garnishee's liability to the defendant is the measure of his liability to a creditor of the defendant, yet such rule is by no means universal. The law is that, when the garnishee holds property of the defendant under a fraudulent transfer or arrangement, the right of the plaintiff to hold the garnishee liable is not limited to the defendant's right against the garnishee." In the *Kenosha Stove Case*, supra, the court used this language: "As between Shedd, Billings, and Bixby, they could not allege that the transaction was fraudulent, and Shedd cannot shield himself from liability by pleading his own fraud. He would not be permitted to hold property on the ground that he committed larceny to acquire it; nor will he be permitted to escape liability in this case on the ground of his fraudulent acts in concert with Billings and Bixby." And in the *Thomas Case*, supra, we said: "She [garnishee] received the money, his property, ostensibly to satisfy the judgment; and the law will not permit him to recover anything she may have received in carrying out their common design to cheat his creditors. But the creditors may follow his property,—and money is property, even when in the hands of third parties,—and insist upon its proper application to the satisfaction of his debts."

Appellants rely chiefly, however, upon a rule announced in *Allen v. Hall*, 5 Met. 263. In that case "A attached the goods of B, his debtor, and caused them to be sold at auction on the writ, without conforming to the provisions of . . .

[the law], and himself became the pur-

chaser of the goods, and took them into his possession. Held, in a process of foreign attachment [garnishment] in which A was summoned as trustee [garnishee] of B, that he could not set off the debt due to him from B against the value of said goods, but that he was chargeable as trustee [garnishee] of B to the amount of the value of the goods." Chief Justice Shaw wrote the opinion in that case, and, among other things, said:

"The great question, then, the only question, is whether he owes the principal debt or anything; and, if it appears that he does, he is held liable to pay it to his creditor's creditor, instead of paying it to the creditor himself. It is unnecessary here to consider the various questions which may arise, as to the nature of such debts, whether absolute, or contingent, and the nature of such contingency; whether, if uncertain at the time, it can be made certain at a future time, by sales, collections of money, or other proceedings, showing that, in point of fact, the trustee was a debtor to the principal at the time of the attachment. In such cases, although the facts are subsequently disclosed, and the accounts subsequently adjusted, in order to charge the trustee, the result must show that the trustee was a debtor to the principal at the time of the attachment. This distinction between the two classes of cases will go far to show in what cases the trustee may or may not set off such claims as he may have against the principal debtor, and to reconcile what may, without discrimination, be deemed to be conflicting authorities. On the provision in which the trustee is charged as a debtor, it is very obvious that, as he is a mere third party, called in to pay his debt in a manner different from that in which he was bound to pay it, and in which his own rights are not drawn into controversy, he ought not to be placed in a worse situation than he would be if he were called to make the settlement with his creditor. The balance only, after all just allowances, is the sum for which he ought to be held. He shall therefore have the benefit of a set-off, legal or equitable, in his own right, or in the right of those with whom he is privy, and in whose favor the debt claimed to be due from the trustee could, in his hands, be made available by way of set-off in any of the modes provided by law. *Hathaway v. Russell*, 16 Mass. 473; *Picquet v. Swan*, 4 Mason, 443, Fed. Cas. No. 11,133.

"But where the trustee has goods in his custody, the property of the principal defendant, and in their nature liable to be attached by the process of law, the question whether the trustee has any right to set off claims of his own must depend upon the fact whether he has any lien, legal or 30 L.R.A. (N.S.)

equitable, upon such goods, or any right, as against the owner, as whose property they are attached, by contract, by custom, or otherwise, to hold the goods, or to retain the possession of them, in security of some debt or claim of his own. If the party who is summoned as trustee has a mere naked possession of the goods, without any special property or lien; if the principal debtor is the owner and has a present right of possession, so that he might lawfully take them out of the custody, or authorize another to take them out of the custody, of the present holder,—they would be liable to be attached as the property of the general owner, by an officer, under the common process of attachment, if he could have access to them, and no right of the trustee would be violated. But if the officer cannot have access to the goods, so as to take them into custody, if they are secreted by the trustee, or if the trustee sets up pretended claims and rights of possession, so that the creditor and officer cannot safely take them out of the custody of the trustee and require the answer and disclosure of the trustee, as to the grounds of his claim to the property or possession, then he may be summoned as trustee; and if it shall subsequently appear, on his disclosures, that he had only such naked possession, without any lien or right of possession, then the goods stand charged in his hands, till judgment and execution; and he has no greater right to charge these goods with a debt of his own, by way of set-off, than he would have had if the goods had been taken into custody by the officer at the time of the attachment. This, we think, is the result of the laws on this subject. *Allen v. Megguire*, 15 Mass. 490; *Swett v. Brown*, 5 Pick. 178; *Brewer v. Pitkin*, 11 Pick. 298. . . .

"The respondent obtained the bare custody of the goods, without lawful possession or right of possession. If the respondent could have the goods in security of his original debt against Tufts, or set off that debt, under this process, he would in effect get possession of his debtor's goods, under color of legal process, without conforming to the requisitions of law, and thus avail himself of such unauthorized possession to the same extent as if he had taken and sold the goods on execution, in conformity to law,—which he cannot do."

The distinction pointed out by the learned Chief Justice is clear and should be preserved in the instant case. The agreed statement of facts is meager as to many of the vital propositions. It does, however, negative any thought of fraud in the relations between the judgment debtor and the garnishee. That is to say, there is no showing, either directly or indirectly, by inference, that in what was done between them there

was any purpose to cheat or defraud creditors of the judgment defendant. It appears that the garnishee attempted on its motion to rescind the sale of its lumber to the judgment defendant because of the insolvency and fraud of the purchaser. But it does not appear, except by inference, that the purchaser was insolvent when the goods were sold. The sale was made July 20, 1906, and the attempt at rescission was made on the 28th of the same month. The judgment defendant did not consent to the rescission, and never ratified the same. Now, it may be that the claimed rescission was so close to the time of sale that insolvency of the purchaser at the time of sale would be inferred; but mere insolvency of the buyer at the time of sale is not ground for rescission. *Houghtaling v. Hills*, 59 Iowa, 287, 13 N. W. 305; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573, 42 Am. Rep. 53, 10 N. W. 900; *American Exp. Co. v. Smith*, 57 Iowa, 242, 10 N. W. 655; *Franklin Sugar Ref. Co. v. Collier*, 89 Iowa, 69, 56 N. W. 279. If coupled with an intent on the part of the purchaser never to pay for the goods, or if the natural and probable result of his act is to defraud the seller, then rescission may be had. *P. Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. 316; *Deere v. Morgan*, 114 Iowa, 287, 86 N. W. 271; *Phelps D. & P. Co. v. Samson*, 113 Iowa, 145, 84 N. W. 1051; *Seeley v. Seeley-Howe-Le Van Co.* 130 Iowa, 626, 114 Am. St. Rep. 452, 105 N. W. 380; *Starr Bros. v. Stevenson*, 91 Iowa, 684, 60 N. W. 217.

We do not think that the record shows sufficient ground for a rescission of the sale as between the garnishee and the judgment defendant, and, if the garnishee still held the goods, we should have no doubt of the right of plaintiff to charge the garnishee with the goods or their value. But it appears that the garnishee took the goods on July 28, 1906, credited the value thereof to the account of the judgment debtor, commingled the lumber with other goods, and sold and converted the same to its own use. The garnishments in question were run more than two years after the alleged conversion. If the garnishment had not been run, and the judgment debtor had attempted to enforce its claim against the garnishee, it would have brought an action of tort for the conversion of the goods, or, waiving the tort, might have brought action on an implied promise to pay for the same. The goods themselves had been disposed of, and the judgment debtor could not have brought either an action of replevin or of detinue for the recovery of the same. Both the latter actions are for the recovery of personal chattels *in specie*. In the action of replevin, and doubtless in det-

inue, the defendant in the action cannot interpose a counterclaim. See Code 1897, § 4164. The reason for this is that it would allow a creditor to forcibly seize the property of his debtor without process, and then plead the indebtedness as an offset to an action to recover it back. *Palmer v. Palmer*, 90 Iowa, 17, 57 N. W. 645. But one cannot maintain an action of replevin where he shows an actual conversion of the property. *Woodling v. Mitchell*, 127 Iowa, 262, 103 N. W. 115. Here the agreed statement of facts shows an actual conversion by the garnishee, and that neither the action of replevin nor detinue could have been brought against the garnishee for the recovery of the specific goods. In an action brought for the value of the goods, as in conversion, or upon an implied promise to pay the value thereof, the garnishee, as defendant, might have pleaded by way of set-off its account against the judgment defendant, had he been the plaintiff in the action. Code 1897, § 3570, and cases cited in annotations. As further supporting these views, see *Laughlin v. Main*, 63 Iowa, 580, 19 N. W. 673; *Porter v. Dalhoff*, 59 Iowa, 459, 13 N. W. 420.

One other thought in this connection is quite conclusive of plaintiff's rights. In order to charge the garnishee, he must either have actual possession of the judgment debtor's property, or be indebted to the judgment defendant at the time the note of garnishment is served. Code, §§ 3897, 3935; *Smalley v. Miller*, 71 Iowa, 90, 32 N. W. 187.

It conclusively appears that the garnishee in this case did not have actual possession of the property, and it could only be charged as a debtor of the judgment defendant. If sought to be so charged, the garnishee might interpose its account against the judgment debtor as a set-off or a counterclaim, and, granted that it could do this, it may do the same when it is sought to be held as garnishee. These conclusions render it unnecessary to determine whether a tortfeasor is subject to garnishment; for, conceding that he is, under our liberal provisions as to counterclaim, he could, had he been sued by the judgment debtor, have interposed a counterclaim for the amount owing him by the judgment debtor. Nothing herein decided runs counter to the views expressed by Justice Shaw in the case heretofore cited. In that case the garnishee held actual possession of the property which he had taken wrongfully, and he was unable to show any lien upon the goods. Moreover, in an action for the recovery of the goods, he could not have interposed his account as a counterclaim. So much depends upon the statutes of a given state that cases from other juris-

dictions are of little help. The general rule regarding set-off or counterclaim is stated in Shinn on Attachment & Garnishment, § 624, as follows: "The policy of the law is that the garnishee, being an indifferent and sometimes an unwilling party to the litigation between the plaintiff and defendant, shall not be disturbed in his rights. As above stated, he is permitted to interpose all the defenses which he can show against the claim of the principal defendant. The one which he most frequently desires to interpose is a claim of set-off. After much litigation upon the subject, it is now a well-established rule that the garnishee will be allowed to claim in his answer and retain for himself any demand . . . allowed, either by the common law or by statute, had the action been brought by the principal defendant himself, or if the proceedings had been wholly between the principal defendant and himself. . . . The demands which he may deduct from his liability to the defendant are not confined to matters which are technically termed 'set-off.' He is further entitled to show and retain whatever he might have demanded of the defendant by way of 'recoupment' or any like defense arising upon their contract relation, even though it be a penalty arising upon a stipulation in such contract."

These statements are well fortified by the authorities cited in support of the text, among them: Clinton Nat. Bank v. Studemann, 74 Iowa, 104, 37 N. W. 112. See also Drake, Attachm. 7th ed. §§ 689a, 690.

With the distinction in mind between cases where a garnishee has the actual possession of the property of the judgment debtor, and cases where he is sought to be charged as a debtor of the judgment defendant, the case now in hand is not difficult of solution.

The trial court was right in dismissing the writ and discharging the garnishee, and the judgment must be, and it is, affirmed.

MAINE SUPREME JUDICIAL COURT.

SOPHIA E. RODERICK

v.

PARKER M. SANBORN.

(106 Me. 159, 76 Atl. 263.)

Fixtures — storm shutters — mortgage.

Storm doors and windows made to fit a house and fastened in place by screws are fixtures which will pass with a mortgage and subsequent deed to the mortgagee, although during certain periods of the year 30 L.R.A. (N.S.)

they are removed from their places and stored on the premises.

(November 26, 1909.)

REPORT by the Supreme Judicial Court for Franklin County for the opinion of the full bench of an action brought to recover the value of certain storm doors and windows which were alleged to have been converted by defendant. Judgment for defendant.

The facts are stated in the opinion.

Mr. Enoch O. Greenleaf, for plaintiff:

In order to render chattels incident to the real estate and make them fixtures, actual annexation to the freehold, and an adaptation to its purposes, must both unite.

Despatch Line v. Bellamy Mfg. Co. 12 N. H. 205, 37 Am. Dec. 203; Lathrop v. Blake, 23 N. H. 46.

To constitute a fixture, there must be not only an actual annexation to the realty, but it must be the intention of the party to make it a permanent accession to the freehold.

Thompson v. Smith, 111 Iowa, 718. 50

Note. — Storm doors and windows and screens as fixtures.

In Harrison v. Smith, 19 N. S. 516, double windows put in place by a tenant, and screwed on, were held to have become part of the realty, and damages were allowed the owner for their removal by the tenant's successor claiming under a bill of sale.

What appears to be the only other case as to storm windows differs in its conclusion, but the conflict is to be accounted for probably in the difference as to the manner of annexation. Thus, in Peck v. Batchelder, 40 Vt. 233, 94 Am. Dec. 392, the question arose between vendor and vendee as to whether certain double windows passed upon a sale of the house to which they belonged. The windows were made for the house, fitted to its window casings, and set in place, where they remained for a short time, but they were never nailed or fastened in, and no preparations had been made to fasten them to the house, the original frames and casings not having been constructed for double windows. The decision in favor of the vendor was upon the ground that the very manner in which the windows were put in and temporarily used negatived any intention that they should become a part of the realty.

The question as to storm doors and windows seems quite closely analogous to that with respect to screen doors and windows. Upon this question there is some conflict of authority, due perhaps to some extent to differences in the facts.

Window screens used in summer residences during the summer have been held fixtures as between mortgagee of realty and purchaser of personality. Cunningham v.

L.R.A. 780, 82 Am. St. Rep. 541, 83 N. W. 789; Fuller-Warren Co. v. Harter, 110 Wis. 80, 53 L.R.A. 603, 84 Am. St. Rep. 867, 85 N. W. 698; Kimball v. Grand Lodge, 131 Mass. 59; McFarlane v. Foley, 27 Ind. App. 484, 87 Am. St. Rep. 264, 60 N. E. 357; Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa, 57, 24 Am. Rep. 719; Atchison, T. & S. F. R. Co. v. Morgan, 42 Kan. 23, 4 L.R.A. 284, 16 Am. St. Rep. 471, 21 Pac. 809.

The fact that plaintiff had used the windows on the house is of no consequence, for it makes no difference whether they were ever on the house, if they were not so at time of sale.

Peck v. Batchelder, 40 Vt. 233, 94 Am. Dec. 392; Gray v. Holdship, 17 Am. Dec. 688, note.

Mr. George W. Gower, for defendant: There can be no severance unless by the owner of the fee.

Gray v. Holdship, 17 Serg. & R. 413, 17 Am. Dec. 680; Shep. Touch. 90.

It is not necessary that a thing be constantly affixed to realty.

Gray v. Holdship, 17 Am. Dec. 694, note; Bishop v. Bishop, 11 N. Y. 125, 62 Am. Dec. 68; Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201.

The circumstances, object, mode, etc., must be considered.

5 Enc. Ev. p. 756; Hopewell Mills v. Taunton Sav. Bank, 150 Mass. 519, 6 L.R.A. 249, 15 Am. St. Rep. 235, 23 N. E. 327;

Seaboard Realty Co. 67 N. J. Eq. 210, 58 Atl. 819.

And "mosquito transoms" and window screens, each being fitted to its particular window and shoved up and down on grooves, have been held to be fixtures passing with the sale of a hotel. Fratt v. Whittier, 58 Cal. 132, 41 Am. Rep. 251.

So, window and door screens manufactured for a particular house, though not physically attached or screwed, but simply fastened by buttons, have been held "appurtenances," within a statute giving a mechanics' lien for material or labor in the construction of a building or appurtenances. E. M. Fish Co. v. Young, 127 Wis. 149, 106 N. W. 795.

In Hook v. Bolton, 199 Mass. 244, 17 L.R.A. (N.S.) 699, 127 Am. St. Rep. 487, 85 N. E. 175, the question whether window screens and doors were fixtures passing under a mortgage on a dwelling house was held to be for the jury, the criterion being whether it was the intention that they should become part of the building and be used with it, to promote the object for which it was erected or to which it has been devoted, without any intention that they should be taken out and used elsewhere, unless by reason of some unexpected change in the use of the building itself.

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Gray v. Holdship, 17 Serg. & R. 413, 17 Am. Dec. 680; Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Hayford v. Wentworth, 97 Me. 347, 54 Atl. 940; Portland v. New England Teleph. & Teleg. Co. 103 Me. 245, 68 Atl. 1040.

Intention controls.

Hayford v. Wentworth; Portland v. New England Teleph. & Teleg. Co.; and Hopewell Mills v. Taunton Sav. Bank,—supra; Fuller-Warren Co. v. Harter, 110 Wis. 80, 53 L.R.A. 603, 84 Am. St. Rep. 867, 85 N. W. 698.

There is a presumption that the annexations are permanent.

Winslow v. Merchants' Ins. Co. 4 Met. 314, 38 Am. Dec. 368; Arnold v. Crowder, 81 Ill. 56, 25 Am. Rep. 260.

The burden is on plaintiff to prove that the doors and windows were not fixtures.

6 Lawson, Rights, Rem. & Pr. p. 4710, § 2890 and citations; Peck v. Batchelder, 40 Vt. 233, 94 Am. Dec. 392.

The storm doors and windows were fixtures.

Carlin v. Ritter, 68 Md. 478, 6 Am. St. Rep. 467, 13 Atl. 370, 16 Atl. 301; 1 Washb. Real Prop. 5th pp. 24, 25; 8 Am. & Eng. Enc. Law p. 50; Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201; Bennett, Farm Law, 21; Young v. Hatch, 99 Me. 465, 59 Atl. 950, 2 A. & E. Ann. Cas. 374; State v. Elliot, 11 N. H. 540; Gray v. Holdship, 17 Serg. & R. 413, 17 Am. Dec. 680; Bishop v. Bishop, 11 N. Y. 125, 62 Am. Dec. 68.

But screen doors and windows were held in Hall v. Law Guarantee & Trust Soc. 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643, not to be fixtures as between mortgagor and mortgagee.

And in Durkee v. Powell, 75 App. Div. 176, 77 N. Y. Supp. 368, the court held that, even assuming that window and door screens are not property which in their own nature determine their legal character, yet the screens in dispute should be deemed personal property as between the parties, it appearing that prior to the foreclosure sale the purchaser at that sale had bargained for them as personality.

And a storm house attached by screws and nails was held in Bernheimer v. Adams, 70 App. Div. 120, 75 N. Y. Supp. 93 (affirmed in 175 N. Y. 472, 67 N. E. 1080) to be an ordinary trade fixture removable by a tenant.

And among the articles in a saloon declared in Webber v. Franklin Brewing Co. 123 App. Div. 465, 108 N. Y. Supp. 251 (affirmed on opinion below in 198 N. Y. 509, 92 N. E. 1106) to be trade fixtures, were screens and summer doors.

Ordinary doors, blinds, and shutters do not possess the same distinctive features as screens, storm doors, and windows, and are not included within this note. W. A. S.

Spear, J., delivered the opinion of the court:

This is an action of trover to recover the value of certain outside windows and outside doors, commonly known as "storm windows" and "storm doors," alleged to have been converted by the defendant. The plaintiff claims them as her own personal property, and the defendant claims that they passed to him by virtue of a mortgage and final deed to him from the plaintiff. The case is reported upon the agreed statement, in which it appears that the plaintiff's husband purchased the premises in question in 1904, and conveyed them to his wife in 1908, in which sale the doors and windows were included, but not mentioned in the deed. The title to the real estate is not further involved. That part of the agreed statement pertinent to the issue is as follows:

"Said Joseph A. and Sophia E. Roderick immediately took possession of the premises, with the intention of making it their home, and lived thereon until on or about October 8, 1908.

"Said Joseph, with the purpose of making the place more comfortable for use, procured the outside windows and doors to be made for the house and especially fitted to it; the doors and windows being prepared in the usual manner for fastening to the house by means of screws passing through hinges on the doors and into the frame of the door casing, and by means of screws passing through the double window frames and into the window casings of the house. Each window frame was fitted to a particular window casing on the building, and the window casings were numbered consecutively from one upwards, and the double windows were numbered to correspond, so that it might be readily determined to which window casing each outside or double window was designed to be attached and used.

"Said outside doors and windows were attached by means of screws as aforesaid, and used on the house during each winter that it was occupied by said Roderick, and up to October 8, 1908. In the spring of each year they were removed and stored in the stable on the premises, where they remained until attached to the house the next winter, when they would be replaced in their respective places on the building until the following spring."

It also appears that in February, 1907, when the plaintiff mortgaged the premises to the defendant, the doors and windows were then actually attached to the house, and that in October 1908, when the plaintiff conveyed the premises to the defendant by warranty deed, the doors and windows

were then upon the premises in the stable chamber.

The only question involved is whether the windows and doors under this statement of facts became a part of the realty, so that the title vested in the defendant under his deed of the premises, or remained personal property, the title to which did not pass with the deed.

Whatever the early understanding, it is well settled now that whether a chattel has become a part of the realty is a mixed question of law and fact. In the case before us the facts are admitted, and from these facts is to be inferred the legal character of these doors and windows. It is now generally conceded that the old tests of physical character of annexation are discarded, and the modern trend of authority is adverse to any arbitrary or fixed rule by which it may be determined whether a chattel is or is not a fixture. It is now, however, held that a chattel is not merged in the realty unless, in the language of *Hayford v. Wentworth*, 97 Me. 347, 54 Atl. 940: (1) It is physically annexed, at least by juxtaposition, to the realty or some appurtenances thereof; (2) it is adapted to and usable with that part of the realty to which it is annexed; and (3) it was annexed with the intention on the part of the person making the annexation to make it a permanent accession to the realty. See also 19 Cyc. Law & Proc. p. 1036. In order to meet the first of these conditions, it is not necessary that the chattel should be physically fastened to the realty at all times. There may be constructive, as well as actual, annexation. It was said in *Farrar v. Stackpole*, 6 Me. 154, 19 Am. Dec. 201: "Although the being fastened or fixed to the freehold is the leading principle in many of the cases in regard to fixtures, it has not been the only one. Windows, doors, and window shutters are often hung, but not fastened, to a building; yet they are properly part of the real estate, and pass with it, because it is not the mere fixing or fastening which is regarded, but the use, nature, and intention." The controversy in this case was whether a chain used in a sawmill passed with a deed of the mill as a part of the realty. It was decided in the affirmative, although the chain was not necessarily fastened to any part of the mill. "The civil law allows movable property to be made immovable by destination. Corresponding to this is the annexation by intention of the recent common law. Where such annexation is allowed, it is sufficient that the owner intends to make the chattel a part of the realty. It is not necessary to use force. It is enough to exercise the

will. If this is duly manifested, the article is dedicated to the realty, and its status as personality has ceased. These two methods of annexation are sometimes called actual and constructive annexation." [19 Cyc. Law & Proc. p. 1039.] In the note under the section is cited the English rule. "In the leading English case it is said that what constitutes annexation sufficient to make the chattel a part of the realty must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, *viz.*, the degree of annexation and the object of annexation." A reference to the statement of facts leaves little doubt that the manner in which the doors and windows were actually and intended to be fastened to the house for use satisfies the degree and kind of annexation required by the law.

To establish the requirements of the second condition, it is necessary to show that the doors and windows were adapted to and used with that part of the realty to which they were annexed. Discussion upon this proposition would be superfluous. The agreed statement is conclusive. It conceded that "said Joseph, with the purpose of making the place more comfortable for use, procured outside windows and doors to be made for the house and specially fitted to it." The rest of the paragraph emphasizes the proof of adaptability, but this is sufficient.

The third and most important element to be established tending to prove that a chattel has been merged into a fixture is the intention with which the party provided its use. This principle has been very recently stated in *Portland v. New England Teleph. & Teleg. Co.* 103 Me. 240, 68 Atl. 1040, in this language: "The intention with which an article is annexed to the freehold has come to be recognized as the cardinal rule and most important criterion by which to determine its character as a fixture, and the attendant facts and circumstances are chiefly valuable as evidence of such intention. 'This controlling intention is not the initial intention at the time of procuring the article in question, nor the secret intention with which it is affixed, but the intention which the law deduces from all the circumstances of the annexation.'" The same idea is stated in *Hayford v. Wentworth*, *supra*, in this language: "As to the intention, of course, it is not the unrevealed, secret intention that controls. It is the intention indicated by the proven facts and circumstances, including the relation, the conduct, and language of the parties,—the intention that should be inferred from all these." We think the inference from the agreed facts is conclusive upon this point. Joseph A. Roderick, who procured the win-

dows and doors, with his wife, "took possession of the premises with the intention of making it their home," and lived there over four years, using these windows and doors as they were designed to be used during the whole period. They were "made for the house and especially fitted to it." "Each window frame was fitted to a particular window casing on the building, and the window casings were numbered consecutively." They were procured "with the purpose of making the place more comfortable for use." A chattel need not be absolutely necessary to the completeness of the dwelling house if obviously adapted and intended to be used with it. *Bainway v. Cobb*, 99 Mass. 457. The last phrase quoted from the agreed statement seems to bring the case within the doctrine of *Bainway v. Cobb*. The ordinary meaning of the language of this statement shows that these doors and windows were obtained for the house, and not for the occupants; to make the place more comfortable for use, not for A, or B, but for anyone who might have occasion to occupy it.

We cannot avoid the conclusion that these doors and windows were procured for permanent use with the house, added to the value of its use, and inured to the benefit of the estate.

Judgment for the defendant.

MASSACHUSETTS SUPREME JUDICIAL COURT.

H. P. HOOD & SONS, Incorporated,
v.

MARYLAND CASUALTY COMPANY.

(206 Mass. 223, 92 N. E. 329.)

Indemnity Insurance — sickness of employee — glanders.

Injury to an employee from glanders contracted from horses which his duties required him to handle is within a policy insuring the employer against liability for the loss imposed by law upon the insured for damages on account of bodily injuries accidentally suffered by an employee while on duty within the premises of the assured in the operation of his trade or business.

(June 24, 1910.)

Note. — Injuries covered by employers' indemnity policy.

In *Cashman v. London Guarantee & Acci. Co.* 187 Mass. 188, 72 N. E. 957, it was held that a stevedore insured against liability for accident to his employees while engaged in the business of a stevedore was entitled to recovery for damages for injury to an

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court after judgment in plaintiff's favor of an action brought to recover the amount alleged to be due on an employer's indemnity policy. Judgment for plaintiff.

The facts are stated in the opinion.

Messrs. Whipple, Sears, & Ogden for plaintiff.

Mr. M. O. Garner for defendant.

Morton, J., delivered the opinion of the court:

The defendant issued to the plaintiff corporation a policy insuring it "against loss from the liability imposed by law upon the

employee caused by a defect in a runway on a wharf belonging to a coal company, which the assured, in a contract with the owner to unload the coal coming to it there, had agreed to keep in repair so long as he was engaged in the business of unloading coal at that place.

In Fuller Bros. Toll Lumber & Box Co. v. Fidelity & C. Co. 94 Mo. App. 490, 68 S. W. 222, a policy indemnifying a wooden-box manufacturer against liability for damages on account of bodily injuries to his employees while on duty within his factory, resulting from the operation of the trade or business described in a schedule which was made a part of the contract of insurance, was held to cover damages for injury to an employee caused by the fall of an elevator while he was performing the duties of his employment at the factory, though the elevator was not mentioned in the schedule.

In Columbia Paper Stock Co. v. Fidelity & C. Co. 104 Mo. App. 157, 78 S. W. 320, kidney disease contracted by an employee by the handling of infected rags and paper in the ordinary course of her employer's business was held to be an injury "accidentally suffered" within the meaning of an employer's liability policy.

In Travelers' Ins. Co. v. Bright, 24 Ohio C. C. 441, it was held that injuries to an employee of one insured as a "contracting carpenter," received while employed upon a brick hoisting apparatus leased and operated jointly by his employer and another for carrying up the materials used by each, was covered by the insurance, where it appeared that he continued to receive his wages from his employer only, and that the hoisting apparatus was a necessary and usual part of the business of a contracting carpenter.

In Fidelity & C. Co. v. Lone Oak Cotton Oil & Gin Co. 35 Tex. Civ. App. 260, 80 S. W. 541, it was held that an injury to a carpenter in the regular employ of a cotton oil and gin company, received while removing some scaffolding required to be taken down after the factory had been constructed and was being operated, was within a policy to indemnify such company against loss from liability for damages on account of

assured for damages on account of bodily injuries or death accidentally suffered while this policy is in force, by any employee . . . of the assured while on duty within the factory, shop, or yard described in the schedule . . . in and during the operation of the trade or business described in the schedule." While the policy was in force one Jeremiah Barry, who was employed by the plaintiff as a hostler in its stables at Charlestown, had the care of horses which were afterwards found to have been suffering from glanders and were killed, and Barry was directed to assist in cleaning up the stalls. No notice was given to him that the horses suffered or had suffered from glanders. Glanders is an infectious disease, and subsequently Barry

bodily injuries to any of its employees within the factory, shop, or yards in and during the operation of the trade or business of the assured.

In Hoven v. Employers' Liability Assur. Corp. (Hoven v. West Superior Iron & Steel Co.) 93 Wis. 201, 32 L.R.A. 388, 67 N. W. 46, it was held that an injury to a workman in an iron and steel works caused by the fall of a girder, which was being raised by an independent crew building an addition to the works, was within a policy of indemnity against claims for compensation for injuries in "all operations connected with the business of iron and steel works."

In Andrus v. Maryland Casualty Co. 91 Minn. 358, 98 N. W. 200, under a policy indemnifying the assured for damages for injuries to persons in or about a certain building owned by him, but which excepted loss from liability for injuries suffered by any persons engaged in making additions to or alterations in any building, or any loss from liability for injuries suffered by any person before the premises had been fully completed ready for occupancy, it was held that such exception did not cover injuries to an employee while operating an elevator in such building which was being constructed to replace an old building and which was not altogether completed when the employee sustained his injury, where at the time of the execution of the contract of insurance the insurer had notice that the building was not fully completed.

In Fidelity & C. Co. v. Phoenix Mfg. Co. 40 C. C. A. 614, 100 Fed. 604, in which the contract of insurance described the assured's business as that of "manufacturers and erectors of machinery, show cases, and office fixtures, and general woodwork," and indemnified the assured against losses from liability for injuries to its employees in the occupations mentioned, it was held in an action on the policy to recover for damages paid for injuries received by certain carpenters in the employ of the insured, who were engaged in tearing down an old building preparatory to the erection of a new one, that it was proper to submit to the jury the question whether the men injured

was attacked by it and brought an action against the plaintiff for negligently putting him to work on the horses and thereby exposing him to the disease. Judgment was rendered in his favor for \$1,512, which the plaintiff paid in full. The present action is brought to recover the amount so paid, with the costs and expenses of suit. The defendant was duly notified by the plaintiff of the bringing of the action against it, and was requested, as provided in the policy, to take upon itself the defense of this suit, but it declined to do so on the ground that the cause of action did not come within the terms of the policy. The case was heard by a judge of the superior court without a jury, on stipulations by the parties as to the facts and the evidence. It was agreed that the damages assessed in Barry's favor were fair and reasonable, and it was also agreed that if the judge found that the defendant was liable he should add to the \$1,512 such sum as he found to be reasonable and proper and necessarily disbursed by the plaintiff in the action of Barry against it. The judge found for the plaintiff in the sum of \$2,474.68. The defend-

ant asked the judge to make certain rulings and findings which the judge refused to make, and the defendant excepted thereto and to the findings and rulings that were made. The case comes here on report. If the rulings and findings are correct, judgment is to be entered for the plaintiff; otherwise for the defendant.

The policy is entitled "Manufacturers' Employers' Liability Policy." The contract which it contains is one of indemnity, in which the defendant engages to make good to the plaintiff any loss or damage which it may sustain by reason of its liability to its employees for bodily injuries accidentally suffered by them while engaged in doing the work which they were employed to do. It is a kind of insurance that has grown out of modern industrial and business conditions, and it is intended to afford full protection to employers in all cases where their employees have accidentally received bodily injuries for which they are liable. It also accomplishes the economic result with which, however, we have nothing to do, of distributing more or less widely some of the loss or damage which

were at the time of the injury engaged in one of the occupations covered by the policy of insurance, and whether the term "general woodwork" was commonly understood to include the work upon which the injured employees were engaged.

On the other hand, in *B. Roth Tool Co. v. New Amsterdam Casualty Co.* 88 C. C. A. 569, 161 Fed. 709, it was held, under a policy warranting that no explosives should be used on the assured's premises, that there could be no recovery for a loss resulting from injuries to an employee of the assured resulting from the explosion of a large metal tube filled with various metals and materials of an explosive nature when exposed to the heat of a furnace on assured's premises.

In *Home Mixture Guano Co. v. Ocean Acci. & Guarantee Corp.* 176 Fed. 600, under an employer's liability policy covering injuries to employees engaged in "ordinary repairs," and excepting injuries to employees occurring in the "construction, demolition, or extraordinary repairs to any structure, building, or plant," it was held that the assured could not recover for damages on account of injuries suffered by one of his employees while engaged in rebuilding a portion of assured's factory, which had been destroyed by fire.

In *People's Ice Co. v. Employers' Liability Assur. Corp.* 161 Mass. 122, 36 N. E. 754, under a contract of liability insurance in which it was warranted that the insured's business was that of ice dealers, and that the operations carried on by its employees were cutting and handling ice, and that the machinery in use was such as was necessary in cutting ice, it was held that injuries received by employees by the fall

of an ice house which, in a season in which there could be no cutting of ice, was in process of construction by the assured for the purpose of storing ice, were not covered by the policy.

In *Wollman v. Fidelity & C. Co.* 87 Mo. App. 677, under an employers' indemnity policy which described the assured's business as that of "wholesale dry goods and stock of merchandise," and stated that the machinery used was that usual to such buildings, it was held injuries to an employee engaged in running machinery for polishing rusted cutlery, put in the building after the issuance of the policy, were not within its scope.

In *Kelley v. London Guarantee & Acci. Co.* 97 Mo. App. 623, 71 S. W. 711, it was held that liability for injuries due to the individual negligence of a member of a partnership when not engaged in the partnership business was not covered by a policy of insurance indemnifying the partnership against loss for injuries to its employees from the negligence of the partnership.

In *East Carolina R. Co. v. Maryland Casualty Co.* 145 N. C. 114, 58 S. E. 906, under an indemnity policy excepting loss from liability for injuries "to or caused by any person unless his wages are included in the estimated wages named in the schedule," it was held that, to recover for a loss for injuries to an employee caused by the negligence of a fellow servant, it was necessary for the assured to show that both of the servants, the injurer and the injured, were on the pay roll, and that therefore there could be no recovery for damages on account of injuries to an employee due to the negligence of the president and general manager, who was at the time running as

falls on those engaged in industrial occupations. It is to be noted that the policy does not contain the words "violent and external" in addition to the word "accidental," as is the case in many if not most accident policies. The insurance is liability insurance so called, and not insurance against accidents. The liability insured against is that "imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered . . . by any employee." Although the policy contains many conditions, there is no limitation or exception in regard to the kind or nature or cause of the accidents out of which the liability insured against may rise. The fact that the accident may have been occasioned through negligence on the part of the insured is, therefore, immaterial. Though instructions to that effect were requested and refused, and exceptions were taken to such refusal, they have not been argued; the defendant being apparently content with the instructions given in regard to that matter. The question then is whether the amount which the plaintiff was compelled to pay Barry

was paid "for damages on account of bodily injuries accidentally suffered" by him within the meaning of the policy. It is plain that Barry suffered bodily injury in consequence of becoming infected with glanders; as much so as if he had had a leg or an arm broken by a kick from a vicious horse. Indeed it is possible that the bodily injury caused by glanders was greater and more lasting than that caused by a broken leg or arm would have been. It is plain, also, that he suffered the injury "within the factory, shop, or yard described in the schedule," and "during the operation of the trade or business described in the schedule." Was the injury brought about accidentally, within the fair scope and meaning of the policy, or was it the result of a disease contracted while in the employ of the plaintiff, but for which the defendant is not liable? It is clear, we think, that the infection which caused the disease from which Barry suffered was due to accident. It was in the nature of an accident that he was set to work upon or cleaning up after horses that had glanders, and it was in the nature of an accident that he became

engineman, and whose wages were not included in the estimated wages in the schedule.

In *Frank Unnewehr Co. v. Standard Life & Acci. Ins. Co.* 99 C. C. A. 490, 176 Fed. 16, the policy in suit provided that it should not cover loss for liability for injuries suffered by "any person employed in violation of law as to age," and it appeared that it was provided by statute that no child was to be employed "at employment whereby its life or limb is in danger." It was held that there could be no recovery on the part of the assured for injuries to a child caused by his attempting to stop a saw in the neighborhood of which he worked, though the employment of the child did not involve the operating or assisting in operating the saw itself.

In *Chicago-Coulterville Coal Co. v. Fidelity & C. Co.* 130 Fed. 957, it was held under an indemnity policy exempting the insurer from liability for any loss for injuries to the assured's employees occasioned by the failure of the insured to observe any statute affecting the safety of persons, that there could be no recovery for damages for injuries to a miner in the employ of the assured, resulting from the latter's wilful failure to maintain an open passageway around the landing place at the bottom of the shaft, as required by statute, though the policy of insurance contained a preceding general statement that the insured was indemnified against loss from statutory liability to its employees.

The case last reviewed was followed in *Royle Min. Co. v. Fidelity & C. Co.* 126 Mo. App. 104, 103 S. W. 1098, and the same conclusion reached under identical provisions of a similar policy.

30 L.R.A. (N.S.)

In *Tozer v. Ocean Acci. & Guarantee Corp.* 94 Minn. 478, 103 N. W. 509, and *Goodwillie v. London Guarantee & Acci. Co.* 108 Wis. 207, 84 N. W. 164, it was held under an exception in an employers' liability policy that it did not cover any loss from liability for injuries to any child employed by the assured contrary to law, that there could be no liability on the part of the insurer even though the injury was not the proximate result of the illegal employment.

It may be well to note here that in *Tozer v. Ocean Acci. & Guarantee Corp.* and *Royle Min. Co. v. Fidelity & C. Co.* supra, the assured recovered upon the ground that the insurer was estopped from denying its liability under its contract, because, after having been informed of all the facts, it voluntarily assumed control of and conducted the defense to the suit against the assured.

So, in *Glens Falls Portland Cement Co. v. Travelers' Ins. Co.* 162 N. Y. 399, 56 N. E. 897, affirming 11 App. Div. 411, 42 N. Y. Supp. 285, under a contract of insurance in which the assured stipulated to conduct all its business and maintain all its premises to which the insurance applied in strict compliance with all statutes, ordinances, and by-laws providing for the safety of persons, the insurer was held to be estopped from setting up the defense that the set screw which caused the accident to the insured's employee was not guarded as required by law where, in accordance with its contract, it had conducted the defense in the action for the injury down to the eve of trial; and had then withdrawn, leaving the assured no reasonable opportunity to prepare a defense to the action. J. A. C.

infected with the disease. The language used by Mathew L. J., in *Higgins v. Campbell & Harrison* [1904] 1 K. B. 328, 337, where the judgment of the court of appeals was sustained by the House of Lords (*Brintons v. Turvey* [1905] A. C. 230, 2 A. & E. Ann. Cas. 137), though there was a vigorous dissent by Lord Robertson, is appropriate here. "It was an accident that the workman, in dealing with the wool, was brought in contact with that which might infect him with this disease of anthrax, and it was a further accident that the disease attacked him." If the disease was the result of an accident, then we do not see why it does not follow that the bodily injury which Barry suffered as the result of the disease was not accidentally suffered, nor why the case does not come within the terms of the policy. The language is "bodily injuries accidentally suffered." It hardly could be broader. The intention is, as has been said, to afford full protection and indemnity to the assured. Any accident that causes bodily injury in any way is included. Bodily injury is more commonly associated perhaps with physical force of some sort, but, in the absence of anything in the policy limiting it to that, we do not see how or why it can or should be so restricted. A liability growing out of an accident which results in infecting the workman with a loathsome and dangerous disease and thereby causes him great and perhaps lasting physical injury would seem to be as much within the spirit and intent of the contract as if the injury had been caused by a blow or some other equally obvious manifestation of force. As was said by Lord Halsbury in *Brintons v. Turvey* [1905] A. C. 230, 233, 2 A. & E. Ann. Cas. 137, the anthrax case, "when some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury,' because the injury inflicted by accident sets up a condition of things which medical men describe as disease."

The construction which we are inclined to give to the policy accords with the great weight of authority in similar cases, and rests, we think, on sound principles. *Freeman v. Mercantile Mut. Acci. Asso.* 156 Mass. 351, 17 L.R.A. 753, 30 N. E. 1013; *Hughes v. Clover, C. & Co.* [1909] 2 K. B. 798, affirmed by the House of Lords in [1910] A. C. 242; *Brintons v. Turvey* [1905] A. C. 230, 2 A. & E. Ann. Cas. 137, [1904] 1 K. B. 328; *Wicks v. Dowell & Co.* [1905] 2 K. B. 225, 2 A. & E. Ann. Cas. 732; *Ismay v. Williamson* [1908] A. C. 437; *Fenton v. J. Thorley & Co.* [1903] 30 L.R.A. (N.S.)

A. C. 443; *Columbia Paper Stock Co. v. Fidelity & C. Co.* 104 Mo. App. 157, 78 S. W. 320; *Ætna L. Ins. Co. v. Fitzgerald*, 165 Ind. 317, 1 L.R.A. (N.S.) 422, 112 Am. St. Rep. 232, 75 N. E. 202, 6 A. & E. Ann. Cas. 551; *Fetter v. Fidelity & C. Co.* 174 Mo. 256, 61 L.R.A. 459, 97 Am. St. Rep. 560, 73 S. W. 592; *Cary v. Preferred Acci. Ins. Co.* 127 Wis. 67, 5 L.R.A. (N.S.) 926, 115 Am. St. Rep. 997, 106 N. W. 1055, 7 A. & E. Ann. Cas. 484; *Omberg v. United States Mut. Acci. Asso.* 101 Ky. 303, 72 Am. St. Rep. 413, 40 S. W. 909; *Delaney v. Modern Acci. Club*, 121 Iowa, 528, 63 L.R.A. 603, 97 N. W. 91; *Martin v. Manufacturers' Acci. Indemnity Co.* 151 N. Y. 94, 45 N. E. 377.

The defendant relies on *Bacon v. United States Mut. Acci. Asso.* (*Stedman v. United States Mut. Acci. Asso.*) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399. The deceased in that case died from malignant pustule. It did not appear how the disease was contracted, though from what is said in the dissenting opinion it might perhaps be inferred that it was contended that it was caused by the bacilli of anthrax coming from the car loads of hides which frequently passed the station where the deceased was employed, and from the cattle which were slaughtered in large numbers in the vicinity. The certificate, however, expressly provided that the benefits under it should not extend "to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease; nor to any death or disability which may be caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of this certificate." What the deceased was insured against were "bodily injuries effected through external, violent, and accidental means." The form of the certificate or policy is enough, we think, to distinguish that case from this.

In accordance with the report the entry will be—

Judgment for the plaintiff.

MASSACHUSETTS SUPREME JUDICIAL COURT.

JOHN H. MENUT, Appt.,

v.

BOSTON & MAINE RAILROAD.

(— Mass. —, 92 N. E. 1032.)

Railroad — duty to fence — protection against fall from abutting property.

The statutory duty of a railroad company to fence its tracks does not extend to the

erection of a fence to prevent one who, while at work on adjoining property, falls from a structure, from passing over the boundary line onto its right of way, to his injury.

(November 22, 1910.)

APPEAL by plaintiff from a judgment of the Superior Court for Essex County in defendant's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Plaintiff alleged that while lawfully working on premises adjoining defendant's right of way, he was thrown from a pile of lumber, and in falling, fell over a stone wall, and was severely injured, "owing to negligence of defendant, its servants or agents, in failing to erect and maintain a fence on said premises, which said fence, if erected and maintained, would have caught said plaintiff as he fell from the pile of lumber, and prevented his falling over the stone wall to the ground below."

The other facts are stated in the opinion.

Messrs. E. M. Schwarzenberg and E. F. Schwarzenberg, for appellant:

An action to recover damages for per-

sonal injuries sustained while lawfully employed upon another's premises adjoining the defendant's railroad, caused by the defendant's failure to erect and maintain a fence on the side of the railroad opposite said premises, in accordance with the provisions of § 120, chap. 111, of the Revised Laws, then in force, can be maintained.

New York C. & H. R. R. Co. v. Price, 16 L.R.A.(N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330; Baltimore & P. R. Co. v. Cumberland, 176 U. S. 232, 44 L. ed. 447, 20 Sup. Ct. Rep. 380; Atchison, T. & S. F. R. Co. v. Reesman, 23 L.R.A. 768, 9 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370; Schmidt v. Milwaukee & St. P. R. Co. 23 Wis. 186, 99 Am. Dec. 158; Blair v. Milwaukee & P. du Cu. R. Co. 20 Wis. 254; Union P. R. Co. v. McDonald, 152 U. S. 283, 38 L. ed. 443, 14 Sup. Ct. Rep. 619; Isabel v. Hannibal & St. J. R. Co. 60 Mo. 475; Keyser v. Chicago & G. T. R. Co. 66 Mich. 390, 33 N. W. 867; Donnegan v. Erhardt, 119 N. Y. 468, 7 L.R.A. 527, 23 N. E. 1051; Ludtke v. Lake Shore & M. S. R. Co. 24 Ohio C. C. 120.

Messrs. Henry F. Hurlburt and Damon E. Hall, for appellee:

The object of Rev. Laws, chap. 111, § 120,

Note. — Duty of railroad company to fence tracks against persons.

As to the duty of a railroad company to fence its right of way, in general, see note in 5 L.R.A. 737.

The duty of a railroad company to fence its tracks against children is considered in the note to New York C. & H. R. R. Co. v. Price, 16 L.R.A.(N.S.) 1103, and this note is accordingly limited to cases involving the duty as against adults.

It seems evident that an ordinary railroad fence would hardly constitute a barrier to an adult person about to enter voluntarily upon a railroad right of way, and that the want of a fence along the tracks could hardly be said to be a contributing cause of an injury to an ordinary adult person wilfully trespassing upon the right of way. Thus, in Lehey v. Hudson River R. Co. 4 Robt. 204, holding that a statute requiring railroad companies to fence in their road is inapplicable to a freight depot, and that the failure of a railroad company to inclose such a depot cannot affect its liability for the death of a trespasser, killed by the movement of cars there, the court said: "The decedent was not killed in consequence of the want of such fence. The same rule is not to be applied to him as to dumb animals, who stray on uninclosed tracks, and get killed."

The cases involving the duty of a railroad company to fence its tracks against an adult are therefore comparatively few, and most of them arise where, as in *MENUT v. BOSTON & M. R. Co.* the person accidentally falls upon the right of way, or where

he unwittingly passes thereon, or is thrown or carried thereon in some way, against his will, under such circumstances that, if the tracks had been fenced, the particular injury would not have been inflicted. But under such circumstances it seems to be uniformly held that railroad companies are under no duty to maintain fences.

Thus, in *King v. Central R. Co.* 107 Ga. 754, 33 S. E. 839, it is held that a railroad company owes no duty to the public to place a fence or guard rail along its road, where the tracks are in a cut on one side of which is a brick wall, with its top on a level with and extending along a public street, running parallel with the right of way, to prevent a stranger attempting to cross the tracks in the night, and not knowing of the cut and wall, from falling from the latter and onto the right of way, to his injury.

So, in the absence of statute, a railroad company is under no duty to fence in or place guards along a cut or excavation through which its track runs, with a highway running parallel with and alongside of the cut, to prevent one driving along the highway from being thrown, with his horse and buggy, from the road and down into the cut, to his injury. *Collier v. Georgia R. Co.* 76 Ga. 611.

And in the absence of a statutory requirement, the fact that a railroad is not fenced does not make the railroad company liable for injuries to a person driving along a highway parallel with the track, whose horse drew him against a train as it passed. *Reynolds v. Great Northern R. Co.* 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808.

is "to prevent the entrance of cattle upon the road," and not to prevent men from falling from adjoining property onto the railroad location, and the only persons entitled to the protection of this statute are "adjoining owners."

Byrnes v. Boston & M. R. Co. 181 Mass. 322, 63 N. E. 897; *Gerry v. New York, N. H. & H. R. Co.* 194 Mass. 35, 79 N. E. 783; *New York C. & H. R. R. Co. v. Price*, 16 L.R.A. (N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330.

The statute was intended and has always been held to be for the protection of cattle, and not of persons, and the present plaintiff cannot take advantage of it to recover for personal injuries.

Byrnes v. Boston & M. R. Co. supra; *Eames v. Worcester & N. R. Co.* 105 Mass. 193.

The proximate cause of the accident was the initial loss of balance, with which the defendant was in no way connected.

Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; *Kane v. Boston Elev. R. Co.* 192 Mass. 386, 78 N. E. 485; *Glassey v. Worcester Consol. Street R. Co.* 185 Mass. 315, 70 N. E. 109; *Bellino v. Columbus Constr. Co.* 188 Mass. 430, 74 N. E. 684; *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; *Dolphin v. Worcester Consol. Street R. Co.* 189 Mass. 270, 75 N. E. 635; *Stacy v. Knickerbocker Ice Co.* 84 Wis. 614, 54 N. W. 1091; *Elliott v. Allegheny County Light Co.* 204 Pa. 568, 54 Atl. 278.

Braleley, J., delivered the opinion of the court:

The plaintiff, having no cause of action at common law, seeks to hold the defendant in damages for personal injuries caused

by a failure to comply with Rev. Laws, chap. 111, § 120, now Acts 1906, chap. 463, pt. 2, § 103, that "every railroad corporation shall erect and maintain suitable fences, with convenient bars, gates, or openings therein, upon both sides of the entire length of its railroad, except at the crossings of a public way, or in places where the convenient use of the road would be thereby obstructed, and except at places where, and so long as, it is expressly exempted from the duty of so doing by the board of railroad commissioners. . . . The corporation shall also construct and maintain sufficient barriers, where it is necessary and practicable to do so, to prevent the entrance of cattle upon the railroad. A corporation which unreasonably neglects to comply with the provisions of this . . . section shall, for every such neglect, forfeit not more than \$200 for every month during which the neglect continues, and the supreme judicial court shall have jurisdiction in equity to compel the corporation to comply with such provisions, and, upon such neglect, to restrain and prohibit it from crossing a highway or town way, or from using any land, until such provisions shall have been complied with." *Rust v. Low*, 6 Mass. 90, 93; *Thayer v. Arnold*, 4 Met. 589; *Eames v. Salem & L. R. Co.* 98 Mass. 560, 96 Am. Dec. 676; *Baxter v. B. & W. R. Corp.* 102 Mass. 383; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335. It is not sufficient for the plaintiff to prove that the defendant failed to fence, and if this had been done he would not have been injured, but he must go further, and show that the requirement of the statute was enacted for his benefit. The inquiry, therefore, is whether it was the defendant's duty to erect and maintain at the place of the accident

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In *Wabash R. Co. v. Gaull*, 116 Ill. App. 443, it was held that a railroad company is under no common-law duty to fence its right of way; and that its statutory duty does not extend to the erection of a fence to prevent injury to one by reason of his horses running away as he was driving along a highway parallel with and adjoining the railroad, and, in the absence of a fence there, running upon and along the railroad track to an embankment across a ravine, and there throwing or rolling themselves, the wagon, and the driver down the embankment, whereby the driver was killed.

Where a public highway is so constructed that it terminates 20 feet from a previously existing railway cut, through which the railway company's tracks run, and the intervening land is a foot higher than the crown of the highway at its terminal, and rises higher toward the cut, which is 5 feet in depth below the crown of the highway,—the railroad company owning a 5-foot strip next to the cut, and the remainder of the inter-

vening 20 feet being an unused strip owned by a third person,—the railroad company is under no duty to fence the cut to prevent one ignorant of the locality, and using the highway on a dark night, from driving his horse and buggy through the highway, and up over the intermediate land, and into the cut, to his injury. *Daneck v. Pennsylvania R. Co.* 59 N. J. L. 415, 59 Am. St. Rep. 613, 37 Atl. 59.

And a statute imposing upon railroad companies the duty of erecting and maintaining fences on the sides of their roads, but expressly enacting that no corporation shall be required to fence the sides of its road, except where necessary to prevent cattle, etc., from getting on the track from lands adjoining the same, has no application to fences to prevent one going along a highway on a dark night from falling into a deep cut or excavation made across the highway in constructing a railroad. *Ditchett v. Spuyten Duyvil & P. M. R. Co.* 67 N. Y. 425.

A. C. W.

a fence sufficient to have intercepted the plaintiff's fall, and prevented his injuries. If this is established, the further averments of its negligence are admitted by the demurrer. The language imposing the duty does not define its scope, and to ascertain the proper construction, the statute must be read with the provisions of the original enactments from which it has been derived. The earlier acts of incorporation contain some provisions for adapting the railroad, at the expense of the corporation, to the grade of intersecting highways, which must be raised or lowered to meet the change in level, and Stat. 1833, chap. 187, 1834, chap. 137, and Stat. 1835, chap. 148, provided for the assessment of damages if the location was acquired by eminent domain, and that at grade crossings certain precautions should be taken for the safety of travelers on highways. But no attempt at a general system of statutory law for the construction and operation of railroads appears until the Rev. Stat. 1836, chap. 39; Sp. Laws Mass. 1829, chaps. 93-95; Stat. 1830, chap. 4; Stat. 1831, chaps. 55, 134, 139, 152; Stat. 1832, chaps. 49, 80, 97; Stat. 1833, chaps. 109, 116; Stat. 1835, chap. 111. The revision, however, did not require either party to fence, although, under the general powers of the county commissioners, by whom damages were assessed, they could direct that, instead of an award in money to the landowner for the cost, as in the taking of land for a highway, the corporation should provide and maintain the necessary fences. *First Parish v. Plymouth*, 8 Cush. 475; *Morss v. Boston & M. R. Co.* 2 Cush. 536; *Boston & W. R. Corp. v. Old Colony R. Corp.* 12 Cush. 605, 608, 609; *Baxter v. Boston & W. R. Corp.* supra. If money damages were awarded, and the land remained unfenced, besides incurring the danger of injury to his cattle, for which he would have no remedy, the landowner also might be held liable to suit if, passing to the track, they caused the derailment of trains. *Lyons v. Merrick*, 105 Mass. 71, 76; *Lovett v. Salem & S. D. R. Co.* 9 Allen, 557, 562. But if either party was dissatisfied, and applied for a jury, the order was vacated; and as the verdict might not require the erection of fences, the corporation could not be compelled to act, and the landowner must provide them.

It was to guard against such results in the future, as well as to furnish a remedy "to any owner of land heretofore taken," that Stat. 1841, chap. 125, was passed. The corporation, in addition to the pecuniary damages assessed upon it, was now required "to construct and maintain such embankments, drains, culverts, walls, fences, or other structures as said commissioners shall

judge reasonable for the security and benefit of such landowners. And in their order therefor the commissioners shall prescribe the time within which and the manner how such structure shall be made or repaired, which order it shall not be competent for a jury to alter or reverse." *Boston & P. R. Corp. v. Doherty*, 154 Mass. 314, 28 N. E. 277. By § 4, the commissioners were authorized, on "the application of any owner of land heretofore taken," or of the selectmen of the town through which the railroad passed, to require suitable fences to be made and maintained by the corporation, "as well for the benefit and security of such landowner as of travelers on such railroad," unless the landowner already had received in the assessment of damages full compensation, or had agreed to make and maintain such fence; yet no right is conferred upon the corporation or the commissioners to compel him to fence, although compensated for the outlay, or where the land having been obtained by purchase, the price paid was presumed to include the cost of fencing by the grantor. *Morss v. Boston & M. R. Co.* supra; *Stearns v. Old Colony & F. River R. Corp.* 1 Allen, 493. But as the corporation was not required to act unless ordered by the commissioners, and the landowner, content with the compensation received, could remain quiescent, while passengers might be exposed to great peril during transportation on a partially or wholly unfenced track. Stat. 1846, chap. 271, § 3, to do away with this serious danger, directed, under a penalty provided by § 4, that "every railroad corporation shall erect and maintain suitable fences with convenient bars, gates, or openings therein, at such places as may reasonably be required, upon both sides of the entire length of any railroad which they may hereafter construct, except at the crossings of any turnpike, highway, or other way, or in places where the convenient use of the railroad would be obstructed thereby, and shall also construct and maintain sufficient barriers at such places as may be necessary, where it is practical to do so, to prevent the entrance of cattle upon the railroad." See *Boston & W. R. Corp. v. Old Colony R. Corp.* 12 Cush. 605, 609. The duty thus imposed was subsequently made enforceable in equity by this court under Stat. 1855, chap. 350, and these statutes having been consolidated in Gen. Stat. 1860, chap. 63, §§ 40 to 43, and Acts 1874, chap. 372, §§ 83, 84, have been uniformly construed, where the road was built prior to April 17, 1841, as requiring the owner to fence if his damages, or the price paid to him, where the acquisition was by purchase, included the cost of fencing; and where the road was

constructed after May 16, 1846, the corporation fenced the entire length of the railroad on both sides, except in places where a fence would obstruct the convenient use of the railroad, or at crossings where the general public had a right of way. *Morss v. Boston & M. R. Co. and Stearns v. Old Colony & F. River R. Corp.* supra; *Boston & A. R. Co. v. Briggs*, 132 Mass. 24. The exemption, however, was repealed by Stat. 1879, chap. 205, which finally put upon the corporation the absolute and sole duty of maintaining the fence, and where by either law or contract this burden before had been placed on the adjoining landowner, the corporation was required thereafter to erect such fences, or to keep them in repair if they had been erected, and could recover the reasonable cost in an action of contract, or by a lien upon the land for the labor and materials.

Pub. Stat. 1882, chap. 112, § 115, and Rev. Laws, chap. 111, § 120, are re-enactments of these provisions, which, from the first to the last enactment, prescribe neither the dimensions, material, nor mode of construction, except as may be inferred from the words that it shall be a "suitable fence." It is common observation that a railroad often runs through extensive tracts of woodland and unimproved lands, and as a fence which there might be sufficient to comply with the statute would be wholly insufficient between coterminous owners of lands under cultivation, *Eames v. Salem & L. R. Co.* 98 Mass. 560, 565, 96 Am. Dec. 676, decided, that the fence defined in Gen. Stat. chap. 25, § 1, now Rev. Laws, chap. 33, § 1, was not the standard of requirement. The "security and benefit" of the landowner and "of travelers upon such railroad" having been the words of the statute of 1841, there would seem to be no reasonable ground to question that, under the original act and subsequent statutes, which indicate no change of purpose, a fence sufficient to turn the cattle of those whose lands adjoined the road was all that the legislature intended. The railroad company also, in the operation of its trains, has the right to the exclusive use of its tracks, and is under no obligation to anticipate the intrusion of cattle which may have passed unlawfully to the location, even where there has been a neglect to fence, or the fence may be insufficient to restrain them; and if injured or destroyed, the corporation is not responsible to the owner, unless gross negligence at common law is shown. *Eames v. Salem & L. R. Co.* 98 Mass. 560, 96 Am. Dec. 676; *Maynard v. Boston & M. R. Co.* 115 Mass. 458, 15 Am. Rep. 119; *McDonnell v. Pittsfield & N. A. R. Corp.* 115 Mass. 564; *Darling v. Boston & A. R. Co.* 121 Mass. 30 L.R.A. (N.S.)

118; *Towne v. Nashua & L. R. Co.* 124 Mass. 101, 104; *Taft v. New York, P. & B. R. Co.* 167 Mass. 297, 32 N. E. 168. The case of *Browne v. Providence, H. & F. R. Co.* 12 Gray, 55, 71 Am. Dec. 736, did not arise under our statute, but, as pointed out in *Eames v. Salem & L. R. Co.* 98 Mass. 560, 564, 96 Am. Dec. 676, rested on the construction of a statute of Connecticut, under which suit had been brought in our courts. See *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78. This doctrine has been applied to persons, and no distinction has been made in suits for personal injuries by adults or by plaintiffs of tender years, who have passed or strayed to the tracks through openings in the fence on the side of the railroad which were not shown to have been necessary for its convenient operation, or for crossings to accommodate the public ways, or a place which, by implication, the public had been invited to use. *Wright v. Boston & M. R. Co.* 129 Mass. 440; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 380, 30 Am. Rep. 686; *Wright v. Boston & A. R. Co.* 142 Mass. 296, 7 N. E. 866; *Chenery v. Fitchburg R. Co.* 160 Mass. 211, 213, 22 L.R.A. 575, 35 N. E. 554. See *McCarty v. Fitchburg R. Co.* 154 Mass. 17, 27 N. E. 773. And since Acts 1853, chap. 414, § 4, it has been a misdemeanor for any person without right, knowingly to stand or walk on a railroad track. If the erection and maintenance of a fence was also designed for the protection of the public generally, and the failure to fence was the proximate cause of the injury, the plaintiffs were not barred, and as proof of their due care, or of those responsible for his conduct where the plaintiff appears to have been unable to care for himself, would have been all that was necessary to have established the defendant's liability, they should have been permitted to recover. But it is evident from these decisions, that the railroad was not required to assume that trespassers might be on the track, or to fence for their protection, and we never have adopted the view that, if a trespasser is a child of immature age, or so young as to be incapable of caring for himself, the company is called upon to anticipate and discover his presence, although, when discovered, he cannot be injured wilfully, or treated with a reckless disregard for his safety. *Anternoit v. New York, N. H. & H. R. Co.* 193 Mass. 542, 79 N. E. 789. Compare *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 58 Am. Rep. 387, 6 N. E. 310, 10 N. E. 70.

The plaintiff, however, urges that the demurrer should be overruled and the judgment reversed, because in a few jurisdictions statutes primarily enacted for purposes

similar to our own, even if in some instances varying in terms, have been judicially defined as including protection from personal injuries which might be caused to children of tender years who wandered upon the track through the neglect of the corporation to fence. *Keyser v. Chicago & G. T. R. Co.* 56 Mich. 559, 56 Am. Rep. 405, 23 N. W. 311; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475, 484; *Schmidt v. Milwaukee & St. P. R. Co.* 23 Wis. 186, 99 Am. Dec. 158; *Rosse v. St. Paul & D. R. Co.* 68 Minn. 216, 37 L.R.A. 591, 64 Am. St. Rep. 472, 71 N. W. 20; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522. See further, *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L.R.A. 768, 9 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370, *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369, and *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619. But even in the distinction the decisions are not harmonious. Some of them are favorably commented upon by Brown, J., in delivering the opinion of a majority of the court in *New York C. & H. R. R. Co. v. Price*, 16 L.R.A.(N.S.) 1103, 86 C. C. A. 502, 159 Fed. 330, where a boy six and one half years old ran onto the defendant's unfenced track, receiving injuries from which he died after a period of conscious suffering. The decision turned upon whether our statute required the road to fence against the plaintiff's intestate, and the construction adopted by this court in *Byrnes v. Boston & M. R. Co.* 181 Mass. 322, 63 N. E. 897, was followed, and recovery was denied. A child six years old went upon the unfenced track of the defendant, in *Bischof v. Illinois Southern R. Co.* 232 Ill. 446, 83 N. E. 948, 13 A. & E. Ann. Cas. 185, and was killed; but after a review by Cartwright, J., of many of the cases upon which the plaintiff at bar relies, the court held that, under a statute requiring the corporation to erect and maintain a fence sufficient to prevent cattle, horses, sheep, hogs, and other stock from getting on the railroad, the company was not responsible for the death of the plaintiff. It also has been decided in other jurisdictions that statutes requiring the corporation to fence against live stock should not be construed as requiring it to fence for the protection of persons, whether infants or adults; and where fencing is held as designed for the benefit of the general public, it would seem there is no obligation to provide for the safety of those capable of taking care of themselves, and of realizing the peril of being on a railroad track. *Allen v. Boston & M. R. Co.* 87 Me. 326, 32 Atl. 963; *Russell v. Maine C. R. Co.* 100 Me. 406, 61 Atl. 30 L.R.A.(N.S.)

899; *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461, 473, 4 Atl. 106; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *Baltimore & O. S. W. R. Co. v. Bradford*, 20 Ind. App. 348, 87 Am. St. Rep. 252, 49 N. E. 388; *Cornwall v. Sullivan R. Co.* 28 N. H. 165, 166; *Delphia v. Rutland R. Co.* 76 Vt. 84, 56 Atl. 279; *Schreiner v. Great Northern R. Co.* 86 Minn. 245, 247, 58 L.R.A. 75, 90 N. W. 400; *Co-hoon v. Chicago, B. & Q. R. Co.* 90 Iowa, 169, 173, 57 N. W. 727; *Ditchett v. Spuyten-Duyvil & P. M. R. Co.* 67 N. Y. 425; *Lake Shore & M. S. R. Co. v. Liidtte*, 69 Ohio St. 384, 69 N. E. 653; *Carper v. Norfolk & W. R. Co.* 35 L.R.A. 135, 23 C. C. A. 669, 42 U. S. App. 282, 78 Fed. 94. If the building and maintenance of a "suitable fence," which, under certain conditions, formerly devolved upon the landowner, meant a structure sufficient to protect his cattle, and to prevent their intrusion upon the location, no adequate reason has been suggested by the plaintiff why a different construction should be adopted when this duty is imposed solely upon the corporation, and the obligation so extended as to include a structure sufficient to protect the landholder or occupier, or their servants, when on the premises, from inadvertently passing or falling upon the track. It was so decided in principle in the case of *Byrnes v. Boston & M. R. Co.* 181 Mass. 322, 63 N. E. 897, which was followed with approval in *Gerry v. New York, N. H. & H. R. Co.* 194 Mass. 35, 38, 79 N. E. 783.

We are not satisfied that these recent cases, to say nothing of those which preceded them, should be overruled, and a radical departure entered upon from that which has been deemed to be the true application and construction of these statutes. If the agricultural conditions which prevailed when the development of our railroad law began, and for some time afterwards, have very largely changed, and the statutory regulations relating to the operation of railroads should be made more rigorous where the population has become increasingly urban and more dense, by imposing additional safeguards by the erection of barriers, or prescribing what shall constitute a lawful fence, for the personal safety of those who may live on estates adjoining, or in proximity to the line, or use the public ways contiguous and parallel to it, the change should come by further legislation.

The plaintiff having failed to allege any breach of duty by the defendant which it owed to his employer, or to him, the first ground of demurrer was well taken, and the second need not be considered.

Judgment affirmed.

UNITED STATES CIRCUIT COURT
OF APPEALS, THIRD CIRCUIT.

DANIEL C. LEWIS, Plff. in Err.,
v.
NEW YORK LIFE INSURANCE COM-
PANY.

(— C. C. A. —, 181 Fed. 433.)

**Insurance —return of premiums —
pleading.**

1. The return of the premiums paid cannot be secured in an action praying damages for failure to make a loan on an insurance policy, as provided in the contract, and it is immaterial that the complaint contains language indicating an intention on plaintiff's part to repudiate the contract, if it also shows that the insurer had no such intent.

Same — refusal to lend money.

2. Breach by an insurance company of its contract to lend money on a policy does not justify the insured in treating the contract as rescinded, and suing for a return of the premiums paid.

**Same — noncompliance with contract —
effect.**

3. The holder of an insurance policy which contains a provision for loans upon the policy does not make a case for rescission of the contract for failure to grant a loan, where he does not allow time between the making of his demand and the bringing of the suit for the application to reach the home office and the reply to be returned, and he does not execute the loan agreement which the policy makes a condition precedent to the granting of a loan.

(October 3, 1910.)

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in defendant's favor in an action brought to recover damages for failure to make a loan on a policy of life insurance, in accordance with a provision thereof agreeing to do so. **Affirmed.**

The facts are stated in the opinion.

Argued before Lanning, Circuit Judge, and Bradford and Archbald, District Judges.

Note. — Breach of agreement of insurer to make loan on policy as justifying rescission and recovery of premiums by insured.

But two decisions (New York L. Ins. Co. v. Pope, 24 Ky. L. Rep. 485, 68 S. W. 851, and Key v. National L. Ins. Co. 107 Iowa, 446, 78 N. W. 68) seem to have involved the question as above stated, and these, while arriving at opposite conclusions, are distinguishable and reconcilable with the holding announced in *LEWIS v. NEW YORK L. INS. CO.*, provided the true criterion of a breach which warrants rescission is whether 30 L.R.A. (N.S.)

Messrs. Malcolm Lloyd, Jr., Reynolds D. Brown, and Charles H. Burr, for plaintiff in error:

The clause of the policy under consideration is a vital clause.

Key v. National L. Ins. Co. 107 Iowa, 446, 78 N. W. 68.

The violation of its contract entitles the plaintiff to rescind.

Union Cent. L. Ins. Co. v. Pottker, 33 Ohio St. 459, 31 Am. Rep. 555; True v. Bankers' Life Assn. 78 Wis. 287, 47 N. W. 520; Braswell v. American L. Ins. Co. 75 N. C. 8; McKee v. Phenix Ins. Co. 28 Mo. 383, 75 Am. Dec. 129; Van Werden v. Equitable Life Assur. Soc. 90 Iowa, 621, 68 N. W. 892; Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51; American L. Ins. Co. v. McAden, 109 Pa. 399, 1 Atl. 256; Supreme Council A. L. H. v. Black, 59 C. C. A. 414, 123 Fed. 650; Fawcett v. Supreme Sitting, O. I. H. 64 Conn. 170, 24 L.R.A. 815, 29 Atl. 614; Meade v. St. Louis Mut. L. Ins. Co. 51 How. Pr. 1; People's Mut. Ins. Fund v. Bricken, 92 Ky. 297; 17 S. W. 625; Daix v. Supreme Council A. L. H. 127 Fed. 374 (affirmed in 64 C. C. A. 435, 130 Fed. 101); McAlarney v. Supreme Council A. L. H. 131 Fed. 539 (reversed in 67 C. C. A. 546, 135 Fed. 72); Michaelson v. Security Mut. L. Ins. Co. 83 C. C. A. 334, 154 Fed. 356, 12 A. & E. Ann. Cas. 37.

The right of rescission carries with it the right to recover premiums paid.

Union Cent. L. Ins. Co. v. Pottker; Alabama Gold L. Ins. Co. v. Garmany; American L. Ins. Co. v. McAden; Supreme Lodge A. L. H. v. Black,—supra.

Mr. Arthur G. Dickson, for defendant in error:

The plaintiff below was not entitled to recover as upon a rescission of the entire contract, because his suit was for damages for breach of contract, and not for money had and received, namely, the premiums paid by him.

American Life Ins. & T. Co. v. Shultz, 82 Pa. 46; Rumbold v. Penn Mut. L. Ins. Co. 7 Mo. App. 71; Supreme Council A. L. H. v. Jordan, 117 Ga. 808, 45 S. E. 33; Suess v.

the failure to perform defeats the object of the contract or merely goes to a subsidiary part of it which can be compensated in damages. New York L. Ins. Co. v. Pope, supra, which directly supports *LEWIS v. NEW YORK L. INS. CO.*, was a suit for a rescission of a contract of life insurance in which recovery of all premiums paid, and interest and damages in addition, was sought upon refusal of the insurer to make a loan in accordance with a stipulation in the policy, which, between the sixth and tenth year, allowed a loan, not to exceed \$212 at any one time, the policy being for \$2,000. From this it will be seen that here,

Imperial L. Ins. Co. 64 Mo. App. 1; American L. Ins. Co. v. McAden, 109 Pa. 399, 1 Atl. 256.

The insured, who has enjoyed the protection of a policy, cannot recover the premiums paid by him, as upon rescission, because the company has given him something of value, for which it is entitled to compensation, even though it has been guilty of a breach of the principal contract.

Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51; Universal L. Ins. Co. v. Binford, 76 Va. 103; Mutual Reserve Fund Life Assn. v. Taylor, 99 Va. 208, 37 S. E. 854; Ebert v. Mutual Reserve Fund Life Assn. 81 Minn. 116, 83 N. E. 506, 834, 84 N. W. 457; Barney v. Dudley, 42 Kan. 212, 16 Am. St. Rep. 476, 21 Pac. 1079; Speer v. Phoenix Mut. L. Ins. Co. 36 Hun, 322; People v. Security L. Ins. & A. Co. 78 N. Y. 114, 34 Am. Rep. 522; Toplit v. Bauer, 161 N. Y. 325, 55 N. E. 1059; Skudera v. Metropolitan L. Ins. Co. 17 Misc. 367, 39 N. Y. Supp. 1059; Keyser v. Mutual Reserve Fund Life Assn. 60 App. Div. 297, 70 N. Y. Supp. 32; Brooklyn L. Ins. Co. v. Weck, 9 Ill. App. 358; Continental L. Ins. Co. v. Houser, 89 Ind. 258; Metropolitan L. Ins. Co. v. McCormick, 19 Ind. App. 49, 65 Am. St. Rep. 392, 49 N. E. 44; Merrick v. North Western Nat. L. Ins. Co. 124 Wis. 221, 109 Am. St. Rep. 931, 102 N. W. 593; American Casualty Ins. Co's Case (Boston & A. R. Co. v. Mercantile Trust & D. Co.) 82 Md. 535, 38 L.R.A. 97, 34 Atl. 778; Smith v. St. Louis Mut. L. Ins. Co. 2 Tenn. Ch. 727; Day v. Connecticut General L. Ins. Co. 45 Conn. 480, 29 Am. Rep. 693; Kellner v. Mutual L. Ins. Co. 43 Fed. 623.

A breach of the agreement to loan does not give the right of rescission.

New York L. Ins. Co. v. Pope, 24 Ky. L. Rep. 485, 68 S. W. 851.

The proper measure of damages for breach of a provision in a life insurance policy that, after a certain number of premiums have been paid, a paid-up policy will be issued, upon surrender of the original policy, is the value of the paid-up poli-

cy, not a return of the premiums that have been paid.

Nestel v. Knickerbocker L. Ins. Co. 12 Phila. 477; Price v. Guardian Mut. L. Ins. Co. 5 W. N. C. 250; Missouri Valley L. Ins. Co. v. Kelso, 16 Kan. 481; Watts v. Phoenix Mut. L. Ins. Co. 16 Blatchf. 228, Fed. Cas. No. 17,294; Nashville L. Ins. Co. v. Matthews, 8 Lea, 499; Phoenix Mut. L. Ins. Co. v. Baker, 85 Ill. 410; Standley v. Northwestern Mut. L. Ins. Co. 95 Ind. 254; Rumbold v. Penn Mut. L. Ins. Co. 7 Mo. App. 71; Piedmont & A. L. Ins. Co. v. Young, 58 Ala. 476, 29 Am. Rep. 770; Union Cent. L. Ins. Co. v. McHugh, 7 Neb. 66; Harris v. Scrivener (Tex. Civ. App.) 78 S. W. 705; Knickerbocker L. Ins. Co. v. Heidel, 8 Lea, 488.

Archbald, District Judge, delivered the opinion of the court:

The plaintiff was insured in the defendant company for \$30,800 on the ordinary life 20-year standard accumulation plan, by a policy bearing date July 12, 1904, and containing a provision for a cash loan, the right to which, as he claims, he was not permitted to enjoy. And the company, according to this, having broken their contract, this action was brought to recover the damages. The clause of the policy which was relied on is as follows: "The insured may obtain cash loans on the sole security of this policy, on written request, at any time after it has been in force two full years, if premiums are duly paid to the anniversary of the insurance next succeeding the date after the loan may be obtained. The insured shall pledge this policy and its accumulations as collateral security for such loans, in accordance with the terms contained in the company's then-existing form of policy loan agreement. The amount of loan available at any time is stated in the table on the second page, and includes loans then unpaid. Interest will be at the rate of five (5) per cent per annum, payable in advance to the next anniversary, and annually in advance on that date and thereafter."

as in the LEWIS CASE, the obtaining of insurance, and not the privilege of a loan, was the object of the contract. The court refused to adjudge the return of the premiums, holding that the insured was only entitled to damages, the measure of which was said to be the difference between the interest at which the defendant agreed to furnish the money, and the rate, not exceeding the legal rate, at which a loan could have been obtained elsewhere; at least, in the absence of an averment that the money was desired for a specific use, known to the defendant, and that it could not have been obtained elsewhere. On the other hand, the 30 L.R.A. (N.S.)

policy holder in Key v. National L. Ins. Co. supra, on refusal of a loan, was allowed to rescind and recover the premiums, on the ground that the taking out of the insurance was but an incident, whereas the making of the loan was the principal subject-matter of the agreement, it having been expressly agreed that the policy was not to be accepted unless the loan could be secured. Thus it will be seen that the latter decision may, as is stated in the LEWIS CASE, be distinguished therefrom on the ground that the breach defeated the real object of the contract, going directly to the consideration.

G. J. C.

By the table which is there referred to, the insured, after four years, was entitled to borrow \$1,940; and in part availing himself of this, on March 18, 1908, the plaintiff had secured \$1,300, which was all that he required at the time, but was \$640 less than he was privileged to borrow. A year later, however, the last of May, 1909, not being satisfied with the policy because of the deferred dividend arrangement, he made up his mind to change; but, there being no provision in the policy for a cash surrender value, he decided to realize on it, by borrowing up to the limit, and then letting the policy lapse; and he accordingly applied to the company through the agency at Philadelphia for a further loan upon it. The representatives of the company, to whom he applied, being made aware of his purpose, endeavored to dissuade him, and suggested without success that he take a new form of policy, with regard to which there were some negotiations. The policy, on account of the existing loan, being in the possession of the company in New York, the additional amount to which he was entitled was not known to him, and in the course of his interviews with the Philadelphia agents he was advised that, on July 12, 1909, after the payment of his next premium, amounting to \$960, he would be entitled to a loan of \$2,556, or \$1,256 more than he then had; it being stated to him that until then the policy had no further loanable value. Having obtained a copy of the policy, however, he discovered that this was not so, and that he had been entitled all along to \$1,940, or \$640 more than he had received, and he thereupon made a demand by letter, July 7, for this further accommodation. But on July 9, two days later, having obtained no reply, and there being but three days until the next premium was due, he began this action. At the trial the plaintiff, upon this showing, was allowed a verdict of \$640, the difference between the loan which he had and \$1,940, the amount which he had a right to. Not content with this, however, he claimed the full amount of the premiums paid, on the basis that there was a breach of the policy, which justified a rescission and authorized a recovery of everything that had been paid under it. And this being denied him, the case is brought here for consideration.

The plaintiff, in his statement of claim, declares for damages for a breach of the agreement to loan him the amount he was entitled to, which affirms the contract, and not for the premiums paid, which repudiates it; the one cause of action being distinctly different from the other. *American Life Ins. & T. Co. v. Shultz*, 82 Pa. 46. This appears by the *ad damnum* clause, where, in 30 L.R.A. (N.S.)

conclusion, it is declared: "Wherefore the plaintiff claims damages from the defendant in the sum of \$6,000, at which sum the plaintiff estimates the damages which he has suffered by reason of the wilful failure and refusal on the part of the defendant company to comply with the terms of the policy aforesaid."

It is true that, leading up to this, after setting out the facts substantially as they are given above, it is averred that, receiving no further reply from the company to his written request for a loan on July 7, he notified them on July 9, through his counsel, that he treated their refusal to make the loan as a breach of the entire contract, and that he was not willing, in consequence, to continue paying the premiums; which, so far as it goes, may seem to be a repudiation of the policy. But it is also further averred that, as he believes, it was the sole purpose of the company, in declining the loan and prolonging negotiations, to induce him to renew the policy, by paying the premium to come due July 12, which negatives any intent on the part of the company to abrogate the policy, or no longer be bound by it, and, on the contrary, expressly affirms their desire to keep on with it, in confirmation of which it is stated that the plaintiff was assured by the representatives of the company, at Philadelphia, that, upon payment of the next annual premium, he would be entitled to a loan of \$2,556, or \$1,256 more than he then had; the only difference between the parties thus being that he claimed the right to \$640 more at once, before the next premium was due, and that the company did not immediately fall in with this. And the damages claimed, on the strength of these averments, being those sustained by the refusal of the company to make the additional loan, whatever might otherwise have been made out of the facts stated, the action cannot be regarded as proceeding for anything outside of that. These damages consisted in the difference between the loan which the plaintiff had obtained, and the loan which, by the terms of the policy, he was entitled to, which the company, in disregard of their agreement, refused to allow him, amounting to \$640, the judgment which he recovered. And having thus got all that he declared for, there was no error in holding him down to it.

But not to decide the case on a question of pleading, and assuming that the liability of the company for the premiums paid, based on a rescission of the policy, was open for determination, the plaintiff shows no cause of action beyond that which was allowed him. The right to rescind and recover the premiums paid was not justified by

the refusal of the company to loan the additional amount named in the policy. The right to rescind is an extreme right, and it is not every breach of contract that warrants its exercise. It exists, however, where the contract is entire, and either in time or manner of performance is broken by either party from the outstart. *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366, 6 Sup. Ct. Rep. 12; *Bowes v. Shand*, L. R. 2 App. Cas. 455; *Pope v. Porter*, 102 N. Y. 366, 7 N. E. 304. But where the contract, if divisible, or even if indivisible, is made up of several distinct and similar acts, to be separately and successively performed, the right to rescind, according to some of the authorities, depends on whether the conduct of the party in default is such as evinces an intent to abandon the contract, or no longer be bound by its terms. *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 434, 23 Eng. Rul. Cas. 504; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27; *Harding v. York Knitting Mills (C. C.)* 142 Fed. 228. But never does the failure to perform afford ground for rescission, unless it be such as to defeat the object of the contract, and not simply go to a subsidiary part of it, which can be fully compensated in damages. 9 Cyc. Law & Proc. pp. 635, 650; 24 Am. & Eng. Enc. Law, 2d ed. p. 644. As is said in *Weintz v. Hafner*, 78 Ill. 27: "For partial derelictions and noncompliances in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must still seek his remedy upon the stipulations of the contract itself."

Or, as it is put in *Elgin v. Joslyn*, 136 Ill. 525, 26 N. E. 1090: "A slight or partial neglect to observe some of the terms or conditions of a contract will not justify a rescission or abandonment."

It is only where the breach goes to that which is vital that this course is open. But, if that be so, the plaintiff had no right to throw up the policy and sue for the premiums simply because the company failed to honor, offhand, the additional loan required of them. The refusal, under the circumstances, cannot be said to have evinced an intent not to be bound by or live up to the terms of the contract, if that is the criterion. Indeed, it is a question whether, rightly considered, there was a refusal at all; the plaintiff not having given time for it. And much less can it be said that, the company having broken one part of the contract, there was no assurance that they would regard the rest of it, which magnifies the breach out of all proportion to its real significance. The fact is that the agreement for a loan was mere-

ly subsidiary to the main purpose of the policy, which was to insure the plaintiff for the benefit of the party designated; the right to a progressive loan as the policy aged being an accommodation altogether secondary and subordinate,—valuable, no doubt, but not vital.

It certainly was no more important than the right, under certain conditions, to a paid-up policy; and yet it has been held, in numerous cases, that the breach of this provision does not entitle the insured to recover the premiums paid, as upon a rescission. *Watts v. Phoenix Mut. L. Ins. Co.* 16 Blatchf. 228, Fed. Cas. No. 17,294; *Phoenix Mut. L. Ins. Co. v. Baker*, 85 Ill. 410; *Rumbold v. Penn Mut. L. Ins. Co.* 7 Mo. App. 71; *Union Cent. L. Ins. Co. v. McHugh*, 7 Neb. 66; *Nashville L. Ins. Co. v. Mathews*, 8 Lea, 499. And the same ruling was made with regard to the refusal to permit a change of the beneficiary. *Harris v. Scrivener (Tex. Civ. App.)* 78 S. W. 705. And the failure to return a part of the premiums, as agreed in the policy. *Knickerbocker L. Ins. Co. v. Heidel*, 8 Lea, 488. It is true that, in each of these cases, the action was for damages for a breach of the contract, and not in terms for the premiums. But it was held in each, which is the significant thing, that the premiums were not a measure of the damages.

The case of *New York L. Ins. Co. v. Pope*, 24 Ky. L. Rep. 485, 68 S. W. 851, is also in point, the suit there being for a rescission and a recovery of the premiums, on the ground that there had been a refusal of a loan by the company, in violation of the policy; but it was held that the plaintiff was only entitled to damages. It is true that, in *Key v. National L. Ins. Co.* 107 Iowa, 446, 78 N. W. 68, the policy holder, on the refusal of a loan, was allowed to rescind and recover the premiums. But, as an inducement to take out the policy, there had been an express agreement in that case to make a loan on certain personal property, with the policy as collateral; and this being the inducement which moved the plaintiff to insure, the refusal went directly to the consideration. The case is thus to be distinguished from the ordinary one, where, as here, the agreement for a loan is merely an incident; the opportunity afforded by it not being the moving cause for taking out the policy. And, except as so distinguished, the case does not meet with our approval.

It is urged, however, that this court, in *Supreme Council A. L. H. v. Black*, 59 C. C. A. 414, 123 Fed. 650, sustained the right to rescind and recover back the premiums where there has been a breach of the insurance contract. But the attempt there was to cut down the policy, by an amendment of

the by-laws, from \$5,000 to \$2,000; the company deciding that this was the highest amount for which thereafter a policy should issue. This, as was said of a similar attempt in *Becker v. Berlin Ben. Soc.* 144 Pa. 232, 27 Am. St. Rep. 624, 22 Atl. 699, was a repudiation, pure and simple, there being an entire abrogation of the existing policy, and the substitution of another and very different one; the amount of insurance being reduced over one half from that on which the insured had been paying premiums. Going as this did to the root of the contract, the insured was not obliged to submit, but had the right, as it was held, to rescind and sue for what he had paid on it. It is not at all like the present case, where, if there was any breach, it was merely of a minor feature.

But, assuming that the plaintiff, for the refusal of a loan, was entitled to rescind, he did not, in our judgment, put matters in shape to do so. The written request for the loan, which was required by the policy, was not made until July 7, and was not received by the company, at the home office in New York, where the policy was in pledge for the existing loan of \$1,300, until the day following; and before a reply, in the reasonable course of events, could be made to it, the plaintiff, the next morning, July 9, appeared at the branch office in Philadelphia, where he had filed his request, and peremptorily demanded his money. And, upon being advised that no reply had as yet been received, he went off and at once brought suit, charging the company with having broken the agreement. But, according to the terms of the policy, in order to lay grounds for a loan, the plaintiff had not only to make a written request, as he did, but he had also to sign a loan agreement, pledging the policy, and obligating himself, as therein provided. He may have been dependent on the company for the form of this agreement; but, without waiting or asking for that, two days after his request was made, the present suit was instituted. The right to a loan was not like money in the bank, to be demanded over the counter. Not only were there certain formalities to be observed, as just stated, but, the question of a loan having to be referred to the officers of the company in New York, the representatives in the Philadelphia office having apparently no authority over it, a reasonable time had necessarily to elapse, after the request was sent in, before a response could be expected, and until it had passed, which certainly was not the case when suit was brought, it cannot be said that the company was in default, or that the agreement had been broken.

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It is true that the plaintiff began moving for a loan the latter part of May, and had been told, as we have seen, by the representatives of the company at Philadelphia, that he was not entitled to any more than he had secured until after the payment of the next premium. But the facts show that he did not rest on this. Nor is it to be treated the same as if, after due application, there had been an express denial by the company. Having procured a copy of the policy on June 29, and consulted with his counsel, it was plainly to be seen that he was entitled to \$640 above what he had borrowed, and he accordingly made demand for it. But he still waited eight days, until July 7, after he had returned from his vacation; and if he had the right to put the matter off in this way, for his own convenience, he cannot blame the company for the predicament in which he found himself by reason of the time for his next premium having meantime run against him. And neither had he a right to hold the company as for a breach, two days after he made his demand, because of there being only three days left to the life of his policy.

It is urged, as bearing on the right to rescind and recover the premiums, that there was no offer by the plaintiff, either before suit or afterwards, to repay the \$1,300 which he had borrowed; also, that there was no offer to adjust or make allowance for the protection which he had enjoyed during the period for which the policy had been carried. This was exacted in *Lovell v. St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390. But the necessity for it was denied by this court in *Supreme Council A. L. H. v. Black*, *supra*. And not being essential to the case, we do not undertake to dispose of it. Without regard to anything that is so suggested, it is clear, for the reasons already given, that the plaintiff got all that he was entitled to in the \$640 which he recovered.

The judgment is affirmed.

TEXAS SUPREME COURT.

TEXAS CENTRAL RAILROAD COMPANY,
NY, Plff. in Err.,
v.

J. M. ZUMWALT.

(— Tex. —, 132 S. W. 113.)

Master — relief department — charity — malpractice of physician.

A railroad company which retains from the wages of each employee a small amount, with the aggregate of which it employs a physician to treat employees when ill or injured, is not liable to an employee for the malpractice of the physician, if it uses or-

inary care in his selection, and is not promoting any interests of its own in the transaction, since it will be regarded as merely administering a charity.

(November 30, 1910.)

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District to review a judgment reversing a judgment of the District Court for Bosque County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of a physician employed by defendant. Reversed.

The facts are stated in the opinion.

Messrs. J. A. Kibler and Cureton & Cureton, for plaintiff in error:

A railway company cannot be held liable for the negligence of the physicians it furnishes, except upon the ground of want of proper care in selecting or retaining them.

Note. — Liability for negligence of attendants furnished by relief department toward which employees contribute.

The only cases included are those decided since the preparation of the note on the same point, appended to Phillips v. St. Louis & S. F. R. Co. 17 L.R.A.(N.S.) 1167.

In accord with the weight of authority as disclosed in the earlier note, it is held in Wells v. Ferry-Baker Lumber Co. 57 Wash. 658, 29 L.R.A.(N.S.) 426, 107 Pac. 869, that an employer who retains from the wages of his employees a certain amount with which to pay for the services of a surgeon, if they are injured, discharges his full obligation when he selects a competent surgeon to attend a particular injury, and cannot be held responsible for such surgeon's negligence.

So, it is held in Barden v. Atlantic Coast Line R. Co. 152 N. C. 318, — L.R.A.(N.S.) —, 67 S. E. 971, that a relief department supported by the mutual contributions of a railroad company and its employees, and maintained for the sole purpose of giving relief to the latter, is a charity, in the administration of which the only duty devolving upon the company is to use reasonable care in the selection of physicians and surgeons who are reasonably competent; and that, having exercised this duty, the company is not responsible for their want of skill. In arriving at the conclusion that this constituted a charity, the court holds void a regulation providing that the acceptance of benefits shall operate as a release of claims against the company for damages "growing out of said injury."

On the other hand, it was held in Texas & P. Coal Co. v. McVain (Tex. Civ. App.) 124 S. W. 202, that where there was a contract whereby the employer, in consideration of the monthly deductions from the servants' wages, undertook to furnish them medical treatment, the former was liable for 3C L.R.A.(N.S.)

Galveston, H. & S. A. R. Co. v. Hanway (Tex. Civ. App.) 57 S. W. 697; Galveston. H. & S. A. R. Co. v. Scott, 18 Tex. Civ. App. 321, 44 S. W. 589; Southern P. R. Co. v. Mauldin, 19 Tex. Civ. App. 166, 46 S. W. 650; Richardson v. Carbon Hill Coal Co. 6 Wash. 52, 20 L.R.A. 338, 32 Pac. 1012; Union P. R. Co. v. Artist, 23 L.R.A. 581, 9 C. C. A. 16, 19 U. S. App. 612, 60 Fed. 365; South Florida R. Co. v. Price, 32 Fla. 46, 13 So. 638; Quinn v. Kansas City, M. & B. R. Co. 94 Tenn. 713, 28 L.R.A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036; Eighth v. Union P. R. Co. 93 Iowa, 538, 27 L.R.A. 296, 61 N. W. 1056; Pittsburgh, C. C. & St. L. R. Co. v. Sullivan, 141 Ind. 83, 27 L.R.A. 840, 50 Am. St. Rep. 313, 40 N. E. 138; Louisville & N. R. Co. v. Foard, 104 Ky. 456, 47 S. W. 343; Laubheim v. De Koninglyke Nederlandsche S. B. Maatschappij, 107 N. Y. 228, 1 Am. St. Rep. 815, 13 N. E. 781;

the negligence of physicians supplied by it in discharge of the undertaking, notwithstanding no profit accrued to the employer from the fund. It was further held that this liability could not be avoided upon the theory that the plaintiff was a member of a labor union in whose hands the matter of employing a physician wholly rested; that the defendant merely distributed the fund; and that its services were rendered without compensation, and at the request of the employees, who selected the physicians that treated them,—where it did not appear that the union had anything to do with the selection of the second physician who attended the plaintiff, and whose attendance began a few days after the injury occurred, and extended over several months, and that this and every other injured employee had his choice of one of three physicians employed by the defendant, and if one other than these three should be chosen, the employee forfeited his right to resort to the fund.

Attention is also directed to Carroll v. St. Louis Southwestern R. Co. (Tex. Civ. App.) 120 S. W. 1079, holding that where a surgeon in charge of a hospital maintained by a railroad company for its employees has no authority to bind the company by his promise to notify a mother of any unfavorable change in the condition of her son, a patient and an employee, the company cannot be held responsible to her for the surgeon's negligent failure so to notify her, at least where the only damages claimed are for mental anguish.

On the question of the master's duty to provide medical assistance for his servant, see the note to The Kenilworth, 4 L.R.A.(N.S.) 49.

On the right of a servant to recover for his master's delay in taking him to a hospital, see the note in 7 L.R.A.(N.S.) 997.

See also the note in 18 L.R.A.(N.S.) 174, on the liability of the master for services of a physician whom he summons to care for an employee.

L. A. W.

26 Cyc. Law & Proc. p. 1082; Thomp. Neg. §§ 3841-3843.

Messrs. Prendergast & Williamson, for defendant in error:

A corporation organized for profit, conducting a hospital for charge, is liable to one injured therein through the negligence of its employees.

Texas & P. Coal Co. v. Connaughten, 20 Tex. Civ. App. 642, 50 S. W. 173; Gitzhoffen v. Sisters of Holy Cross Hospital Asso. 32 Utah, 46, 8 L.R.A. (N.S.) 1161, 88 Pac. 691; University of Louisville v. Hammock, 127 Ky. 564, 14 L.R.A. (N.S.) 784, 128 Am. St. Rep. 355, 106 S. W. 219; Richardson v. Carbon Hill Coal Co. 6 Wash. 52, 20 L.R.A. 338, 32 Pac. 1012; Sawdey v. Spokane Falls & N. R. Co. 30 Wash. 349, 94 Am. St. Rep. 880, 70 Pac. 972; Brown v. La Societe Francaise, 138 Cal. 475, 71 Pac. 516; Phillips v. St. Louis & S. F. R. Co. 211 Mo. 419, 17 L.R.A. (N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 109, 14 A. & E. Ann. Cas. 742.

Brown, J., delivered the opinion of the court:

This suit was instituted by the defendant in error against the railroad company to recover damages for the loss of an eye, which was claimed to have been caused by the negligence of Dr. Samuel Webb. There is no controversy as to the facts of this case, and they may be briefly stated as follows:

The railroad company entered into a contract with Dr. Webb in terms as follows:

The State of Texas, County of McLennan.

This memorandum of agreement made and entered into on this day by and between S. Webb, Jr., party of the first part, and the Texas Central Railroad Company, party of the second part, witnesseth: The party of the first part hereby agrees to act as chief surgeon of party of the second part, and as such to establish and maintain at Walnut Springs, Texas, an adequate and suitable hospital at his own expense and cost, for the treatment of all employees of the party of the second part, who are entitled to hospital privileges as hereinafter provided, and to furnish all instruments, devices, and appliances, and all medicines and other necessities (including board and lodging while patients are at the hospital), for the proper treatment of all such employees, who are entitled to hospital privileges under this contract or the rules and regulations of the party of the second part governing in such matters. (2) It is understood that none but white employees shall be entitled to the hospital privileges herein mentioned, and that no employee shall be treated under the terms hereof for

any venereal disease, and that no person suffering from contagious disease shall be admitted to the hospital of the party of the first part. (3) As consideration to party of first part for the performance of the foregoing covenants and agreements, party of the second part agrees to collect from all of its white employees, except its general officers, the sum of 50 cents per month as hospital fees, and to deliver to the party of the first part as compensation for his services, etc., the amount thus collected at the end of each month. (4) It is understood and agreed that no hospital fee shall be collected by party of the second part from any employee remaining in its service for a period of less than one week. (5) It is further agreed and understood that local surgeons shall be appointed by party of the first part at all important towns on line of party of the second part, and that such local surgeons may be called by party of the second part or its authority to treat in cases of emergency any employee entitled to hospital privileges hereunder, and the fees of such local surgeons for such services shall be deducted by the party of the second part from the hospital fund hereinbefore provided for. (6) As part compensation to all local surgeons appointed hereunder, party of the second part agrees to furnish to them annual transportation over its line of road, without cost to the party of the first part. (7) This contract shall continue in force for a term of five years from the date hereof, subject, however, to be terminated by either party hereto, by giving written notice of sixty days to the other party of his intention so to do. In testimony whereof witness the signatures of the Texas Central Railroad Company, acting by and through C. Hamilton, its vice president and general manager, and my hand, at Waco, Texas, on this the 1st day of January, 1907.

Texas Central Railroad Company,
C. Hamilton, Vice President
and General Manager.
S. Webb.

Witness: G. W. Young.
A. B. Chambers.

Dr. Webb was a competent surgeon and physician. Dr. Webb established the hospital provided for in the contract at Walnut Springs, at which place Zumwalt was engaged as a boiler maker in the employ of the railroad company. In the course of his work, a particle of iron struck in the ball of one of his eyes, and he went to Dr. Webb to have it removed. Dr. Webb removed the piece of iron from his eye, but it is claimed that he acted negligently in using an instrument which was not disin-

fectured or sterilized, and that the eye became infected, and it became necessary to remove the ball. It is unnecessary to set out the facts with regard to Dr. Webb's negligence, for that question is not before us. The case is presented to this court upon the assumption that Dr. Webb was negligent in the manner in which he performed the operation. The question that we have to deal with is, Was the railroad company liable for the negligence of Dr. Webb? On the trial the district court charged the jury to return a verdict for the defendant, which was done, and upon appeal to the court of civil appeals that judgment was reversed, and the cause remanded for a new trial. This court granted a writ of error upon the ground of conflict with Galveston, H. & S. A. R. Co. v. Hanway (Tex. Civ. App.) 57 S. W. 695.

It was the custom of the railroad company each month to deduct 50 cents from the wages due to each employee, which constituted a fund to be applied to the procurement of medical attention and care for any of such employees who might be injured or become sick during his employment with the company. When Zumwalt was employed by the railroad company, he understood this custom of the company, and expected it to reserve 50 cents out of his monthly wages for the purpose of providing medical treatment in case he should become sick or receive an injury. The company did reserve from Zumwalt's wages for each and every month up to the time of his injury 50 cents, which went into the hospital fund. Under the contract, which is copied above, the railroad company monthly turned over to Dr. Webb the full amount received by it from its employees by means of the deduction before stated. There is no evidence to show whether this was sufficient to pay the expenses of the hospital which Dr. Webb established at Walnut Springs or not. It does appear from the contract that Dr. Webb undertook to furnish, for the sum collected, medical attention and proper care to all persons entitled to participate in the fund. The railroad company claims that it was administering a charity, in the performance of which it received from its employees the fund provided by the tax levied, and paid it over to Dr. Webb, who was in charge of the hospital. Therefore it is not liable for the injury resulting from his negligence.

If the fund distributed was such that it was constituted a charity, and the railroad company had no purpose to be served in connection with its own business by administering the fund, then it was only required in administering the trust, to use ordinary care in the selection of Dr. Webb as the means by which to carry out the scheme in-

augurated. Union P. R. Co. v. Artist, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365; Fire Ins. Patrol v. Boyd, 120 Pa. 643, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553. If, however, the railroad company originated the scheme with a view to promote its own business, and undertook the duty of dispensing the fund to accomplish a purpose of its own, it would be liable for the negligence of Dr. Webb, because, under these circumstances, the hospital would be the business of the railroad company, and Dr. Webb would be its agent. The effect of the evidence is that the railroad company inaugurated the plan to accumulate a fund with which to care for such of its employees as might be injured or be sick during such employment, and that fact suggests that it may have had a purpose of its own, but there is nothing in the evidence to indicate what that purpose was, and liability cannot be based upon vague speculation. The fund did not become the property of the company, but it was held by it in trust for the contributing employees. There being no method of executing the trust specified, the company was charged with the duty of administering it in such manner as would best accomplish the end for which it was accumulated; that is, to provide for the care of the sick and injured employees who should come within the terms of the trust. From the standpoint of the contributing employees, the fund constituted a charity, because it was raised by them to be expended for the benefit of persons entitled thereto, who would receive it without cost to them. It may then with propriety be said that the railroad company was charged with dispensing a charity fund, and if it made the contract with Dr. Webb as a means of executing the trust reposed in it,—that is, to give relief to the sick and injured employees coming within the class entitled to receive it without cost to them,—it was engaged in dispensing a charity, and, under such circumstances, Dr. Webb would not be the agent of the company, nor would he be performing or transacting a business of the company. Therefore it would not be liable for his negligence in the discharge of his duty as surgeon.

Although the fund was accumulated in the treasury of the company for charitable purposes, and the company was charged with the duty of dispensing it for such purpose, yet, if in fact the contract with Dr. Webb was made by the company in order to promote its own interest by the administration of the trust fund, and it had that effect, he was the agent of the company, and it should be held liable for his negligence. Upon the face of the con-

tract, it appears to provide the most practical method by which the trust fund could be applied to the purposes for which it was accumulated. The contract was made with a physician who was required to do those things which the sick and injured would need to have done for them, and the entire fund received by the railroad company was devoted to execution of the contract and the accomplishing of the purpose to which it was intended to be devoted. The contract did not require Dr. Webb to do anything for the railroad company in connection with the discharge of his duties, nor, indeed, does it appear from the terms of that instrument or the attending circumstances that, by the performance of it, the business of the railroad company was in any manner affected, or that Dr. Webb, in the discharge of his duties, was in any manner serving the railroad. In order to hold the railroad company liable under such circumstances, it must be shown in some way, or it must appear from the facts and circumstances, that in truth and in fact the railroad company used the trust fund by means of the contract to its own advantage. We find nothing in the facts found by the court of civil appeals which would indicate that any business of the company could be promoted, hindered, or delayed either by having the hospital or by its nonexistence. It is true that the company reserved the right to terminate the contract, but that was eminently proper, so that, in case Dr. Webb failed to carry out the good purpose of the parties, another arrangement could be made. All that has been done by the company is consistent with a desire to faithfully carry out the purpose of its employees in creating the fund. We cannot attribute to the company motives not indicated by its acts nor proved by the evidence.

The honorable Court of Civil Appeals erred in reversing the judgment of the District Court. It is ordered that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the District Court be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

SOCIÉTÉ NOUVELLE D'ARMEMENT,
Appt.,
v.

UNITED STATES STEAMSHIP COMPANY,
Claimant, of the Santa Rita.

(100 C. C. A. 360, 176 Fed. 890.)

Proximate cause — burning of vessel — negligent disposition of oil.

The act of an oil-burning vessel lying at
30 L.R.A.(N.S.)

a wharf which is oil soaked and laden with inflammable material, in discharging a quantity of fuel oil into the water, which floats under the wharf and becomes matted with particles of inflammable rubbish and *débris* on the water, is the proximate cause of injury to another vessel at the wharf by the burning of the oil and a portion of the wharf, although the oil is ignited by an independent, innocent act of a stranger, such as throwing a lighted cigar or burning coal into the water.

(February 28, 1910.)

Note. — Discharging oil into stream or bay as proximate cause of fire resulting therefrom.

The decision in *SOCIÉTÉ NOUVELLE D'ARMEMENT v. UNITED STATES S. S. Co.*, holding that the discharge by a steamer of fuel oil into the bay, where it was carried by the wind and tide under a wharf, and with other *débris* formed a mat, was the proximate cause of damage to another vessel by fire resulting from the accidental igniting of the *débris*, seems sound under the facts of that case.

Few cases have considered the question of the discharge of oil into streams or bays as the proximate cause of fires resulting therefrom, and no case involving facts like those of the above case has been found.

In *Kuhn v. Jewett*, 32 N. J. Eq. 647, where oil tank cars had been negligently left standing on a grade, so that they descended and collided with a locomotive, throwing some of the cars from the track, and igniting the oil, which flowed down a stream and set fire to the plaintiff's building, the defendant was held liable. The court said: "Although water is almost universally used as a means to extinguish fire, and it seems, at first blush, to be absurd to say that it can be used for the purpose of extending it, yet it is true, as a matter of fact, that as an agency for the transmission of burning oil, it is just as certain and effectual in its operations as the wind in carrying flame or a spark, or combustible matter in spreading a fire. In keeping up the continuity between cause and effect, it may be just as certain and effectual in its operation as any other material force. In this instance, it carried the consequences of the defendant's negligence to the petitioner's property, with almost as much certainty and directness as if the burning oil had descended upon it in obedience to the law of gravitation. This view is in conflict with that pronounced by the supreme court of Pennsylvania in *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653,—a case which, in its facts, is substantially the counterpart of the one in hand. The water of a running stream was there held to be an intervening agency sufficiently independent and powerful to constitute a new force, without which the injury might not have happened; and it was therefore held that it caused a sufficient break in the chain of causation to relieve

APPEAL by libellant from a judgment of the District Court of the United States for the Northern District of California in defendant's favor in an action brought to recover damages for injuries inflicted upon libellant's vessel, which were alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Argued before Gilbert and Morrow, Circuit Judges, and Hunt, District Judge.

Mr. William Denman, for appellant:

The Santa Rita's violation of the statute to protect vessels from fire is admittedly the *sine qua non* of the loss, and she is liable in damages for the consequences.

Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; McDonald v. Toledo Consol. Street R. Co. 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 104; The Iniziativa, 6 C. C. A. 346, 14 U. S. App. 496, 57 Fed. 311; Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; Deserant v. Cerillos Coal R. Co. 178 U. S. 409, 44 L. ed. 1127, 20 Sup. Ct. Rep. 967, 20 Mor. Min. Rep. 573; Mason v. The William Murtaugh, 3 Fed. 404; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354.

The Santa Rita, having violated a law to protect the instruments of navigation, had cast on her the burden of proving that its violation not only did not cause, but that it could not have caused, the injury.

Richelieu & O. Nav. Co. v. Boston M. Ins. Co. 26 Fed. 596; The Pennsylvania, 19 Wall. 125, 22 L. ed. 148; Flint & P. M. R.

the defendant from liability. The capacity and adaptability of a running stream as an agency for the transmission of burning oil, and its similitude to other material forces as a means of communicating this species of fire, does not seem to have been considered by the court; at least, no allusion is made to it."

In the case of Hoag v. Lake Shore & M. S. R. Co. supra, just referred to by the court, through the negligence of defendants' engineer an oil train ran into an obstruction which had fallen upon the track, and a portion of the train was derailed in such a way that the oil ignited and was carried down a stream upon which plaintiff's house was situated, by reason of which his house was burned. In holding that no recovery could be had, the court said: "The probable consequences of the collision, such as the engineer would have a right to expect, would be the throwing of the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil tanks; the oil taking fire; the burning oil running into and being carried down the stream; and the sudden rising of the waters of the stream, by means of which, in part, at least, the burning oil set fire to the plaintiff's building? This would be a severe rule to ap-

Co. v. Marine Ins. Co. 71 Fed. 210; United States v. St. Louis & M. Valley Transp. Co. 184 U. S. 247, 46 L. ed. 520, 22 Sup. Ct. Rep. 350; The Admiral Cecille, 134 Fed. 673.

The pumping of inflammable oil overboard was the proximate cause of the fire. Johnson v. Chicago, M. & St. P. R. Co. 31 Minn. 61, 16 N. W. 488; Clerk & L. Torts, § 54; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 L. ed. 708, 27 Sup. Ct. Rep. 412; Washington & G. R. Co. v. Hickey, 166 U. S. 521, 41 L. ed. 1101, 17 Sup. Ct. Rep. 661; Barnes v. Masterson, 38 App. Div. 612, 56 N. Y. Supp. 939; Allison v. Hobbs, 96 Me. 26, 51 Atl. 245; Graves v. City & Suburban Teleg. Asso. 132 Fed. 387; 21 Am. & Eng. Enc. Law, 2d ed. p. 496; McGill v. Michigan S. S. Co. 75 C. C. A. 518, 144 Fed. 793; Kuhn v. Jewett, 32 N. J. Eq. 647; 2 Shearm. & Redf. Neg. § 666; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256.

Messrs. Charles Page, Edward J. McCutchen, and Samuel Knight, for appellee:

The doctrine of *causa proxima, non remota, spectatur*, is here applicable, and the alleged act of the steamer was not the proximate cause of the damage to the bark.

Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Davidson v. Nichols, 11 Allen, 514; Aetna F. Ins. Co. v. Boon, 95 U. S. 117, 24 L. ed. 395; Taylor v. Lake Shore & M. S. R. Co. 45 Mich. 74,

ply, and might have made the defendants responsible for the destruction of property for miles down Oil creek. The water was an intervening agent, that carried the fire just as the air carried the sparks in the case of the Pennsylvania R. Co. v. Kerr, 62 Pa. 353, 1 Am. Rep. 431. It is manifest that the negligence was the remote, and not the proximate, cause of the injury to the plaintiff's building."

Where a defendant erected an oil refinery remote from the built-up portions of a city, and without negligence on his part some oil escaped into a river and mingled there with other oil and inflammable material, for the presence of which the defendant was not responsible, and the entire mass was ignited by a third person, over whom the defendant had no control, he was held not liable for the burning of a tugboat by the fire so occasioned, since it was not the direct result of any default on his part, and was not a result which he should have foreseen. Neal v. Atlantic Ref. Co. 16 Pa. Co. Ct. 241.

For a note on liability of one for injury caused by escape of dangerous substance, including oil, stored on his premises, see Brennan Constr. Co. v. Cumberland, 15 L.R.A. (N.S.) 535.

J. T. W.

40 Am. Rep. 457, 7 N. W. 728; Southern R. Co. v. Dickens, 153 Ala. 283, 45 So. 215; Cole v. German Sav. & L. Soc. 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; 21 Am. & Eng. Enc. Law, pp. 480-482; 29 Cyc. Law & Proc. p. 525; Frontier Steam Laundry Co. v. Connolly, 72 Neb. 767, 68 L.R.A. 425, 101 N. W. 995; Shearm. & Redf. Neg. §§ 13, 27; Nickey v. Steuder, 164 Ind. 189, 73 N. E. 117; Stone v. Boston & A. R. Co. 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1.

Plaintiff must not only prove negligence, but also a causal connection between the cause and the injury.

21 Am. & Eng. Enc. Law, p. 516; Avery v. Bowden, 6 El. & Bl. 973; M'Mahon v. Lennard, 6 H. L. Cas. 993; Toomey v. London, B. & S. C. R. Co. 3 C. B. N. S. 146; Cotton v. Wood, 8 C. B. N. S. 568; Judson v. Giant Powder Co. 107 Cal. 549, 29 L.R.A. 718, 48 Am. St. Rep. 146, 40 Pac. 1020; Harter v. Colfax Electric Light & P. Co. 124 Iowa, 500, 100 N. W. 508; The Pennsylvania, 19 Wall. 125, 22 L. ed. 148; Riche-lieu & O. Nav. Co. v. Boston M. Ins. Co. 136 U. S. 408, 34 L. ed. 398, 10 Sup. Ct. Rep. 934; Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619.

Hunt, District Judge, delivered the opinion of the court:

The Société Nouvelle d'Armement, a corporation of France, brought this libel against the American steamer Santa Rita, to recover damages for injuries inflicted upon the Boieldieu, a three-masted steel bark belonging to the libellant. The lower court found that the alleged negligent act of the defendant was not a proximate, but remote, cause of the injury. The libellant sued out this appeal from a judgment in favor of defendant.

The material uncontroverted facts are substantially as follows: The Santa Rita, an oil-burning steam vessel, 450 feet long, was moored to the north side of a wharf at Oakland, California. The British ship Whitlieburn and the libellant's bark Boieldieu were moored on the south side of the same wharf, and directly opposite the Santa Rita. The wharf was 90 feet wide, built on piles driven into the bottom of the harbor. Between 4 and 5 o'clock on the afternoon of March 11, 1907, a fire broke out, partially consuming the wharf and greatly injuring the Boieldieu.

The libellant alleges that this fire was caused by the negligence of the Santa Rita in pumping into the bay or allowing to drip from her docks therein large quantities of volatile fuel oil, which collected un-

der the wharf in the alleyway formed by the vessels and the wharf, and that, as the tide started to come in, this mass of oil, held and matted together by particles of inflammable rubbish and *débris*, moved partially out from under the wharf and surrounded the Boieldieu. The libellant further contends that, while the Boieldieu was thus surrounded by this highly combustible oil mat, a spark from an engine on the wharf, or a live coal from the fuel box of the donkey engine, or a burning cigar, was thrown from the wharf into this oily mass, igniting it, and causing the conflagration which damaged the wharf and the Boieldieu.

The court found, among other things, that oil of a highly combustible nature was discharged from the Santa Rita, and collected in the water under the wharf and around the Boieldieu. There is ample evidence to support this conclusion. Much of the evidence offered by the defendant relating to this finding is that of men who testify that they did not pump any oil overboard or see any thus pumped.

On the other hand, the libellant supports its contention by the testimony of those who saw the oil thrown into the bay, and, in fact, were actors in putting it there. The Lakme, 55 C. C. A. 466, 118 Fed. 972. The decision of this question of fact depends upon the veracity of the libellant's witnesses; and who is better fitted to judge of their credibility than the court before whom they appeared? The surrounding facts and circumstances also point strongly to the probability that the oil which burned on the water around the Boieldieu came from the Santa Rita. We believe the finding of the lower court was correct.

The court further found that this mat of oil was ignited by the heat or flame from the burning wharf; taking the view that, in some unexplained manner, the wharf caught fire, and that the fire was communicated to the oil which lay on the water in close proximity thereto, and that the injury to the Boieldieu was caused jointly by the burning of the wharf and by the burning of the oily mass on the water. The finding that the fire originated on the wharf is vigorously assailed. The libellant contends that the oil ignited first, and that the flame spread from the oil to the wharf. We regard the defendant's contention that no oil whatever burned on the water as plainly against the evidence, and without merit. There is no reasonable doubt that the wharf burned, and some oil on the water burned; and the further question now arises: Where did the fire originate? On the wharf, or in the oil?

There is no evidence tending to show.

that any particular act started the conflagration; nor do the circumstances of themselves point to any probability by which the court may safely be guided to one view or the other. There were several oil-burning locomotives, a donkey engine, and twenty or twenty-five men on the wharf at the time of the fire. The wharf itself was more or less oil-soaked in spots, and there were several car loads of hay or other inflammable material thereon. The men were smoking. It is not at all improbable that one of them carelessly let drop a burning match near the hay, thus starting the fire. Or, an engine may have dropped some fire or sparks on the oil-soaked planks of the wharf, and so caused the fire. On the other hand, the presence of active engines and smoking men might lead equally as well to the conclusion that the fire started in the oil on the water. It is well established that this matted mass of fresh oil was very inflammable, even though floating. A burning cigar stub, or a live spark thrown from an engine, falling on a chip or other more or less solid material in the oil, would furnish a rational explanation of the origin of the fire.

The natural probabilities in favor of the different theories being equal, it is necessary to weigh and examine carefully the testimony of the eyewitnesses, in order to arrive at as just and right a conclusion as is possible under the circumstances. Fortunately, there is little real conflict in the testimony of those who saw the fire as to where it started. One of defendant's witnesses says positively that it started on the wharf, and the others say that it looked to them as if it started there. But those who were in a position to see where it started—who were south of the line of cars—testify directly and unequivocally that the fire started on the water, and that they saw it there before any was visible on the wharf proper. Whether on the water or on the wharf, it is undeniable that it started either to the south of the cars or in the cars themselves. The witnesses of libellant who testified on the point were in such a position that a fire in either of the places above named would have been easily discernible by them, while the defendant's witnesses were so situated that they could not have seen a fire on the water near the Boieldieu unless the flames mounted very high, and even then they were so far off that they might easily have been mistaken about the exact position of the conflagration. After a careful consideration of all the testimony, we are of opinion that the finding of the lower court, to the effect that the fire originated on the wharf, was clearly

against the weight of the evidence, and cannot stand.

In our examination of the evidence, which has led us to the conclusion that the learned judge of the lower court erred in his finding upon this point, we observe that libellant's principal witnesses, who gave direct evidence, thereon, testified by depositions. Upon this matter, therefore, the trial judge had not the advantage of seeing and hearing the witnesses. His position, to arrive at a true result, was scarcely better than ours. Hence the rule that, when oral testimony is evidently the basis of a finding, or the written testimony relates to matters as to which the trial court is better able to reach a satisfactory conclusion than the appellate court, the finding will be adhered to, does not apply with the same force.

The court, after finding the facts as hereinbefore recited, made the further finding that the negligence of the Santa Rita in discharging oil into the bay could not be regarded as the efficient or proximate cause of the injury to the Boieldieu. The court said: "The burning of the wharf was entirely disconnected, and unrelated to the original act of the Santa Rita in discharging the oil, and was not caused by any person connected with that vessel, and whose actions were subject to her control. Unless, therefore, the burning of the wharf and the consequent ignition of the oil were matters which ought to have been reasonably anticipated as probable,—that is, more likely to occur than otherwise,—the burning of the wharf must be found to be the efficient cause of the damage to the Boieldieu. Was the burning of the wharf and the ignition of the oil something more likely to occur than not,—something that a person of ordinary prudence would have thought to be probable? The result has shown that such a fire, the ignition of oil thereby, and the consequent damage to the Boieldieu, were matters which might occur,—events which any person of ordinary judgment would have known to be possible. But the question is not whether a person of ordinary prudence would have known that such results were possible, but whether they would have been regarded by him as probable,—something likely to occur, and therefore to be guarded against by not discharging fuel oil into the bay. It seems to me this question must receive a negative answer. A man of extreme caution might have anticipated the result; but one of ordinary prudence and foresight would not have thought, in view of all the surrounding circumstances, that fuel oil, if discharged into the waters of the bay, with its tides and winds, would probably be set on fire, by the accidental or negligent burning of

the wharf, or by live coals thrown into the bay, and coming in contact with the oil." [173 Fed. 413.]

We cannot give our assent to this view of the case. The respondent ship, being an oil-burning one, was charged with knowledge of the inflammable quality of fresh oil, even on water, and was also charged with knowledge of the probable effects of ordinary winds and tides in carrying the oil to where it might do great injury. The respondent cannot, therefore, be heard to say that she did not know fresh oil on water was inflammable, or that she had no reason to believe that the oil which she put into the harbor would be driven by the winds and tide under the dock and in among the shipping. It ought to have been known that the presence of a large quantity of fresh oil of a very combustible nature was a menace and danger while lying in an exposed position around a busy wharf. It ought reasonably to have been anticipated by those in charge of the Santa Rita that such a mass of oil, floating under the wharf and around the shipping, was likely to be ignited in some manner through the numerous and patent sources of fire which were near by. What would be more natural than for a man about the shipping to throw his lighted cigar stub into the bay, or for an engineer on the wharf to dump his live coals into the water? Certainly, one not having any reason to believe that the water was covered with an inflammable sheet could not be held to be negligent in thus throwing his burning coals or lighted cigar into the harbor. Indeed, a careful man, anxious to avoid all risks of fire, would select the water as the natural and seemingly proper place to put them. Surely, the defendant was charged with notice that men rightfully do these things, and that the doing of them where large masses of inflammable oil are floating about would probably produce a conflagration.

There is no infallible rule by which one can distinguish between a proximate and a remote cause. Justice Moody, for the Supreme Court, has recently said: "Few questions have more frequently come before the courts than that whether a particular mischief was the result of a particular default. It would not be useful to examine the numerous decisions in which this question has received consideration, for no case exactly resembles another, and slight differences of fact may be of great importance. The rules of law are reasonably well settled, however difficult they may be of application to the varied affairs of life." *Atchison, T. & S. F. R. Co. v. 30 L.R.A. (N.S.)*

Calhoun, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321.

In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, the court said: "Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application, but it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attendant circumstances."

Tried by the above rule, it appears to us that the negligent act of the Santa Rita in pouring oil into the bay was the proximate cause of the injury to the Boieldieu. The injury flowed directly from the negligent act. The result of the act is not incompatible with what one would expect. The question is not whether such an act would produce a conflagration in the majority of cases, but whether it has a decided and natural tendency to produce such a result.

One of the most valuable tests to apply to determine whether a negligent act is the proximate or remote cause of an injury is to determine whether a responsible human agency has intervened between the fact accomplished and its alleged cause. "If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered too remote." *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. ed. 65; *Washington & G. R. Co. v. Hickey*, 166 U. S. 521, 41 L. ed. 1101, 17 Sup. Ct. Rep. 661.

In this case another force or power had not intervened. The throwing of the lighted cigar or burning coal into the bay cannot be said to be another force, or to break the causal chain. These acts were innocent, yet probable, and as natural as were the acts of the shopkeepers in throwing around the squib, in the famous "squib case" (*Scott v. Shepherd*, 2 W. Bl. 892), although we recognize that the causal connection that existed in the squib case between the original act and the intermediate acts is not found in the present instance.

We are of opinion that the injury to the Boieldieu was the natural and probable consequence of the negligent act of the Santa Rita, and ought to have been anticipated, in the light of the surrounding circumstances. The circumstances which must

be considered are the highly combustible nature of the oil, the condition of the tide and wind, the proximity of the wharf and shipping, the inflammable condition of the oil-soaked wharf, and the many chances of accidental ignition to which the oil was exposed. Without doubt, the natural and probable consequence of covering water with oil might not, under different circumstances, have had a natural tendency to produce any injury. If the oil had been dumped into the middle of the bay, far from any ship or wharf; if the wind and tide had been different; if the wharf had been fireproof; if the oil had been less inflammable; if the chances of fires had been much less,—we might have reached a different conclusion. But, considering all the facts and circumstances, we must conclude that the injury done by the floating oil ought to have been foreseen, and that therefore the placing of it on the water was the proximate cause of the injury inflicted by its ignition. *Milwaukee & St. P. R. Co. v. Kellogg*, supra; *Aetna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395; *Washington & G. R. Co. v. Hickey*, supra; *McGill v. Michigan S. S. Co.* 75 C. C. A. 518, 144 Fed. 788.

The libellant placed great reliance on § 374 $\frac{1}{2}$ of the Penal Code of California, as affecting the question of proximate cause and the burden of proof in relation thereto. That is a statute which makes it a misdemeanor for anyone to discharge petroleum or certain other substances into the waters of a navigable bay or river of the state. In arriving at our conclusion, we have not taken this statute into consideration, because, under the facts, we believe liability exists irrespective of the statute.

The decree of the District Court, dismissing the libel, with complainant's costs, is reversed.

It is further ordered that the District Court enter a decree in favor of libellant in the usual and proper form.

Petition for writ of certiorari denied by the United States Supreme Court, October 24, 1910 (218 U. S. 674, 54 L. ed. 1205, 31 Sup. Ct. Rep. 223).

DISTRICT OF COLUMBIA COURT OF APPEALS.

S. DANA LINCOLN, Appt.,
v.

NATIONAL METROPOLITAN BANK,
Intervener.

(35 App. D. C. 362.)

Bank — renewal note — release of collateral.

A bank which, in order to remove an overdue note from its books, takes the note

of a third person for its amount, with such note as collateral thereto, releases, in favor of attaching creditors of the maker, its lien on property which had been assigned to it as collateral for the overdue note, at least where it permits assigned funds to pass through its hands into those of the maker of the note for a long period of time, without any attempt to apply them to the satisfaction of the note.

(May 27, 1910.)

A PPEAL by plaintiff from a judgment of the Supreme Court entered upon a directed verdict for intervener in an attachment proceeding. Reversed.

The facts are stated in the opinion.

Messrs. Percival M. Brown and Walter B. Guy for appellant.

Messrs. Ralston, Siddons, & Richardson and Walter D. Davidge for appellee.

Van Orsdel, J., delivered the opinion of the court:

This cause came here on appeal from the judgment of the supreme court of the District of Columbia in an attachment proceeding. It appears that on September 11, 1906, the appellant, S. Dana Lincoln, trad-

Note. — Loss of collateral by treating note secured as itself collateral for a new note for the same debt.

While the decision in *LINCOLN v. NATIONAL METROPOLITAN BANK* would seem to be proper on the facts as they appear in that case, the circumstances involved are so peculiar as to make it doubtful if it could be considered authority for the general proposition that collateral security for a note would be lost by treating the note as collateral for another note. It is admitted that the assignment or transfer of a note usually carries with it security for its payment. This is also the result where a pledgor renews the note given to evidence the debt which the pledge secures. 22 Am. & Eng. Enc. Law, 2d ed. p. 871.

And even a novation of a debt evidenced by a note, by the substitution of a new note, has been held not to discharge a lien held under the first note, as long as any part of the original debt can be traced into the new note. *Kausler v. Ford*, 47 Miss. 289.

It was held in *Ensley Lumber Co. v. Lewis*, 121 Ala. 94, 25 So. 729, that the indorsement of conditional sale notes as collateral for a loan does not pass legal title to the property for which they were given. In that case, however, the vendor had paid the debt for which the purchase money notes were pledged as collateral, and received them back, and was attempting to enforce his rights against a subsequent mortgagee of the property.

The only cases found involving the effect of the pledge of a note as collateral security for another note, upon collateral pledged

ing as National Motar Company, hereafter referred to as plaintiff, brought suit in the supreme court of the District of Columbia against the Southern Construction Company, a corporation, for the sum of \$968.57, for material furnished it in constructing a building in this city for the National Metropolitan Bank, appellee, hereafter, for convenience, referred to as the bank. At the same time a writ of attachment was issued, which was returned on February 6, 1907, showing that certain credits belonging to the Southern Construction Company had been attached in the hands of the Thompson-Starrett Company, garnishee.

On March 12th the Thompson-Starrett Company answered that in December, 1905, it had contracted with the Southern Construction Company to furnish and erect all the fireproofing necessary in the construction of the National Metropolitan Bank Building. It is alleged in the answer that subsequently the Southern Construction Company failed, and the Thompson-Starrett Company was compelled to complete the work, and that there was left in its hands the sum of \$1,029.60, which was claimed by a number of parties, among whom was the defendant bank, which claimed a right to it under an alleged assignment of any and all payments that might become due the Southern Construction Company under its contract.

The plaintiff joined issue on the answer of the garnishee, and shortly thereafter the garnishee paid into the registry of the court below the sum of \$1,029.60, the amount admitted to be in its possession. Before the cause came on for trial, the bank, by leave of the court, filed an intervening petition, in which it set up its claim to the fund, alleging, among other things, as follows:

"2. That heretofore, to wit, on the 17th day of February, 1906, the defendant, Southern Construction Company, gave an order upon the Thompson-Starrett Company, a party herein, directing it to pay

over to this intervener any and all payments as they might become due according to the contract of the Southern Construction Company with the Thompson-Starrett Company, for work to be done on the National Metropolitan Citizens Bank Building, and that such order was forthwith duly accepted by the Thompson-Starrett Company, and that such order and acceptance thereof at once communicated to this intervener, and that, relying upon such order and acceptance, the said bank did, on or about the 19th day of February, 1906, loan to said Southern Construction Company the sum of two thousand (2,000) dollars, taking its note therefor, and holding said duly accepted order as collateral. That thereafter, and prior to the filing of the attachment in this case, there became due to the Southern Construction Company by the Thompson-Starrett Company, because of the work upon the building of the intervener, a large sum, to wit, the sum of twelve hundred (1,200) dollars, which sum, or so much thereof as the Thompson-Starrett Company admits to have been due by it to the Southern Construction Company, has been paid into the registry of this court, attachment having been served herein upon the Thompson-Starrett Company before said payment could be made.

"That at and before the time of the service of said attachment, there was and still is due to the said bank, the intervener, herein, by the Southern Construction Company as balance of the aforementioned loan of two thousand (2,000) the sum of twelve hundred (1,200) dollars, for which it gave, as a renewal of the aforesaid note for thousand (2,000) dollars, its note to the National Metropolitan Bank dated August 14, 1906, payable sixty days after date, with interest at the rate of 6 per centum per annum until paid, the original note of two thousand (2,000) dollars having theretofore been reduced by the payment of interest and eight hundred (800) dollars on ac-

to secure the first note, hold that the pledge of the note carries with it the collateral security.

Thus, in *Eddy v. Fogg*, 192 Mass. 543, 78 N. E. 549, where one borrowing money from a bank gave his note, and, as collateral thereto, indorsed to the bank the note of a third party, which was secured by collateral, it appears that he notified the bank that the note was so secured, but it does not appear that the collateral was actually assigned with the note. The court said that it was clear that the borrower could pledge the note to the bank, and that the security passed with it to the pledgee, who could collect the note by suit thereon or sale of the collateral, or both.

And in *Mechanics' Bldg. Asso. v. Ferguson*, 29 La. Ann. 548, it appeared that F. 30 L.R.A. (N.S.)

borrowed from P., and executed notes, and at the same time delivered to P., in pledge and as security, two notes of G., which were secured by mortgage. Later, G., being about to execute a mortgage to plaintiff on the same property, procured from F. a waiver of precedence of the first mortgage and an agreement that plaintiff's mortgage should prime F's. But the court held that the waiver of F. was invalid as to P., and that the latter was entitled to priority in the mortgage property to the extent of his loan to F.

It is to be noticed, however, that in these cases the notes were pledged to secure new and different debts, not the ones for which they were originally given, as was the case in *LINCOLN v. NATIONAL METROPOLITAN BANK*.

R. L. S.

count of the principal thereof, out of funds paid to the said intervening bank by the Thompson-Starrett Company, pursuant to and in reliance upon the aforementioned assignment of February 17, 1906."

On trial, the jury was instructed to return a verdict for the defendant, and, from the judgment entered thereon, the cause comes here on appeal.

*A number of assignments are made of error alleged to have occurred in the course of the trial, which, we think, need not be considered. For the purposes of this appeal, it is only necessary to consider the assignment charging error in granting the peremptory instruction of the defendant directing a verdict in its favor. The order or assignment upon which defendant asserts its right to the fund in question consists of the following letter:

Baltimore, February 17, 1906.

Messrs. Thompson-Starrett Co.,

14th and G. Streets N. W.,

Washington, District of Columbia.

Gentlemen:—

We hereby authorize you to pay over to the National Metropolitan Citizens Bank any and all payments as they may become due according to our contract with you for work to be done on the National Metropolitan Citizens Bank Building.

Very truly yours,

[Seal.] Southern Construction Company,
Warfield Ward, President.

J. Hurst Purnell, Sec. & Treas.

Accepted by

Thompson-Starrett Company,

B. C. Dickinson, Mgr.

Two days prior to the giving of this order, a letter was written by the Southern Construction Company to the president of the bank, which is to some extent explanatory of their transactions. It is as follows:

February 15, 1906.

Mr. E. S. Parker, President

National Metropolitan Citizens Bank,
Washington, District of Columbia.

Dear Sir:—

Confirming the conversation the writer had with you this morning, we beg to make application for a loan of \$2,000. We have at present \$6,000 worth of hollow tile fireproofing stored in Washington, which is to be used in fireproofing your new building. We are willing to assign this material over to you, and likewise any payment which will be due us from the Thompson-Starrett Company on our erection of the work. This loan to be placed to our credit in your bank, and to be subject to our check.

30 L.R.A. (N.S.)

We would be very glad to have an answer from you by Saturday, February 17th.

Respectfully submitted,

Southern Construction Company,
Warfield Ward, President.

The validity of this assignment is vigorously assailed by counsel for plaintiff. We think it unnecessary, however, to consider this point, since, conceding for the purposes of this appeal that the assignment is valid, a question upon which we express no opinion, it is apparent that at the date of the attachment the loan for which it had been taken by the bank as security had been satisfied, at least, to the extent of preventing the bank from claiming a lien on the fund in question superior to that acquired by the attaching creditor. It appears that the bank applied the last payment received from the Thompson-Starrett Company, amounting to \$885.50, to the reduction of the original loan, and took a new note on August 14, 1906, for the sum of \$1,200, surrendering the original note. The new note reads as follows:

\$1,200.

Washington, District of Columbia,
August 14, 1906.

Sixty days after date we promise to pay to the order of ourselves twelve hundred dollars at National Metropolitan Bank, Washington, District of Columbia.

Southern Construction Company,
Warfield Ward, President.

J. Hurst Purnell, Sec.-Tr.

Value received.

No. —.

Due Oct. 15th.

The note was indorsed on the back as follows:

"J. Hurst Purnell,
Warfield Ward,
Southern Construction Company,
Warfield Ward, President,
J. Hurst Purnell, Sec. Tr.
410 Cont. Bldg., Balto., Md."

This note was allowed to become long overdue. The bank, on July 15, 1907, took the personal note of J. Hurst Purnell for the sum of \$1,200, and took the note of the construction company as collateral security for the payment of the personal note. The Purnell note reads, in part, as follows:

\$1,200. Washington, D. C., July 15, 1907.

On demand, for value received, I promise to pay to the National Metropolitan Bank of Washington, or order, at office of said bank in the city of Washington, District of Columbia, twelve hundred dollars, with interest at the rate of 6 per cent per annum, having deposited with said bank, as col-

lateral security for the payment of this note, and also as collateral for all other present and future demands, of any and all kind, of the said bank against the undersigned, due or not due, the following property, *viz.*:

Note Southern Construction Company for \$1,200 dated August 14, 1906, for sixty days, and indorsed by Warfield Ward and J. Hurst Purnell, and do hereby authorize the said bank, on the nonperformance of this promise, or the nonpayment of any of the demands aforesaid, or failure to furnish further security as hereafter agreed, to sell the whole or any part of said collaterals or substitutes therefor or additions thereto, at any broker's board or public or private sale, at the option of the said bank, without notice, etc.

The Purnell note, by this transaction, became the primary evidence of indebtedness. The bank could not recover on both notes. Neither could it select which one it might treat as the primary security. It had placed itself in a position where it could only dispose of the construction company note as collateral in the event of its failure to recover on the Purnell note,—a contingency which never happened. The law does not favor uncertainties. The bank cannot treat Purnell as its debtor on its books, and thereby, for the purpose of inspection, remove overdue paper from its books, and at the same time claim the protection here sought in the courts. The auditor for the bank attempted to explain the reason for the taking of the Purnell note as follows: "This note was given to keep an overdue note of the Southern Construction Company off the books, balance of \$1,200 due on the Southern Construction Company, note, and the note was taken from Mr. Purnell with that Southern Construction note as collateral in order to keep the paper alive, take the overdue paper off the books." On the strength of this testimony it is claimed that the bank never surrendered possession of the construction company note. Its officer at the trial did not so testify. His evidence is that the note "had never been out of the bank." This, however, is of little importance, since the taking of the Purnell note and the transfer of the construction company note to the position of collateral security constituted in law a constructive delivery of the construction company note to Purnell, and a change of possession. The transaction must be treated as a novation, whereby the bank surrendered its security under the assignment from the construction company, and accepted the primary obligation of Purnell, secured by the construction company note, 30 L.R.A. (N.S.)

which Purnell put up as collateral. The title to the construction company note passed to Purnell, and with it all right of the bank to assert its lien against the fund here in question became extinguished.

It is claimed by counsel for defendant that the assignment was general in its terms, and nothing short of the satisfaction of the debt to the bank would satisfy the object and purpose of the assignment. Without discussing the validity of the assignment, it is sufficient to call attention to the fact that counsel overlook the difficulty which confronts them, that the debt of the construction company to the bank has been satisfied. The Purnell note accomplished this. The power of the bank to take money due the construction company from the Thompson-Starrett Company no longer existed. That right did not pass to Purnell by the delivery of the construction company note, and could not, therefore, pass back when the note was put up with the bank as collateral for the payment of a different obligation. The title to the note still remained in Purnell, subject to be forfeited to the bank for failure to pay his own note. We are unable to discover any theory upon which the defendant can claim a lien upon the fund in question superior to that acquired by plaintiff under the writ of attachment.

We are not unmindful of the rule that the assignment or transfer of a note usually carries with it the security for its payment. This is especially true in the case of mortgages, deeds of trust, and instruments executed and of record as security for the payment of the notes or bonds of indebtedness. But we think the present alleged assignment does not come within that class of securities. Here the letter of the construction company to the Thompson-Starrett Company was an order for it to pay any balance due it to the bank. It is obvious that the Thompson-Starrett Company would not have been justified in paying this money to a third party upon the order of the bank. The test of the validity of the assignment lies in the power of the bank to enforce its claim against the Thompson-Starrett Company over the objection of the construction company, and the further right of the Thompson-Starrett Company to comply with its conditions and at the same time escape liability to the construction company.

In arriving at the right of the bank to lay claim to the fund in question under the assignment, it is beside the case that no objection is being made by the construction company. The legal test to be applied is whether such objection could be made. With this situation presented, it can hardly

be claimed that the bank, under a personal assignment, which, in effect, furnished a mere cloak through which it passed to the construction company over \$10,000, without applying any part of this sum to the liquidation of the \$2,000 loan, could assert a lien superior to that of the attaching creditor. During the time that these transactions were being carried on between the bank and the construction company, the note was repeatedly renewed.

Referring to these transactions in detail, the witness Purnell, secretary and treasurer of the construction company, testified on cross-examination as follows: "On cross-examination the attention of the witness was called to the fact that the alleged assignment to the bank was dated February 19, 1906, and the checks offered in evidence, aggregating over \$11,000, were all paid to the bank after that date; the witness was asked whether the bank received money from the Thompson-Starrett Company after that, and witness replied that the checks were all made out for the account of the Southern Construction Company; in all instances except one, the bank gave the Southern Construction Company credit for the full amount of these checks, until August 10, 1906, the date of the last check, for \$885, when the Southern Construction Company asked the bank to renew the note for \$2,000, and the bank refused to do this, but said that it would take a new note for \$1,200, and thus the \$2,000 note was reduced to \$1,200. Witness was asked what authority he had to tell the bank how to apply the money received on these checks from the Thompson-Starrett Company, and replied that when the bank notified them that it had received a check for work which the Southern Construction Company had done the previous month, Mr. Ward and witness came over to see the bank and asked it to continue the loan for \$2,000, and to let them have the check, and at their request, the bank would let them have the check; that they never received a cent from the Thompson-Starrett Company after the assignment was given to the bank; that they got that \$885 in August by its being deducted from the \$2,000 note; that the bank turned the amount of the said checks received by the bank after the date of the assignment over to them without collateral security; and that there was always margin enough for the protection of the bank."

Though there is no evidence of fraudulent intent on the part of the bank, and none can be reasonably inferred from the record, yet it must be remembered that the building was being erected for it; the material furnished by plaintiff went into it, and 30 L.R.A. (N.S.)

the bank must have known of the existence of dealings between plaintiff and the construction company. While these facts do not in themselves determine the nature or legal effect of the assignment in question, or whether it would follow the transfer of the note to Purnell, and, as collateral, back to the bank, yet they are important in ascertaining the intent of the parties at the time the assignment was made. If the assignment was for the sole purpose, as appears from the record, and as we must assume, to secure the loan of \$2,000 from the bank to the construction company, the bank should have promptly applied the funds coming into its hands to that purpose. This it did not do. It violated the intent the parties presumably had in making the assignment, and thereby prejudiced the rights of the plaintiff, who was ignorant of the existing relations between the bank and the construction company when it extended credit to the latter. Assuming again the validity of this assignment, a matter not free from doubt, it cannot be held that it was within the contemplation of the parties that it should extend further than to authorize the bank to hold out sufficient of the funds coming into its hands to satisfy the loan. This it failed to do when ample opportunity was afforded. It elected to accept other security, and, by so doing, forfeited further claim upon the fund in question.

The judgment is reversed, with costs, and remanded, with instructions to proceed in accordance with the views expressed in this opinion.

Petition for rehearing denied.

Mr. Justice Anderson, of the supreme court of the District of Columbia, sat with the court in the hearing and determination of this appeal, in the absence of Mr. Chief Justice SHEPARD.

NORTH DAKOTA SUPREME COURT.

F. H. STOLTZE, Respt.,

v.

H. A. HURD et al., Appts.

(— N. D. —, 128 N. W. 115.)

Mechanics' lien — building on adjoining lots held in severalty.

When two persons have made a joint contract with a builder for the erection of a building, to be placed on two adjoining

Headnote by CARMODY, J.

Note. — Mechanics' lien: where building covers adjoining lots held in severalty.

As to extent of land to which mechanics

lots owned in severalty by each of said persons, and a subcontractor furnishes building material, which is used for the erection of such building under an entire contract with the builder, he is entitled to a joint lien, but not to a separate lien against one lot and the part of the building standing thereon.

(September 17, 1910.)

SEPARATE appeals by defendants from orders of the District Court for Ward County overruling demurrers to the complaint in an action brought to enforce an alleged mechanics' lien. Reversed.

The facts are stated in the opinion.

Messrs. Thompson & Schull, with Mr. F. B. Lambert, for appellants:

Where materials are sold to a contract-

lien will attach, see the note in 26 L.R.A. (N.S.) 831.

This note is confined strictly to cases coming within the foregoing title, to the exclusion of cases in which adjoining lots were owned by the same person, or in which separate buildings were erected upon adjoining lots owned in severalty. The cases excluded rest upon considerations which have a distinctiveness not accorded them in the indiscriminate citation of cases in briefs and opinions; for if one building covers lots of several owners, there would seem to be the greater room for dispute as to the propriety of maintaining a several lien against one lot and the part of the building thereon; whereas, if separate buildings are erected upon the separate lots, the greater doubt concerns the propriety of maintaining a joint lien.

That there may be a joint lien in circumstances coming within the scope of this note is established by *STOLTZE v. HURD*, and other cases of the same kind.

It is held that the owners in severalty of contiguous city or platted lots may, by their acts, connect them so as to constitute one lot within the meaning of the mechanics' lien law. *Miller v. Shepard*, 50 Minn. 268, 52 N. W. 894; *Menzel v. Tubbs*, 51 Minn. 364, 17 L.R.A. 815, 53 N. W. 653, 1017; *Deegan v. Kilpatrick*, 54 App. Div. 371, 66 N. Y. Supp. 628.

Such lots have been held to be so joined by the construction on them of a building by the owner of one lot, with the knowledge and consent of the other. *Menzel v. Tubbs*, 51 Minn. 364, 17 L.R.A. 815, 53 N. W. 653, 1017.

So, where each of the owners in severalty of two adjoining lots conveyed to a third person, and retained the legal title in trust as security for the purchase money, and consented to the erection by the grantee of an entire structure across both lots, and further consented that a materialman might furnish material for such building, it was held that, inasmuch as the equitable title to both lots vested in the grantee, together with possession, and the materials went into the improvement of both lots as one 30 L.R.A. (N.S.)

or for use in a building situated upon two contiguous lots owned in severalty by different owners, and the contract between the contractor and the owners is a joint contract, a joint lien must be filed covering both properties.

Fullerton v. Leonard, 3 S. D. 118, 52 N. W. 325.

The contract entered into by the lienor is the basis of the lien, and if the contract under which the work is done and the material furnished is joint, the lien must be joint or not at all.

Sergeant v. Denby, 87 Va. 206, 12 S. E. 402; *Phillips v. Gilbert*, 101 U. S. 721, 25 L. ed. 833; *Fullerton v. Leonard*, supra; *Bohn Sash & Door Co. v. Case*, 42 Neb. 281, 60 N. W. 576; *Premier Steel Co. v. McEl-*

piece of land, the right to file a lien attached thereto. *Miller v. Schmitt*, 67 N. Y. Supp. 1077.

In *Deegan v. Kilpatrick*, 54 App. Div. 371, 66 N. Y. Supp. 628, upholding a lien against adjoining lots owned in severalty, for excavation work performed under an entire contract into which the lot owners jointly entered,—the court said: "The appellants contend that inasmuch as they did not jointly have title to the entire premises upon which the lien is sought to be enforced, a single lien cannot be acquired upon the entire plot, but that if the plaintiffs have a lien at all, it is a separate one upon each lot, and that inasmuch as the contract provided that payment for the work was to be made by the yard, the plaintiffs were in a position to determine just how many yards of rock and earth were taken from each lot, and, therefore, they should have filed separate liens against the owners of each lot for the work done for him. But the contract does not so provide. On the contrary, the provisions of it are that the defendants jointly obligate themselves to pay for the work done, irrespective of the question of the title. The two lots are contiguous and by the contract were treated as one parcel. The defendants had the right to thus treat them, and the plaintiffs had an equal right to treat them in the same manner, so far as it became necessary to file a notice of lien, or to enforce the same for the purpose of obtaining what the defendants had agreed to pay. This being so, it follows that they had the right to acquire a lien upon the two lots for the work performed, and for that purpose could treat the two lots as one parcel."

And it was held in *Miller v. Shepard*, 50 Minn. 268, 52 N. W. 894, that two adjoining lots owned in severalty could be treated as one lot for the purposes of enforcing a single claim for a lien for labor and materials furnished for a building occupying a part of each lot, under a joint contract entered into by the several owners. But it was held that the lienors could sever their claims so as to obtain judgment against

waine—Richards Co. 144 Ind. 619, 43 N. E. 878; Maryland Brick Co. v. Spilman, 76 Md. 342, 17 L.R.A. 599, 35 Am. St. Rep. 434, 25 Atl. 297; Willamette Mills Co. v. Shea, 24 Or. 40, 32 Pac. 762; Eisenbeis v. Wakeman, 3 Wash. 534, 28 Pac. 923.

Where separate buildings have been erected under one general contract, a lien may be had against all the property on contiguous lots.

Holland v. Cunliff, 96 Mo. App. 67, 69 S. W. 737; Lehmer v. Horton, 67 Neb. 574, 93 N. W. 964, 2 A. & E. Ann. Cas. 683; Culver v. Lieberman, 69 N. J. L. 341, 55 Atl. 812; Idaho Min. & Mill. Co. v. Davis, 59 C. C. A. 200, 123 Fed. 396; Seattle Lumber Co. v. Sweeney, 33 Wash. 691, 74 Pac. 1001; Phillips v. Salmon River Min. & De-

velopment Co. 9 Idaho, 149, 72 Pac. 886; Bowman Lumber Co. v. Newton, 72 Iowa, 90, 33 N. W. 377; Lewis v. Saylor, 73 Iowa, 504, 35 N. W. 601; McElroy v. Keily, 27 R. I. 474, 63 Atl. 238; Childs v. Anderson, 128 Mass. 108; Wall v. Robinson, 115 Mass. 429; Worthley v. Emerson, 116 Mass. 374; Rice v. Nantasket Co. 140 Mass. 256, 5 N. E. 524; Sexton v. Weaver, 141 Mass. 273, 6 N. E. 367; Glass v. St. Paul Park Carriage & Sleigh Co. 43 Minn. 228, 45 N. W. 150; Lyon v. Logan, 68 Tex. 521, 2 Am. St. Rep. 511, 5 S. W. 72; Crawford v. Anderson, 129 Ind. 117, 28 N. E. 314; Orr v. Northwestern Mut. L. Ins. Co. 86 Ill. 260; James v. Hambleton, 42 Ill. 308; Batchelder v. Rand, 117 Mass. 176; Quimby v. Durgin, 148 Mass. 104, 1 L.R.A. 514, 19 N. E. 14;

each lot, provided they could show what proportion of the material went into the part of the building situated on each lot. It should be stated that the evidence failed to show a basis for apportionment.

In holding that the lien can be severed and asserted against one parcel, the foregoing case departs from *STOLTZE v. HURD*, and seems to accord with the weight of authority. It should be noted that the question is not as to enforceability of the claim as affected by failure or inability to apportion the work and labor between the parcels, but as to whether, assuming that such apportionment has been, or can be, made, the nature of the contract, or of the improvement, or of both, is such as to require the lien to be enforced jointly, or, at least, to render it unenforceable severally against the parcels.

It was held in *Kinney v. Mathias*, 81 Minn. 64, 83 N. W. 497, that where one contracted separately with the owners of two adjoining lots, to construct a building upon each, and it was subsequently agreed among all the parties that such buildings were to be erected at the same time and as one structure, a lien for an unpaid balance due for labor and materials could be enforced against one of the lots to the extent of the proportion of the materials used in the structure on that lot, and provided that proportion was shown. Here the court expressly follows *Miller v. Shepard*, and in this case, as in that, there was a failure to establish the proportion of materials used in the building.

So, it was held in *Hannon v. Logan*, 14 Mo. App. 33, that a lien was enforceable against one lot and its improvement for the amount of labor and materials shown to have been expended thereon, although the improvement comprised two houses under one roof, situated on lots of separate owners, and the labor and materials were furnished for both for an entire sum.

And in *Booth v. Booth*, 3 Ont. L. Rep. 294, 1 Ont. Week. Rep. 49, where, under contract with adjoining owners, repairs were made for an entire sum upon separate buildings included under one roof, a lien could be 30 L.R.A. (N.S.)

enforced against each lot for labor and materials furnished for the building on that lot. The court said: It is unnecessary to express any opinion as to whether the respondent would have been entitled to a lien under the act on both the lands of his wife and of his mother for the whole of the agreed price, for the only claim which is made is to a lien on the lands of the wife for the price of the work done on her part of the building and for the materials furnished in respect of it. It was, however, contended that the effect of the bargain, it having been for the whole work at one price, and not at separate prices in respect of each building, is that even such a lien as is claimed was not created. I am unable to agree with this view. Had it been impossible to distinguish between the work done and materials furnished on the wife's building and those for the building of the mother, there, possibly, might have been a difficulty in the respondent's way; but I see no reason why, if it be practicable to do this, and *a fortiori* where, as appears to have been done in this case, a separate account had been kept, the lien may not attach to the land of each owner for the price of the work performed and materials furnished on his part of the building. I see no reason for giving to the act such a narrow construction as would leave outside the beneficial provisions of it one who, under such circumstances, has performed work or furnished materials for the construction or repair of a building."

So, it was held in *Edwards v. Edwards*, 24 Ohio St. 402, that where one house was built upon adjoining lots, under one contract entered into by the owners in severalty and their husbands, the building having been erected so as to give each owner a separate domicile situated on her separate estate, the builder might enforce a lien against each of the lots for the labor and materials thereon expended.

In *Perkins v. Boyd*, 37 Colo. 265, 86 Pac. 1045, where, under contract with the husband as his wife's agent, a building and retaining wall were built upon a lot owned by the wife, and a strip of an adjoining lot

Wall v. Robinson, 115 Mass. 429; Worthley v. Emerson, 116 Mass. 374; Lax v. Peterson, 42 Minn. 214, 44 N. W. 3; O'Leary v. Roe, 45 Mo. App. 567; Kick v. Doerste, 45 Mo. App. 134; Cole v. Colby, 57 N. H. 98; McAuley v. Mildrum, 1 Daly, 396; Livingston v. Miller, 16 Abb. Pr. 371; Mandeville v. Reed, 13 Abb. Pr. 173; Chadbourne v. Williams, 71 N. C. 448; Pennock v. Hoover, 5 Rawle, 291; Hall v. Sheehan, 69 N. Y. 618; Moran v. Chase, 52 N. Y. 346; Menzel v. Tubbs, 51 Minn. 364, 17 L.R.A. 815, 53 N. W. 653, 1017; Reilly v. Williams, 47 Minn. 590, 52 N. W. 826.

Mr. C. Aurland, for respondent:

Plaintiff was entitled to a single lien on both of the lots and buildings.

Menzel v. Tubbs, 51 Minn. 364, 17 L.R.A. 815, 53 N. W. 653, 1017; Lax v. Peterson, 42 Minn. 214, 44 N. W. 3; Fullerton v. Leonard, 3 S. D. 118, 52 N. W. 325; Reilly v. Williams, 47 Minn. 590, 50 N. W. 826.

If plaintiff had a right to a lien on both lots he had a right to such a lien on one of them. The greater contains the less.

Meixell v. Griest, 1 Kan. App. 145, 40 Pac. 1070; Reilly v. Williams, supra.

The plaintiff had a right to waive his lien on a part of the property on which he could rightly claim a lien, and hold the balance.

Meixell v. Griest, supra; Miller v. Shepard, 59 Minn. 268, 52 N. W. 894; Reilly v. Williams, supra; Carr v. Hooper, 48 Kan. 253, 29 Pac. 398; Carter Lumber Co. v. Simpson, 83 Tex. 370, 18 S. W. 812; Poole v. Fellows, 25 R. I. 64, 54 Atl. 772.

Carmody, J., delivered the opinion of the court:

This is an action brought by plaintiff to foreclose an alleged mechanics' lien. The complaint alleges: That the defendant J. A. Roell is the owner of lot 20, in block 7, of the town site of Minot, in Ward county, North Dakota. That one A. S. Blakey is the owner of lot 21, in said block 7, that

said lots are adjoining, and that the defendant Roell and the said Blakey entered into a joint contract with the defendant Hurd for the construction and erection by him, the said H. A. Hurd, for them, upon the said lots 20 and 21, of a three-story brick and stone building. That in pursuance of said contract the defendant Hurd did erect and construct on said lots a three-story brick and stone building. That on or about the 17th day of April, 1907, plaintiff entered into a contract for the sale to the defendant Hurd of certain building material to be by him used in the construction of said building. That plaintiff did furnish defendant Hurd building material of the value of \$5,740.48. That prior to the completion of said building the plaintiff duly notified the said A. S. Blakey and the said J. A. Roell, and each of them, that he had furnished said materials to defendant Hurd as aforesaid. That on or about the 10th day of January, 1908, at the request of the defendant Hurd and the said A. S. Blakey, and with the consent of the defendant J. A. Roell, and in consideration of the payment to him of the sum of \$3,000 by the said A. S. Blakey, the plaintiff waived his lien upon the said lot 21 and the part of the building thereon standing. That on the 12th day of March, 1908, he filed in the office of the clerk of the district court in and for Ward county a duly verified claim, for the purpose of securing and perfecting a lien for the balance of the moneys due him for the materials so furnished on said lot 20 and the building thereon standing. That subsequently \$407 was paid by defendant Hurd to this plaintiff. That on the 14th day of July 1908, for the purpose of further perfecting his lien, he filed, as supplementary and amendatory to the lien statement filed on March 12th, his supplementary and amendatory claim therefor. That the whole of said lot 20 is required for the convenient use and occupation of said building. That the defendants, and each of them,

owned by the wife and husband jointly,—it was held that the materialman who had filed his statement of lien against the wife's lot was entitled to have his entire debt out of that lot; the court saying that if the statement had included the other lot, the lien would have extended to both lots for all labor and materials furnished.

In Ballou v. Black, 17 Neb. 389, 23 N. W. 3, s. c. on subsequent appeal 21 Neb. 131, 31 N. W. 673, where a church and an individual owning adjoining lots made a contract for the construction of a block of buildings thereon, locating the same so that the parts adapted to the uses of the several owners should be upon their respective lots, and providing for payment by the one in certain agreed proportions, it appearing that the materials furnished were not designated for 30 L.R.A. (N.S.)

any part of the building, but were used indiscriminately upon either part,—the court said that while the contract might be a several contract as between the parties to it, yet the liability for labor and material was a joint liability. The conclusion of the court was that the arrangement between the parties, and the practice under it, furnished a rule by which the court would be governed in apportioning and adjusting the lien for material between the lots.

It was held in Swift v. Calnan, 102 Iowa, 206, 37 L.R.A. 462, 63 Am. St. Rep. 443, 71 N. W. 233, that no mechanic's lien could be had for one half the expense of a party wall, which the party who built it was entitled to recover from his neighbor upon the latter's use and appropriation of the wall.

L. A. W.

claim to have some interest in, or lien or encumbrance upon the said premises, which, if any there be, the plaintiff alleges are subsequent and subject to his lien. That there is due and owing the plaintiff from the defendant Hurd the sum of \$2,224.40. Plaintiff asks judgment for that amount, for the foreclosure of his lien, that the rights and interests of the defendants, and each of them, in said premises be determined, if any they have, and the same be decreed to be subject and subsequent to the lien of the plaintiff, for the sale of the said lot 20 and the building thereon standing, and for a deficiency judgment against the defendant Hurd.

To this complaint defendant Hurd interposed the following demurrer: "Comes now the defendant H. A. Hurd, and demurs to the complaint of the plaintiff herein on the ground that two causes of action have been improperly united in said complaint; and demurs to the complaint on the further ground that said complaint does not state facts sufficient to constitute a cause of action against this defendant; and on the further ground that the court has no jurisdiction of the subject of the action." The defendants J. A. Roell, Margaret Roell, and the Fidelity Mutual Life Insurance Company demurred to the complaint, as follows: "(1) That there is a defect of parties defendant; (2) that several causes of action have been improperly united; (3) that the complaint does not state facts sufficient to constitute a cause of action." Both of these demurrers were overruled. From the orders overruling said demurrers, separate appeals were taken to this court, which appeals were submitted together. Defendants assign as error the overruling of the demurrers.

Section 6238, Rev. Codes 1905, reads as follows: "If labor is done or materials furnished under a single contract for several buildings, erections, or improvements, the person furnishing the same shall be entitled to a lien therefor as follows: 1. If such buildings, erections, or improvements are upon a single farm, tract, or lot, upon all such buildings, erections, and improvements and the farm, tract, or lot upon which the same are situated. 2. If such buildings, erections, or improvements are upon separate farms, tracts, or lots, upon all such buildings, erections, and improvements and the farms, tracts, or lots upon which the same are situated; but upon the foreclosure of such lien the court may, in the cases provided for in this subdivision, apportion the amount of the claim among the several farms, tracts, or lots in proportion to the

enhanced value of the same produced by means of such labor or materials, if such apportionment is necessary to protect the rights of third persons."

The doctrine is well settled that, where one seeks to avail himself of the benefits of a purely statutory right, he must bring himself fairly within its provisions by complying with its terms. A mechanics' lien is a creature of the statute, and every step prescribed by the statute must be shown to have been substantially followed, or it does not exist. *Mark Paine Lumber Co. v. Douglas County Improv. Co.* 94 Wis. 322, 68 N. W. 1013; *Rosholt v. Corlett*, 106 Wis. 474, 82 N. W. 305; *Caylor v. Thorn*, 125 Ind. 201, 25 N. E. 217; *Robbins v. Blevins*, 109 Mass. 219; *Berry v. McAdams*, 93 Tex. 431, 55 S. W. 1112; *Neeley v. Searight*, 113 Ind. 316, 15 N. E. 598; *Schulenburg v. Bascom*, 38 Mo. 188; *Clark v. Edwards*, 119 N. C. 115, 25 S. E. 794; *Shafer v. Archbold*, 116 Ind. 29, 18 N. E. 56; *North Dakota Lumber Co. v. Bulger* (N. D.) 125 N. W. 883.

There was but a single joint contract made by defendant Hurd with the owners of the lots for the construction of a building upon both lots. The plaintiff sold the building material to defendant Hurd under one contract for both buildings. The contract entered into by the lienor is the basis of the lien, and, if the contract under which the work is done and the material furnished is joint, "the lien must be joint or not at all." *Sergeant v. Denby*, 87 Va. 206, 12 S. E. 402. The United States Supreme Court, in *Phillips v. Gilbert*, 101 U. S. 721, 25 L. ed. 833, in an appeal from the supreme court of the District of Columbia, in which the act of Congress passed February 2, 1859 (act Feb. 2, 1859, chap. 17, § 1, 11 Stat. at L. 376), providing that any person who should by virtue of a contract with the owner of any building perform labor or furnish materials for the construction or repair thereof, should, upon filing the proper notice, have a lien upon the building and the lot upon which it was situated, where such a lien was claimed for materials furnished and work done upon a row of brick buildings upon different lots, under a joint contract therefor with the owner,—held that, such contract being joint, the lien must be joint. The opinion by Mr. Justice Bradley contains: "The contract was one, and related to the row as an entirety, and not to the particular buildings separately. The whole row was a building within the meaning of the law, from having been united by the parties in one contract, as one general piece of work." The supreme court of South Dakota, in *Fuller-*

ton v. Leonard, 3 S. D. 118, 52 N. W. 325, uses the following language: "It is the contract with the owners which is to govern the question before us. There was no separate contract with the several owners for the building of each house or the barn, nor was there, as disclosed from the complaint, a separate account for each building to be kept. But the contract was joint, and was for the entire work, and the contract with the subcontractor with the plaintiff was of the same nature. The material was to be furnished for all the buildings for the sum specified, and not for each separately. It seems clear, then, that as between the contractors and the owners the buildings must be considered as one piece of work, and that the right to a joint lien can be maintained against all the buildings. The lien must have its foundation in the contract, and if the contract be joint the lien must be joint, or not at all."

The lien must follow the contract, and no valid lien can be had against one particular lot or building. The plaintiff was entitled to a joint lien upon the building and both lots, but is not entitled to a separate lien upon one lot and the portion of the building situated thereon. See § 6238, Rev. Codes 1905. If further authority is necessary, the following cases are in point: Phillips v. Gilbert, supra; Holland v. Cunniff, 96 Mo. App. 67, 69 S. W. 737; Lehmer v. Horton, 67 Neb. 574, 93 N. W. 964, 2 A. & E. Ann. Cas. 683; Seattle Lumber Co. v. Sweeney, 33 Wash. 691, 74 Pac. 1001; Phillips v. Salmon River Min. & Development Co. 9 Idaho, 149, 72 Pac. 886; Bowman Lumber Co. v. Newton, 72 Iowa, 90, 33 N. W. 377; Childs v. Anderson, 128 Mass. 108; Premier Steel Co. v. McElwaine-Richards Co. 144 Ind. 619, 43 N. E. 878; Willamette Mills Co. v. Shea, 24 Or. 40, 32 Pac. 762; Batchelder v. Rand, 117 Mass. 176; Eisenbeis v. Wakeman, 3 Wash. 534, 28 Pac. 923.

The fact that the complaint alleges that at the request of the defendant Hurd and said A. S. Blakey, and with the consent of the defendant J. A. Roell, and in consideration of the payment to him of the sum of \$3,000 by the said A. S. Blakey, the plaintiff waived his lien upon the said lot 21, and the part of the said building thereon standing, does not help the plaintiff. No agreement or consent by Hurd, Blakey, or Roell is binding on the other defendants, who the plaintiff alleges claim some interest in the property.

The plaintiff not having any lien to foreclose, the complaint does not state facts sufficient to constitute a cause of action.

The orders appealed from are reversed, 30 L.R.A.(N.S.)

and the District Court is directed to enter orders sustaining each of said demurrers.

All concur, except Morgan, Ch. J., not participating.

TENNESSEE SUPREME COURT.

MRS. E. C. CAYARD et al.

v.

S. A. ROBERTSON et al.

and

NEW AMSTERDAM CASUALTY COMPANY, Appt.

(— Tenn. —, 131 S. W. 864.)

Indemnity Insurance — Liability to injured employee.

One agreeing to indemnify an employer against liability for damages on account of bodily injuries to an employee through his negligence, by a policy providing that no action shall lie against the insurer as respects any loss under the policy unless it shall be brought by the assured himself, for loss actually sustained and paid by him in satisfaction of a final judgment, and binding the insurer to defend any action brought by an injured employee against the assured, or settle the same, is not liable to the injured servant for the amount of a judgment recovered by him, although the employer has become insolvent, and the insurer assumed the defense of the action, and excluded the employer from participating therein.

(October 22, 1910.)

A PPEAL by the defendant Casualty Company from a decree of the Chancery Court for Knox County overruling a demurrer to a bill filed to reach certain funds claimed to be owing defendants Robertson

Note. — The question of an injured employee's right to reach the fund under an employers' liability policy is discussed in the note to Allen v. Aetna L. Ins. Co. 7 L.R.A.(N.S.) 958.

Inasmuch as the question of the injured employee's right to follow the fund depends upon whether or not the insurance becomes due and payable before the assured has paid the loss, attention may be called to the note appended to Kennedy v. Fidelity & C. Co. 9 L.R.A.(N.S.) 478, upon the question of giving a promissory note as a loss or damage within the condition of a contract of indemnity, and to the subsequent cases, involving that question, of Seattle & S. F. R. & Nav. Co. v. Maryland Casualty Co. 50 Wash. 44, 18 L.R.A.(N.S.) 121, 126 Am. St. Rep. 886, 96 Pac. 509, and Stenbom v. Brown-Corliss Engine Co. 137 Wis. 564, 20 L.R.A.(N.S.) 956, 119 N. W. 308.

et al. on an employers' indemnity policy. Reversed.

The facts are stated in the opinion.

Messrs. Lucky, Fowler, & Andrews, for appellant Casualty Company:

The insurance company does not owe the assured under an indemnity policy until he has paid a final judgment rendered against him in favor of an employee for an injury covered by the policy.

Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2, 3 A. & E. Ann. Cas. 962; Frye v. Bath Gas & Electric Co. 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395.

Messrs. Pickle, Turner, & Kennerly for appellees.

Beard, J., delivered the opinion of the court:

The complainants, in part as owners and in part as lienors, are interested in a judgment for \$5,000, rendered against Robertson & Hobbs for a fatal injury received by an employee while in their service, as a result of their actionable negligence. This judgment has not been paid, and, on account of the insolvency of the judgment debtors, cannot be collected out of them. At the time of the injury Robertson & Hobbs were carrying an employers' indemnity policy, issued to them by the New Amsterdam Casualty Company, which covered the injury that constituted the original cause of action, to the extent of \$5,000. The present bill is filed against these parties and the Casualty Company, in which, after making all necessary allegations of fact, the complainants ask a decree against all the parties defendant, and especially against the Casualty Company, upon the policy referred to. While conceding by its demurrer the averments of fact made in the bill, the company denies, as a conclusion of law, all privity with the complainants, or any liability to them by reason of the issuance of the policy for the injury or death of the employee in question.

The introductory provision of the policy is as follows: "In consideration of \$150 premium, . . . the New Amsterdam Casualty Company . . . does hereby agree to indemnify Robertson & Hobbs . . . for the term of twelve months . . . against loss from common law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered by any employee or employees of the assured while on duty, . . . caused by the negligence of the assured, . . . and against the expense of defending any suit for such damages."

After limiting the liability of the company "from an accident resulting in injuries to 30 L.R.A. (N.S.)

or in the death of one person" to \$5,000, under the head of "General Agreements" the following provisions or conditions were made:

"(1) The assured, upon the occurrence of an accident, shall give notice in writing within five days of the event causing the injury, with full particulars thereof, to the home office of the company at New York city, or its duly authorized agent. He shall give like notice, with full particulars, of any claim which may be made on account of such accident.

"(2) If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company shall defend such suit in the name and on behalf of the assured, or settle the same.

"(3) The assured shall not settle any claim except at his own costs, nor incur any expense, nor interfere in any negotiations for settlement, or in any legal proceeding, without the consent of the company, previously given in writing. . . . The assured, when requested by the company, shall aid in securing information and evidence, and in effecting settlements, and in case the company calls for the attendance of any employee or employees, as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time.

"(7) No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a final judgment after trial of the issue."

We had occasion in Finley v. United States Casualty Co. 113 Tenn. 592, 83 S. W. 2, 3 A. & E. Ann. Cas. 962, to consider a policy in all material respects like the one at bar. We there recognized the distinction made by the authorities between a policy insuring an employer against liability and one agreeing to indemnify the assured "against loss from liability for damages," and it was held that the policy then in question was of the latter character, and further, that the amount of the insurance provided for in the policy did not become available until the payment of the loss by the assured, and could not be impounded by an employee and appropriated by him to an unsatisfied judgment against his employer.

We are entirely satisfied with the conclusions announced in that opinion, and it is necessarily controlling here, unless the two cases can be materially distinguished. This, it is insisted by counsel for complainants,

they have succeeded in doing. The facts relied upon as radically distinguishing this from the earlier case and relieving complainants from its authority are that upon the occurrence of the accident and notice thereof the New Amsterdam Casualty Company, conceding that it fell within the terms of the policy, "undertook and assumed exclusive control of negotiations for settlement and of the defense of the suit" instituted by the injured employee, and "conducted the same in the name of Robertson & Hobbs, who were excluded from all participation therein, except as agents and assistants of" the defendant company. It is upon these facts, as well as under the terms of the policy, the contention is made by the complainants that the insurance company became the real defendant in that case, and that thus the benefit of the policy and liability of the company "inured" to them, and entitles them to a decree in this cause.

It is true, in the Finley Case, that the indemnity company did not interfere in any way with the suit which the injured employee brought against the master, but, to the contrary, denied liability for the injury; yet, pending the suit, it did pay the employer \$50 in compromise and settlement of all claim under the policy. After the judgment obtained therein by the injured employee, he sought by a bill in equity to hold the Casualty Company liable for the amount of his recovery on two grounds: First, that the policy taken out by the employer, upon the injury sustained by him, inured at once to his benefit; and, second, if mistaken in this, then he had a right to impound the alleged debt in the hands of the company, and subject it to his judgment, because the compromise, mentioned above, was in fraud of his claim.

These two grounds for recovery were challenged as unsound by a demurrer, which was sustained by the chancellor, whose decree was afterwards affirmed by the court of civil appeals. On being brought into this court by certiorari, after consideration, the decree of the latter court was in all things affirmed; this court holding that, under the contract, there was no privity between the injured employee and the parties to the indemnity policy, that this contract was one between the company and the assured, and alone for his benefit.

If it be true, then, that the injured servant is not in privity with the parties to the contract, but that it is solely made for the benefit of the master, and, as is provided in the seventh of the general agreements, set out above, that no action will lie against the company for any loss, unless brought by the assured "to reimburse him for a loss 30 L.R.A. (N.S.)

actually sustained and paid by him," it is difficult to see how the indemnity company in the present case so changed its relations to the parties and the contract that it became operated with and obligated to pay the unsatisfied judgment of the employee, because, for its better protection, it saw proper to avail itself of the terms of the general agreement No. 3, by defending the action in which that judgment was obtained.

To combat this view, and avoid the force of the holding in *Finley v. United States Casualty Co.*, it is insisted that under the policy, when properly construed, in assuming the defense of the case against Robertson & Hobbs, the defendant company had placed itself under obligation to pay the judgment then recovered; and the counsel of complainants rely on *Sanders v. Frankfort M. Acci. & Plate Glass Ins. Co.* 72 N. H. 485, 101 Am. St. Rep. 688, 57 Atl. 653, in support of their insistence.

The court delivering the opinion in that case is of recognized ability, and its decisions are entitled to great respect; but to accept its construction of the policy there involved would be to overrule *Finley v. United States Casualty Co.* supra, for the two cases cannot stand together. It is true, as has been stated, that in the latter case the indemnity company did not take part in the defense of the servant's suit against the master, or exercise any control over the master in resisting it, while in the *Sanders* Case the reverse was true; yet to hold, with that court, that the insurer, after taking control of the proceeding against the assured, who is insolvent, cannot be discharged of liability except by payment of the indemnity, or a settlement of the plaintiff's claim reduced to judgment, would be counter to our holding that in such a policy there is no privity between the servant and the parties to the contract, that the fund provided for indemnity is not a trust fund, and the loss contemplated is that which the master sustains by the satisfaction of the judgment obtained against him.

It will be found, on examination of the opinion of the supreme court of New Hampshire, that the conclusion therein announced rests largely on that portion of § 2 of the general agreements, where, on receiving immediate notice of a suit brought against the assured to recover damages on account of an accident covered by the policy, the company undertakes "to defend against such proceeding, in the name and on behalf of the assured, or settle the same, at its own cost."

To the word "defend," used in the section, is given the broad meaning "to protect, to secure against attack,—in short, to

successfully defend," and then holding that, under this section, when the company undertook a defense, it "could only perform its covenant of indemnity by assuming the liability." On this point, it is said, in the course of the opinion, "the engagement is not merely to contest the suit to judgment, but to 'defend against such proceedings,'—meaning necessarily all the proceedings in the suit founded upon the claim for damages against the insured. The judgment is a proceeding in such a suit, as also is the execution. After final judgment, payment is ordinarily the only defense open which will defeat further progress in the proceedings,—the issuance of execution."

So, with this construction (and this was essential to avoid an irreconcilable conflict), it was held that the agreement or condition that "no action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment, after trial of the issue," was intended to "provide for the cases, if any should arise, where the company contended the claim arose from an accident not covered by the policy."

This court, however, gave a broader scope to this clause in *Finley v. United States Casualty Co. supra*, and, construing it in connection with §§ 2 and 3 held as follows: "While the company is bound to reimburse the assured for loss actually sustained and paid by him in satisfaction of a judgment recovered against him by an employee, yet, in order to make sure, as far as possible, that there shall be no recovery as a basis on which to subsequently establish a claim, the company reserves the right to defend the litigation, also to supervise any settlement that may be made, and to have a free hand in negotiating settlements of a claim made against the assured. As stated, if these provisions—that is, the second and third general agreements—stood alone, they would furnish strong reasons for construing the contract as one against liability; but, from what has just been stated, it is perceived that they have a proper place in a contract against loss from liability for damages in the way of enabling the company to minimize the loss."

In *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981, is presented a controversy similar in all respects to the one at bar. There the complainant, in bill of equity, with an unsatisfied judgment against the master, rendered in a case where the indemnity company had assumed the defense, relied for his contention as to the liability of the company to him by reason of the terms of its policy on the authority of *Sanders v. Frank-*

fort M. Acci. & Plate Glass Ins. Co. supra. The court, however declined to follow that case, saying, among other things, that the word "defend," as used in the policy, had its natural import, and that it meant there "what it means when counsel are retained to defend an action; and that it is not to be extended beyond that,—to mean to successfully defend." As to the purpose and effect of the second clause, in which the word "defend" occurs, the court said that they are "plain, when taken in connection with the third. It is plainly inserted as an additional obligation and privilege for the protection of the insurance company, on the assumption that it is for the pecuniary interest of the company to be given the conduct of and to defend the action which is to fix its liability, and the amount to be paid when liable, rather than to leave that matter to be dealt with by the several persons injured, respectively. This does not result in the necessity of writing into clause 2 the qualifying words 'until final judgment,' as the plaintiff contends, for when final judgment is rendered ordinarily all defense is at an end. Nothing remains but a writ of review or a writ of error; and if such a proceeding were necessary, it might well be held to be covered by the obligation to defend. But when the defense is ended, and, in spite of the defense, judgment is rendered against the insured, there is nothing to do but pay. Making payment of a judgment against the defendant is no part of a covenant to defend the action. Whether the insurance company is bound to pay the judgment depends upon the terms of its agreement to indemnify the assured against loss; and the eighth clause [corresponding with the seventh clause in this policy] in terms provides that no action shall lie for 'any loss under this policy,' unless brought by the assured 'to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.'"

In *Allen v. Gilman McN. & Co. (C. C.)* 137 Fed. 136, the same ruling is made. As to the opinion in *Sanders v. Frankfort M. Acci. & Plate Glass Ins. Co. supra*, the court said: "It is certainly opposed to the weight of authority, and I am not satisfied with the construction of the policy that the court found it necessary to adopt, in order to avoid the force of the provision forbidding suit by the insured until after he has paid the employee's judgment."

We are satisfied with the reasoning and conclusion announced by these two latter courts. The view taken by them of a policy such as is the one at bar, we think is entirely sound. It is in accord with the general conclusion reached by this court in *Finley v. United States Casualty Co. supra*.

We have examined the cases referred to by counsel for complainant in Kennedy v. Fidelity & C. Co. 100 Minn. 1, 9 L.R.A. (N.S.) 478, 117. Am. St. Rep. 658, 110 N. W. 97, 10 A. & E. Ann. Cas. 673, and Nesson v. United States Casualty Co. 201 Mass. 30 L.R.A. (N.S.) 71, 131 Am. St. Rep. 390, 87 N. E. 191, and find that they have no bearing on the questions raised. It follows that the action of the chancellor in overruling the demurrer to this bill must be reversed, and the bill is dismissed.

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Premature; conditions precedent.

1. A formal disaffirmance by an insane person, or by someone acting in his behalf, of a void deed which had been executed by him to one who had knowledge of the insanity, and who gave no substantial consideration, is not a condition precedent to the bringing of an action by a devisee under the prior valid will of the grantor, to set aside such deed as a cloud on title, which was alleged to have passed under the will, although there was ample time for such action between the execution of the deed and the grantor's death. *Bethany Hospital Co. v. Philippi*, 30: 194, 107 Pac. 530, 82 Kan. 64.

2. An objection that an action by a devisee under a will to set aside a deed of the testator, which was alleged to have procured while he was of unsound mind, was premature, because brought before the will was probated, because immaterial upon the trial upon an amended and supplemental petition filed after the probate of the will. *Bethany Hospital Co. v. Philippi*, 30: 194, 107 Pac. 530, 82 Kan. 64.

3. The right of action against a title abstractor under a statute providing that persons engaged in making of abstracts shall give bond conditioned for the payment of all damages that may accrue to any person by reason of any incompleteness, imperfections, or error in any abstract furnished by them, accrues at the time the abstract is delivered, and not when the error is discovered and the damages resulting therefrom have been paid. *Walker v. Bowman*, 30: 642, 111 Pac. 319, — Okla. —.

Joinder.

4. Claims for the benefit of the widow and next of kin of one killed by another's wrongful act, and for the benefit of his estate, may be joined in one action to hold the one responsible for the wrong liable for the damages. *Tillar v. Reynolds*, 30: 1043, 131 S. W. 969, — Ark. —.

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As to bill of review, see Review.

Right to appeal.

1. The installation by a gas company of a single meter in an apartment house, and the connection of the building with its mains, after the dismissal of a petition for mandamus to compel it to install a meter in each apartment, is not a termination of the controversy, which will destroy the jurisdiction of the appellate court. *State ex rel. Hullett v. Seattle Lighting Co.* 30: 492, 110 Pac. 799, — Wash. —.

Jurisdiction of United States Supreme Court.

2. The nature and character of the rights of the surviving wife in the community property are peculiarly local questions, not open to review by the Federal Supreme Court when determining, on a writ of error to a state court, whether the imposition of an inheritance tax under the state laws denies to the wife the equal protection of the laws. *Moffitt v. Kelly*, 30: 1179, 31 Sup. Ct. Rep. 79, 218 U. S. 400, 54 L. ed. 1086.

3. Whether or not the rights of a surviving wife in the community property as they existed when the marriage was celebrated were correctly subjected to a state inheritance tax law subsequently enacted cannot be reviewed by the Federal Supreme Court when determining, on writ of error to a state court, the validity of such statute under the contract clause of the Federal Constitution. *Moffitt v. Kelly*, 30: 1179, 31 Sup. Ct. Rep. 79, 218 U. S. 400, 54 L. ed. 1086.

Transfer of cause; effect; time.

4. The pendency of an appeal from an order committing officers of a corporation for contempt in disobeying an order directing them to turn over the corporate books to a receiver will not prevent the nisi prius court from sequestering the corporate property. *Manning v. Mercantile Securities Co.* 30: 725, 90 N. E. 238, 242 Ill. 584.

5. Where after the entry of a judgment and the denial of a motion for new trial, the successful party causes a new judgment to be entered its date is that from which to reckon the time allowed for appeal. *Jemo v. Tourist Hotel Co.* 30: 926, 104 Pac. 820, 55 Wash. 595.

Record on appeal.

6. The rule that alleged errors which require an examination of all the facts cannot be reviewed unless the case-made avers that it contains all the evidence introduced at the trial is complied with by a statement in a case-made, preceding the evidence, to the effect that "the following evidence was introduced, same being all

the evidence introduced by both parties at the trial." *American Steel & W. Co. v. Coover*, 30: 787, 111 Pac. 217, — Okla. —.

7. Cross assignments of error will not be considered where appellees ask an affirmation of the judgment, which can be done without considering them. *Baldwin v. Moroney*, 30: 761, 91 N. E. 3, 173 Ind. 574.

8. All points relied upon for reversal on appeal must be properly made in the brief or they will be deemed waived; and it is not sufficient to assert in general terms that a ruling of the trial court is wrong, but a fair effort must be made to prove that it is wrong, or the point will not be considered as having been made. *Allison v. Bryan*, 30: 146, 109 Pac. 934, — Okla. —.

Objections and exceptions; raising questions in lower court.

9. An objection that a decree of adoption entered by a probate court cannot be set aside on the facts entitles one appealing from a subsequent decree attempting to set it aside, to raise the question whether or not petitioner is entitled on all the facts to any relief, and to raise objections not specified as objections to the decree, where under such an appeal the case is heard *de novo* in the appellate court. *Phillips v. Chase*, 30: 159, 89 N. E. 1049, 203 Mass. 556.

10. The question of ratification of a decree of adoption procured by fraud, or of laches and the statute of limitations, cannot be raised on appeal from a subsequent decree of the probate court setting aside the former one, where no objections to the decree on those grounds were filed on appeal, although upon such an appeal the case is heard *de novo* in the appellate court. *Phillips v. Chase*, 30: 159, 89 N. E. 1049, 203 Mass. 556.

Presumptions.

11. The appellate court will, when the record recites that the parties came and submitted the cause to the court for trial, without the intervention of a jury, presume that a jury trial was expressly waived. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —.

What reviewable generally.

Scope of review on writ of error from Federal supreme court to state court, see *supra*, 2, 3.

12. The appellate court will not, under a statute requiring it to weigh the evidence in equity cases, do so where the testimony is oral, and there is a substantial conflict in it. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —.

Objections as to which party is estopped.

13. One who consents to a trial of a cause by the court without a jury cannot insist on appeal that it was, because of that fact, tried on a wrong theory, to his injury. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —.

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Discretionary matters.

14. There is no abuse of discretion in refusing to permit the filing of a bill to review a decree settling the credits to be allowed on a note given to a bank for money loaned to settle with the maker's creditors, because of newly discovered evidence consisting of items delivered to the bank for credit, but not credited, where the items were known to petitioner, or by the exercise of reasonable diligence could have been discovered, before the rendition of the decree, and which were merely overlooked or forgotten. *Smith v. Rucker*, 30: 1030, 129 S. W. 1079, — Ark. —.

Questions not raised below.

15. A judgment cannot be affirmed on a theory not presented in the pleading and proofs. *Woodson v. Metropolitan Street R. Co.* 30: 931, 123 S. W. 820, 224 Mo. 685.

16. A garnishee cannot plead the statute of limitations to a recovery of a claim against him for the first time in the appellate court. *Tiger v. Rogers Cotton Cleaner & Gin Co.* 30: 694, 130 S. W. 585, — Ark. —.

17. Relators cannot on appeal raise the objection for the first time that an affidavit of defense in a mandamus proceeding should not have been treated as a pleading, where it was in fact an answer in all but name. *State ex rel. Hallett v. Seattle Lighting Co.* 30: 492, 110 Pac. 799, — Wash. —.

18. Failure to show that the street on which an accident occurred for which a municipal corporation is sought to be held liable was a public street within its limits is not reversible error, where both parties assumed at the trial that it was so. *Woodson v. Metropolitan Street R. Co.* 30: 931, 123 S. W. 820, 224 Mo. 685.

Review of facts.

19. Assignments of error which challenge the sufficiency of the evidence to warrant a conviction cannot be considered by the Federal Supreme Court on a writ of error to the supreme court of the Philippine Islands, to review a judgment affirming such conviction, where it is not contended that there was no evidence of guilt, since only errors of law can be considered upon a writ of error. *Ling Su Fan v. United States*, 30: 1176, 31 Sup. Ct. Rep. 21, 218 U. S. 302, 54 L. ed. 1049.

20. The findings of the trial court in an action to recover possession of a quantity of grain which had been sold, but not actually delivered, that the title passed to the vendee, will not be disturbed on appeal unless against the clear weight of evidence, since the question is one of fact, as it depends on the intent of the parties to the transaction. *Seldomridge v. Farmers' & M. Bank*, 30: 337, 127 N. W. 871, — Neb. —.

Grounds for reversal.

21. It is reversible error for a state corporation commission which has directed the amendment of an original affidavit charging a violation of one of its orders, to proceed with the trial over the objection of the

defendant, upon the theory that the affidavit has been amended so as to charge a violation of a different order, where such amendment has never been made nor verified. *St. Louis & S. F. R. Co. v. State*, 30: 137, 107 Pac. 929, — Okla. —.

22. Erroneous rulings on the pleadings will not require reversal where, on the merits, judgment was entered for the right party. *Jenkins v. Hawkeye Commercial Men's Asso.* 30: 1181, 124 N. W. 199, — Iowa, —.

23. It is not reversible error to permit a witness in an action by a servant to hold his master liable for personal injuries, who testifies as to measurements taken immediately after the accident, to state that he was a member of a committee whose duty it was to investigate the circumstances of accidents, and that he took the measurements in making such examination. *Duffey v. Consolidated Block Coal Co.* 30: 1067, 124 N. W. 609, — Iowa, —.

24. One who is shown to be guilty of assaulting an officer in the discharge of his duty, upon his own evidence, cannot secure a reversal of the conviction because improper evidence was admitted for the impeachment of one of his witnesses. *Dotterer v. State*, 30: 846, 88 N. E. 689, 172 Ind. 357.

25. The admission of immaterial evidence will not require a reversal if it is nonprejudicial. *Duffey v. Consolidated Block Coal Co.* 30: 1067, 124 N. W. 609, — Iowa, —.

26. It is not reversible error to refuse to permit questions to be put to a witness on recross-examination, where no excuse is given why they were not asked upon the cross-examination, where the witness has been finished with once and recalled, and the party offering him has finished with him. *Duffey v. Consolidated Block Coal Co.* 30: 1067, 124 N. W. 609, — Iowa, —.

27. Refusal to strike out a part of the evidence of a certain witness as not the best evidence is harmless error where, had it been stricken out, other evidence sufficient to justify the judgment would have remained. *McGregor v. Harm*, 30: 649, 125 N. W. 885, — N. D. —.

28. It is not prejudicial error to refuse an instruction which is not within the issues presented by the pleadings. *Dardanelle Pontoon Bridge & Turnp. Co. v. Croom*, 30: 360, 129 S. W. 280, — Ark. —.

29. A statement by the state's attorney when summing up a criminal case to the jury, to the effect that to the knowledge of the presiding judge one of the number had been fixed, based not upon facts in evidence, but upon the judge's statement to him that he had seen the juror and a relative of the accused in conversation under suspicious circumstances, an objection to which the judge overrules, is reversible error. *Turpin v. Commonwealth*, 30: 794, 130 S. W. 1086, — Ky. —. (Annotated)

30. Permitting the jury in a homicide case to take a dying declaration which had been reduced to writing and introduced in evidence, to their room, under the erroneous belief that it was within the terms 30 L.R.A. (N.S.)

of a statute providing what papers shall be allowed to be so taken, is reversible error. *Territory v. Eagle*, 30: 391, 110 Pac. 862, — N. M. —.

31. Under the principle of *de minimis non curat lex* refusal to direct a verdict for 39 cents, although erroneous, does not constitute ground for reversal, where no question of costs is involved. *McGregor v. Harm*, 30: 649, 125 N. W. 885, — N. D. —.

32. A relator is not entitled to reversal of a decree refusing a mandamus, for the purpose of avoiding costs, because it did not award that portion of the relief demanded to which he was entitled, where he rejected respondent's offer to furnish such portion. *State ex rel. Hallett v. Seattle Lighting Co.* 30: 492, 110 Pac. 799, — Wash. —.

Effect of decision; subsequent proceedings.

33. A plaintiff whose judgment is reversed on appeal after consideration of the law and the facts is not entitled to the benefit of a statute permitting the institution of a new suit within a year in case of a nonsuit or a reversal of a judgment in his favor, where the appellate court is authorized to award a new trial, reverse, or affirm, since the reversal referred to in the statute must be held to mean one in which the merits of the cause have not been adjudicated. *Strottman v. St. Louis, I. M. & S. R. Co.* 30: 377, 128 S. W. 187, 228 Mo. 154. (Annotated)

APPLIANCES.

Master's duty as to, see Master and Servant, 9-13.

APPLICATION.

Of deposit, see Banks, 1.

ARGUMENT.

Of counsel, see Appeal and Error, 29; Trial, 2.

ARREST.

Release from, on bail, see Bail and Recognizance.

Carrier's liability for assault by police officer in making, see Carriers, 3.

Civil liability for making, see False Imprisonment.

ASSAULT.

On passenger, see Carriers, 3-7; Evidence, 24.

Wife's right of action for assault on her by husband, see Husband and Wife, 3.

Liability of master for assault by servant, see Master and Servant, 2, 24.

Sufficiency of defendant's pleadings in action for, see Pleading, 11.

ASSESSMENT.

For public improvements, see Public Improvements.

ASSETS.

Of bankrupt, see Bankruptcy.

ASSUMPSIT.

Assumpsit by assignee of a portion of claim against second assignee who has collected full amount, see Assumpsit, 2.

Liability of assignee of stock on unpaid subscriptions, see Corporations, 6.
Of mortgage, see Mortgage.

1. That one contracted for himself, "his heirs and assigns," does not render assignable a contract which, without the words "his heirs and assigns," would not have been assignable. *Schlesinger v. Forest Products Co.* (N. J. Err. & App.) 30: 347, 76 Atl. 1024, — N. J. —.

2. A contract for the sale of staves to be manufactured is not assignable by the vendor, where the purchaser relied upon personal performance of the contract by the vendor, so as to compel the purchaser to accept performance from one to whom the contract had been assigned. *Schlesinger v. Forest Products Co.* (N. J. Err. & App.) 30: 347, 76 Atl. 1024, 78 N. J. L. 637.

3. Where claims for tort may be assigned, a railroad company against which a claim exists for a personal injury cannot, by settlement with the person injured, avoid liability to his wife for the amount due her under an agreement between them in a divorce proceeding that she shall have a portion of the recovery as alimony, which has been confirmed by a decree which made the allowance a lien on the fund to be recovered, after it had notice thereof. *Kithcart v. Kithcart*, 30: 1062, 124 N. W. 305, — Iowa, —.

ASSIGNMENT FOR CREDITORS.

As to bankruptcy matters, see Bankruptcy.

ASSOCIATIONS.

Jurisdiction over, see Courts.

Religious societies, see Religious Societies.

ASSUMPSIT.

1. An action will lie to recover a sum certain whenever one has the money of another which he, in equity and good conscience, has no right to retain. *Brooks v. Hinton State Bank*, 30: 807, 110 Pac. 46, — Okla. —.

2. The assignee of a portion of a claim against a county for public work may recover as for money had and received the amount of such assignment from a second assignee, who has collected the full amount from the county, where it appears that the first assignment was pinned to the claim when the second assignment was made, and was so attached when the claim was filed with the county clerk by the second assignee, but before payment had become detached and lost. *Brooks v. Hinton State Bank*, 30: 807, 110 Pac. 46, — Okla. —.

(Annotated)

ASSUMPTION OF RISK.

By servant, see Master and Servant, 14-16.

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ATTACHMENT.

Of property of individual partner where other member has been adjudged a bankrupt, see Bankruptcy, 3.

As to garnishment, see Garnishment.

Sufficiency of publication notice in, see Writ and Process, 1.

1. An attachment is properly dismissed when the only levy thereof is by the service of a summons of garnishment which is void. *Cowart v. W. E. Caldwell Co.* 30: 720, 68 S. E. 500, 134 Ga. 544.

2. Although an attachment may be dismissed because of its invalidity, plaintiff is entitled to proceed for a verdict and general judgment on his declaration, if the defendant has appeared and made defense, under Code provisions providing that, where defendant has appeared and made defense, judgment against him shall bind all his property, and have the same force and effect as if there had been personal service, and that, where notice in writing was given to defendant of the pendency of attachment proceedings, the declaration shall not be dismissed because the attachment may have been dismissed or discontinued, but the plaintiff shall be entitled to judgment on the declaration filed, as in other cases at common law, upon the merits of the case. *Cowart v. W. E. Caldwell Co.* 30: 720, 68 S. E. 500, 134 Ga. 544.

ATTORNEYS.

Argument of, see Appeal and Error, 20; Trial, 2.

Contempt in failing to pay attorneys' fees, see Contempt, 5.

Advice of attorney as defense in action for false imprisonment, see False Imprisonment.

Liability for counsel fees under guaranty insurance policy, see Insurance, 12.

Recovery of attorneys' fees in action on replevin bond, see Replevin.

AUTOMOBILES.

Criminal liability for death resulting from negligence, see Homicide.

Evidence in prosecution of chauffeur for homicide, see Evidence, 19.

1. One attempting to crank an automobile in close proximity to horses, without paying any attention to whether or not they are frightened by the resulting noise, and continuing to turn the crank until the machine starts notwithstanding the horses manifest fright, as the result of which they run away, is responsible for the resulting injury to them. *Tudor v. Bowen*, 30: 804, 67 S. E. 1015, 152 N. C. 441.

2. It is negligence *per se* to attempt to crank a defective automobile which makes a terrible noise when starting, in close proximity to horses, without giving their driver notice to remove them to a safe place. *Tudor v. Bowen*, 30: 804, 67 S. E. 1015, 152 N. C. 441.

BAGGAGE.

Of passenger, see Carriers, 15.

BAIL AND RECOGNIZANCE.

The arrest on a criminal charge of one who had been arrested in the same state on another charge and released on bail, intermediate the date of the bond and the time when, by the terms thereof, he was obligated to appear in court, and his detention until after such time, releases the sureties on the bond, since the state for whose protection the bond was given, itself rendered performance of the conditions by the prisoner impossible. *State v. Funk*, 30: 211, 127 N. W. 722, — N. D. —.

(Annotated)

BALLOTS.

Construction of statute as to preserving, see Statutes, 6-8.

BANKRUPTCY.

Estoppel to claim property as against trustee in bankruptcy, see Estoppel, 3.

Enforcement against trustee of mortgage of bankrupt's exemptions, see Exemptions.

Garnishment of funds in hands of trustee, see Garnishment, 1.

Assets: avoiding transfers.

1. The proviso in § 70 of the bankruptcy act, that when a bankrupt shall have an insurance policy with a cash surrender value payable to himself or his estate, he may, under certain circumstances, pay such value to the trustee and retain the policy, does not interfere with the operation of the provision in the section that the trustee shall be vested by operation of law with any property which the bankrupt could by any means have transferred, and therefore a policy the beneficiary in which may be changed by the bankrupt at pleasure will pass to the trustee. *Re Orear*, 30: 990, 178 Fed. 632, 102 C. C. A. 78. (Annotated)

2. Unpaid subscriptions to the stock of a corporation constitute assets in the hands of its trustee in bankruptcy, even though the stock has been transferred from the possession of the original subscribers. *Perkins v. Cowles*, 30: 283, 108 Pac. 711, 157 Cal. 625.

3. The property of a partnership which has not been adjudicated a bankrupt does not pass to the trustee of the estate of an individual member who has been adjudged a bankrupt, so as to defeat an attachment lien of a firm creditor, levied on firm assets within four months prior to the adjudication of the individual as a bankrupt, under § 67 of the Federal bankruptcy act of 1898, which provides that all attachments obtained against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed void in case he is adjudged a bankrupt, and the property affected shall pass to the trustee unaffected by the attachment. *American Steel & W. Co. v. Coover*, 30: 787, 111 Pac. 217, — Okla. —. (Annotated)

4. Acceptance by one who has transmitted a mortgage to an insolvent banker for 30 L.R.A. (N.S.)

collection, of a deed to real estate and notes of strangers in satisfaction of the proceeds of the mortgage, which the banker transmitted with instructions to accept the same upon hearing that the bank had closed its doors, amounts to treating the transaction as an indebtedness, and terminates the trust relation, where the banker dissipates the proceeds of the collection and closes the bank without funds into which the proceeds can be traced; and the owner of the mortgage is therefore not entitled to a preference over other creditors, but may be required to surrender his security to the banker's trustee in bankruptcy, who is appointed within four months thereafter. *Atherton v. Green*, 30: 1053, 179 Fed. 806, 103 C. C. A. 298. (Annotated)

5. The conveyance by a bankrupt to his wife of real estate which he had purchased with her funds, but held in his own name, cannot be interfered with by the bankruptcy trustee, in the absence of anything to estop her from claiming the benefit of the trust. *Blake v. Meadows*, 30: 1, 123 S. W. 868, 225 Mo. 1.

Rights in assets; title and rights of trustee.

6. Where, under the local law, it is not against public policy to permit the transfer of exemptions from execution, and mortgages may cover after-acquired property, a mortgage by one of his exemptions, to apply when it is sought to be enforced, will be enforced against the claim of his trustee in bankruptcy. *Re National Grocery Co.* 30: 982, 181 Fed. 33, — C. C. A. —.

7. A trustee in bankruptcy takes title to the bankrupt's property which has been conveyed in fraud of creditors, and contrary to the terms of the bankruptcy act, subject to outstanding equities not lost by estoppel or fraud, to which the title was subject in the hands of the bankrupt. *Blake v. Meadows*, 30: 1, 123 S. W. 868, 225 Mo. 1. **Claims against estate; distribution.**

8. A claim against the assets of an insolvent corporation, based upon a fraudulent sale by it of its stock, cannot, in the bankruptcy proceedings against it, be given preference to claims of other creditors, although they are officers of the corporation and parties to the fraud, and become parties to the proceeding, where no issues are made presenting the question of priority to the court. *Davis v. Louisville Trust Co.* 30: 1011, 181 Fed. 10, — C. C. A. —.

9. In determining the validity of liens on the property of a bankrupt as against the claims of the trustee, the latter has, under the bankruptcy act, the rights of creditors of the bankrupt, and is not limited to those of the bankrupt himself. *Fourth Street Nat. Bank v. Taylor*, 30: 552, 172 Fed. 177, 96 C. C. A. 620.

Discharge; effect.

Binding effect of judgment refusing discharge in bankruptcy, see Judgment, 3.

10. A false representation by one member of a partnership for the purpose of securing credit, of which the copartner is

ignorant, will not prevent the latter from securing a discharge upon his individual petition therefor, under the statute requiring the granting of the discharge unless applicant obtained property on credit from any person upon a materially false statement made for that purpose, although it may prevent the discharge from operating as a release from liability for the credit so falsely obtained, under the section of the statute providing that the discharge shall release the bankrupt from all debts except such as are liabilities for obtaining property by false representations. *Frank v. Michigan Paper Co.* 30: 623, 179 Fed. 776, 103 C. C. A. 268. (Annotated)

11. The liability of an employer upon an accepted order of his employee, to pay a certain sum per week out of the latter's wages until a certain debt is satisfied, is extinguished by the discharge of the employee in bankruptcy. *Levi v. Loevenhart & Co.* 30: 375, 127 S. W. 748, 138 Ky. 133. (Annotated)

BANKS.

Discrimination against stockholders of, in taxation of capital stock, see Taxes, 1.

Deducting real estate in taxing capital stock, see Taxes, 3, 4.

Application of deposit.

Damages for refusal to return special deposit, see Damages, 11.

1. A bank which accepts a deposit of money needed by the depositor for a special purpose, under the agreement that it will pay the amount when needed for that purpose, cannot apply it upon the depositor's general indebtedness to it. *Smith v. Sanborn State Bank*, 30: 517, 126 N. W. 779, — Iowa, —. (Annotated)

Payment of checks.

Presentment of negotiable paper, see Bills and Notes, 2, 3.

2. Payment of a check wholly written by hand, and signed "V. P. by S. P.," the "V. P. by" having been written by a hand other than the "S. P.," will not authorize charging the amount thereof against a deposit account as to which it had been agreed that checks drawn thereon should be honored only when signed either "V. P. per S. P.," written wholly by S. P., or when drawn upon a certain printed form and signed by S. P., although the signature upon the check paid was that of S. P., where checks similar in form to that paid had never been issued by S. P. and in fact he had written his signature upon a blank piece of paper for another purpose, and the balance of the check had afterward been written in by another, without authority, and with intent to defraud, and the bank had ample time to inquire as to the validity of the check before honoring it. *Polizotto v. People's Bank*, 30: 206, 51 So. 843, 125 La. 770. (Annotated)

3. The drawee bank of a check upon which at the time it was drawn was stamped in the lower left-hand corner, and 30 L.R.A.(N.S.)

immediately following the direction to the drawee bank, the words, "Payable through (a named bank in another city) at current rate," need not pay the check when not presented through the named bank, but directly by a third bank. *Farmers' Bank v. Johnson, King, & Co.* 30: 697, 68 S. E. 85, 134 Ga. 486. (Annotated)

BAR.

Of judgment, see Judgment, 2-5.

Of limitation, see Limitation of Actions.

BASTARDY.

Abatement of bastardy proceeding, see Abatement and Revival.

BENEVOLENT SOCIETIES.

Insurance by, see Insurance.

BID.

For public contract, see Contracts, 16-20.

BILL OF REVIEW.

See Review.

BILLS.

See Statutes.

BILLS AND NOTES.

Conflict of laws as to limitation of actions on, see Conflict of Laws, 3, 4.

Loss of collateral by treating note secured as itself collateral for new note for same debt, see Pledge and Collateral Security, 3.

Negotiability.

1. A note which, on its face, is subject to the terms of a contract between maker and payee, is not negotiable. *Klots Throwing Co. v. Manufacturers' Commercial Co.* 30: 40, 179 Fed. 813, 103 C. C. A. 305. (Annotated)

Presentment; protest.

2. Causing a check to be protested and notice to be given to the drawer and indorsers without proper presentation for payment, according to its terms, renders the holder liable to the drawer for the resulting damages. *Farmers' Bank v. Johnson, King, & Co.* 30: 697, 68 S. E. 85, 134 Ga. 486.

3. The indorsement on a check made payable through a named bank, when presented directly by a third bank, and not through the named bank, of a statement that it would be paid when presented through the bank through which it was made payable, does not authorize the presenting bank to have the check protested. *Farmers' Bank v. Johnson, King, & Co.* 30: 697, 68 S. E. 85, 134 Ga. 486.

BILLS OF EXCHANGE.

See Bills and Notes.

BLOOD POISONING.

As accident within meaning of accident insurance policy, see Insurance, 11.

BONDS.

Prematurity of action on, see Action or Suit, 3.

Bail bonds, see Bail and Recognizance. Jurisdiction of equity of suits on, see Equity, 1.

Who may maintain action on official bond, see Parties, 4.

Replevin bond, see Replevin.

1. Failure of the principal to sign his official bond does not render it void in favor of the surety, where the statute provides that no irregularity shall render such bond void, if it is delivered as the official bond of the officer and serves as such, and it is joint and several in form. *Adams v. Williams*, 30: 855, 52 So. 865, — Miss. —.

2. The official bond of the treasurer of a levee board which has the conditions prescribed by law is not rendered void by the insertion of an additional condition relieving the surety from liability for loss of money deposited in the bank, such condition being merely surplusage and void. *Adams v. Williams*, 30: 855, 52 So. 865, — Miss. —.

3. The bond of a custodian of public money is liable to account for the interest which he receives upon it, where the statute makes him liable to safe-keep, account for, and pay over all money that may come into his custody in his official capacity, and all other money for which he is properly accountable as such officer, although the statute makes it unlawful for him to use such money for his own benefit. *Adams v. Williams*, 30: 855, 52 So. 865, — Miss. —. (Annotated)

BOOKS.

Contempt in refusing to turn over corporate books to receiver, see Appeal and Error, 4.

Right to inspect books of corporation, see Corporations, 4.

Compelling production of, see Discovery and Inspection.

BOUNDARIES.

Admissibility of evidence as to, see Evidence, 16.

BRIDGES.

Opinion evidence as to safety of, see Evidence, 14.

1. A railing on a bridge, made of light, unbraced pine posts, bolted at the bottom, may be found to be insufficient to meet the requirements which the law imposes upon the owner to render the bridge safe for teams which may be upon it. *Dardanelle Pontoon Bridge & Turnp. Co. v. Croom*, 30: 360, 129 S. W. 280, — Ark. —.

2. The proprietor of a toll bridge is liable for the loss of a team which falls from the bridge and is killed because of the failure of such proprietor to use reasonable and ordinary care to see that the guard rail was sufficient to withstand such pressure as might be imposed upon it by teams likely to be upon the bridge. *Dardanelle Pontoon Bridge & Turnp. Co. v. Croom*, 30: 360, 129 S. W. 280, — Ark. —. (Annotated)

danelle Pontoon Bridge & Turnp. Co. v. Croom, 30: 360, 129 S. W. 280, — Ark. —. (Annotated)

BRIEFS.

On appeal, see Appeal and Error, 8.

BUILDING CONTRACT.

See Contracts, 11.

BUILDINGS.

Contract for heating and ventilating system in public building, see Contracts, 16, 17.

Fixtures in, see Fixtures.

Lien on, see Mechanics' Liens.

Right of taxpayer to restrain illegal contract as to public buildings, see Parties, 7.

BURDEN OF PROOF.

In general, see Evidence, 4-8.

BY-LAWS.

Of corporation, see Corporations, 4.

CANCELATION OF INSTRUMENTS.

Right to jury trial in action for, see Jury, 1.

Duplicity of petition in action for, see Pleading, 5.

CARRIERS.

Making violation of rules as to street car transfers a crime, see Constitutional Law, 1.

Damages in action against, see Damages, 2, 6, 7.

Control of interstate commerce commission over, see Interstate Commerce.

Injury to employee, see Master and Servant.

Running of trains on Sunday, see Sunday, 4.

As to telegraph companies, see Telegraphs.

Negligence as question for jury, see Trial, 9.

Who are passengers.

1. An immigrant required to accompany his stock and household goods for the purpose of caring for them is not entitled to the rights of a passenger, where, after his car reaches destination, and his stock has been unloaded, he attempts to use the car for sleeping purposes, until his goods can be removed from it, where the goods can be fully protected in the car, and there are hotel accommodations near by. *Chicago, R. I. & P. R. Co. v. Thurlow*, 30: 571, 178 Fed. 894, 102 C. C. A. 128. (Annotated)

2. The relation of a passenger to a railroad company ceases when he has alighted from the train upon the platform at his destination, and proceeded far enough towards the exit from the company's property to be out of danger from the movement of the train, and necessity for further relation with the servants of the company has ceased. *Berryman v. Pennsylvania R. Co.* 30: 1049, 77 Atl. 1011, 228 Pa. 621.

Assault.

Evidence in mitigation of damages for, see Evidence, 24.

Sufficiency of defendant's pleading in action for, see Pleading, 11.

3. A railroad company is not liable for the act of its police officer in wilfully and maliciously inflicting injury upon one whom he is attempting to arrest for a justifiable cause, while he is in the act of leaving the company's train. *Berryman v. Pennsylvania R. Co.* 30: 1049, 77 Atl. 1011, 228 Pa. 621.

4. A railroad company is not liable for the unprovoked shooting, without justification, of a passenger while in the act of leaving the train and station, by a policeman in its employ and on duty at the station. *Berryman v. Pennsylvania R. Co.* 30: 1049, 77 Atl. 1011, 228 Pa. 621.

5. Offensive language addressed by a passenger, whom the carrier is bound to protect, to its conductor, is no justification for an assault on him by the conductor which will absolve the carrier from liability for the consequences of the assault. *Jackson v. Old Colony Street R. Co.* 30: 1046, 92 N. E. 725, 206 Mass. 477.

6. A carrier is not liable for an assault on a former passenger after he has left the car, by its conductor, for what had transpired on the car, or for insults offered after the passenger had left it. *Jackson v. Old Colony Street R. Co.* 30: 1046, 92 N. E. 725, 206 Mass. 477.

7. An assault by the conductor upon a passenger who is leaving the car at his command without resistance is unjustifiable, and will render the carrier liable for the consequences of it. *Jackson v. Old Colony Street R. Co.* 30: 1046, 92 N. E. 725, 206 Mass. 477.

Duty to stop train for passenger.

Damages for failure to stop train, see Damages, 6.

Demurrer to complaint in action for failing to stop train, see Pleading, 15-17.

8. A railroad company is bound to stop its passenger trains in response to proper signals at a flag station at which it is in the habit of stopping trains of that character. *Southern R. Co. v. Wallis*, 30: 401, 66 S. E. 370, 133 Ga. 553.

9. In the absence of a statute prohibiting a carrier from running a passenger train on Sunday, or prohibiting it from entering into contracts of carriage on that day, a railroad company cannot excuse its failure to stop its passenger trains in response to proper signals at a flag station at which it is in the habit of stopping trains of the kind signaled, on the ground that it is under no duty to stop its passenger trains on Sunday at any particular station to receive passengers, nor to enter into a contract of carriage on Sunday. *Southern R. Co. v. Wallis*, 30: 401, 66 S. E. 370, 133 Ga. 553. (Annotated)

Contributory negligence of passenger.

As question for jury, see Trial, 10.

10. No recovery can be had for the 30 L.R.A. (N.S.)

death of one thrown by a jerk from the top of a car, on which he was riding in preference to riding with the crowd within, in the absence of anything to show that the jerk was so violent as to show want of proper care in the operation of the train. *Patterson v. Louisville & N. R. Co.* 30: 425, 128 S. W. 1068, 138 Ky. 648.

(Annotated)

11. That one injured by attempting to alight from a street car moving at the rate of 6 miles an hour was a foreigner, recently arrived in this country, and that he did not understand English, and was inexperienced in street car travel, but had seen other passengers leave moving cars, does not relieve him from the charge of contributory negligence in making the attempt. *Fosnes v. Duluth Street R. Co.* 30: 270, 122 N. W. 1054, 140 Wis. 455.

(Annotated)

Ejection of passenger.

Damages for, see Damages, 7.

12. A railroad company is responsible for the tort of its brakeman in throwing from a moving passenger train, to his injury, a minor who was really, although not apparently, a trespasser thereon, irrespective of any authority to the servant, either express or implied, to determine the question whether or not the injured person was a trespasser, or to expel or not to expel him. *Penas v. Chicago, M. & St. P. R. Co.* 30: 627, 127 N. W. 926, — Minn. —

13. A carrier, by issuing and honoring for the going passenger a round-trip ticket without requiring the purchaser to sign it, as required by a provision printed on the face thereof, waives such requirement so as to render wrongful the ejection of the passenger from the company's train for refusal to pay his return fare, after refusal of the company's servant to accept the unused portion of the tendered unsigned ticket. *Chicago, R. I. & P. R. Co. v. Newburn*, 30: 432, 110 Pac. 1065, — Okla. —

(Annotated)

14. A passenger who accepts from a carrier's agent a ticket for interstate passage at a through rate which, under the rules of the Commission, does not allow stop-over privileges, cannot hold the carrier liable in damages for his expulsion from the train in case he attempts to exercise such privileges, although the marks necessary to show the limited character of the ticket are not placed upon it. *Melody v. Great Northern R. Co.* 30: 568, 127 N. W. 543, — S. D. —

Baggage.

What constitutes baggage, see *infra*, 15.

Exemplary damages for exclusion of personal baggage, see Damages, 2.

15. A passenger cannot be said as matter of law not to be entitled to carry upon a street car, as personal baggage, a small piece of ice wrapped so as not to drip. *McIntosh v. Augusta & A. R. Co.* 30: 889, 69 S. E. 159, — S. C. —

(Annotated)

Carriers of freight.

Regulation of interstate business of, see Commerce.

Rule of state corporation commission as to demurrage charges, see Corporation Commission.

Damages for failure to transport, see Damages, 12.

Right of consignee to maintain action for delay where title retained by consignor, see Parties, 5.

16. The carrier has notice of the likelihood of special injury in case it fails to perform its contract upon receiving for transportation by express an engine shaft to be delivered to a furniture manufacturing company. *Harper Furniture Co. v. Southern Express Co.* 30: 483, 62 S. E. 145, 148 N. C. 87.

17. A carrier will be liable for compensatory damages in case it stops the operation of a factory through neglect promptly to transport repairs needed by it, where it has notice that special injury will result from its neglect. *Harper Furniture Co. v. Southern Express Co.* 30: 483, 62 S. E. 145, 148 N. C. 87.

CASE.

Right of action by person in possession for injury to property, see Parties, 3.

CASE MADE.

On appeal, see Appeal and Error, 6.

CAUSE.

Of loss, death, or injury, see Insurance, 11.

Question for jury as to, see Trial, 3.

CHANCERY.

See Equity.

CHARGE.

On realty, see Wills, 10.

CHATTEL MORTGAGE.

Of exemptions, see Bankruptcy, 6; Contracts, 8; Exemptions.

The mortgage of the statutory exemptions from execution to which a merchant is entitled out of his stock in trade is sufficiently specific to be upheld where by statute he is entitled to claim as exempt merchandise to a specified value out of the stock. *Re National Grocery Co.* 30: 982, 181 Fed. 33, — C. C. A. —.

CHATTELS.

Mortgage on, see Chattel Mortgage.

CHECKS.

As to duties and liabilities of bank with respect to, see Banks.

Protest of, for nonpayment, see Bills and Notes, 2, 3.

Negotiability of bills or notes, see Bills and Notes.

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CHILDREN.

In general, see Infants.

CHOICE.

Of remedies, see Election of Remedies.

CHURCHES.

See Religious Societies.

CITIES.

See Municipal Corporations.

CLAIMS.

Against bankrupt's estate, see Bankruptcy, 8, 9.

Against decedent's estate, see Executors and Administrators.

CLOUD ON TITLE.

Who may sue to set aside deed as, see Parties, 1.

CODICIL.

See Wills, 4.

COIN.

Prohibiting exportation of Philippine coin, see Constitutional Law, 7.

COLLATERAL SECURITY.

See Pledge and Collateral Security.

COMBINATIONS.

As to illegal combinations, see Monopoly and Combinations.

COMMERCE.

As to powers of interstate commerce commission, see Interstate Commerce Commission.

1. Storage of an interstate shipment of freight after its arrival at the point of destination, while awaiting payment of charges and delivery to the consignee, is a part of the interstate transaction, and freight, while so stored, is not subject to the rules of the state railroad commission. *St. Louis & S. F. R. Co. v. State*, 30: 137 107 Pac. 929. — Okla. —.

2. A rule of a state corporation commission requiring railroad companies to store less than car-load shipments of freight which are destined to consignees living at interior points 5 miles or more from the railroad station, free of charge, for ten days, is, as applied to interstate shipments, invalid in that it interferes with and imposes upon interstate commerce an unreasonable burden. *St. Louis & S. F. R. Co. v. State*, 30: 137, 107 Pac. 929. — Okla. —. (Annotated)

3. A rule of a state corporation commission requiring railroad companies to store less than car-load shipments of freight which are destined to consignees living at interior points 5 miles or more from the railroad station, free of charge, for ten days, is, as applied to interstate shipments, in conflict with and superseded by the Hepburn act, requiring the filing by transportation companies with the Interstate

Commerce Commission of schedules of rates for transportation or any services connected therewith, and empowering the Interstate Commission to decide what regulations in respect to transportation are reasonable, and to require conformance therewith. *St. Louis & S. F. R. Co. v. State*, 30: 137, 107 Pac. 929, — Okla. —.

COMMERCIAL AGENCY.

Admissibility in evidence of report by agent of, see Evidence, 11.

Evidence as to methods of business of see Evidence, 25.

False representations to, see Fraud and Deceit.

COMMISSIONERS.

Necessity of permit from highway commissioners to make use of boulevard, see Highways, 1.

COMMON CARRIERS.

See Carriers.

COMPENSATION.

Of employees, see Master and Servant, 3, 4.

COMPLAINT.

In pleading, see Pleading, 6-8.

COMPROMISE AND SETTLEMENT.

Liability under policy indemnifying against liability for personal injuries, for expenses incurred in compromise of action, see Insurance, 12.

CONCLUSIVENESS.

Of judgment, see Judgment, 2-5.

CONDITION.

Precedent to suit, see Action or Suit, 1.

Relating to real property, see Covenants and Conditions.

To right of married woman to rescind conveyance, see Ejectment.

In telegram, see Telegraphs, 7.

In devise or bequest as to contest of will, see Wills, 2, 3.

CONFLICT OF LAWS.

As to marriage.

See also Marriage, 1.

1. The validity of an attempted marriage between citizens of one of the United States must be determined by its laws, where it takes place in Germany, whose law provides that the contraction of a marriage, even if only one of the parties is a German, is determined, in respect of each of the parties, by the laws of the country of which he or she is subject; and that the same rule applies to an alien who contracts a marriage within the Empire, although the statute also provides that the form of a marriage concluded within the Empire is determined exclusively by the German law, since the latter provision must be held to apply to the 30 L.R.A. (N.S.)

celebration of the marriage in Germany between German subjects. *Re Lando*, 30: 940, 127 N. W. 1125, — Minn. —.

2. The laws of Germany in force at the time of the solemnization in that country of a marriage between American citizens sojourning therein will govern the courts of Minnesota in determining the validity of the marriage, since the validity of a marriage must be determined by the law of the place where the ceremony is performed. *Re Lando*, 30: 940, 127 N. W. 1125, — Minn. —.

Statute of limitations.

3. The statute of limitations of the state where the maker of a note resides when it falls due does not govern an action brought upon it in the state where it is in fact payable, where the statute of that state, although prohibiting actions in its courts upon causes of action which are fully barred by the laws of the country where defendant had previously resided, states that the provisions shall not apply to causes of action arising within the state. *Moran v. Moran*, 30: 898, 123 N. W. 202, — Iowa, —.

4. Where, in response to notification by a person resident in one state, that he will lend money to one residing in another state, upon receipt of a note for the amount, the latter forwards the note, and the former upon receiving it sends the money, the contract is made in the state where the lender resides, and a suit upon it is governed by its statute of limitations, and not by that of the state where the maker resides. *Moran v. Moran*, 30: 898, 123 N. W. 202, — Iowa, —.

5. A debtor who, after contracting in the state of his residence, where his creditor continues to reside, takes up his residence in another state, may, when suit is brought there on the contract, set up its statute of limitations, although the action is not barred by the statute of the state where the contract was made. *Staples v. Waite*, 30: 895, 76 Atl. 353, 30 R. I. 516.

CONSENT.

To adoption of child, see Parent and Child, 3, 4.

CONSOLIDATION.

Of religious societies, see Courts, 2, 3; Religious Societies, 1, 2, 4, 5.

CONSTITUTIONAL LAW.

Cruel and unusual punishment, see Criminal Law, 2.

As to title of statute, see Statutes, 3, 4.

As to privilege of witness, see Witnesses, 2, 3.

Delegation of power.

1. A statute making it a crime fraudulently or wilfully to violate the rules made by street car companies with respect to the issuance and use of their transfers is not unconstitutional as a delegation to such companies of the right to create or suspend

the law. *Whaley v. State*, 30: 499, 52 So. 941, — Ala. — (Annotated)
Equal protection and privileges.

As to equality and uniformity of taxation, see *Taxes*, 1.

2. No unconstitutional discrimination against retail druggists is made by a statute requiring them, when selling poisons without a physician's prescription, to satisfy themselves that they are to be used for a legitimate purpose, although the same requirement is not imposed upon wholesalers. *Katzman v. Com.* 30: 519, 130 S. W. 990, — Ky. —

Due process; right to life, liberty, and property.

3. Securing, by writ of sequestration, the books and property of a corporation pending an appeal by its officers from an order adjudging them in contempt for refusing to turn them over to a receiver, does not deprive the officers of any of their constitutional property rights. *Manning v. Mercantile Securities Co.* 30: 725, 90 N. E. 238, 242 Ill. 584.

4. The assessment of an area tax upon property does not deprive the owner of his property without due process of law, if he has a right to be heard, either before the assessing body or in the courts. *Bowes v. Aberdeen*, 30: 709, 109 Pac. 369, 58 Wash. 535.

5. A druggist is not deprived of his liberty or property without due process of law by a statute requiring him, when selling poisons at retail, without a physician's prescription, to satisfy himself that they are to be used for a legitimate purpose. *Katzman v. Com.* 30: 519, 130 S. W. 990, — Ky. — (Annotated)

6. Freedom of contract is not unconstitutionally interfered with by the prohibition of the use of trading stamps. *District of Columbia v. Kraft*, 30: 957, 35 App. D. C. 253. (Annotated)

7. The owner of Philippine silver coin is not deprived of his property therein without due process of law, contrary to the act of July 1, 1902, by the prohibition against the exportation of such coin from the Philippine Islands, under penalty of forfeiture and fine or imprisonment, which is made by Philippine law No. 1411, enacted by the Philippine Commission in the exercise of the power under the act of Congress of March 2, 1903 (32 Stat. at L. 952, chap. 980. U. S. Comp. Stat. Supp. 1909, p. 893), § 6, to adopt such measures as are deemed proper, not inconsistent with the organic act, to maintain the parity between gold and silver pesos, but such statute is within the limits of the police power. *Ling Su Fan v. United States*, 30: 1176, 31 Sup. Ct. Rep. 21, 218 U. S. 302, 54 L. ed. 1049.

8. Judicial proceedings are not necessary to the revocation of a license to practise medicine, in order to avoid conflict with the constitutional provision against depriving one of property without due process of law. *State Medical Board v. McCrary*, 30: 783, 130 S. W. 544, — Ark. — 30 L.R.A. (N.S.)

9. A statute making a drainage assessment take priority over existing mortgages, without notice to the mortgagees out of possession, does not deprive them of their property without due process of law. *Baldwin v. Moroney*, 30: 761, 91 N. E. 3, 173 Ind. 574. (Annotated)

10. A provision that upon conviction for violation of a statute providing that all rooms except drug stores where intoxicating liquors are sold shall be kept closed on Sunday, the license shall be revoked and the rooms and premises not used for the sale, storage, or manufacture of intoxicating liquors for one year from the date of conviction, does not deprive a licensed liquor dealer so convicted of his property without due process of law. *State v. Woodward*, 30: 1004, 69 S. E. 385, — W. Va. — (Annotated)

Police power.

Sufficiency of title of statute conferring right to exercise police power, see *Statutes*, 4.

11. The police power extends to filling, against the protest of their owners, and assessing the expense upon the property benefited, lots located in or near the business portion of a city, which are covered by flood tide, and because of inability to drain them are a menace to the public health and a hindrance to the growth of the city, where the tract is of considerable extent, and the proposed improvement will allow proper drainage and the construction of needed streets. *Bowes v. Aberdeen*, 30: 709, 109 Pac. 369, 58 Wash. 535. (Annotated)

12. The business of a trading stamp company is not a process of advertising the merchants with whom contracts are made which will take it out of the operation of the police power. *District of Columbia v. Kraft*, 30: 957, 35 App. D. C. 253.

13. Forbidding physicians to advertise special ability to treat or cure chronic or incurable diseases is within the police power. *State Medical Board v. McCrary*, 30: 783, 130 S. W. 544, — Ark. — (Annotated)

Impairing obligation of contracts.

14. The enactment of a state statute subjecting to an inheritance tax the rights of a surviving wife in the community property does not violate the contract clause of the Federal Constitution, even if such rights, as they existed when the marriage was celebrated, are contractual, so that they may not be essentially changed or modified by subsequent legislation without impairing contract obligations. *Moffitt v. Kelly*, 30: 1179, 31 Sup. Ct. Rep. 79, 218 U. S. 400, 54 L. ed. 1086.

15. The obligation of the contract of a mortgagee is not impaired by the passage of a drainage law providing that the assessment upon the property shall have priority over the mortgage, without requiring notice of the assessment to be given the mortgagee. *Baldwin v. Moroney*, 30: 761, 91 N. E. 3, 173 Ind. 574.

CONSTRUCTION.

Of contract generally, see Contracts, 4-7.

Of lease, see Landlord and Tenant, 1.

Of statute, see Statutes, 5-8.

CONSTRUCTION CONTRACT.

Absence of provision as to price, see Contracts, 2.

Interpretation of, see Contracts, 4-7.

CONTAGIOUS DISEASE.

Infecting building with, as waste, see Waste.

CONTEMPT.

Effect of pendency of appeal from order committing for, see Appeal and Error, 4.

Sequestering books pending appeal from contempt order for refusing to produce them, see Constitutional Law, 3.

Parties defendant in contempt proceeding, see Parties, 9.

1. The father of an illegitimate, unmarried minor child which has been legitimated by him, who neglects, without sufficient cause, to observe a valid court order directing him to permit its natural mother to visit it, is punishable as for a contempt, and it is no defense that his wife refused to permit him to obey the order, where, by the act of legitimation, the child was not made her heir, and it did not enter her house as her child, since in such case she had no legal right to the custody or control of it. *Allison v. Bryan*, 30: 146, 109 Pac. 934, — Okla. —.

2. That some of the books of a corporation might tend to incriminate its officers will not excuse them from complying with an order of the court directing them to turn over to a receiver all books and papers belonging to the corporation, so far as it can be obeyed without incriminating them. *Manning v. Mercantile Securities Co.* 30: 725, 90 N. E. 238, 242 Ill. 584.

3. The court cannot compel a husband who has no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and, by exercise thereof, derive an income, to comply with the court's order to pay alimony to his wife, in a suit for her separate maintenance. *Messervy v. Messervy*, 30: 1001, 87 S. E. 130, 85 S. C. 189. (Annotated)

4. An appeal in a contempt proceeding is properly entitled the same as in the principal proceeding, where the contempt proceeding is really but an incident of the original suit. *Manning v. Mercantile Securities Co.* 30: 725, 90 N. E. 238, 242 Ill. 584.

5. A finding of facts showing that accused was guilty of contempt as matter of law is necessary to support a judgment adjudging one guilty of contempt for failure to pay alimony and attorneys' fees in a divorce proceeding. *Hoffman v. Hoffman*, 30: 564, 127 N. W. 478, — S. D. —.

(Annotated)

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CONTEST.

Of wills, see Wills, 2, 3.

CONTINGENT REMAINDER.

See Wills, 6.

CONTRACTORS.

Contractor as laborer entitled to lien, see Mechanics' Liens, 2, 3.

CONTRACTS.

Assignment of, see Assignment, 1, 2.

Restraint on freedom of, see Constitutional Law, 6.

Impairing obligation of, see Constitutional Law, 14, 15.

As to covenants, see Covenants and Conditions.

As to mortgages, see Mortgage.

Specific performance of, see Specific Performance.

Contracts as to real property generally, see Vendor and Purchaser.

Parties.

1. The contract for the sale of cattle is between the principal and the owner of the cattle, where the owner, after negotiating for the sale thereof with an agent, telegraphed the agent's principal, asking if the agent's draft for a stated amount for the cattle would be honored, and the principal replied that the draft would be honored as per terms stated in the telegram if the cattle were billed to him, so as to prevent recovery from the principal of a different price from that stated in the telegram delivered to him, although another price had been agreed upon by the agent, and the price quoted to the principal differed therefrom because of the negligence of the telegraph company. *Strong v. Western U. Telegr. Co.* 30: 409, 109 Pac. 910, 18 Idaho, 389.

Implied agreements.

Implied covenants, see Landlord and Tenant, 1.

Effect of filing claim against estate as widow to prevent recovery for services, see Election of Remedies, 1.

2. In the absence of a provision in an excavation contract for the price at which a certain class of materials shall be moved, the contractor is entitled to the reasonable value of the work. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —.

Statute of frauds.

3. A contract by a manufacturer of dishes to fill an order for a certain number, bearing the monogram of the purchaser, constitutes a contract for work and labor, not within the statute of frauds, where the value of the undecorated dish is a small part of the final cost, although compliance with the contract will result in a sale of the dishes. *Re Gies*, 30: 318, 125 N. W. 420, 160 Mich. 502. (Annotated)

Construction.

Construction of contract between telephone company and municipality, see Telephones, 2, 3.

Construction of public contracts, see *infra*, 14, 15.

See also *supra*, 2.

4. A provision in an excavation contract taking material that cannot be plowed out of the class of ordinary earth, for purposes of compensation, means that cannot be plowed with reasonable facilities, and includes such material as hardpan, or that containing large and coarse boulders and cemented gravel, which frequently turns the plow out of its shallow furrow, or fastens it so firmly that unusual means are required to loosen and extract it. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —.

5. That the most feasible and available method of loosening material to be excavated under a contract which takes material that cannot be plowed out of the class of ordinary earth, for purposes of compensation, is the plow, does not require compensation at the rate paid for ordinary earth, if it cannot be plowed in the ordinary manner. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —.

6. In an excavation contract providing that loose rock, which is not to be removed at the ordinary price, shall comprise hard shale, coarse boulders in gravel, cemented gravel, hardpan, or any other material which cannot be plowed in a specified manner, a provision that it is to be understood that the plowing test shall apply to all materials named herein does not apply to the substances specified, but only to "any other material" which cannot be plowed. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —.

7. The engineer's estimates, which, by the terms of a construction contract, are to be binding in case of dispute, are not binding if he misinterprets or misconstrues the provisions of the contract. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —.

Validity; public policy.

Remedies in case of, see *infra*, 10.

8. Under a statute permitting the selection of statutory exemptions to be made by the debtor or his "authorized agent," a mortgage of such exemptions, giving the mortgagee the right to make the selection, is not against public policy. *Re National Grocery Co.* 30: 982, 181 Fed. 33, — C. C. A. —. (Annotated)

9. A contract to secure evidence of a given state of facts, which will permit the winning of a lawsuit, is void as against public policy. *Neece v. Joseph*, 30: 278, 129 S. W. 797, — Ark. —. (Annotated)

Remedies; unlawful contracts.

10. Agents of a foreign corporation which was organized for legitimate business purposes, and has fully complied with the laws entitling it to do business in the state, cannot defeat an action by it to compel them to pay over money belonging to it, arising from goods sold and collections made, on the theory that it is a trust or monopoly, either at common law or under 30 L.R.A. (N.S.)

der a statute making illegal contracts in restraint of trade or commerce, although the statute denies to a foreign corporation violating its provisions, the right to do business in the state. *International Harvester Co. v. Smith*, 30: 580, 127 N. W. 695, — Mich. —. (Annotated)

Performance; breach.

Measure of compensation for breach, see Damages.

Who may maintain action for breach of, see Parties, 5.

11. One who contracts for the performance of the labor upon his property, to be completed by a certain day, and obligates himself to furnish the necessary material, and prepare the property for the performance of the work, is liable to the contractor for the reasonable worth and value of the work which he performs, and for any loss sustained by him if he is delayed beyond the time specified in the performance of the work by the default of the owner. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —.

12. One in whose favor foreclosure of a land contract is decreed, unless the purchaser pay him a specified sum of money, is guilty of breach of contract which will support an action in case he evades a tender of the money for the purpose of preventing the purchaser from acquiring the property, which results in damages to him which the parties might reasonably have contemplated as a natural consequence of the breach. *Loehr v. Dickson*, 30: 495, 124 N. W. 293, 141 Wis. 332.

Defenses.

13. One who is required by judgment to deed property upon receiving a certain sum in payment of the amount due cannot escape liability for evading tender, to the injury of the other party, on the theory that tender might have been made to the attorney of record, or the money paid into court, if there is nothing to show that such tender or payment would have secured a conveyance. *Loehr v. Dickson*, 30: 495, 124 N. W. 293, 141 Wis. 332.

Public contract.

Right of taxpayer to restrain performance of illegal contract, see Parties, 7.

14. An ambiguous or doubtful contract between a telephone company and a municipal corporation in which it is to transact business, as to the rights of the public under it, will be construed in favor of the public rights. *Colorado Teleph. Co. v. Fields*, 30: 1088, 110 Pac. 571, — N. M. —.

15. In the construction of a contract between a telephone company and a municipality in which it is to transact business, the rule applies that where a contract as a whole discloses a given intention, if certain words or clauses taken literally would defeat the intention, it will be construed, if possible, so as to be consistent with the general intent. *Colorado Teleph. Co. v. Fields*, 30: 1088, 110 Pac. 571, — N. M. —.

16. The letting of a contract for the installation of a heating and ventilating sys-

tem in a proposed public school building, as to which complete plans and specifications, but not including heating and ventilating, were on file, without making or filing any plans and specifications except advertisements for bids, which stated that bids accompanied by plans and specifications in the form of a proposal for a steam force blast system of heating and ventilating, controlled by automatic heat regulation, and specifying the amount of air each pupil was to receive, and the degrees to which the different portions of the building were to be heated in the coldest weather, would be received, thereby leaving the bidders to submit plans and specifications showing the kind of power, radiation apparatus, registers, appliances, and appurtenances of all kinds, violates a statute requiring the plans and specifications submitted to the bidders to be so definite and detailed as to enable the bidders to make a definite bid on a common standard, previously ascertained, for definite work to be done. *Hannan v. Board of Education*, 30: 214, 107 Pac. 646, — Okla. —.

17. The plans and specifications for a heating and ventilating system of a school building, adopted by a board of education previous to the advertisement for bids under a statute providing that such board shall make no contract involving an expenditure of more than \$500 for the purpose of erecting any public building or making any improvement, except by sealed proposals and to the lowest responsible bidder, must be so definite and detailed as to disclose the specific thing to be undertaken, so as to enable all bidders to make a definite bid on a common standard, previously ascertained, for definite work to be done. *Hannan v. Board of Education*, 30: 214, 107 Pac. 646, — Okla. —. (Annotated)

18. A statutory requirement that contracts for public improvements shall be let to the lowest responsible bidder involves a consideration not only of which bid was the lowest in price, but also the ascertainment of the ability of bidders to discharge all the obligations assumed in accordance with what is expected or may be demanded under the terms of the contract. *Hannan v. Board of Education*, 30: 214, 107 Pac. 646, — Okla. —.

19. A statutory requirement that contracts for the performance of municipal work shall be let to the lowest bidder does not give such bidder a right of action against a municipality for his lost profits in case the contract is, contrary to the statute, awarded to a higher bidder. *Molloy v. New Rochelle*, 30: 126, 92 N. E. 94, 198 N. Y. 402. (Annotated)

20. The making of the lowest bid for the performance of municipal work, in response to an advertisement, does not effect a contract with the municipality, a breach of which will give the bidder a right of action, although the statute requires the contract to be let to the lowest bidder, where the advertisement reserves the right to reject 30 L.R.A. (N.S.)

any or all bids. *Molloy v. New Rochelle*, 30: 126, 92 N. E. 94, 198 N. Y. 402.

CONVICTS.

Liability of one employing, for acts of, see *Master and Servant*, 24.

CORPORATION COMMISSION.

Reversible error in proceeding before, see *Appeal and Error*, 21.

Powers as to demurrage charges on interstate shipment, see *Commerce*.

As to railroad commission, see *Railroad Commission*.

A rule of a state corporation commission providing that ten days' free storage shall be allowed by railroad companies on less than car-load shipments when destined to consignees living at interior points 5 miles or more from the railroad station is within the meaning of a constitutional provision giving the commission paramount authority to prescribe the rates, charges, and classifications of transportation companies, and therefore renders inoperative a general act of the legislature, attempting to regulate the same subject-matter. *St. Louis & S. F. R. Co. v. State*, 30: 137, 107 Pac. 929, — Okla. —.

CORPORATIONS.

Contempt in refusing to turn over corporate books to receiver, see *Appeal and Error*, 4.

Unpaid subscriptions as assets in bankruptcy, see *Bankruptcy*, 2.

Claim against trustee in bankruptcy because of fraudulent sale of stock, see *Bankruptcy*, 8.

Securing books of, by writ of sequestration, see *Constitutional Law*, 3.

As to corporation commission, see *Corporation Commission*.

Compelling production of books of, see *Discovery and Inspection*.

Right of purchaser of stock to rely on reports to commercial agency, see *Fraud and Deceit*, 2.

Delay in rescinding subscription, see *Limitation of Actions*, 1, 2.

Discrimination between individuals and corporations in taxes, see *Taxes*, 1.

Deducting real estate in taxing capital stock, see *Taxes*, 3, 4.

Refusal of officer to produce books of, on ground that they would incriminate him, see *Witnesses*, 2, 3.

Acts of agents.

1. To bind a corporation by the acts of one as its agent, either upon the ground of an implied authority or of estoppel, it must appear that the corporation is chargeable with notice of the acts relied upon to establish such implied authority or estoppel. *Schlesinger v. Forest Products Co.* (N. J. Err. & App.) 30: 347, 76 Atl. 1024, 78 N. J. L. 637.

Officers.

Imputing officer's or agent's knowledge to corporation, see *Notice*.

2. The president of a corporation can-

not, without authority of the directors, purchase for it its own stock, at a sale conducted for the purpose of enforcing payment of the unpaid balance of the subscription. *Tiger v. Rogers Cotton Cleaner & Gin Co.* 30: 694, 130 S. W. 585, — Ark. — **Rights and powers of shareholders.**

3. A holder of corporate stock which has no market value, which he was forced to acquire for self-protection, and which he desires to sell, is entitled to inspect the books of the corporation for the purpose of ascertaining its value. *State ex rel. Brumley v. Jessup & Moore Paper Co.* 30: 290, 77 Atl. 16, — Del. —

4. A by-law of a corporation making the right of a stockholder to inspect its books absolutely dependent upon the discretion of its directors, and denying all right to make extracts from them, is unreasonable and void. *State ex rel. Brumley v. Jessup & Moore Paper Co.* 30: 290, 77 Atl. 16, — Del. — (Annotated)

Liability of stockholders.

5. A trustee who permits stock to stand on the register of the corporation in his individual name, without disclosing the fact of the trusteeship, is not entitled to the benefit of a provision in a statute creating a stockholders' liability, that no person holding stock as executor, administrator, guardian, or trustee shall be personally subject to any liability as a stockholder. *Converse v. Paret*, 30: 1092, 77 Atl. 429, 228 Pa. 156. (Annotated)

6. One who purchases stock of a corporation which is not fully paid, from original subscribers, including the president, may be held liable to creditors for the unpaid balance, although the sellers represented that the stock was fully paid, and he had no actual knowledge to the contrary, where by law the transfer effects a substitution of the transferee for the original subscriber upon the subscription contract. *Perkins v. Cowles*, 30: 283, 108 Pac. 711, 157 Cal. 625. (Annotated)

Insolvency; rights of creditors.

As to bankruptcy matters, see Bankruptcy.

7. An insolvent corporation has no power as against the rights of its creditors to purchase its own stock at a sale thereof for nonpayment of a balance due on the subscription, and thereby relieve the subscriber from further liability, since unpaid subscriptions are a trust fund for the benefit of creditors, of the benefit of which it cannot deprive them. *Tiger v. Rogers Cotton Cleaner & Gin Co.* 30: 694, 130 S. W. 585, — Ark. — (Annotated)

COSTS.

Right to reversal of decree for purpose of avoiding, see Appeal and Error, 32.

Liability under policy indemnifying against liability for injuries for costs of suit brought by person injured, see Insurance, 12.

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Judgment for, by state court in case which has been removed, see Removal of Causes.

COUNTERCLAIM.

See Set-off and Counterclaim.

COUNTIES.

Assumpsit by assignee of portion of claim against county against second assignee who has collected full amount, see Assumpsit, 2.

COURTS.

Jurisdiction on appeal, see Appeal and Error.

Presumption as to jurisdiction, see Evidence, 7.

Mandamus to, see Mandamus, 2.

As to removal of causes, see Removal of Causes.

Jurisdiction over religious societies.

1. A civil court has no jurisdiction to examine into the regularity and validity of a church tribunal, and restrain its proceedings for nonconformity with its own laws, in a matter concerning only spiritual or ecclesiastical rights. *Ramsey v. Hicks*, 30: 665, 91 N. E. 344, — Ind. —

2. The act of a church judicatory which has authority to amend its Confession of Faith and constitution so as to make them conform to those of another ecclesiastical society, in effecting a union with such other society rather than a specific amendment of the Confession and constitution, is one of policy or expediency rather than of power or authority, and therefore cannot be questioned by the civil courts. *Ramsey v. Hicks*, 30: 665, 91 N. E. 344, — Ind. —

3. The decision of a proper church tribunal proceeding in manifest good faith, under color of authority, that it has jurisdiction to form a union with another church, is binding on the civil courts, although such authority is not expressly conferred by the constitution of the church. *Ramsey v. Hicks*, 30: 665, 91 N. E. 344, — Ind. —

4. The decision of the General Assembly of the Cumberland Church, that the revised Confession of Faith of the Presbyterian Church was in substantial accord with its own doctrinal tenets, is binding and conclusive upon the membership of the church and upon the civil courts. *Ramsey v. Hicks*, 30: 665, 91 N. E. 344, — Ind. — **State courts.**

5. Okla. Const. art. 7, §§ 2, 10, providing that the supreme court and the district court shall have power to issue writs of quo warranto, simply fixes the ancient remedies secured by such writs, leaving to the legislature the right to prescribe the procedure, and under a statute providing that the remedies theretofore obtainable in that form might be had by civil action, and extending the remedy so as to permit a private person to contest with another private person the right or title to a public

office, the district court has jurisdiction of a civil action in the nature of quo. warrant, to try title to the office of county judge, as between two contestants therefor. *Newhouse v. Alexander*, 30: 602, 110 Pac. 1121, — Okla. —.

6. The district court, being one of general legal and equitable jurisdiction, may, in the exercise of its equity powers, determine the question of the right of visitation of a parent denied the custody of a child. *Allison v. Bryan*, 30: 146, 109 Pac. 934, — Okla. —.

COVENANTS AND CONDITIONS.

In lease, see *Landlord and Tenant*, 1.

The legal existence of a railroad right of way and of the roadbed and track upon real estate at the time it is conveyed by a deed in which the grantors bind "themselves and their heirs, executors, and administrators, to warrant and forever defend the title to said premises unto the said party of the second part, its heirs, successors, and assigns, against the said parties of the first part and their heirs, executors, and administrators, and against all persons whomsoever lawfully or equitably claiming, or to claim, the same," does not give the grantee in the deed a right of action for damages against the grantor, because of the existence of the said right of way, roadbed, and track. *Van Ness v. Royal Phosphate Co.* 30: 833, 53 So. 381, — Fla. —. (Annotated)

CRIMINAL LAW.

Argument of state's attorney in criminal case, see *Appeal and Error*, 29.

Making criminal violation of rules as to street car transfers, see *Constitutional Law*, 1.

Opinion evidence in prosecution, see *Evidence*, 15.

Evidence of dying declarations, see *Evidence*, 18.

Relevancy and materiality of evidence, see *Evidence*, 19.

Civil liability for false arrest and imprisonment, see *False Imprisonment*.

Direction of verdict in criminal case, see *Trial*, 16.

See also *Disturbing Meeting*; *Homicide*; *Larceny*; *Lottery*; *Rape*.

Instigation or consent as defense.

1. One cannot escape punishment for illegal sale of intoxicating liquor because it was made to one employed by the police department to procure it, such department furnishing the money to pay for it. *State v. Smith*, 30: 946, 67 S. E. 508, 152 N. C. 798. (Annotated)

Sentence and imprisonment.

2. A statute fixing the punishment for opening on Sunday any room except a drug store where intoxicating liquors are sold or kept for sale, at a fine of from \$50 to \$250, imprisonment for six months, revocation of the license, and the closing of the business

for one year, does not violate the constitutional injunction against cruel or unusual punishment, or the infliction of penalties disproportionate to the offense. *State v. Woodward*, 30: 1004, 69 S. E. 385, — W. Va. —. (Annotated)

CRIMINATION OF SELF.

As to privilege of witness against, see *Witnesses*, 2, 3.

CROSS ERRORS.

Assignment of, see *Appeal and Error*, 7.

CROSS-EXAMINATION.

Of witnesses, see *Witnesses*, 1.

CROWN.

Word "Crown" as valid trademark, see *Trademarks*, 1.

CRUEL AND UNUSUAL PUNISHMENT.

See *Criminal Law*, 2.

CUSTODY.

Of children, see *Infants*.

DAMAGES.

Relevancy of evidence as to, see *Evidence*, 22, 24.

In action on replevin bond, see *Replevin*.

Right of consignee to hold carrier liable for profits lost through delay in transportation of machinery, see *Parties*, 5.

Exemplary or punitive.

1. Exemplary damages are not recoverable against a principal in an action based on the act of an agent, where there is a total absence of evidence showing that the principal participated in the wrongful act, or that he expressly or impliedly authorized or approved it, either before or after its commission. *Chicago, R. I. & P. R. Co. v. Newburn*, 30: 432, 110 Pac. 1065, — Okla. —.

2. Punitive damages may be awarded against a street car company for refusal to permit a passenger to take into the car as personal baggage, a small piece of ice wrapped so as to prevent dripping, which is needed by a sick person, notice of which has been given to the conductor. *McIntosh v. Augusta & A. R. Co.* 30: 889, 69 S. E. 159, — S. C. —.

Sales of personality.

3. The measure of damages for breach of a contract to purchase a specifically designated mortgage within sixty days after its delivery by the mortgagor to the mortgagee is the price, and not the difference between the price and the market value of the mortgage, since the title passes when the contract is made. *Henderson v. Jennings*, 30: 827, 77 Atl. 453, 228 Pa. 188.

For telegrams.

4. The damages for which a telegraph company from the failure of a telegraph from an insurer, cancelling a policy, so

that the property is destroyed before the policy is canceled, is liable, are the amount which the insurer is compelled to pay for the loss, and not merely the difference between the reasonable value of carrying the risk for the additional time and the amount of unearned premium on the policy. *Providence-Washington Ins. Co. v. Western U. Tele. Co.* 30: 1170, 92 N. E. 134, 247 Ill. 84.

5. The measure of damages for the negligent altering of a telegram quoting a price at which stock will be sold, where the price as quoted was accepted and the stock was shipped and paid for in accordance with the terms of the telegram as received, and the vendors acted prudently and with due diligence after discovering the mistake, so as to minimize the loss, is the difference between the market value of the stock on the day the message was received, and the price paid by the purchaser. *Strong v. Western U. Tele. Co.* 30: 409, 109 Pac. 910, 18 Idaho, 389.

Failure in duty to passenger.

6. Two hundred and fifty dollars is not an excessive award of damages to a person who was forced, because a train which he had gone to a flag station to board wrongfully refused to stop upon his signal, to walk 7 miles over a muddy road on a night when the weather was cold and bad, with the result that he was made sick and confined to his bed for some time, suffering severe pain. *Southern R. Co. v. Wallis*, 30: 401, 66 S. E. 370, 133 Ga. 553.

7. Loss of time, as to the value of which there is no evidence, cannot be considered in assessing damages for wrongful ejection of a passenger from a train. *Chicago, R. I. & P. R. Co. v. Newburn*, 30: 432, 110 Pac. 1065, — Okla. —.

Personal injuries; death.

Relevancy of evidence as to, see Evidence, 22, 24.

8. Three thousand seven hundred dollars is not excessive to award as damages for the wrongful killing of a strong man thirty-one years old, who is the sole support of his wife and children, and who shortly before his death was earning from \$50 to \$60 per month, most of which he contributed to their support, although at the time of his death he was serving a short sentence for the commission of a misdemeanor. *Tillar v. Reynolds*, 30: 1043, 131 S. W. 969, — Ark. —.

Injury to real property.

9. The building of a railroad embankment across that portion of a street which has been vacated by the city is not an element to be considered in assessing damages caused by the vacation of the street, to property abutting on that portion of the street not vacated, as the building of the railroad was no part of the street vacation. *Newark v. Hatt* (N. J. Err. & App.) 30: 637, 77 Atl. 47, — N. J. —.

10. Injury to the reputation of an estate because of its use as a smallpox hospital is 30 L.R.A. (N.S.)

not an element of damages in an action against the lessee for waste. *Delano v. Smith*, 30: 474, 92 N. E. 500, 206 Mass. 365. (Annotated)

Mental anguish:

11. The liability of a bank which refuses to return a fund deposited with it to defray the expenses of the sick wife of the depositor, by which treatment is delayed, does not include compensation for the mental suffering of the depositor. *Smith v. Sanborn State Bank*, 30: 517, 126 N. W. 779, — Iowa, —.

Loss of profits.

12. The damages to be allowed for the enforced idleness of a mill because of a carrier's neglect to transport machinery to it will not include lost profits. *Harper Furniture Co. v. Southern Express Co.* 30: 483, 62 S. E. 145, 148 N. C. 87. (Annotated)

DANGEROUS PREMISES.

Liability for injury on, see Negligence.

DEATH.

Effect of, to abate action, see Abatement and Revival.

Joinder of causes of action for, see Action or Suit, 4.

Measure of damages for, see Damages, 8.

Effect of, on admissibility of evidence, see Evidence, 11.

Master's liability for death resulting from servant's act, see Master and Servant, 24.

Effect of, to vest property, see Wills, 5.

Right to recover after death of one for whose benefit charge is made on property sums accruing during her lifetime, see Wills, 10.

Under a statute creating a right of action for wrongful death, to be brought by an administrator, for the exclusive benefit of the widow, children, or heirs at law of decedent, no action can be maintained in case he dies childless, leaving a widow, who dies before action brought. *Hammond v. Lewiston, A. & W. Street R. Co.* 30: 78, 76 Atl. 672, 106 Me. 209. (Annotated)

DEBTOR AND CREDITOR.

Insolvency of debtor, see Bankruptcy; Corporations, 7.

Right of creditor to raise estoppel against other person's right to claim property in possession of debtor, see Estoppel, 4.

Creditors of decedent, see Executors and Administrators.

As to exemptions, see Exemptions; Homestead.

Conveyances fraudulent as to creditor, see Fraudulent Conveyances.

Lien of creditor, see Mechanics' Liens.

DECEIT.

See Fraud and Deceit.

DEEDS.

- Acknowledgment of, see Acknowledgment.
- Cancellation of, see Cancellation of Instruments.
- Covenants in, generally, see Covenants and Conditions.
- Who may sue to set aside deed, see Parties, 1.
- Rescission of deed or contract as to purchase of land, see Vendor and Purchaser, 4-6.
- Effect of deed to revoke will, see Wills.

DEFAULT.

- Judgment by, see Judgment, 6.

DEFENDANTS.

- Parties defendant, see Parties, 8, 9.

DEFENSE.

- First pleading of, on appeal, see Appeal and Error, 16.
- To liability for assault on passenger, see Carriers, 5.
- To action by foreign corporation, see Contracts, 10.
- To liability on contracts generally, see Contracts, 13.
- To criminal prosecution, see Criminal Law.
- In suit for divorce, see Divorce and Separation, 1, 2.
- In action for false imprisonment, see False Imprisonment.
- To injunction, see Injunction.
- In mandamus case, see Mandamus, 4.
- Necessity of pleading, see Pleading, 11, 12.
- To prosecution for rape, see Rape.

DELAY.

- By carrier in transportation, see Carriers, 16, 17.
- In completing building contract, see Contracts, 11.
- Effect of delay in rescinding contract, see Election of Remedies, 3.
- In rejecting receipt for renewal of insurance, see Insurance, 3.
- Of motion papers sent by mail, see Judgment, 6.
- Effect of, to bar action, see Limitation of Actions, 1, 2.
- In transmission of telegram, see Telegraphs, 3.

DELEGATION OF POWER.

- Constitutionality of, see Constitutional Law, 1.

DELIVERY.

- Of personalty sold, see Sale, 1, 2.

DEMAND.

- For jury trial, see Jury, 2.

DEMURRAGE.

- Rule of state corporation commission as to demurrage charges, see Corporation Commission.

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DEMURRER.

- See Pleading, 14-19.

DENIALS.

- In pleading, see Pleading, 10.

DESCENT AND DISTRIBUTION.

- As to adoption of child, generally, see Parent and Child.

DETINUE.

- See Replevin.

DEVASTAVIT.

- See Waste.

DIRECTION OF VERDICT.

- Prejudicial error in, see Appeal and Error, 31.
- In general, see Trial, 15, 16.

DIRECTORY PROVISIONS.

- In statutes, see Statutes, 6-8.

DISCHARGE.

- In bankruptcy, see Bankruptcy, 10, 11.
- Of employee, see Master and Servant, 5; Trial, 6.

DISCOVERY AND INSPECTION.

- Contempt in refusing to turn over corporate books to receiver, see Appeal and Error, 4.
- Securing books by writ of sequestration, see Constitutional Law, 3.
- Contempt in disobeying order to produce, see Contempt, 2.
- Mandamus to compel vacation of invalid order for, see Mandamus, 2.
- Refusal of witness to produce books on ground that they would incriminate him, see Witnesses, 2, 3.

A corporation may be compelled to produce its books for inspection in a suit against it in the courts of the state where it was organized, although they are in possession of its officers in another state. *State ex rel. Brumley v. Jessup & Moore Paper Co.* 30: 290, 77 Atl. 16, — Del. —.

DISCRETION.

- Review of, on appeal, see Appeal and Error, 14.

DISCRIMINATION.

- By gas company, see Gas, 2.
- In taxes generally, see Taxes, 1.

DISMISSAL.

- Of attachment, see Attachment, 2.
- Of pleading, see Pleading, 4.

DISOBEDIENCE.

- As contempt, see Contempt, 1-3, 5.

DISSOLUTION.

- Of attachment, see Attachment, 2.

DISTURBING MEETING.

- It is a misdemeanor at common law wantonly to disturb an assembly of per-

sons met together for any lawful purpose, such as the enjoyment of a Christmas tree, and this law is not changed by a statute providing for the punishment of anyone who shall disturb a meeting for religious, educational, or literary purposes, or for the promotion of temperance. *State v. Watkins*, 30: 829, 130 S. W. 839, — Tenn. —

(Annotated)

DIVORCE AND SEPARATION.

Judgment of, as evidence, see Evidence, 9.

Effect of divorce of parent to whom child was awarded on right to custody, see Infants, 1, 2.

Failure to attempt to disprove charges in divorce suit as admission of their truth, see Judgment, 4.

Annulment of marriage, see Marriage, 2, 3.

Defenses.

1. The wife, when sued for divorce on the ground of wilful and continued desertion, may, under a statute providing that in all cases the party sued may plead in defense the conduct of the party suing, and the jury may, on examination of the whole case, refuse a divorce, set up as a defense thereto, adulterous acts of the husband which occurred subsequent to other adulterous acts on his part which had been condoned by her. *Davis v. Davis*, 30: 73, 68 S. E. 594, 134 Ga. 804.

2. The wife, when sued for divorce on the ground of wilful and continued desertion, cannot set up adulterous acts of the husband as a defense thereto under a statute providing that in all cases the party sued may plead in defense the conduct of the party suing, and the jury may, on examination of the whole case, refuse a divorce, where such acts of adultery occurred previous to the desertion, where condoned by the wife with full knowledge thereof, and were not revived by the conduct of the husband after being so condoned. *Davis v. Davis*, 30: 73, 68 S. E. 594, 134 Ga. 804.

Alimony.

Alimony as lien on claim for tort which has been assigned, see Assignment, 3.

Contempt in failing to pay alimony, see Contempt, 3, 5.

3. Alimony may be decreed to a wife against whom a divorce is granted for wilful and continued desertion under a statute providing that in all suits for divorce the jury may provide permanent alimony for the wife, when neither the husband nor the wife have any property, and the evidence tends to show bad conduct upon the part of the husband, who is able-bodied and earning about \$18 per week, that the wife had always helped support the family by sewing, that her eyesight is failing, and that her health has become so poor that she is not able to support herself without assistance. *Davis v. Davis*, 30: 73, 68 S. E. 594, 134 Ga. 804. (Annotated)

4. The jury is not prevented from granting alimony to a wife against whom

a divorce is granted under a statute providing that in all suits for divorce the jury may provide permanent alimony for the wife, by a statutory provision that, if the jury find in favor of the wife, they shall also, in providing permanent alimony for her, specify what amount the minor children should be entitled to for their support, and that they may do that if, from any legal cause, the wife may not be entitled to permanent alimony, and the children are not in the same category, since such provision does not mean that in no event can alimony be awarded unless the wife shall obtain a divorce. *Davis v. Davis*, 30: 73, 68 S. E. 594, 134 Ga. 804.

5. A decree in chancery granting a divorce may establish a lien in favor of the wife upon a fund due the husband by a third person for an injury negligently inflicted upon him. *Kithcart v. Kithcart*, 30: 1062, 124 N. W. 305, — Iowa, —

(Annotated)

DOCUMENTARY EVIDENCE.

See Evidence, 9-11.

DOMICIL.

Effect of, on jurisdiction of action to annul marriage, see Marriage, 2.

DRAFTS.

In general, see Bills and Notes.

DRAINS AND SEWERS.

Liability for negligence in constructing, see Highways, 12.

Cause of settling of earth in sewer trench, see Trial, 3.

Improper filling of trench as proximate cause of injury, see Trial, 4.

DRUGS AND DRUGGISTS.

Discrimination in statute as to sale of poisons by, see Constitutional Law, 2.

Due process in statute regulating sale of poisons by, see Constitutional Law, 5.

Evidence in prosecution for wrongful sale of opium, see Evidence, 15.

Ambiguity in statute regulating sale of poisons by, see Statutes, 1.

Negligence of, as question for jury, see Trial, 13.

DUE PROCESS OF LAW.

See Constitutional Law, 3-10.

DUPLICITY.

In pleading, see Pleading, 5.

DYING DECLARATIONS.

Admissibility in evidence, see Evidence, 18.

Right to take to jury room, see Trial, 1.

EJECTION.

Of passenger, see Carriers, 12-14.

Damages for ejection of passenger, see Damages, 7.

EJECTMENT.

In an action by a married woman to recover possession of her real estate conveyed by a deed in which her husband did not join, under a statute permitting her to sell her real estate in the same manner as if *sole*, except that her husband must join in the deed, a conditional verdict should be rendered designating the amount to which the vendee is entitled for advancements, improvements, and other charges for which he should be reimbursed. *McCoy v. Niblick*, 30: 355, 70 Atl. 577, 221 Pa. 123.

ELECTION.

Between legacy and dower, see Wills, 7-9.

ELECTION OF REMEDIES.

Bar of former judgment, see Judgment, 2-5.

1. The assertion of a claim to a widow's share in a decedent's estate which fails for lack of proof of marriage is not an election of remedy so as to bar a claim against the estate for services rendered. *Asher v. Pegg*, 30: 890, 123 N. W. 739, — Iowa, —.

2. The presentation in administration proceedings upon the estate of one to whom property was devised upon condition that he make certain annual payments to testator's wife, which are made a lien on the property, of a claim for arrears not paid, and the acceptance of payment of such instalments with interest as were not barred by limitation, is not an election of remedies which will prevent enforcement of the lien against the property for the residue of the arrears. *Stringer v. Gamble*, 30: 815, 118 N. W. 979, 155 Mich. 295.

3. A delay of four months after the discovery of the fraud by one who has been defrauded into a contract for the purchase of land, in electing to rescind the contract, affords plenary proof of an election not to rescind which is final; especially where there is no adequate excuse for the delay consistent with promptitude of action. *Faulkner v. Wassmer* (N. J. Err. & App.), 30: 872, 77 Atl. 341, — N. J. —.

(Annotated)

ELECTIONS.

Construction of statute as to preserving of ballots, see Statutes, 6-8.

Jurisdiction of election contests, see Courts, 5.

ELECTRIC LIGHTS.

Injury to trees in stringing wires, see Highways, 5.

ELECTRIC RAILWAYS.

As carriers, see Carriers.

EMPLOYEES.

Rights, duties, and liabilities of, generally, see Master and Servant. 30 L.R.A. (N.S.)

EMPLOYER'S LIABILITY.

Insurance against, see Insurance, 13, 14.

ENTRAPMENT.

As defense to criminal prosecution, see Criminal Law, 1.

EQUALITY.

Of immunities, privileges, and protection, see Constitutional Law, 2.

In taxation, see Taxes, 1.

EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law, 2.

EQUITY.

Review on appeal of evidence in equity cases, see Appeal and Error, 12.

Right to jury trial in, see Jury, 1.

Limitation of action in, see Limitation of Actions, 1, 2.

Right of court to make findings independent of jury's verdict, see Trial, 17.

1. The secretary and treasurer of a board of levee commissioners is a public officer within the meaning of a constitutional provision giving the chancery court jurisdiction of suits on bonds of public officers for failure to account for public money received by them. *Adams v. Williams*, 30: 855, 52 So. 865, — Miss. —.

2. Equity has jurisdiction of a suit brought by the senior lessee against his lessor and a junior lessee of the same land from the same lessor, for the purpose of enjoining the removal of the oil from the leased premises, and for specific execution of his lease; and, in such a suit, the court can settle the conflicting claims of the lessees, and grant such relief to either claimant as the pleadings, and proof may warrant. *Smith v. Root*, 30: 176, 66 S. E. 1005, 66 W. Va. 633.

ERROR.

As to appellate review, in general, see Appeal and Error.

ESTOPPEL.

To raise question on appeal, see Appeal and Error, 13.

Of insurance company, see Insurance, 7-9.

Of married women.

See also *infra*, 3, 4.

1. That a wife who, with her husband, was in possession of land as a community, claiming title when he took a written lease for the property from a rival claimant, refused to sign it, will not prevent its constituting an estoppel upon her right to set up the community title in an action for unlawful detainer, where she remained in possession of the property under the lease until its expiration. *Monroe v. Stayt*, 30: 1102, 107 Pac. 517, 57 Wash. 592.

2. An estoppel on a wife, who with

her husband, was in possession as a community of real estate when he took a written lease of the property from another claimant, which she did not sign, to deny the title of the landlord, is not prevented by a statute providing that he should not sell, convey or encumber the community real property unless she joined in the deed. *Monroe v. Stayt*, 30: 1102, 107 Pac. 517, 57 Wash. 592. (Annotated)

By laches, silence, or acquiescence.

Laches as bar to action, see Limitation of Actions, 1, 2.

3. The mere failure of a woman immediately to enforce the promise of her husband to convey to her real estate which he has purchased with her funds, and the title to which he has taken, without authority, in his own name, does not, in the absence of fraud, estop her from relying on a deed in execution of the promise, made after he became bankrupt, although he was in business, and credit was given him, without her knowledge, on the faith of the property. *Blake v. Meadows*, 30: 1, 123 S. W. 868, 225 Mo. 1. (Annotated)

Who may set up.

4. Persons with knowledge that a man purchased real estate with his wife's funds, and took the title thereto in his own name, cannot raise an estoppel against her right to claim the property as against their claims arising out of credit extended to him. *Blake v. Meadows*, 30: 1, 123 S. W. 868, 225 Mo. 1.

EVIDENCE.

Right to bill of review because of newly discovered evidence, see Appeal and Error, 14.

Contract to secure, see Contracts, 9.

Judicial notice.

See also *infra*, 25.

1. The court takes judicial notice of the fact that a liquor containing more than 2 per cent of alcohol by weight will intoxicate. *Fuller v. Jackson*, 30: 1078, 52 So. 873, — Miss. —

2. Courts cannot take judicial notice of the location, use, and control of streets. *Woodson v. Metropolitan Street R. Co.* 30: 931, 123 S. W. 820, 224 Mo. 685.

Presumptions and burden of proof.

3. The burden of proving nonassumption of risk cannot be laid upon a servant seeking damages for injuries alleged to have been caused by his master's negligence. *Duffey v. Consolidated Block Coal Co.* 30: 1067, 124 N. W. 609, — Iowa, —

4. Under a statute providing that deeds not recorded shall be adjudged void as to all "subsequent purchasers without notice" whose deeds shall be first recorded, the burden of proof of lack of notice of an unrecorded deed of land under which title is claimed is upon the party who claims that he is a subsequent purchaser without notice, and the holder of a deed first recorded. *Dundee Realty Co. v. Leavitt*, 30: 389, 127 N. W. 1057, — Neb. —

5. The publication by a newspaper of a report made by the police in the regular 30 L.R.A.(N.S.)

course of police administration, that persons had been poisoned by sugar purchased at plaintiff's store, is not sufficient of itself to support an allegation of malice on the part of the newspaper publisher in a libel action founded on such publication. *Morasca v. Item Co.* 30: 315, 52 So. 565, 126 La. 426.

6. A prima facie case of negligence in the transmission of a telegram is established by proof that it was delivered to the telegraph company for transmission, and that the company accepted it, and made a mistake in its transmission. *Strong v. Western U. Tele. Co.* 30: 409, 109 Pac. 910, 18 Idaho, 389.

7. Failure of a probate court to recite jurisdictional facts in its decree does not raise a presumption that such facts did not exist. *Holmes v. Holmes*, 30: 920, 111 Pac. 220, — Okla. —

8. The burden of showing the falsity of a publication is not placed on plaintiff by a plea of privilege in an action for libel in attacking plaintiff's moral character. *Tanner v. Stevenson*, 30: 200, 128 S. W. 878, 138 Ky. 578.

Documentary evidence.

9. A decree for divorce is not admissible as evidence of the grounds upon which it was granted in a suit by the divorcee against a stranger, to secure the custody of of her child. *Wilson v. Mitchell*, 30: 507, 111 Pac. 21, — Colo. —

10. A letter written to a party to a suit is not admissible in evidence against him if it was never received by him, and has never been in his possession. *Wilson v. Mitchell*, 30: 507, 111 Pac. 21, — Colo. —

11. A report made by an agent of a mercantile corporation to it, as to the financial standing of a merchant which he had been sent to investigate, and placed on file in due course of business, is admissible as evidence of facts which he learned at the time, although he has since deceased. *Davis v. Louisville Trust Co.* 30: 1011, 181 Fed. 10, — C. C. A. —

Parol.

12. Parol evidence is admissible to supply the township, county, range, and state in case a devise of lands is described merely as parts of certain sections. *Graves v. Rose*, 30: 303, 92 N. E. 601, 246 Ill. 76.

13. Proof that testator did not own the land described in his will as certain subdivisions of a section will not make admissible parol evidence to transfer the description to the land he did own, by changing the letters used to indicate such subdivisions. *Graves v. Rose*, 30: 303, 92 N. E. 601, 246 Ill. 76.

Opinions and conclusions.

14. A properly qualified witness may give an opinion as to the sufficiency and safety of the guard rail on a bridge to protect users from loss or injury. *Dardanelle Pontoon Bridge & Turnp. Co. v. Croom*, 30: 360, 129 S. W. 280, — Ark. —

15. Upon a prosecution for selling opium to an habitual user, under a statute requiring persons selling it at retail to sat-

isfy themselves that it is desired for legitimate purposes, physicians and druggists may testify that, in their opinion, such sale is not for a legitimate purpose. *Katzman v. Com.* 30: 519, 130 S. W. 990, — Ky. —
Hearsay; declarations; res gestæ.

Right of jury to take dying declaration to jury room, see *Appeal and Error*, 30; *Trial*, 1.

16. In an action for damages for trespass upon real estate, declarations of defendant's predecessor in title, as to the boundary lines made while he was owner of the property, are admissible in evidence against defendant. *Beaufort Land & Invest. Co. v. New River Lumber Co.* 30: 243, 68 S. E. 637, — S. C. —

17. Witnesses for a servant may testify in an action to hold his employer responsible for personal injuries, to expressions of existing pain at a time long subsequent to the date of injury. *Duffey v. Consolidated Block Coal Co.* 30: 1067, 124 N. W. 609.

18. Declarations will be presumed to have been made under a sense of impending death where it appears that the person making them was wounded by a bullet which entered the body near the base of the breast bone and ranged downward, leaving the body at about the mid scapular line, posteriorly just above the brim of the pelvis, that the wound was large and gaping, that there was marked internal hemorrhage, that the abdomen was greatly distended, that his temperature was subnormal, that he vomited blood and all nourishment given him, that there was a discharge of the intestinal contents at the point of exit of the bullet, and that a notary was called to take his statement, although there was but little external bleeding, and the deceased made no statement showing that he knew his danger or was conscious of his impending death, and there was nothing in his conduct or that of those present, acquiesced in by him, from which such consciousness of impending death could be ascertained. *Territory v. Eagle*, 30: 391, 110 Pac. 862, — N. M. —

(Annotated)

Relevancy and materiality.

Review of evidence on appeal, see *Appeal and Error*, 12.

Prejudicial error in admitting, see *Appeal*, 23-35.

Prejudicial error in excluding, see *Appeal and Error*, 27.

Admissibility for purpose of impeaching witness, see *Witnesses*, 1.

19. Upon a trial of a chauffeur for homicide in running his car at a reckless rate on a city street, and striking and killing a pedestrian, evidence is not admissible as to the reputation of accused as a skillful chauffeur and careful driver. *State v. Goetz*, 30: 458, 76 Atl. 1000, 83 Conn. 437.

20. Evidence of a conversation between a person injured while alighting from an electric car, and officers of the railway company, bearing upon the question of the negligence of the motorman, is admissible to

show knowledge of his incompetence, in an action by a coemployee to hold the company liable for injuries due to his disobedience of orders. *Robbins v. Lewiston, A. & W. Street R. Co.* 30: 109, 77 Atl. 537, — Me. —

21. Evidence of specific acts of negligence on the part of an employee, tending to show his incompetence, by which the master had actual knowledge, or, by the exercise of due care, should have had such knowledge, is admissible on the question of incompetence and knowledge, in an action to hold the master liable for injury to an employee through a negligent act of the one alleged to be incompetent. *Robbins v. Lewiston, A. & W. Street R. Co.* 30: 109, 77 Atl. 537, — Me. —

22. While, upon the question of damages to be awarded for a personal injury, plaintiff, as proof of his personal incapacity to perform labor, may give evidence that he was compelled to employ servants to perform labor formerly done by himself, he cannot show the amount which he is compelled to pay for such service, since it would have no bearing upon the diminished value of his own services. *Stynes v. Boston Elevated R. Co.* 30: 737, 91 N. E. 998, 206 Mass. 75. (Annotated)

23. Upon the question of the negligence of a driver in a mine, seeking to hold his employer liable for personal injuries due to his coming in contact with the roof of the tunnel, evidence is competent that it was proper and customary for him to ride upon the drawbar at the rear of the car, where he was when he was injured, rather than upon the tail chain at the mule's heels. *Duffey v. Consolidated Block Coal Co.* 30: 1067, 124 N. W. 609, — Iowa, —

24. Evidence of insulting language by a passenger on a car, which induced the conductor to assault him, is admissible in evidence in mitigation of damages in an action against the carrier based on the assault. *Jackson v. Old Colony Street R. Co.* 30: 1046, 92 N. E. 725, 206 Mass. 477.

25. Although courts take judicial notice of the methods of mercantile agencies, this knowledge may be supplemented respecting disputed methods of business by the testimony of experienced officers of the agencies themselves. *Davis v. Louisville Trust Co.* 30: 1011, 181 Fed. 10, — C. C. A. —

Weight and sufficiency.

First objecting to, on appeal, see *Appeal and Error*, 18.

Review of facts on appeal, see *Appeal and error*, 19, 20.

26. A finding of undue influence in securing an adoption by a woman of the son of her husband by a former wife is supported by evidence that the husband, being her physician and she an invalid, married her after she had secured a divorce from a former husband, about which she was peculiarly sensitive, and within a few months threatened to leave her unless she would adopt his son, which under the circumstances she could not bear, and that she

subsequently said many times that she was forced to adopt the son against her will. *Phillips v. Chase*, 30: 159, 89 N. E. 1049, 203 Mass. 556.

27. The jury cannot act upon the contradicted testimony of an experienced laborer that he did not know that striking a hard blow with a heavy hammer upon a small chisel held against iron would cause splinters to fly, where ordinary observation and thought would have revealed that fact to him. *L'Houx v. Union Constr. Co.* 30: 800, 77 Atl. 636, — Me. —.

28. A jury finding that an independent contractor caused the uneven condition of a road which resulted in injury to a traveler thereon is sustained by proof that dirt was taken in scrapers from a drain which the defendant was constructing, and dumped on the road and left in piles, which became frozen, leaving depressions 8 or 10 inches deep, and that before dumping the dirt there the road was smooth and even. *Solberg v. Schlosser*, 30: 1111, 127 N. W. 91, — N. D. —.

29. A jury finding that a public highway was in a dangerous condition by reason of having earth dumped thereon which had not been leveled, and had become frozen at the time a traveler thereon was injured by the tipping over of his wagon, is sustained by testimony describing the road as "pretty rough," as "hilly and uneven," and as having "high and low places," by proof that, at the time and place of the accident, the depressions were 8 or 10 inches in depth, and the testimony of a witness that he had extreme difficulty in safely driving over the road about that time. *Solberg v. Schlosser*, 30: 1111, 127 N. W. 91, — N. D. —.

30. An oil and gas lease giving the lessees the right for a period of ten years to explore for oil and gas, and providing that, if a well is not completed on the leased premises within three months from the date thereof, the lessees shall pay to the lessor in advance a quarterly cash rental for each additional three months the completion of a well is delayed, is proven to have been voluntarily abandoned by the lessees by evidence that they failed to make any exploration for oil and gas on the premises for more than a year after the date of the lease, and their failure to pay three successive quarterly rentals, when taken in connection with the fact that they considered their rights thereunder terminated when they failed to make the third quarterly payments, at which time they regarded the lease as of no value. *Smith v. Root*, 30: 176, 66 S. E. 1005, 66 W. Va. 633.

31. Where an accused is charged with having assaulted and killed one "P. S., alias F. M." evidence that the defendant assaulted and killed a person commonly known as F. M. will not sustain a verdict of guilty, unless it is shown that the F. M. so killed and P. S. were one and the same person: since the name of the person injured must be proved as laid, where such proof is not excused by statute. *Goodlove* 30 L.R.A. (N.S.)

v. State, 30: 134, 92 N. E. 491, 82 Ohio St. 365.

Admissibility under pleadings.

32. In a suit against a railroad company, a denial by such company upon information and belief, that it was operating a railroad at the time and place alleged, being a matter necessarily within defendant's knowledge raises no such issue upon the pleadings as will admit testimony that it was not operating such railroad over an objection that such testimony was not admissible under the pleadings. *Chicago, R. I. & E. P. R. Co. v. Wertheim*, 30: 771, 110 Pac. 573, — N. M. —.

Variance.

In action for damages for trespass, see Trespass.

33. An allegation of an obstruction of a sidewalk is sustained by evidence that the obstruction was on the parking between the pavement and the curbing. *Woodson v. Metropolitan Street R. Co.* 30: 931, 123 S. W. 820, 224 Mo. 685.

EXCEPTIONS.

See Appeal and Error, 9, 10.

EXCLUSIVE PRIVILEGE.

To operate ferry, see Ferry, 2.

EXECUTION.

Mortgage of exemptions, see Contracts, 8.

Exemption from, see Exemptions.

Homestead exemption, see Homestead.

Levy on, see Levy and Seizure.

EXECUTORS AND ADMINISTRATORS.

Filing claim to widow's share against estate as election of remedy, see Election of Remedies.

Presentation of claim against estate as bar of other remedy, see Election of Remedies, 1, 2.

Effect of judgment denying claim to share in estate as widow of decedent on claim against estate for services, see Judgment, 2.

An equitable excuse for failure to file a claim for services against a decedent's estate within the time required by statute is shown where claimant was to within a reasonable time before presenting her claim prosecuting before the courts a claim to share in the estate as decedent's widow. *Asher v. Pegg*, 30: 890, 123 N. W. 739, — Iowa, —.

EXECUTORY DEVISE.

See Wills, 5.

EXEMPLARY DAMAGES.

See Damages, 1, 2.

EXEMPTION.

Mortgage of, see Bankruptcy, 6; Chattel Mortgage.

Homestead exemption, see Homestead.

1. One who has mortgaged his statutory

exemptions from execution cannot, by failing to claim them in bankruptcy proceedings, effect a waiver of the claim, which will prevent their enforcement by the mortgagee. *Re National Grocery Co.* 30: 982, 181 Fed. 33, — C. C. A. —.

2. The provision of the bankruptcy act empowering courts to set off to bankrupts their exemptions does not prevent the enforcement of a mortgage of such exemptions, which confers upon the mortgagee the right to select them. *Re National Grocery Co.* 30: 982, 181 Fed. 33, — C. C. A. —.

EXPULSION.

Of passenger, see Carriers, 12-14.

EXTERNAL, VIOLENT AND ACCIDENTAL MEANS.

Injury or death of insured by, see Insurance, 11.

FACTS.

Review of, on appeal, see Appeal and Error, 19, 20.

FALSE IMPRISONMENT.

1. Advice by an attorney to his client during a trial, that an adverse witness is guilty of false swearing, is not so unbiased as to justify the client in acting upon it in procuring the arrest of the witness for such offense. *Smith v. Fields*, 30: 870, 129 S. W. 325, — Ky. —.

2. Advice by a reputable attorney that a witness was guilty of false swearing will not constitute probable cause to justify the securing of a warrant for his arrest, if all the facts bearing upon the question were not stated to the attorney. *Smith v. Fields*, 30: 870, 129 S. W. 325, — Ky. —.

FEES.

Of officers, see Officers.

FELLOW SERVANTS.

In general, see Master and Servant, 13, 21-23.

FENCES.

Duty of railroad as to, see Railroads.

FERRIES.

1. One employing a flatboat or other means of transporting his employees and teams across a stream to and from his sawmill, who does not transport any part of the public for hire or compensation, is not engaged in operating a ferry. *Futch v. Bohannon*, 30: 462, 67 S. E. 814, 134 Ga. 313.

2. The use of a flatboat or other vessel, solely for the purpose of carrying the owner's employees and teams across a stream to and from his sawmill, does not infringe the rights of the owner of a public ferry, although such rights are exclusive and territorially extend beyond the point at which the former keeps and maintains his personal conveyance. *Futch v. Bohannon*, 30: 462, 67 S. E. 814, 134 Ga. 313.

(Annotated)

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FINDER.

Larceny of property found, see Larceny.

FIRE DEPARTMENT.

Liability of one summoning, for injury to member of, see Negligence, 1-4; Nuisances, 1.

Liability of railroad for destruction of fire engine, see Negligence, 5.

Liability for failure to furnish water for, see Waters, 8-11.

FIRE INSURANCE.

See Insurance.

FIRES.

Proximate cause of loss or injury by, see Proximate Cause, 2.

Liability of water company for loss resulting from, see Waters, 8-11.

FIXTURES.

Tenant's rights as to fixtures, see Landlord and Tenant, 2.

Storm doors and windows made to fit a house and fastened in place by screws are fixtures which will pass with a mortgage and subsequent deed to the mortgagee, although during certain periods of the year they are removed from their places and stored on the premises. *Roderick v. Sanborn*, 30: 1189, 76 Atl. 263, 106 Me. 159.

(Annotated)

FLAG STATION.

Duty to stop train at, see Carriers, 8, 9; Damages, 6; Pleading, 15-17.

FORCIBLE ENTRY AND DETAINER.

Estoppel to set up title in action for unlawful detainer, see Estoppel, 1.

FOREIGN CORPORATIONS.

Foreign insurance company, see Insurance, 1, 2.

FOREIGNER.

Negligence of person unable to understand English, see Carriers, 11.

FOREIGN LAW.

Construction of, see Statutes, 5.

FORFEITURE.

By beneficiary contesting will, see Wills, 2, 3.

FRAUD AND DECEIT.

Giving right to preference in bankruptcy proceedings, see bankruptcy, 8.

Effect of fraud of one member of partnership on right of other member to secure discharge in bankruptcy, see Bankruptcy, 10.

As to fraudulent conveyances, see Fraudulent Conveyances.

As ground for relief against judgment, see Judgment, 7-9.

Delay in rescinding contract for fraud, see Election of Remedies, 3; Limitation of Actions, 1, 2.

1. A report by the president of a corporation which is desirous of selling stock, to a mercantile agency, which falsely states the amount of stock subscribed and the amount of capital paid in, and makes an unwarranted forecast as to the payment of the remainder, must be treated as having been designed fraudulently to influence the purchase of stock. *Davis v. Louisville Trust Co.* 30: 1011, 181 Fed. 10, — C. C. A. —.

2. One securing information as to the standing of a corporation desirous of disposing of some of its treasury stock, through a subscriber to a mercantile agency to which such corporation had furnished such information, may, although he himself has no contractual relations with the agency, rely thereon in purchasing stock from the corporation, and in case the information was erroneous, may rescind the contract. *Davis v. Louisville Trust Co.* 30: 1011, 181 Fed. 10, — C. C. A. —.

FRAUDULENT CONVEYANCES.

Reliance upon ownership of a certain parcel of land, sufficient to overturn a deed by the debtor to a third person, is not shown by the fact that the creditor had before him commercial reports showing that the debtor was "said" to own, or "credited" with owning, the land, or that he has good farm or town property of a certain value, without any particular reference to the land in question. *Blake v. Meadows*, 30: 1, 123 S. W. 868, 225 Mo. 1.

FREEDOM OF CONTRACT.

See Constitutional Law, 6.

FREIGHT CARRIERS.

See Carriers.

GARNISHMENT.

First pleading of defense on appeal, see Appeal and Error, 16.

Levy of attachment by service of summons of garnishment which is void, see Attachment, 1.

What subject to.

1. Funds in the hands of a trustee in bankruptcy which the referee has ordered him to pay to a certain person cannot be reached by a creditor of such person by a summons of garnishment issued from a state court, and directed to and served upon the trustee. *Cowart v. W. E. Caldwell Co.* 30: 720, 68 S. E. 500, 134 Ga. 544. (Annotated)

Rights of garnishee.

2. One who, after selling chattels to an insolvent, seizes and sells them to another, may, upon being garnished for their value by a judgment creditor of the buyer, set off against the claim his account against the buyer for the unpaid purchase price. *J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co.* 30: 1184, 128 N. W. 389, — Iowa, —. (Annotated) 30 L.R.A. (N.S.)

Procedure.

3. That a garnishee was not made a party to the principal action, and no relief was demanded against him therein, does not prevent the court from rendering judgment against him where the writ of garnishment was served on him, if by statute it is not necessary to commence an action against the garnishee in order to authorize the court to render judgment against him. *Tiger v. Rogers Cotton Cleaner & Gin. Co.* 30: 694, 130 S. W. 585, — Ark. —.

4. Failure to give notice of a garnishment proceeding to the principal does not entitle the garnishee to a discharge or dismissal of the proceeding, under a statute providing that no judgment shall be entered against the garnishee until notice has been given to the principal defendant. *J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co.* 30: 1184, 128 N. W. 389, — Iowa, —.

GAS.

Injunction against pumping, see Injunction.

As to gas in mine, generally, see Mines.

1. A rule of a gas company that, in all buildings where more than one meter shall be required, a separate meter room shall be provided, where all can be placed, is reasonable, where such arrangement would be more sanitary, less dangerous, more convenient for finding leaks, making repairs, and making collections from prepayment meters, than would the other, while the high pressure of the mains would be confined to the main service pipe. *State ex rel. Hallett v. Seattle Lighting Co.* 30: 492, 110 Pac. 799, — Wash. —. (Annotated)

2. A gas company is not prevented from enforcing a rule against consumers generally, by making an exception in a few cases where buildings were erected in such manner as to make the enforcement of the rule impossible, before notice of the adoption of the rule was given. *State ex rel. Hallett v. Seattle Lighting Co.* 30: 492, 110 Pac. 799, — Wash. —.

GIFT ENTERPRISE.

See Lottery.

GUARANTY INSURANCE.

In general, see Insurance, 12-14.

GUARDS.

About dangerous machinery, see Master and Servant, 12.

HARMLESS ERROR.

See Appeal and Error, 21-32.

HEALTH.

Drainage and filling of land at expense of property benefited, see Constitutional Law, 11.

Title of statute conferring powers on city in interest of, see Statutes.

Infection of building with smallpox by board of health, see Waste.

HIGHWAYS.

As to bridges, see Bridges.

Damages for injuries caused by vacation, see Damages, 9.

Judicial notice of location of, see Evidence, 2.

Rights and title of abutting owner generally.

1. Since owners of property abutting on a highway have the absolute right of access thereto, a statute empowering commissioners to make reasonable rules and regulations concerning the use of a boulevard, and providing that no connections therewith shall be allowed without a permit from the commissioners, does not authorize the refusal of a permit. *Goodfellow Tire Co. v. Hurlbut*, 30: 1074, 128 N. W. 410, — Mich. — (Annotated)

Obstruction.

Railway on city street as nuisance, see Nuisances, 2.

2. An action cannot be maintained by a private person for an interference with or an obstruction in a public highway, constituting a public nuisance, unless he is thereby specially injured in some way not common to the public at large. *McKay v. Enid*, 30: 1021, 109 Pac. 520, — Okla. —

3. The owner of real property cannot maintain an action for damages thereto caused by the wrongful obstruction of streets by a railway lawfully constructed thereon, where the streets obstructed were not the only means of access to such property, and were not adjacent thereto, since he has suffered no injury special to himself and different in kind from that suffered by the general public. *McKay v. Enid*, 30: 1021, 109 Pac. 520, — Okla. —

4. An abutting property owner whose means of access to his property has been materially interrupted by the building of railway tracks upon the street on one side of such property, the nearest of which is within 10 feet thereof, may recover damages therefor, notwithstanding such owner has a means of access from another street. *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 30: 231, 95 Pac. 224, 20 Okla. 583.

Rights as to trees in street.

Limitation period for action for injury to trees, see Limitation of Actions, 4.

5. An electric light company operating under a franchise, which, without consent of, or notice to, the lot owner, trims shade trees growing in that part of the street contiguous to his lot, is liable to such owner for the resulting damages, in the absence of a valid legislative act or municipal ordinance enacted before the lot owner planted the trees, granting authority to public-service corporations to trim shade trees growing in the streets without compensating the abutting owner for damages thereby inflicted, although the city has title to the street, and irrespective of whether or not the electric company acted maliciously. 30 L.R.A.(N.S.)

Slabaugh v. Omaha E. L. & P. Co. 30: 1084, 128 N. W. 505, — Neb. — (Annotated)

Liability for injuries on.

Effect of failing to show that street on which accident occurred was a public street, see Appeal and Error, 18.

Negligence in use of automobile on, see Automobiles.

Sufficiency of evidence to show negligence, see Evidence, 28, 29.

Variance in action for obstruction of sidewalk, see Evidence, 33.

Sufficiency of complaint, see Pleading, 7.

Proximate cause of injury on, as question for jury, see Trial, 4.

6. The legislature cannot absolutely exempt a city from liability to respond in damages to those injured by reason of defects in its streets which were caused by its own negligence. *Udike v. Omaha*, 30: 589, 127 N. W. 229, — Neb. —

7. That one subject to vertigo is seized with an attack while walking on a sidewalk, and staggers against an obstruction negligently placed upon the walk, a fall upon which causes his death, will not destroy the liability for the accident of the one responsible for the obstruction. *Woodson v. Metropolitan Street R. Co.* 30: 931, 123 S. W. 820, 224 Mo. 685.

8. An independent contractor for the construction of a public drain, who wrongfully renders a public highway dangerous for travel by dumping the earth excavated from the drain thereon, is liable in damages to a traveler who, without fault on his part, is injured in consequence of the unlawful obstruction. *Solberg v. Schlosser*, 30: 1111, 127 N. W. 91, — N. D. —

Contributory negligence.

As question for jury, see Trial, 11.

9. It is negligence as matter of law for one fully cognizant of the facts to attempt to cross the streets by climbing over an obstruction between the pavement and the curbing of a sidewalk, when a few steps in either direction would have carried him around the obstruction. *Woodson v. Metropolitan Street R. Co.* 30: 931, 123 S. W. 820, 224 Mo. 685.

10. Knowledge of the dangerous condition of a highway imposes a duty upon a traveler to exercise such care as the circumstances demand. *Solberg v. Schlosser*, 30: 1111, 127 N. W. 91, — N. D. —

11. It is not negligence, as a matter of law, for a person to drive upon a dangerous or defective highway, knowing it to be such, unless the dangerous or defective condition is such that a person of ordinary prudence would not attempt to drive over it. *Solberg v. Schlosser*, 30: 1111, 127 N. W. 91, — N. D. —

Notice.

12. A statute providing that cities shall be absolutely exempt from liability for injuries caused by defects in their public ways unless actual notice in writing of the defect shall have been filed with the city

clerk at least five days before the occurrence of the injury complained of does not apply to defects caused by the city itself in negligently constructing a sewer in one of its streets. *Updike v. Omaha*, 30: 589, 127 N. W. 229, — Neb. —.

Vacation.

13. All land abutting on that portion of a street which is not vacated, but which is left a cul-de-sac by vacating another portion of the street between it and the next adjacent cross street, suffers a special injury for which damages may be awarded under a statute requiring a city to pay damages caused by the vacation of any street. *Newark v. Hatt* (N. J. Err. & App.) 30: 637, 77 Atl. 47, — N. J. —.

(Annotated)

HOMESTEAD.

Partition of, see Partition.

What constitutes election by widow destroying her individual rights in, see Wills, 7, 9.

The childless widow of one who died seised in fee of lands occupied by them as a homestead may, under a statute providing that, "upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law," as against the husband's heirs, occupy and possess the whole thereof as long as she preserves its homestead character by maintaining a home thereon. *Holmes v. Holmes*, 30: 920, 111 Pac. 220, — Okla. —.

(Annotated)

HOMICIDE.

Admissibility of dying declarations, see Evidence, 18.

Relevancy and materiality of evidence in prosecution for, see Evidence, 19.

Sufficiency of evidence in prosecution for, see Evidence, 31.

Indictment for, see Indictment, etc.

One is guilty of homicide who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to strike and kill a pedestrian. *State v. Goetz*, 30: 458, 76 Atl. 1000, 83 Conn. 437.

(Annotated)

HOSE.

Bursting a hose while flushing streets, see Municipal Corporations, 2.

HUSBAND AND WIFE.

Privy examination of wife, see Acknowledgment.

Review by Federal supreme court of local law as to community property, see Appeal and Error, 2, 3.

Validity of conveyance to wife by husband as against trustee in bankruptcy, see Bankruptcy, 5.

Subjecting rights of surviving wife in community property to inheritance tax. see Constitutional Law, 14.

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Condition of married woman's right to rescind conveyance, see Ejectment.
Ejectment because of failure of husband to join in deed by married woman, see Ejectment.

Estoppel of married woman, see Estoppel.

Conveyance to wife of real estate purchased with her funds, see Estoppel, 3.

Election by widow between will and her independent rights in property, see Wills, 7-9.

As to divorce, see Divorce and Separation.

As to marriage, see Marriage.

1. A married woman whose husband does not refuse to join in a deed of her real estate cannot avoid her contract to make the sale, on the theory that he has not joined, where the statute gives her the same right to sell her real estate as though she were sole, except that her husband must join in the deed. *McCoy v. Niblick*, 30: 353, 77 Atl. 551, — Pa. —. (Annotated)

2. A married woman cannot repudiate her sale of real estate and keep the purchase price because her husband has not joined in the deed, where the statute provides that she shall have the same right to dispose of her real estate as an unmarried person, but that she cannot convey real property unless her husband joins in the conveyance. *McCoy v. Niblick*, 30: 355, 70 Atl. 577, 221 Pa. 123.

3. The common-law relation between husband and wife was not so far modified as to give the wife a right of action to recover damages from her husband for an assault and battery committed by him upon her person by a statute authorizing married women "to sue separately for the recovery, security, or protection of their property, and for torts committed against them, as fully and freely as if they were unmarried." *Thompson v. Thompson*, 30: 1153, 31 Sup. Ct. Rep. 111, 218 U. S. 611, 54 L. ed. 1180.

(Annotated)

ICE.

As personal baggage of passenger on street car, see Carriers, 15; Damages, 2.

ILLEGITIMATES.

Right of natural mother to visit, see Contempt, 1; Parties, 8, 9.

Legitimation of illegitimate child, see Parent and Child, 2.

Adoption of illegitimate child without mother's consent, see Parent and Child, 3, 4.

IMMIGRANT.

Accompanying stock and household goods as passenger, see Carriers, 1.

IMPAIRMENT OF OBLIGATIONS.

See Constitutional Law, 14, 15.

IMPEACHMENT.

Cross-examination for purpose of, see Witnesses, 1.

IMPLIED AGREEMENTS.

See Contracts, 2.

IMPLIED COVENANTS.

In lease, see Landlord and Tenant, 1.

IMPROVEMENTS.

Right of vendee to compensation for, on rescission by vendor, see Ejectment.

Liens for, see Mechanics' Liens.

Public improvements, see Public Improvements.

IMPUTED NEGLIGENCE.

See Negligence, 5.

INCOMPETENT PERSONS.

As to married women, see Husband and Wife.

As to infants, see Infants.

A deed of an insane person to one who has knowledge of the grantor's incapacity, and who gives no substantial consideration for the property, is a nullity, and does not revoke a valid will previously made by the grantor. *Bethany Hospital Co. v. Philippi*, 30: 194, 107 Pac. 530, 82 Kan. 64.

INDEPENDENT CONTRACTORS.

Liability for injury by defects in highway, see Highways, 8.

Who are, see Master and Servant, 25.

INDICTMENT, INFORMATION, AND COMPLAINT.

Sufficiency of evidence to sustain conviction under, see Evidence, 31.

Where an indictment charges the accused with having assaulted and killed one "P. S., alias F. M.," the "P. S.," cannot be rejected as surplusage so as to sustain a conviction upon evidence tending to show that the defendant killed a person commonly known as F. M., since, under the indictment, the name of the person assaulted was essential matter of description, which cannot be stricken as surplusage. *Goodlove v. State*, 30: 134, 92 N. E. 491, 82 Ohio St. 365. (Annotated)

INFANTS.

Jurisdiction of court to determine right of visit by parent denied custody of child, see Courts, 6.

Employment of, without consent of parent, see Master and Servant, 1.

Adoption of, see Parent and Child, 3-5.

Custody.

Evidence in suit to secure custody, see Evidence, 9.

1. Upon the death of the parent to which a child was awarded by a decree of divorce, the other parent becomes entitled to its custody, unless, in a contest thereof, it is shown that such parent is disqualified, or the interests of the child require some other disposition of its person. *Wilson v. Mitchell*, 30: 507, 111 Pac. 21, — Colo. — 30 L.R.A.(N.S.)

2. That a divorce was granted against the mother of a child for wrongdoing is not conclusive against her right to the custody of the child many years afterwards, where the father is dead, and she has remarried, has a good home and social standing, and there is not the slightest intimation or suspicion of wrongdoing subsequent to the divorce. *Wilson v. Mitchell*, 30: 507, 111 Pac. 21, — Colo. —

3. That the grandparents of a child in whose custody it was placed have acquired an affection for it and it for them is not sufficient reason for refusal to return it to the custody of its mother, who surrendered possession of it merely for the benefit of its health, and always manifested her interest in and love for it, and contributed to its support. *Wilson v. Mitchell*, 30: 507, 111 Pac. 21, — Colo. —

4. The mere fact that a mother intends, if she secures possession of her son, to take him to England for residence, is not sufficient to cause the courts to deny her the right to such possession as against the claims of its grandparents, with whom it had been placed by its father, who has since deceased. *Wilson v. Mitchell*, 30: 507, 111 Pac. 21, — Colo. —

5. The preference of a nine-year-old boy to remain with his grandparents rather than return to his mother will not control the decision of the court, where he had always manifested affection for her until the institution of the proceedings for his custody, when he manifested an unexplained aversion to her. *Wilson v. Mitchell*, 30: 507, 111 Pac. 21, — Colo. —

INFORMATION.

For criminal offense, see Indictment, etc.

INHERITANCE TAX.

Constitutionality of, see Constitutional Law, 14.

INJUNCTION.

An injunction against the pumping of oil and gas wells will not be awarded in favor of the owner of neighboring wells, if the latter has been guilty of similar acts, even though in a lesser degree. *Ilo Oil Co. v. Indiana Natural Gas & Oil Co.* 30: 1057, 92 N. E. 1, — Ind. — (Annotated)

INSOLVENCY.

As to bankruptcy, see Bankruptcy.

Of corporations, see Corporations, 7.

Of purchaser as ground for rescission, see Sale, 5.

INSPECTION.

Right of stockholder to inspect books of corporation, see Corporations, 3, 4.

In general, see Discovery and Inspection.

INSTIGATION.

As affecting criminal responsibility, see Criminal Law, 1.

INSTRUCTION.

Duty to give to servant, see *Master and Servant*, 7, 8.

INSURANCE.

As assets of bankruptcy, see *Bankruptcy*, 1.

Negligence in transmitting telegram from insurer canceling policy, see *Damages*, 4; *Proximate Cause*, 1; *Telegraphs*, 5.

Revoking designation of state officer to receive service, see *Writ and Process*, 2, 3.

Pleading in suit against company for failure to make loan on policy, see *Pleading*, 6.

Change of venue in action on policy, see *Venue*.

Foreign corporations.

1. Merely recognizing existing insurance policies and receiving the premiums on them at its office in another state and adjusting claims which accrue does not constitute doing business within a state by an insurance company after its asserted withdrawal therefrom, so as to continue in force its designation of the insurance commissioner as its agent to receive service of process. *Hunter v. Mutual Reserve L. Ins. Co.* 30: 677, 76 N. E. 1072, 184 N. Y. 136.

2. The receipt by a foreign insurance company at its home office of premiums upon policies theretofore issued, together with four isolated acts extending over a period of three years, consisting in re-writing an existing policy, sending a check in payment of a policy, to be delivered upon receipt of certain unpaid assessments, and two adjustments within the state of claims which have accrued, do not constitute doing business within the state after the company's asserted withdrawal therefrom in good faith, so as to preclude it from revoking its designation of the state insurance commissioner as its agent to receive service of process. *Hunter v. Mutual Reserve L. Ins. Co.* 30: 686, 31 Sup. Ct. Rep. 127, 218 U. S. 573, 54 L. ed. 1155.

Renewal of policy.

3. Mere delay in rejecting a receipt for renewal of an accident insurance policy does not amount to an acceptance which will continue the policy in force. *Richmond v. Travelers' Ins. Co.* 30: 954, 130 S. W. 790, — Tenn. —.

4. An accident insurance policy is not in force where a renewal receipt is mailed by the agent, held by the insured a couple of weeks, and returned with a notice to discontinue, although the agents do not accept the discontinuance, but write assured that they will hold the receipt for him and give him credit for the premium, where he dies before the letter reaches him; and it is immaterial that both parties think that the policy is in force until the discontinuance is accepted. *Richmond v. Travelers' Ins. Co.* 30: 954, 130 S. W. 790, — Tenn. —.

Rescission.

5. Breach by an insurance company of 30 L.R.A. (N.S.)

its contract to lend money on a policy does not justify the insured in treating the contract as rescinded, and suing for a return of the premiums paid. *Lewis v. New York L. Ins. Co.* 30: 1202, 181 Fed. 433, — C. C. A. —. (Annotated)

6. The holder of an insurance policy which contains a provision for loans upon the policy does not make a case for rescission of the contract for failure to grant a loan, where he does not allow time between the making of his demand and the bringing of the suit for the application to reach the home office and the reply to be returned, and he does not execute the loan agreement which the policy makes a condition precedent to the granting of a loan. *Lewis v. New York L. Ins. Co.* 30: 1202, 181 Fed. 433, — C. C. A. —.

Waiver; estoppel.

7. A form of policy of fire insurance, although prescribed by law, is, when issued by the insurance company, none the less a contract, and is to be construed as such; and while the fact that it is a standard form may affect a question of pure waiver, it does not abrogate the doctrine of estoppel, especially where it is provided by statute that policies in the standard form shall be subject to the same rules of construction as to their effect, or the waiver of any of their provisions, as if the form thereof had not been prescribed. *Leisen v. St. Paul F. & M. Ins. Co.* 30: 539, 127 N. W. 837, — N. D. —.

8. An insurance company whose agent was expressly informed, at the time of the execution of a fire policy, of the true interest of the insured in the property, and who carelessly and negligently, without the connivance of the assured, stated in the policy that the insured was the owner in fee simple, which was not true, and collected and retained the premium, is estopped to deny liability in an action on the policy, although it provided that the entire policy should be void if the interest of the insured was not truly stated therein, or if his interest was other than sole and unconditional ownership, unless otherwise provided by agreement indorsed on the policy, and also that no officer or agent should have power to waive any of the provisions or condition of the policy, and that no officer or agent should be deemed to have waived any such provisions or conditions unless such waiver was written upon or attached to the policy. *Leisen v. St. Paul F. & M. Ins. Co.* 30: 539, 127 N. W. 837, — N. D. —.

9. Restrictions in a policy of fire insurance limiting the power of agents to waive conditions except in a certain manner do not apply to those conditions which relate to the inception of the contract, where the agent, with full knowledge of the facts, issues the policy and collects the premium, and the insured has acted in good faith. *Leisen v. St. Paul F. & M. Ins. Co.* 30: 539, 127 N. W. 837, — N. D. —.

Notice; proofs of loss.

10. A requirement of an accident insurance policy that claimant must give af-

firmative proof in writing of the death, and of its being the proximate result of external and accidental means, is satisfied if the beneficiary makes a prima facie showing that the death had occurred, and had resulted from the causes stated. *Jenkins v. Commercial Men's Asso.* 30: 1181, 124 N. W. 199, — Iowa, —.

Risks and causes of loss, injury, and death.

11. Death from blood poisoning due to perforation of the rectum by a bone, presumably swallowed with food, is caused by external, violent, and accidental means, within the meaning of those terms in an insurance policy. *Jenkins v. Hawkeye Commercial Men's Asso.* 30: 1181, 124 N. W. 199, — Iowa, —. (Annotated)

Guaranty policies.

12. One who undertakes to indemnify a manufacturer against loss from liability imposed by law for damages on account of bodily injuries accidentally suffered by any person not employed by the assured, while at or about the work of the assured, and to defend any suit brought to enforce a claim for damages on account of an accident covered by the policy, is not liable for the costs and counsel fees and the amount paid in compromise of a suit brought by a boy injured while trespassing upon its property for the purpose of gaining a view of the interior of a theater on the adjoining property, under circumstances absolving the assured from liability for the injury. *Henderson Lighting & P. Co. v. Maryland Casualty Co.* 30: 1105, 69 S. E. 234, 153 N. C. 275. (Annotated)

13. One agreeing to indemnify an employer against liability for damages on account of bodily injuries to an employee through his negligence, by a policy providing that no action shall lie against the insurer as respects any loss under the policy unless it shall be brought by the assured himself, for loss actually sustained and paid by him in satisfaction of a final judgment, and binding the insurer to defend any action brought by an injured employee against the assured, or settle the same, is not liable to the injured servant for the amount of a judgment recovered by him, although the employer has become insolvent, and the insurer assumed the defense of the action, and excluded the employer from participating therein. *Cayard v. Robertson*, 30: 1224, 131 S. W. 864, — Tenn. —.

14. Injury to an employee from glanders contracted from horses which his duties required him to handle is within a policy insuring the employer against liability for the loss imposed by law upon the insured for damages on account of bodily injuries accidentally suffered by an employee while on duty within the premises of the assured in the operation of his trade or business. *H. P. Hood & Sons v. Maryland Casualty Co.* 30: 1192, 92 N. E. 329, 206 Mass. 223. (Annotated)

INSURANCE COMMISSIONER.

Service of process on, see Writ and Process, 2, 3.

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INTENT.

Of one making false representation, see Fraud and Deceit, 1.

INTEREST.

Liability of custodian for interest on public money, see Bonds, 3.

INTERPRETATION.

Of contracts, see Contracts, 4-7.

INTERSTATE COMMERCE COMMISSION.

Persons dealing with interstate carriers are as effectually bound by the interstate commerce act and the orders of the Commission as to both freight and passenger tariffs as is the carrier himself. *Melody v. Great Northern R. Co.* 30: 568, 127 N. W. 543, — S. D. —.

INTOXICATING LIQUOR.

Revocation of license for wrongful sale of liquor, see Constitutional Law, 10; Criminal Law, 2.

Entrapment as defense to liability for sale, see Criminal Law, 1.

Judicial notice of intoxicating character of liquor, see Evidence, 1.

Direction of verdict in prosecution for sale of, see Trial, 16.

1. The statutory prohibition of the sale of malt liquor makes the sale of such liquor unlawful regardless of the amount of alcohol it contains or its intoxicating quality. *Fuller v. Jackson*, 30: 1078, 52 So. 873, — Miss. —.

2. The prohibition of the sale of alcoholic liquor does not apply to a beverage which contains less than $\frac{3}{10}$ of 1 per cent of alcohol. *Fuller v. Jackson*, 30: 1078, 52 So. 873, — Miss. —.

JAMESTOWN.

Word "Jamestown" as valid trademark, see Trademarks, 1.

JOINDER.

Of causes of action, see Action or Suit, 4.

JOINT CREDITORS AND DEBTORS.

Conclusiveness as to master of acquittal of servant, see Judgment, 5.

1. A joint action may be maintained against a railroad company which contracted to furnish employees to assist in installing a machine which had been purchased from a manufacturing company, which retained title thereto until payment was made, and such manufacturing company, which undertook to furnish a competent engineer to superintend the erection and installation of the machine by an employee of the former, who was negligently injured during such installation, while acting under the direction of the engineer of the latter company. *Fliege v. Kansas City W. R. Co.* 30: 734, 107 Pac. 555, 82 Kan. 147. (Annotated)

2. That it may be difficult to determine what portion of the injury to land by surface water was due to the act of a municipality, and what to another cause, does not defeat an action against the municipality for its share of the damage. *Baker v. Akron*, 30: 619, 122 N. W. 926, — Iowa, —.

JOINT TORT FEASORS.

See Joint Creditors and Debtors.

JUDGMENT.

Time for taking appeal from, see Appeal and Error, 5.

Sufficiency of objection to setting aside decree, see Appeal and Error, 9, 10.

As evidence, see Evidence, 9.

Presumption as to jurisdiction, see Evidence, 7.

Jurisdiction to enter judgment against garnishee, see Garnishment, 4.

Form and substance.

1. The decree of a probate court need not recite the acts or facts upon which the jurisdiction of the court depended. *Holmes v. Holmes*, 30: 920, 111 Pac. 220, — Okla. —. Effect and conclusiveness.

2. A judgment denying the claim of a widow to share in the estate of decedent as his widow, on the ground that the marriage was not proved, does not of itself require the rejection of her claim against his estate for services, which was not presented within the time required by statute, on the ground that equity would not interfere because the relations between the parties were meretricious. *Asher v. Pegg*, 30: 890, 123 N. W. 739, — Iowa, —.

3. The dismissal of a voluntary petition in bankruptcy for laches on the part of the bankrupt in prosecuting the proceedings will prevent his discharge in subsequent proceedings from debts which could have been proved in the former one. *Pollet v. Cosel*, 30: 1164, 179 Fed. 488, 103 C. C. A. 68. (Annotated)

4. That one who has denied the charges upon which a suit for divorce was based made no effort to disprove them at the trial does not amount to an admission of their truth where she did not know the exact charges made against her, and there is evidence tending to show that the divorce decree was procured by perjured testimony. *Wilson v. Mitchell*, 30: 507, 111 Pac. 21, — Colo. —.

5. A verdict exonerating the servant in an action against a railroad company and its locomotive engineer for the death of plaintiff's son, caused by the misfeasance of the engineer, requires an acquittal of the railroad company also. *Southern R. Co. v. Harbin*, 30: 404, 68 S. E. 1103, — Ga. —. (Annotated)

Relief against.

6. A judgment will be set aside where the court refused to file and hear a motion directed to the petition in an action pending before it, and proceeded to enter judgment as on default, where the motion was made during the trial, and prior to the entry of judgment, and the court was informed that 30 L.R.A. (N.S.)

the motion papers had been deposited in a postoffice, postage paid, in an envelop addressed to the clerk of the court, by the attorney, who resided in another county, in such season that they should, in due and regular course of mail, have arrived on the answer day, but were in fact delayed by reason of miscarriage. *Chicago, R. I. & P. R. Co. v. Eastham*, 30: 740, 110 Pac. 887, — Okla. —. (Annotated)

7. One who so dominates the will of his wife as to force her against her will to bring a petition in court for the adoption of his son by a former wife commits a gross fraud upon the wife, and such fraud upon the court that the decree of adoption will be set aside in a proper case. *Phillips v. Chase*, 30: 159, 89 N. E. 1049, 203 Mass. 556.

8. A decree secured by fraud, whereby a woman adopts her husband's son by a former wife, will be set aside at the suit of her next of kin, after the death of the son, where, if permitted to stand, it will deprive them of property to which they are entitled, and vest it in the husband, who was guilty of the fraud. *Phillips v. Chase*, 30: 159, 89 N. E. 1049, 203 Mass. 556. (Annotated)

9. A man who by fraud induces his wife to adopt his son by a former wife, thinking that if the son gets her property the father will benefit thereby, cannot, after the son's death, assert title to the property as his heir against the next of kin of the wife, on the theory that the decree of adoption cannot be set aside because the son was not a party to the fraud. *Phillips v. Chase*, 30: 159, 89 N. E. 1049, 203 Mass. 556.

JUDICIAL NOTICE.

See Evidence, 1, 2, 25.

JURISDICTION.

Of appellate court, see Appeal and Error.

Presumption of, see Evidence, 7.

To render judgment, see Judgment, 1.

In general, see Courts.

JURY.

Presumption of waiver of jury trial, see Appeal and Error, 11.

Estoppel by consent to trial without jury, see Appeal and Error, 13.

Prejudicial error in matters as to, see Appeal and Error, 30.

Question for court or jury, see Trial.

Effect of demurrer to raise question of right to jury trial, see Pleading, 18.

1. A jury cannot be demanded as matter of right in an action by a devisee under a concededly valid will, to cancel and set aside a deed which the testator was fraudulently procured to execute while he was of unsound mind, on the ground that it created a cloud on title, which was alleged to have passed under the provisions of the will, since such an action is equitable in its nature. *Bethany Hospital Co. v. Philippi*, 30: 194, 107 Pac. 530, 82 Kan. 64.

2. Defendants cannot avoid the effect of their neglect to demand a jury trial on

the theory that, the suit being to enforce a lien, and therefore of equitable jurisdiction, a demand for a jury would have been an idle formality and of no avail. *Indianapolis Northern Traction Co. v. Brennen*, 30: 85, 87 N. E. 215, — Ind. —.

KNOWLEDGE.

As affecting right to raise estoppel, see Estoppel, 4.

Burden of proof as to, see Evidence, 4. Evidence of, see Evidence, 20, 21.

Of master as to incompetence of servant, see Master and Servant, 13.

Allegation as to, in pleading, see Pleading, 8.

Of telegraph company of importance of message, see Telegraphs, 5.

Of telegraph company that message is for benefit of addressee, see Telegraphs, 6.

LABORERS.

Lien of, see Mechanics' Liens.

LACHES.

Sufficiency of objection to permit raising of question of right to appeal, see Appeal and Error, 10.

Estoppel by, see Estoppel, 3.

To bar action, see Limitation of Actions, 1, 2.

LAND CONTRACT.

See Vendor and Purchaser.

LANDLORD AND TENANT.

Damages for waste, see Damages, 10. Estoppel of wife of tenant, see Estoppel, 1, 2.

As to oil and gas lease, see Mines.

What constitutes waste by tenant, see Waste.

Implied covenants.

1. The mere lease by the proprietor of a hotel for restaurant purposes of a room between the street and the rotunda of the hotel, with entrances upon both, does not include the right to have the entrance into the rotunda kept open, although closing it will cause a loss of patronage to the restaurant. *Jemo v. Tourist Hotel Co.* 30: 926, 104 Pac. 820, 55 Wash. 595.

Fixtures.

2. A tenant is not taxable for a cold-storage plant erected by him in the leased building, extending from basement to the fifth story above, involving substitution of floors, and constructed so as to form part of the building, if there is no provision in the lease giving him the right to remove it, and it cannot be removed without causing injury to the estate and destruction of the plant itself as such. *John P. Squire & Co. v. Portland*, 30: 576, 76 Atl. 679, 106 Me. 234. (Annotated)

Liability of landlord.

3. A landlord cannot escape liability for injury to the floors and wall of the leased building, which the lessee is compelled to repair, because the cost of the repairs

cannot be stated with exactness, if it can be reasonably estimated from known and approved data. *Jemo v. Tourist Hotel Co.* 30: 926, 104 Pac. 820, 55 Wash. 595.

LARCENY.

A finder is not guilty of larceny because he knows or ascertains who the owner of the property is, and either denies having it or fails voluntarily to return it. *Brewer v. State*, 30: 339, 125 S. W. 127, 93 Ark. 479. (Annotated)

LAWS.

As to statutes, see Statutes.

LEASE.

Estoppel by, see Estoppel, 1, 2.

In general, see Landlord and Tenant.

LEAVE OF COURT.

To file bill of review, see Review, 1.

LEGISLATURE.

Power to exempt city from liability for injuries on highway, see Highways, 6.

Enactment of statutes by, see Statutes. Power to prohibit issuing of trading stamps, see Trading Stamps, 3.

LEGITIMATION.

Of illegitimate child, see Parent and Child, 2.

LETTERS.

Admissibility in evidence, see Evidence, 10.

LEVY AND SEIZURE.

As to exemptions, see Exemptions.

A vested remainder is subject to execution during the continuance of the preceding estate. *Walker v. Alverson*, 30: 115, 68 S. E. 966, — S. C. —. (Annotated)

LIBEL AND SLANDER.

Privileged communications.

Privilege as question for jury, see Trial, 7.

1. Comment made in good faith and fairly published in connection with the publication of a police report that persons had been poisoned by sugar purchased at plaintiff's store does not render the publishers liable in an action for libel based thereon, where actual damages are not proven. *Morasca v. Item Co.* 30: 315, 52 So. 565, 120 La. 426. (Annotated)

2. A county superintendent of schools is not absolutely privileged in requesting the state board of examiners to refuse a teacher's license because of lack of good moral character of the applicant. *Tanner v. Stevenson*, 30: 200, 128 S. W. 878, 138 Ky. 578. (Annotated)

3. A county school superintendent who, from malicious motives, attacks the character of an applicant for a state license to teach school, by making false charges of immoral character against him, is guilty of

libel. *Tanner v. Stevenson*, 30: 200, 128 S. W. 878, 138 Ky. 578.

Actions; defenses.

Presumption and burden of proof, see Evidence, 5, 8.

4. Plaintiff must show actual malice to recover in a libel case where the defendant is entitled to a qualified privilege. *Tanner v. Stevenson*, 30: 200, 128 S. W. 878, 138 Ky. 578.

LICENSE.

Due process in revocation of license, see Constitutional Law, 8.

Revocation of liquor license, see Constitutional Law, 10.

Revocation of, as cruel and unusual punishment, see Criminal Law, 2.

LIENS.

On assigned claim, see Assignment, 3.

On property of bankrupt, see Bankruptcy, 9.

Validity of statute displacing mortgage lien, see Constitutional Law, 9, 15.

For alimony, see Divorce and Separation, 5.

Upon property devised, see Election of Remedies, 2.

Effect of failure to demand jury trial in suit to enforce, see Jury, 2.

On property devised, limitation period for enforcement of, see Limitation of Actions, 3.

Of mechanic or materialman, see Mechanics' Liens.

Of pledge, see Pledge and Collateral Security.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

Pleading of, for first time on appeal, see Appeal and Error, 16.

Conflict of laws as to, see Conflict of Laws, 3-5.

Prescriptive rights in waters, see Waters, 5, 6.

Laches.

Sufficiency of objection to permit raising of question of right to appeal, see Appeal and Error, 10.

Estoppel by, see Estoppel, 3.

1. Three years' delay by one fraudulently induced to purchase stock of a corporation, in taking steps to rescind his contract, will not defeat the right on the ground of laches, in favor of creditors having notice of his claim. *Davis v. Louisville Trust Co.* 30: 1011, 181 Fed. 10, — C. C. A. —.

2. One defrauded into purchasing stock of a corporation cannot be charged with laches which will preclude his rescinding his contract until he has knowledge of the fraud, or knowledge should be imputed to him because of suspicious circumstances which he failed to pursue after receiving notice of them. *Davis v. Louisville Trust Co.* 30: 1011, 181 Fed. 10, — C. C. A. —.

To what claims applicable.

3. The statute governing the limitation 30 L.R.A. (N.S.)

period for enforcement of mortgage liens applies to a suit to enforce a lien imposed by the will on property devised, to secure payment of annuities to testator's widow. *Stringer v. Gamble*, 30: 815, 118 N. W. 979, 155 Mich. 295.

When statute runs.

4. A right of action against an electric light company for unlawfully trimming shade trees growing in the street, to the injury of the abutting property owner, accrues when the trees are so trimmed, and not when the franchise to use the street was granted the electric company. *Slabaugh v. Omaha E. L. & P. Co.* 30: 1084, 128 N. W. 505, — Neb. —.

Interruption of statute; removal of bar.

5. The complaint in an action by a railroad employee for injuries caused by failure of the company to use cars equipped with couplers in ordinary use cannot, after the limitation period has elapsed, be amended so as to charge failure to comply with the act of Congress requiring interstate railroad companies to equip their cars with automatic couplers, and depriving them of the defense of assumption of risk. *Allen v. Tuscarora Valley R. Co.* 30: 1096, 78 Atl. 34, — Pa. —. (Annotated)

LINEMEN.

Master's duty to warn or instruct, see Master and Servant, 8; Trial, 12.

Injury to, by fall of pole, see Master and Servant, 11.

Electrician and engineer as fellow servants of linemen, see Master and Servant, 23.

LIST.

Duty of taxpayers to list property, see Taxes, 2.

LOAN.

Breach of agreement to loan money, see Insurance, 5, 6.

LOCAL IMPROVEMENTS.

See Public Improvements.

LOST PROPERTY.

Larceny of, see Larceny.

LOTTERY.

Prohibiting issuing of trading stamps, see Trading Stamps, 3.

A scheme by which a corporation organizes a co-operative society to which it admits members upon payment of a nominal fee which entitles them to stamps from merchants under contract with the corporation, which it redeems in cash or merchandise, is a gift enterprise within the meaning of a statute providing that every person who shall sell any article with the promise to give or hold out the promise of gift of, anything in consideration of the purchase of an article, shall be regarded as conducting a gift enterprise. *District of Columbia v. Kraft*, 30: 957, 35 App. D. C. 253.

MAILS.

See Postoffice.

MALICE.

Presumption of, see Evidence, 5.
As element of action of libel or slander,
see Libel and Slander, 3, 4.
Malicious evasion of tender of money,
see Torts.

MALICIOUS ARREST.

Liability for, see False Imprisonment.

MALICIOUS PROSECUTION.

As to false imprisonment, see False Imprisonment.

MALT LIQUOR.

Prohibition of sale of, see Intoxicating Liquors, 1.

MANDAMUS.

Appeal in mandamus proceeding, see Appeal and Error, 1.

Right to reversal of decree refusing,
see Appeal and Error, 32.

Raising question as to, for first time
on appeal, see Appeal and Error,
17.

1. The issuance of a peremptory writ
of mandamus is not prevented by the fact
that relator demanded excessive relief.
State ex rel. Brumley v. Jessup & Moore
Paper Co. 30: 290, 77 Atl. 16, — Del. —.

To court or judge.

2. Mandamus lies to compel a trial
court to vacate an invalid order requiring
a plaintiff to produce its books and papers
for examination by defendant. International
Harvester Co. v. Smith, 30: 580, 127 N.
W. 695, — Mich. —.

Procedure.

3. The constitutionality of a statute
cannot be attacked in a mandamus proceeding
to compel performance of an act which
an official refuses to perform because of the
statute. State ex rel. Hunter v. Winter-
rowd, 30: 886, 91 N. E. 956, — Ind. —.

4. The court may quash part of the re-
turn to an alternative writ of mandamus,
and permit the rest to stand, where it con-
tains allegations which are a defense to
part of the relief demanded, but not to all.
State ex rel. Brumley v. Jessup & Moore
Paper Co. 30: 290, 77 Atl. 16, — Del. —.

MANDATORY PROVISIONS.

In statutes, see Statutes, 6-8.

MANUFACTURING CONTRACT.

Assignment of, see Assignment, 2.

MARKETABLE TITLE.

See Vendor and Purchaser, 1, 2.

MARRIAGE.

Conflict of laws as to, see Conflict of
Laws, 1, 2.

1. Where residents of Minnesota, com-
petent to contract marriage, exchange mu-
tual promises to marry in the future, and
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subsequently in Germany exchange mutual
consents before, and are pronounced man
and wife by, one believed by the wife to be
a minister of the Gospel, and she at all
times thereafter believes the marriage to be
valid, and the contracting parties thereafter
live and cohabit as man and wife in Aus-
tria, and hold themselves out and are re-
puted by their friends to be such, they ef-
fect as to her a marriage valid under the
laws of Minnesota, sufficient to satisfy and
render the marriage valid in Germany, un-
der a provision of the German law that the
validity of a marriage in the empire be-
tween aliens shall be determined by the
laws of the country of which he or she is
a subject, although the person who per-
formed the ceremony was not a person au-
thorized by German law to celebrate a
marriage, and there was no other marriage
ceremony. Re Lando, 30: 940, 127 N. W.
1125, — Minn. —.

2. Statutes prescribing a term of resi-
dence in actions for divorce do not apply
to actions for annulment of marriage. Mon-
tague v. Montague, 30: 745, 127 N. W. 639,
— S. D. —. (Annotated)

3. Misrepresentation by one of the par-
ties as to disposition is not such fraud as
will justify an annulment of a marriage
contract. Williamson v. Williamson, 30:
301, 34 App. D. C. 536. (Annotated)

MARRIED WOMAN.

See Husband and Wife.

MASTER AND SERVANT.

Effect of discharge in bankruptcy on
employer's liability, see Bankrupt-
cy, 11.

Prejudicial error in admitting evidence
in action for injury, see Appeal
and Error, 23.

Evidence in action for injury to serv-
ant, see Evidence, 17, 20, 21, 23.

Weight and sufficiency of evidence in
action for injury to servant, see
Evidence, 27.

Insurance against master's liability, see
Insurance, 13, 14.

Joint liability of master and third per-
son for injury to employee, see
Joint Creditors and Debtors, 1.

Amendment as affecting limitation of
action, see Limitation of Actions,
5.

Amendment of pleading in action for
injury, see Pleading, 2.

Proximate cause of injury to servant,
see Proximate Cause, 3, 4.

Master's negligence as question for
jury, see Trial, 12.

Rights of parent in case of unlawful
employment of child, see Parent
and Child, 1.

Boat used for transportation of em-
ployees only as ferry, see Ferry.

Imputing servant's knowledge to em-
ployer, see Notice.

Employing child without knowledge of
parent, see Parent and Child, 1.

Authority to employ servant.

1. The act of a conductor in employing a minor as brakeman on a train without the consent of his father is, as between the railroad company and the father, the act of the railroad company, although the train has a full complement of hands without the minor, so that his employment is not necessary, and no express authority has been given the conductor to make the contract. *Hendrickson v. Louisville & N. R. Co.* 30: 311, 126 S. W. 117, 137 Ky. 562.

When relation exists.

2. A railroad company is not liable for an assault committed in a public street, 50 feet from its pier, by a special policeman employed and paid by it to regulate the traffic on the pier, but commissioned by the police department, upon a truckman who, in approaching the pier to secure a load, failed promptly to obey his signal to halt. *Pennsylvania R. Co. v. Kelly*, 30: 481, 177 Fed. 189, 101 C. C. A. 359. (Annotated)

Wages.

Effect of discharge in bankruptcy upon assignment of future wages, see *Bankruptcy*, 11.

3. Compensation for work within the scope of a regular employment, in addition to the usual but not fixed hours for a day's work, cannot be recovered in the absence of a contract therefor, unless the contract was entered into in reference to a controlling custom. *McGregor v. Harm*, 30: 649, 125 N. W. 885, — N. D. —. (Annotated)

4. Under a contract for services at a sum certain per week, with an additional sum per week if the services be continued for one year, the stipulated additional sum cannot be recovered for the time actually worked, where the servant has within the year, by unjustifiable conduct, caused his discharge. *McGregor v. Harm*, 30: 649, 125 N. W. 885, — N. D. —.

Termination of relation; discharge.

Sufficiency of cause for discharge as question for jury, see *Trial*, 6.

5. The refusal of one employed as a bartender under a contract providing no fixed hours of work, or how many hours shall be considered as a day's work, who had worked eight hours on a particular day, to work an additional hour, affords cause for discharge, where he had occasionally worked twelve hours, and on several occasions had worked more than the generally allotted hours, at the request of the employer. *McGregor v. Harm*, 30: 649, 125 N. W. 885, — N. D. —.

Liability for negligence of physician.

6. A railroad company which retains from the wages of each employee a small amount, with the aggregate of which it employs a physician to treat employees when ill or injured, is not liable to an employee for the malpractice of the physician, if it uses ordinary care in his selection, and is not promoting any interests of its own in the transaction, since it will be regarded as merely administering a charity. *Texas C. 30 L.R.A. (N.S.)*

R. Co. v. Zumwalt, 30: 1206, 132 S. W. 113, — Tex. —. (Annotated)

Duty to warn or instruct.

Negligence in failing to give, as question for jury, see *Trial*, 12.

7. A master cannot escape liability for injury to his servant, because he furnished him with proper implements with which to do his work the use of which would have prevented the accident, if the master did not tell him to use them in the particular case, and he did not know, and was not in fault in not knowing, that he ought to have done so. *Willis v. Plymouth & C. Teleph. Exch. Co.* 30: 477, 75 Atl. 877, 75 N. H. 453.

8. A telephone company which sends a man to straighten an angle pole, knowing that it is less than the usual depth in the ground, of which fact or of the danger of straightening such poles he is ignorant, must use ordinary care to notify him of the dangers peculiar to the service because of it. *Willis v. Plymouth & C. Teleph. Exch. Co.* 30: 477, 75 Atl. 877, 75 N. H. 453.

Duty as to place and appliances generally.

9. A car 47 feet long and 16 feet high, jacked up 6 feet from the floor, is a structure within the meaning of a statute providing that a person directing another to perform labor in the repairing of a house, building, or structure shall not furnish, for the performance of such labor, unsuitable scaffolding. *Caddy v. Interborough Rapid Transit Co.* 30: 30, 88 N. E. 747, 195 N. Y. 415.

10. Planks placed 8 feet from the ground, on painter's horses, to be used as platforms for workmen in repairing a railroad car, are within the meaning of a statute requiring a person employing another to perform labor in the repairing of a house, building, or structure, to furnish for the performance of such labor safe scaffolding. *Caddy v. Interborough Rapid Transit Co.* 30: 30, 88 N. E. 747, 195 N. Y. 415. (Annotated)

11. A telephone company sending a man to straighten an angle pole which is leaning because of the strain of the wires owes him the duty of doing what an ordinary man would do under the circumstances to ascertain whether or not the pole was originally set the proper depth into the ground, or whether it had pulled out, it being unsafe to climb a leaning pole subject to the angle strain if it is not sufficiently deep in the ground. *Willis v. Plymouth & C. Teleph. Exch. Co.* 30: 477, 75 Atl. 877, 75 N. H. 453.

12. A statute requiring a master to guard all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws, and machinery of every description, does not apply to an elevated track running near galleries in a factory, upon which run traveling cranes, so as to render the master liable to a servant injured by falling onto the track, in front of the crane, to his injury. *Wynkoop v. Ludlow Valve Mfg. Co.* 30: 36, 89 N. E. 827, 196 N. Y. 324. (Annotated)

13. A servant who repeatedly violates different rules of the master, and disobeys

different express orders, is legally incompetent; and if the master continues to employ him with knowledge of such incompetence, he will be liable for injuries to other employees through such disobedience of orders. *Robbins v. Lewiston, A. & W. Street R. Co.* 30: 109, 77 Atl. 537, — Me. —

(Annotated)

Assumption of risk.

Sufficiency of evidence to show lack of knowledge, see Evidence, 27.

Necessity of pleading assumption of risk, see Pleading, 12.

Sufficiency of pleading of assumption of risk, see Pleading, 13.

Effect of, on parent's rights where child is employed without parent's consent, see Parent and Child, 1.

14. The defense of assumption of risk in its true sense in an action by a servant for injuries caused by the master's negligence has reference to those risks arising out of negligence of the master which is known to, and the danger from which is appreciated by, the servant. *Duffey v. Consolidated Block Coal Co.* 30: 1067, 124 N. W. 609, — Iowa, —

15. An experienced adult assumes the risk of injury from flying splinters caused by striking a small chisel held against iron a hard blow with a heavy hammer. *L'Houx v. Union Constr. Co.* 30: 800, 77 Atl. 638, — Me. — (Annotated)

16. A servant does not, as matter of law, assume the risk of injury from working under an overhanging frozen crown in a sand pit, if he is commanded under pain of discharge to do so by his master's representative, with the assurance that the representative had tested it and found it was safe. *Brown v. Lennane*, 30: 453, 118 N. W. 581, 155 Mich. 686. (Annotated)

Contributory negligence.

Evidence on question of contributory negligence, see Evidence, 23.

Disobedience of rules, see *infra*, 20.

17. A servant who is injured by having a piece of heavy machinery negligently moved without warning while he is underneath the framework on which it rests, for the purpose of blocking it up, is not guilty of contributory negligence for not adopting a safer method of performing the task, where there was nothing in the machine itself or its position suggestive of danger, as he had a right to assume that it would not be moved until he had reached a position of safety, or, at least, that it would not be moved without notice to him. *Fliege v. Kansas City W. R. Co.* 30: 734, 107 Pac. 555, 82 Kan. 147.

18. A nineteen-year-old employee of at least ordinary intelligence and experience, and accustomed to working in a sawmill, who, when directed by a foreman where to find another employee, from whom he had been ordered to get a tool, chose a way provided only for those engaged in using or repairing the machinery, when there was another ordinarily used way of getting to the place, which was known to him, and which he could have safely used, and, in returning 30 L.R.A. (N.S.)

by the same way, passed over a rapidly revolving shaft, stepping so close thereto that his trousers caught in a set screw that projected less than one half inch from a safety collar on the shaft, is guilty of contributory negligence sufficient to preclude recovery for personal injuries caused by such catching of his clothes, since, in taking the course pursued, the taking of risks and the existence of dangers must have been obvious, even though he had not been warned as to the dangers of the place, and could not have seen the projecting set screw. *German American Lumber Co. v. Hannah*, 30: 882, 53 So. 516, — Fla. —

19. The operator of a machine in a factory is not justified in obeying an order of his boss to clean the machine while it is in motion, if he knows the operation to be dangerous, so as to be entitled to hold his master liable for an injury resulting from the attempt. *Lowe Mfg. Co. v. Payne*, 30: 436, 52 So. 447, — Ala. — (Annotated)

Disobedience of rules.

20. A master cannot escape liability for injury to his servant, because the servant neglects in the particular case to follow any instructions which had ever been given him, and such failure contributed in some way to the accident,—especially where some of them were habitually violated not only by the ordinary workmen, but by their superiors also. *Willis v. Plymouth & C. Teleph. Exch. Co.* 30: 477, 75 Atl. 877, 75 N. H. 453.

Fellow servants and their negligence.

Negligence in selection and retention of fellow servants, see *supra*, 13.

Evidence to show knowledge of incompetency of servant, see Evidence, 20, 21.

21. The mere fact that a device for diverting sawed lumber from the live rolls, which bear it away from the saw to be ready for another machine, has become out of repair so that it may fail to operate, does not render the master liable for injury to the operator of the latter machine by the sticking of a plank and its being hit by a following one, if the master has stationed men in proper places to aid the device in handling the lumber and to prevent the planks from interfering with each other, the performance of whose duties would have prevented the accident. *Carlson v. Weyerhaeuser Timber Co.* 30: 267, 97 Pac. 501, 50 Wash. 490.

22. The mere fact that a device furnished by a master may be insufficient of itself to perform a certain service does not render him liable to a servant injured by its failure to do so, if he furnishes another servant to assist the device, and such assistance makes the device perfectly safe, so that the injury is caused by the failure of the fellow servant to perform his duty. *Carlson v. Weyerhaeuser Timber Co.* 30: 267, 97 Pac. 501, 50 Wash. 490. (Annotated)

Who are fellow servants.

23. The electrician and engineer of an electric light company are fellow servants of a lineman, where they exercise no supervisory power over him or the work, so that

the company is not liable for their negligence in turning on the current while he is in a position of danger, so as to cause injury to him. *Shank v. Edison Electric Illuminating Co.* 30: 46, 74 Atl. 210, 225 Pa. 393. (Annotated)

Master's liability for servant's acts.

When relation exists, see *supra*, 2.

Liability of carrier for act of employees, see *Carriers*.

Exemplary damages against master for act of servant, see *Damages*, 1.

Conclusiveness as to master of judgment acquitting servant, see *Judgment*, 5.

Liability of city for negligence of its officers or agents, see *Municipal Corporations*, 2.

24. The owner of a convict farm is not absolved from liability in damages for the act of the warden whom he has placed in charge of the farm, in punishing a convict so severely that he dies from the effects thereof, by the fact that the warden, although having authority to punish, disobeys not only the instructions of the employer, but also the regulations of the state authorities with respect to the severity of the punishment. *Tillar v. Reynolds*, 30: 1043, 131 S. W. 969, — Ark. —

Who are independent contractors.

25. A person contracting with a public drainage board to construct a drain under plans and specifications made a part of the contract is an independent contractor, where he has sole control of the work, and the board has no control or superintendence thereof except the right to terminate the contract for failure to comply with its terms, and the right to cause the drain to be completed in case he failed to perform the contract, and therefore is not excused from liability for personal injuries caused by negligently depositing the dirt excavated in constructing the drain in a public highway, on the ground that he was engaged as the agent of the board in the performance of work of a public nature. *Solberg v. Schlosser*, 30: 1111, 127 N. W. 91, — N. D. —

MATERIALITY.

Of evidence, see *Evidence*, 19-25.

MAXIMS.

1. A wrongdoer will not be allowed to profit by his own fraud. *Phillips v. Chase*, 30: 159, 89 N. E. 1049, 203 Mass. 556.

2. *Damnum absque injuria*. *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 30: 231, 95 Pac. 224, 20 Okla. 583.

3. *De minimis non curat lex*. *McGregor v. Harm*, 30: 649, 125 N. W. 885, — N. D. —

4. *Ejusdem generis*. *State v. Chamberlain*, 30: 335, 127 N. W. 444, — Minn. —

5. Ignorance of the law is no excuse. *Waggoner v. Waggoner*, 30: 644, 68 S. E. 990, — Va. —

6. *Qui facit per alium facit per se*. *Penas v. Chicago, M. & St. P. R. Co.* 30: 627, 127 N. W. 926, — Minn. —
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7. *Res ipsa loquitur*. *Rich v. Asheville Electric Co.* 30: 428, 68 S. E. 232, 152 N. C. 689.

8. *Respondeat superior*. *Southern R. Co. v. Harbin*, 30: 404, 68 S. E. 1103, — Ga. —; *Updike v. Omaha*, 30: 589, 127 N. W. 229, — Neb. —; *Penas v. Chicago, M. & St. P. R. Co.* 30: 627, 127 N. W. 926, — Minn. —

9. *Semper presumitur pro matrimonia*. *Re Lando*, 30: 940, 127 S. W. 1125, — Minn. —

10. *Sic utere tuo ut alienum non laedas*. *District of Columbia v. Kraft*, 30: 957, 38 Wash. L. Rep. 406, 35 App. D. C. 253.

11. The expression of one thing excludes all others. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —

MECHANICS' LIENS.

Title of statute as to, see *Statutes*, 3.

For what work or materials.

1. No lien exists against a building for labor performed for one who has contracted to furnish fitted stone for it, where the statute provides that whoever performs labor in erecting a building, by virtue of a contract with, or by the consent of, the owner, has a lien thereon. *Munroe v. Clark*, 30: 82, 77 Atl. 696, — Me. — (Annotated)

2. A statute conferring a right to a lien upon laborers does not include contractors who do not themselves perform some labor. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —

3. A statute giving a lien to one who performs work and labor for a railroad does not apply to one who contracts to do construction work by means of employees, but who does not himself perform any work or labor. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. — (Annotated)

To what property attaches.

4. One who has furnished material under an entire contract for a double building being erected on adjoining lots owned in severalty, under a single joint contract with the owners thereof, is not entitled to a separate lien against one lot and the part of the building standing thereon, under a statute providing that, if labor is done or materials furnished under a single contract for several buildings upon separate lots, the person furnishing the same shall be entitled to a lien therefor upon all such buildings and the lots upon which they are situated, and it is immaterial that the materialman, at the request of the builder and the owner of the lot against which a lien is not sought to be enforced, and for a valuable consideration, attempted to waive his lien on such lot, where it is alleged that other defendants, not parties to such agreement, claim an interest in the property. *Stoltze v. Hurd*, 30: 1219, 128 N. W. 115, — N. D. — (Annotated)

MEETING.

Disturbing, see *Disturbing Meeting*.

MENTAL ANGUISH.

Damages for, see Damages, 11.

METERS.

For gas, see Gas, 1.

MINES.

Jurisdiction of equity of suit to prevent waste, see Equity, 2.

Injunction against pumping of oil and gas well, see Injunction.

Sufficiency of evidence to show abandonment of lease, see Evidence, 30.

1. If a lessee in an oil and gas lease giving him the right for the period of ten years to explore for oil and gas, and providing that, if a well is not completed on the leased premises within three months from the date thereof, the lessee shall pay to the lessor in advance a quarterly cash rental for each additional three months the completion of a well is delayed, has not actually entered upon the land thereunder, the relinquishment of his right to do so, or his abandonment, is purely a question of intention, and may be established by proof of such facts and circumstances as evince a voluntary waiver of his rights. *Smith v. Root*, 30: 176, 66 S. E. 1005, 66 W. Va. 633.

2. An oil and gas lease giving the lessee the right for the period of ten years to explore for oil and gas, and providing that, if a well is not completed on the leased premises within three months from the date of the lease, the lessee shall pay the lessor, in advance, a quarterly cash rental for each additional three months the completion of a well is delayed, is an executory contract, and vests no title in the lessee to the oil and gas in place. *Smith v. Root*, 30: 176, 66 S. E. 1005, 66 W. Va. 633.

3. An oil and gas lease whereby the lessee is given the right for the period of ten years to explore for oil and gas, and which provides that, if a well is not completed on the premises within three months from the date thereof, the lessee shall pay to the lessor in advance a quarterly cash rental for each additional three months the completion of a well is delayed, contemplates development of the premises within a reasonable time, and the lessee may lose his rights thereunder before the expiration of the ten years by abandonment of the lease, notwithstanding there is no forfeiture clause in the contract. *Smith v. Root*, 30: 176, 66 S. E. 1005, 66 W. Va. 633.

(Annotated)

MINORS.

See Infants.

MISTAKE.

In telegram, see Damages, 5; Evidence, 6; Parties, 6; Telegraphs, 4.

Of widow electing to take under will, see Wills, 7.

MITIGATION.

Evidence in mitigation of damages, see Evidence, 24.

MONEY.

Prohibiting exportation of Philippine coin, see Constitutional Law, 7.

MONOPOLY AND COMBINATIONS.

1. Contracts by which a corporation which buys up and consolidates all but a small percentage of the ice manufacturing plants of the city, in order to control the market and suppress competition, requires stockholders of the absorbed plants to refrain from re-engaging in the business for a period of ten years, are void as a restraint of trade, and are within a statute declaring guilty of conspiracy any corporation or individual which shall enter into any contract having for its object the limiting of the quantity of any commodity to be produced, and cannot be enforced by a corporation organized to take over the business, property, and contracts of the one which effected the consolidation. *Merchants' Ice & Cold Storage Co. v. Rohrman*, 30: 973, 128 S. W. 599, 138 Ky. 530.

2. That no effort is made to control, fix, or raise the price of the product of certain plants which have been bought in by one concern to control the market and suppress competition, does not render enforceable a contract by which holders of stock in such concern agreed not to enter into the business within the city for a series of years. *Merchants' Ice & Cold Storage Co. v. Rohrman*, 30: 973, 128 S. W. 599, 138 Ky. 530.

3. A system of contracts by which a manufacturer of medicine under a secret formula, which he puts upon the market under a tradename and in a trade dress, undertakes to control the retail price by fixing the price at which it shall be sold, and the dealers who may secure it, is void as in restraint of trade. *W. H. Hill Co. v. Gray & Worcester*, 30: 327, 127 N. W. 803, — Mich. —.

MORTGAGE.

As to chattel mortgage, see Chattel Mortgage.

Statute displacing mortgage lien, see Constitutional Law, 9, 15.

Damages for breach of contract to purchase mortgage, see Damages, 3.

What constitutes fixtures as between mortgagor and mortgagee, see Fixtures.

Limitation period for enforcement of testamentary lien, see Limitation of Actions, 3.

Right of mortgagee to maintain action for injury to mortgaged property, see Parties, 2.

Malicious evasion of tender of money necessary to prevent foreclosure of land contract, see Torts.

What constitutes waste by tenant of mortgagor as against mortgagee, see Waste.

The title to the mortgage passes at the time of making the contract, where one interested in a building operation agrees with a materialman that if he will furnish

certain materials for the project, and take in part payment a specifically described mortgage on the property, "to purchase from you within sixty days after its delivery" the mortgage, the contractor stating "I purchase simply what you get." *Henderson v. Jennings*, 30: 827, 77 Atl. 453, 228 Pa. 188.

MOVING PICTURES.

Exhibition of, on Sunday, see Sunday, 3.

MUNICIPAL CORPORATIONS.

Imputing to city contributory negligence of employee, see Negligence, 6.

Right of taxpayer to restrain performance of contract, see Parties, 7.

Construction of contract between municipality and telephone company, see Telephones, 2, 3.

Construction of contract by water company, see Waters, 7.

Liability for damages.

Liability for defects or obstructions in street, see Highways.

Injury resulting from negligence of municipality and other causes, see Joint Creditors and Debtors, 2.

1. A city upon which the legislature has conferred powers, for the advantage of the city itself, to enable it to hold its property and to conduct such affairs as are for its benefit in its corporate capacity, as distinguished from those powers which relate to its governmental functions, is bound to the same character of duties and liabilities as to such privileges and benefits as are imposed upon private individuals, although no statute so provides. *Udike v. Omaha*, 30: 589, 127 N. W. 229, — Neb. —.

2. A city, in flushing its streets for the promotion of the health, comfort, and safety of the general public, acts in its governmental capacity, and is therefore not liable for injuries to a passerby by the bursting of a hose through the negligence of its employees. *Kippes v. Louisville*, 30: 1161, 131 S. W. 184, 140 Ky. 423. (Annotated)

3. A municipal corporation cannot, in grading and guttering streets, carry surface water out of its natural watershed, and cast it in a body on land outside its limits, without liability for the injury thereby caused. *Baker v. Akron*, 30: 619, 122 N. W. 926, — Iowa. —. (Annotated)

4. That a season in which injury is done to land outside the limits of a municipality, by surface water turned by it out of its course, and cast upon such land, was unusually wet, does not absolve the municipality from liability for the injury. *Baker v. Akron*, 30: 619, 122 N. W. 926, — Iowa. —.

NAME.

Necessity of proving name of person as laid in indictment for his murder, see Evidence, 31.

In indictment, see Indictment, etc.

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Of party in writ, see Writ and Process, 1.

NATURALIZATION.

Right of officer to retain naturalization fees, see Officers.

NECESSITY.

Works of, on Sunday, see Sunday, 4.

NEGLIGENCE.

In operation of automobiles, see Automobiles.

In payment of check, see Banks, 2, 3.

As to bridges, see Bridges.

Matters peculiar to action for death, see Death.

Presumption of, see Evidence, 6.

Opinion evidence as to, see Evidence, 14.

Evidence of habit as to, see Evidence, 19.

As to highways, see Highways.

Homicide resulting from, see Homicide.

Of master or servant, see Master and Servant.

Of municipal corporations, see Municipal Corporations.

As to proximate cause, see Proximate Cause.

Of railroads, see Railroads.

As to telegrams, see Telegraphs.

As question for jury, see Trial, 8, 13.

Contributory negligence as question for jury, see Trial, 8, 10, 11.

Dangerous premises.

Keeping of nitric acid on premises as nuisance, see Nuisances, 1.

1. The negligent breaking by a property owner of a carboy of acid upon such property, which causes in the room where it is kept conditions indicating the presence of fire, is not such recklessness, wantonness, or wilfulness with respect to firemen who are summoned to extinguish the supposed conflagration, as to render him liable for injury to them from the acid fumes. *Lunt v. Post Printing & Pub. Co.* 30: 60, 110 Pac. 203, — Colo. —.

2. An owner of property owes no duty to firemen summoned to extinguish a fire which appears to have started upon it to warn them of the presence of quantities of acid in the room where the fire seems to be, the fumes from which may be dangerous to life. *Lunt v. Post Printing & Pub. Co.* 30: 60, 110 Pac. 203, — Colo. —.

3. An owner of property upon which indications of fire are present does not, by turning in a fire alarm, extend an invitation to the members of the fire department to enter the premises, within the rule regarding property owner's responsibility to invitees for the safe condition of the property. *Lunt v. Post Printing & Pub. Co.* 30: 60, 110 Pac. 203, — Colo. —. (Annotated)

4. One summoning the municipal fire department to extinguish a fire which appears to have started on his property is under no obligation to its members to ac-

quaint himself with the character of the smoke issuing from a room, whether it is caused by fire or is the fumes of acid which he keeps there. *Lunt v. Post Printing & Pub. Co.* 30: 60, 110 Pac. 203, — Colo. — Imputed.

5. The negligence of the driver of a fire engine is not imputable to the municipal corporation employing him, so as to prevent recovery from a railroad for negligence contributing to the destruction of such engine. *Paterson v. Erie R. Co.* (N. J. Err. & App.) 30: 209, 75 Atl. 922, 78 N. J. L. 592.

NEGOTIABILITY.

Of bills or notes, see Bills and Notes, 1.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

Right to bill of review because of, see Appeal and Error, 14.

NEW TRIAL.

Right to, after reversal on appeal, see Appeal and Error, 33.

NITRIC ACID.

Keeping of, on premises as nuisance, see Nuisances, 1.

NONRESIDENCE.

As ground for set-off, see Set-Off and Counterclaim.

NOTES.

In general, see Bills and Notes.

NOTICE.

To carrier of probable injury from failure to transport, see Carriers, 16.

To mortgagee of special assessment displacing mortgage lien, see Constitutional Law, 9, 15.

As affecting right to raise estoppel, see Estoppel, 4.

Burden of proof as to, see Evidence, 4. Evidence of, see Evidence, 20, 21.

Of garnishment proceeding to principal, see Garnishment, 4.

Of defect in street, see Highways, 12.

To master of incompetence of servant, see Master and Servant, 13.

Of unrecorded deed to subsequent purchaser, see Records and Recording Laws.

To telegraph company of importance of message, see Telegraphs, 5.

To telegraph company that message is for benefit of addressee, see Telegraphs, 6.

Notice to the active manager of a corporation who is alleged to have acted as agent therefor is not such notice to the corporation as will suffice to bind it to third persons, upon the ground of implied authority to him to act as agent, or upon the ground of estoppel to deny his authority. 30 L.R.A. (N.S.)

ty so to act, where the interests involved in the transaction as to which he is alleged to have acted for the corporation are adverse thereto. *Schlesinger v. Forest Products Co.* (N. J. Err. & App.) 30: 347, 76 Atl. 1,024, 78 N. J. L. 637.

NUISANCES.

1. The keeping by a printer of a quantity of nitric acid in carboys upon his premises, for use in his business, is not such a nuisance as to render him liable for injuries to a fireman, summoned to extinguish a fire which seems to have started in the room where it is kept, through the breathing of the acid fumes. *Lunt v. Post Printing & Pub. Co.* 30: 60, 110 Pac. 203, — Colo. —.

2. A railway constructed upon a city street under legislative authority is not a nuisance *per se*, although it may become such through the manner of construction or operation. *McKay v. Enid*, 30: 1,021, 109 Pac. 520, — Okla. —.

OBJECTIONS.

To raise question on, see Appeal and Error, 9, 10.

OBSTRUCTION.

Of highway, see Highways.

OFFICERS.

Bonds of, see Bonds.

Of corporations, see Corporations, 2.

Quo warranto to try title to office, see Courts, 5.

Mandamus to, see Mandamus.

Serving corporation by service on, see Writ and Process, 2, 3.

The fees or compensation to be turned over to the county treasurer by a county clerk who is by statute upon a salary in lieu of all fees or compensation for services rendered by him, which shall be so turned over, includes fees collected under the naturalization laws of the United States, which authorize and permit him to retain a portion of the fee received, although the Federal law is passed subsequently to the state law, so that they were not directly in contemplation when the state law was passed. *Barron County v. Beckwith*, 30: 810, 124 N. W. 1,030, 142 Wis. 519. (Annotated)

OFFSETS.

Set-off generally, see Set-Off and Counterclaim.

OIL.

Injunction against pumping, see Injunction.

Negligent discharge of, into water as proximate cause of resulting fire, see Proximate Cause, 2.

As to mines, generally, see Mines.

OPINIONS.

Admissibility in evidence, see Evidence, 14, 15.

OPIUM.

Prosecution for wrongful sale of, see Evidence, 15.

PARENT AND CHILD.

Jurisdiction of court to determine right of visitation by parent, see Courts, 6.

Matters as to infants, generally, see Infants.

1. A father may recover damages for injury to his minor son because of his employment without his knowledge as brakeman by a railroad company which knows of his minority, and the fact that the son assumes the risk of his employment, so that he could not recover for his own injury, is immaterial. *Hendrickson v. Louisville & N. R. Co.* 30: 311, 126 S. W. 117, 137 Ky. 502. (Annotated)

Legitimation.

Contempt in disobeying order permitting natural mother to visit child legitimated by father, see Contempt, 1.

Necessary parties defendant in action by natural mother of legitimated child to enforce right to visit it, see Parties, 8.

Necessary parties to contempt proceeding against father of legitimated child for disobeying order permitting mother to visit child, see Parties, 9.

2. The mother of an illegitimate minor child does not lose the right to visit the child, where the exercise of such right will not conflict with its best interests, because the child has been legitimated by its father under a statute providing that the father of an illegitimate child, by acknowledging it as his own and treating it as if it were legitimated, thereby adopts it as such, and it is thereupon deemed legitimate from birth. *Allison v. Bryan*, 30: 146, 109 Pac. 934, — Okla. —.

Adoption.

Sufficiency of objection as to setting aside decree of adoption, see Appeal and Error, 9, 10.

Sufficiency of evidence to show undue influence in securing adoption, see Evidence, 26.

Setting aside decree of adoption, see Judgment, 7-9.

3. The mother of an illegitimate child, by consenting to a deed of adoption by its natural father, which relates solely to the child's right of inheritance from its father, and which is by its terms limited according to the provisions of a statute which does not undertake to establish the relation of parent and child further than to give the child a right of inheritance, does not thereby yield her rights under a statute providing that an illegitimate child cannot be adopted without the consent of its mother, and that the mother of such child is entitled to its custody, services, and earnings. *Allison v. Bryan*, 30: 146, 109 Pac. 934, — Okla. —.

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4. The voluntary adoption of an illegitimate minor child—to the custody, services, and earnings, of which its natural mother is by statute entitled, and as to which the statutes provide that it cannot be adopted without the consent of the mother, if living, except that consent is not necessary from a mother who has forfeited her rights to the child for specified reasons—by its natural father, without the mother's consent, where she has not forfeited her rights under the statute, is not valid as to her, notwithstanding the father, acting under a statute providing that the father of an illegitimate child, by acknowledging it as his own, and treating it as if it were legitimate, thereby adopts it as such, and such child is thereupon deemed legitimate from birth, had previously received the child into his home, and lawfully effected its legitimation. *Allison v. Bryan*, 30: 146, 109 Pac. 934, — Okla. —.

(Annotated)

5. An adopted child is not issue within the meaning of a statute giving a widow certain rights in her husband's estate in the absence of issue of the marriage, although the statute provides that an adopted child shall, for the purpose of inheritance by it and all other legal consequences and incidents of the natural relation of parents and children, be deemed the child of the parents by adoption. *Morse v. Osborne*, 30: 914, 77 Atl. 403, — N. H. —.

(Annotated)

PAROL EVIDENCE.

See Evidence, 12, 13.

PARTIES.

To contracts, see Contracts, 1.

Description of party in writ, see Writ and Process, 1.

Plaintiff.

Abutting owner, see Highways, 2-4.

1. A devisee under the valid will of a person who, subsequent to the execution thereof, and while insane, executed a deed to one who had knowledge of the insanity, and who gave no substantial consideration, has sufficient interest to sue the grantee to set aside the deed as a cloud on title, which was alleged to have passed under the will. *Bethany Hospital Co. v. Philippi*, 30: 194, 107 Pac. 530, 82 Kan. 64.

(Annotated)

2. A mortgagee may maintain an action in his own name for injury to the mortgaged property. *Delano v. Smith*, 30: 474, 92 N. E. 500, 206 Mass. 365.

3. One who owns the equitable title to real property and is in possession of same may maintain an action for permanent injuries thereto. *Foster Lumber Co. v. Arkansas Valley & W. R. Co.* 30: 231, 95 Pac. 224, 20 Okla. 583.

(Annotated)

4. The state revenue agent may maintain an action on behalf of the board of levee commissioners to hold the bond of its secretary and treasurer liable for public money received by him, under a statute making it his duty to investigate the ac-

counts of levee board officers and to maintain suits against them. *Adams v. Williams*, 30: 855, 52 So. 865, — Miss. —.

5. The consignee of threshing machines ordered for the purpose of sale during the harvesting season upon orders previously taken, may refuse to accept the machines when tendered by the carrier, where, because negligently delayed in transportation, they arrived too late to serve the purpose for which they were ordered, and hold the carrier liable for profits which he would have made by selling them if they had arrived in time, notwithstanding title may have been retained by the consignor. *Clute v. Chicago, R. I. & P. R. Co.* 30: 1071, 111 Pac. 431, — Kan. —. (Annotated)

6. The addressee of a telegram may sue the company in tort for loss sustained by its alteration of the message, if it was for his benefit, and the company had express or implied knowledge of that fact. *Anniston Cordage Co. v. Western U. Teleg. Co.* 30: 1116, 49 So. 770, 161 Ala. 26. (Annotated)

7. A resident taxpayer of a municipality may maintain an action to restrain the performance of an illegal contract for the installation of a heating and ventilating system in a proposed public building, although he shows no special private interest. *Hannan v. Board of Education*, 30: 214, 107 Pac. 646, — Okla. —. Parties defendant.

8. The wife of one who, with her consent, has legitimated his own bastard child, is not a necessary party to an action brought by the natural mother of the child to compel the father to permit her to visit it, where the child, by the act of the father, was not made an heir of the wife; and it is immaterial that she has voluntarily made it her heir. *Allison v. Bryan*, 30: 146, 109 Pac. 934, — Okla. —.

9. The wife of one who, with her consent, has legitimated his own bastard child, is not a necessary party to a contempt proceeding against the father for failure to comply with a court order directing him to permit the natural mother of the child to visit it at stated intervals, where the father, in legitimating the child, did not make it the heir of his wife, although the father attempts to set up as a defense to the contempt proceedings the refusal of his wife to permit him to obey the order permitting visitation. *Allison v. Bryan*, 30: 146, 109 Pac. 934, — Okla. —.

PARTITION.

A homestead set apart to a widow by the probate court from the estate of her deceased husband, for the use of herself as a home, is not, while maintained by her as such, liable to partition at the suit of the heirs of the deceased husband. *Holmes v. Holmes*, 30: 920, 111 Pac. 220, — Okla. —.

PARTNERSHIP.

As to partnership bankruptcy, see Bankruptcy, 3, 10.
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PASSENGER CARRIERS.

See Carriers.

PAYMENT.

Application of deposit by bank, see Banks, 1.

Of depositor's check, see Banks, 2, 3.

Presentation of negotiable paper for, see Bills and Notes, 2, 3.

PENALTIES.

For refusal to receive telegram, see Telegraphs, 2.

PERFORMANCE.

Of contract, generally, see Contracts, 11, 12.

Specific performance, see Specific Performance.

PERMIT.

To use highway, see Highways, 1.

PERSONAL INJURIES.

On bridges, see Bridges.

Evidence of complaint by person injured, see Evidence, 17.

Insurance against liability for, see Insurance, 12-14.

To employee, generally, see Master and Servant.

Proximate cause of, see Proximate Cause.

In general, see Negligence.

PERSONAL PROPERTY.

Mortgage on, see Chattel Mortgage.

PETITION.

In pleading, see Pleading, 6-8.

PETROLEUM.

In mines, generally, see Mines.

PHILIPPINES.

Prohibiting exportation of Philippine coin, see Constitutional Law, 7.

PHYSICIANS AND SURGEONS.

Validity of statute forbidding physicians to advertise special ability, see Constitutional Law, 13.

Ambiguity of statute as to revocation of license of physician, see Statutes, 2.

Due process in revocation of license, see Constitutional Law, 8.

Liability of master for negligence of physician attending servant, see Master and Servant, 6.

PLAINTIFFS.

Parties plaintiffs, see Parties, 1-7.

PLEA.

See Pleading, 9-13.

PLEADING.

Joinder of causes of action, see Action or Suit, 4.

Verification of amendment to affidavit, see Affidavits.

Reversal for error as to, see Appeal and Error, 22.

Evidence admissible under, see Evidence, 32.

Amendment.

As affecting limitation of action, see Limitation of Actions, 5.

1. In the absence of an answer, a petition may be amended without leave. *Jenkins v. Hawkeye Commercial Men's Asso.* 30: 1181, 124 N. W. 199, — Iowa, —.

2. A departure arises where a complaint charging liability of a railroad company to an employee for injuries caused by the use of couplers not of the ordinary type is amended so as to show that defendant was engaged in interstate commerce, and did not use the couplers required by the act of Congress. *Allen v. Tuscarora Valley R. Co.* 30: 1096, 78 Atl. 34, — Pa. —.

3. An amendment of the complaint in an action for damages for mistake in the transmission of a telegram which was insufficient because failing to allege negligence, should be allowed upon reversal of a judgment of nonsuit, where the complaint was not challenged except by motion for nonsuit, although insufficiency of the complaint is not a ground for nonsuit, and upon the trial a prima facie case of negligence was established. *Strong v. Western U. Teleg. Co.* 30: 409, 109 Pac. 910, 18 Idaho, 389.

Dismissal.

4. A petition filed with the clerk of the district court will not be dismissed because entitled in, and by the clerk given the same docket number as, a former case between the same parties, which had been finally closed in that court, in the absence of a showing of prejudice. *Allison v. Bryan*, 30: 146, 109 Pac. 934, — Okla. —.

Duplicity.

5. A petition in an action to cancel a deed which alleges that the deed is void because of the mental weakness of the grantor and the undue influence exercised upon him while in that condition states but a single cause of action, as such grounds are not inconsistent in the sense that they would prevent proof showing both. *Bethany Hospital Co. v. Philippi*, 30: 194, 107 Pac. 530, 82 Kan. 64.

Declaration or complaint.

6. The return of the premiums paid cannot be secured in an action praying damages for failure to make a loan on an insurance policy, as provided in the contract, and it is immaterial that the complaint contains language indicating an intention on plaintiff's part to repudiate the contract, if it also shows that the insurer had no such intent. *Lewis v. New York L. Ins. Co.* 30: 1202, 181 Fed. 433, — C. C. A. —.

7. A complaint which alleges that defendant, while engaged in excavating a ditch (under contract with the county drainage board), deposited large quantities of dirt from the ditch in a public highway, that he carelessly and negligently failed to level such deposits, and allowed them to remain in such condition as to render the 30 L.R.A. (N.S.)

highway unsafe for public travel, and that plaintiff, while attempting to drive along such highway, and while exercising due care, was thrown from his wagon by reason of such uneven condition and injured, states a cause of action for violation of a duty not to render the highway dangerous, and not for breach of the contract to construct the ditch, so as to prevent recovery of damages for the injuries on the ground that the plaintiff, not being a privy to the contract, could not recover for the injuries if they had arisen from a breach. *Solberg v. Schlosser*, 30: 1111, 127 N. W. 91, — N. D. —.

8. An allegation that a property owner had knowledge, either actual or implied, of a certain fact, amounts merely to an allegation that he had implied knowledge thereof. *Lunt v. Post Printing & Pub. Co.* 30: 60, 110 Pac. 203, — Colo. —.

Pleas and answers.

Raising question as to, for first time on appeal, see Appeal and Error, 17.

Evidence admissible under, see Evidence, 32.

9. A defendant, by voluntarily going to trial without a reply being filed to the answer, where he is not bound to do so, thereby waives it, and is regarded as consenting to go to the proof of the answer as if it were denied. *Allison v. Bryan*, 30: 146, 109 Pac. 934, — Okla. —.

10. Denial upon information and belief of matters necessarily within the knowledge of the pleader is not permissible. *Chicago, R. I. & E. P. R. Co. v. Wertheim*, 30: 771, 110 Pac. 573, — N. M. —. (Annotated)

11. A defense to an assault by the conductor of a car upon a passenger, that it was the result of the use of only necessary force rightfully to eject the passenger from the car, must be specially pleaded. *Jackson v. Old Colony Street R. Co.* 30: 1046, 92 N. E. 725, 206 Mass. 477.

12. A master must plead assumption of risk to be entitled to present such defense to the jury, in an action by his servant to hold him responsible for personal injuries, where he relies on assumption of risk in its true sense, which refers to risks arising out of negligence of the master which are known to, and the danger of which is appreciated by, the servant. *Duffey v. Consolidated Block Coal Co.* 30: 1067, 124 N. W. 609, — Iowa, —.

13. A mere allegation that the injuries for which a servant is suing his master were such as he assumed the risk of in his employment amounts to no more than a general denial, and does not raise the question of assumption of risk of the employer's negligence. *Duffey v. Consolidated Block Coal Co.* 30: 1067, 124 N. W. 609, — Iowa, —.

14. The allegation that a quarry is undeveloped does not conflict with another that it is of great value, so as to make demurrable a bill to annul a conveyance of the property secured by fraud. *Crompton v. Beedle*, 30: 748, 75 Atl. 331, 83 Vt. 287.

15. A special demurrer on the ground

that the allegation in a complaint against a carrier for failure to stop its train at a particular flag station and receive plaintiff as a passenger, that plaintiff, in accordance with the rules of the company and the custom, flagged the train and tried to bring it to a stop for the purpose of boarding it, failed to specify in what way the train was flagged, or what custom or rule of the company was violated, was properly overruled, as the allegation was tantamount to saying that it was the habit of the defendant to stop such train at the particular station whenever signaled, but that it failed to do so when flagged by plaintiff. *Southern R. Co. v. Wallis*, 30: 401, 66 S. E. 370, 133 Ga. 553.

16. A special demurrer on the grounds that the allegation in a complaint against a carrier for failure to stop its train at a flag station and receive plaintiff, a physician, as a passenger, that plaintiff was not well, and on account of his physical condition, and to keep from driving in the cold and bad weather, had gone on a train to the flag station to see his patients, was irrelevant, was properly overruled, as the allegation was but matter of inducement, introductory to the narrative of the cause of action. *Southern R. Co. v. Wallis*, 30: 401, 66 S. E. 370, 133 Ga. 553.

17. The overruling of a special demurrer to the allegation in a complaint against a carrier for failure to stop its train at a particular flag station and receive plaintiff as a passenger, that plaintiff was left at the station without means of conveyance to get home, that it was just at night, that the weather was cold and bad and the roads muddy, and that plaintiff had to walk home, a distance of 7 miles, whereby he was made sick, was not error, as such averments were proper to be considered in estimating the damages, if, under the allegations, plaintiff was entitled to recover. *Southern R. Co. v. Wallis*, 30: 401, 66 S. E. 370, 133 Ga. 553.

18. The question of the right to a jury trial cannot be raised by a demurrer to the complaint, which merely raises the question whether or not it states a cause of action, or by objection to the introduction of evidence. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind.

19. The filing of a general demurrer to a declaration is equivalent to pleading to the merits of the case. *Cowart v. W. E. Caldwell Co.* 30: 720, 68 S. E. 500, 134 Ga. 544.

PLEDGE AND COLLATERAL SECURITY.

1. A pledge of property which is not sufficient to effect a lien because of non-delivery cannot be charged with an equitable lien as against creditors of the pledgeor, by the fact that there was an intent to pledge, and that a certificate in the form of a warehouse certificate was given covering the property. *Fourth Street Nat. Bank v. Taylor*, 30: 552, 172 Fed. 177, 96 C. C. A. 629.

2. No pledge valid as against creditors can be effected by the issuance and delivery 30 L.R.A.(N.S.)

of certificates similar to those issued by warehousemen, which purport to cover property retained in possession of the pledgeor, with nothing outside of the certificates to indicate the rights of the certificate holders to it. *Fourth Street Nat. Bank v. Taylor*, 30: 552, 172 Fed. 177, 96 C. C. A. 629. (Annotated)

3. A bank which, in order to remove an overdue note from its books, takes the note of a third person for its amount, with such note as collateral thereto, releases, in favor of attaching creditors of the maker, its lien on property which had been assigned to it as collateral for the overdue note, at least where it permits assigned funds to pass through its hands into those of the maker of the note for a long period of time, without any attempt to apply them to the satisfaction of the note. *Lincoln v. National Metropolitan Bank*, 30: 1215, 35 App. D. C. 362. (Annotated)

POISON.

Constitutionality of statute regulating sale of, see Constitutional Law, 2, 5.

Ambiguity of statute regulating sale of, see Statutes, 1.

Negligence in sale of, as question for jury, see Trial, 13.

POLICE.

Liability for assault by special policeman, see Carriers, 3; Master and Servant, 2.

POLICE POWER.

See Constitutional Law, 7, 11-13.

POSSESSION.

As basis of action for injury to property, see Parties, 3.

POSTOFFICE.

Delay in mails of motion papers, see Judgment, 6.

PREFERENCES.

By bankrupt, see Bankruptcy, 4, 5.

PREJUDICIAL ERROR.

See Appeal and Error, 21-32.

PREMATURITY.

Of action, see Action or Suit, 2, 3.

PRESCRIPTION.

Prescriptive rights in waters, see Waters, 5, 6.

PRESENTMENT.

Of note for payment, see Bills and Notes, 2, 3.

PRESUMPTIONS.

On appeal, see Appeal and Error, 11.
In general, see Evidence, 4-8.

PRINCIPAL AND AGENT.

Parties to contract negotiated through agent, see Contracts, 1.

As to agents of corporations, see Corporations.

Exemplary damages against principal for act of agent, see Damages, 1.
 Power of insurance agent to estop company, see Insurance, 8, 9.
 Imputing agent's knowledge to principal, see Notice.
 Revoking designation of state officer to receive service, see Writ and Process, 2, 3.

1. The employment of a telegraph company as a means of communication does not make it the agent of the sender, so as to bind him to the sendee by the terms of a transmitted telegram negligently altered by it. *Strong v. Western U. Teleg. Co.* 30: 409, 109 Pac. 910, 18 Idaho, 389.

Ratification of agent's acts.

2. The doctrine of ratification by one person of a contract made by another is not applicable to a case where the person who makes the contract was not at the time, and did not profess or assume to be, acting on behalf of a principal. *Schlesinger v. Forest Products Co. (N. J. Err. & App.)* 30: 347, 76 Atl. 1024, 78 N. J. L. 637.

PRINCIPAL AND SURETY.

Surety on bail bond, see Bail and Recognizance.

As to bonds generally, see Bonds.

PRIOR APPROPRIATION.

See Waters, 1-3.

PRIORITY.

Between drainage assessments and mortgage lien, see Constitutional Law, 9, 15.

Of appropriation of water, see Waters, 3.

PRIVATE ACTION.

Of abutting owner, see Highways, 2-4.

PRIVILEGE.

Of libelous communication as question for jury, see Trial, 7.

Of witness, see Witnesses, 2, 3.

PRIVILEGED COMMUNICATIONS.

In libel case, see Libel and Slander, 1-3.

PRIVITY.

Lack of effect of, on right of action for money received, see Assumpsit, 2.

Third person's right of action on contract, see Parties, 5, 6.

PROBATE COURT.

Presumption as to jurisdiction, see Evidence, 7.

PROCESS.

See Writ and Process.

PROFITS.

Right of lowest bidder to recover lost profits from municipality where contract is let to higher bidder, see Contracts, 19.

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Loss of, as element of damages, see Damages, 12.

PROMISSORY NOTES.

See Bills and Notes.

PROOFS OF LOSS.

In general, see Insurance, 10.

PROTEST.

Of note for nonpayment, see Bills and Notes, 2, 3.

PROXIMATE CAUSE.

As question for jury, see Trial, 4.

1. Failure to deliver a telegram from an insurance company, canceling a policy, which prevents the cancellation of the policy before the insured property is destroyed by fire, is the proximate cause of the loss to the insurance company. *Providence-Washington Ins. Co. v. Western U. Teleg. Co.* 30: 1170, 93 N. E. 134, 247 Ill. 84.
 Of loss by fire.

2. The act of an oil-burning vessel lying at a wharf which is oil soaked and laden with inflammable material, in discharging a quantity of fuel oil into the water, which floats under the wharf and becomes matted with particles of inflammable rubbish and debris on the water, is the proximate cause of injury to another vessel at the wharf by the burning of the oil and a portion of the wharf, although the oil is ignited by an independent, innocent act of a stranger, such as throwing a lighted cigar or burning coal into the water. *Société Nouvelle D'Armeement v. United States Steamship Co.* 30: 1210, 176 Fed. 890, 100 C. C. A. 360.
 (Annotated)

Of injury to servant.

3. A street car company is not, although it is disobeying a statute in using a car without a vestibule in front in the winter time, liable for injury to a conductor who falls from the running board while attempting to raise a side curtain to collect a fare, since the injury was not one which should have been anticipated, and is therefore not the proximate cause of the wrongful act. *Rich v. Asheville Electric Co.* 30: 428, 68 S. E. 232, 152 N. C. 689.
 (Annotated)

4. The binding of the side curtain of a summer street car in the crevice in which it runs is not the proximate cause of injury to a conductor who, in collecting fares, attempts to raise the curtain to reach passengers in a seat behind it, and because it does not work properly falls from the car. *Rich v. Asheville Electric Co.* 30: 428, 68 S. E. 232, 152 N. C. 689.

PUBLIC CONTRACT.

See Contracts, 14-20.

PUBLIC CORPORATIONS.

See Counties; Municipal Corporations.

PUBLIC IMPROVEMENTS.

Due process in assessments, see Constitutional Law, 4.

Making assessments take priority over existing mortgages, see Constitutional Law, 9, 15.

Making of, as exercise of police power, see Constitutional Law, 11.

Letting contract to lowest bidder, see Contracts, 18.

Title of statute as to, see Statutes, 4.

1. The making of assessments for drainage improvements is an exercise of the power of taxation. *Baldwin v. Moroney*, 30: 761, 91 N. E. 3, 173 Ind. 574.

2. The assessment for filling a low tract of land in a city may be laid upon the lots benefited according to area, although they are of different value, and some are filled to a greater depth than others, so that the cost of the work is greater. *Bowes v. Aberdeen*, 30: 709, 109 Pac. 369, 58 Wash. 535.

PUBLIC LANDS.

A surveyor employed to survey and plat the land in a town site, and to arrange the plat to conform to the improvements and occupation of the lots, under a statute enacted pursuant to U. S. Rev. Stat. § 2387, U. S. Comp. Stat. 1901, p. 1457, providing that the mayor of incorporated towns located on public lands may enter the lands so occupied in trust, for the benefit of the occupants, and providing for the execution of such trust as to the disposal of lots under such regulations as may be prescribed by the state legislature, cannot change the lot lines of settlers, as fixed by the extent of their occupancy, by cutting off a portion of such lots and including it in a street, since, as the rights of the actual occupants accrued at the time of the entry of the town site, the surveyor's only authority was to make a survey and plat in conformity with the lines of occupation. *Scully v. Squier*, 30: 183, 90 Pac. 573, 13 Idaho, 417. (Annotated)

PUBLIC MONEY.

Liability upon bond for loss of, or misfeasance as to, see Bonds.

Action to prevent illegal expenditure, see Parties, 7.

PUBLIC POLICY.

As affecting contract, see Contracts, 8, 9.

PUNITIVE DAMAGES.

See Damages, 1, 2.

QUANTITY.

Of land sold, see Vendor and Purchaser, 3.

QUO WARRANTO.

Power to issue, see Courts, 5.

RAILROAD COMMISSION.

Powers of state railroad commission as to interstate shipment, see Commerce, 1.

See also Corporation Commission.

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RAILROADS.

As carriers, see Carriers.

Regulation of interstate business of, see Commerce.

Existence of, on property as violation of warranty in deed, see Covenants and Conditions.

Damages for building railroad embankment in street, see Damages, 9.

Evidence in action against, see Evidence, 32.

Obstruction of highways by, see Highways, 3, 4.

Mechanics' lien on, see Mechanics' Liens, 3.

Injury to employee, see Master and Servant.

Liability for destruction of fire engine, see Negligence, 5.

Railway on city street as nuisance, see Nuisances.

The statutory duty of a railroad company to fence its tracks does not extend to the erection of a fence to prevent one who, while at work on adjoining property, falls from a structure, from passing over the boundary line onto its right of way, to his injury. *Menut v. Boston & M. R. Co.* 30: 1196, 92 N. E. 1032, — Mass. —. (Annotated)

RAPE.

One who has had sexual relations with a child prior to the passage of a statute making it a crime carnally to know a child of her age of previous chaste character is not precluded from relying on her previous unchastity to avoid punishment for acts committed after the passage of the statute, on the theory that he cannot take advantage of his previous wrongdoing to avoid the application of the statute. *State v. Dacke*, 30: 173, 109 Pac. 1050, — Wash. —. (Annotated)

RATES.

For telephone service, see Telephones, 2, 3.

RATIFICATION.

Of decree procured by fraud; right to raise question of, see Appeal and Error, 10.

Of agent's act, see Principal and Agent, 2.

REAL PROPERTY.

Covenants and conditions as to, see Covenants and Conditions.

Measure of damages for injury to, see Damages, 9.

As to fixtures, see Fixtures.

Mortgage on, see Mortgage.

As to public lands, see Public Lands.

Records of title, see Records and Recording Laws.

Deduction of, in fixing value of capital stock for taxation, see Taxes, 1, 3, 4.

Rights, duties, and liabilities on transfer of, see Vendor and Purchaser.

Charge upon, by will, see Wills, 10.

RECEIVERS.

Contempt in disobeying order to turn over books to, see Contempt, 2.

RECOGNIZANCE.

See Bail and Recognizance.

RECORDS AND RECORDING LAWS.

On appeal, see Appeal and Error, 6-8.

Estoppel by permitting title to stand in name of another, see Estoppel, 3.

Burden of proof of lack of notice of unrecorded deed, see Evidence, 4.

1. One who purchases a lot originally worth \$300 for \$250, with knowledge that another than the grantor has expended nearly \$200 in grading it, without inquiring as to the rights of the one making the improvements, is chargeable with constructive notice of such person's rights therein, and is not an innocent purchaser without notice, within the meaning of a statute providing that deeds not recorded shall be adjudged void as to all subsequent purchasers without notice whose deeds shall be first recorded. *Dundee Realty Co. v. Leavitt*, 30: 389, 127 N. W. 1057, — Neb. —.

2. A purchaser of real estate from one who has already sold and conveyed the same to another, whose deed is not recorded, cannot hold the land as an innocent purchaser unless he was, at the time of his purchase, without notice, actual or constructive, of the rights of the prior purchaser. *Dundee Realty Co. v. Leavitt*, 30: 389, 127 N. W. 1057, — Neb. —.

RE-CROSS-EXAMINATION.

Error in refusing to permit questions on, see Appeal and Error, 26.

RELEASE.

Of collateral, see Pledge and Collateral Security, 3.

From liability by discharge in bankruptcy, see Bankruptcy, 10, 11.

RELEVANCY.

Of evidence, see Evidence, 19-25.

RELIGIOUS SOCIETIES.

Conclusiveness of decision of tribunal, see Courts, 1-4.

1. The Cumberland Church had inherent power to unite with another ecclesiastical body whose doctrine and polity were deemed in harmony with its own. *Ramsey v. Hicks*, 30: 665, 91 N. E. 344, — Ind. —.

(Annotated)

2. The power to consolidate the Cumberland Church with another ecclesiastical body resided in its General Assembly and presbytery, and not in the individual membership of the church. *Ramsey v. Hicks*, 30: 665, 91 N. E. 344, — Ind. —.

3. The provision of the constitution of the Cumberland Church, prescribing the jurisdiction of the session, presbytery, synod, and General Assembly, which declares that the jurisdiction of those courts is limited by the express provisions of the constitution L.R.A. (N.S.)

tion, limits such jurisdiction as between themselves, and does not circumscribe the sovereign power of the church itself, or of the body in which the supreme power is vested. *Ramsey v. Hicks*, 30: 665, 91 N. E. 344, — Ind. —.

4. A supreme church judicatory having authority to consolidate the church with another ecclesiastical body has power to decide upon the proper mode of procedure, and determine conclusively the regularity and validity of the proceedings. *Ramsey v. Hicks*, 30: 665, 91 N. E. 344, — Ind. —.

5. The express assent of the presbytery of the Cumberland Church to the union with the Presbyterian Church proposed by its General Assembly implied some modification of names, and empowered the General Assembly to adopt any name deemed by it most appropriate for the consolidated church. *Ramsey v. Hicks*, 30: 665, 91 N. E. 344, — Ind. —.

6. A conveyance for a consideration to the trustees of the congregation of a specified religious denomination does not create a trust in the property in favor of members of the congregation, which will prevent the proper authorities of such denomination from uniting with another ecclesiastical body, and conferring upon it a good title to the property. *Ramsey v. Hicks*, 30: 665, 91 N. E. 344, — Ind. —.

REMAINDERS.

Levy on vested remainder, see Levy and Seizure.

Contingent remainder, see Wills, 6.

REMEDIES.

Conflict of laws as to, see Conflict of Laws, 3-5.

In case of illegal contract, see Contracts, 10.

Election of, see Election of Remedies.

REMOVAL OF CAUSES.

1. A state court has jurisdiction to render a judgment for the costs which accrued before the removal of the cause to the Federal court, even though it should eventually be established that the petition which was filed before the accrual of a portion of the costs, such as those on appeal from an order denying the removal, should have been granted. *Wisecarver & Reynard v. Chicago*, R. I. & P. R. Co. 30: 1059, 122 N. W. 909, — Iowa, —.

(Annotated)

2. A state court should not enter a judgment for the costs which accrued before it in a case which was removed to a Federal court, until a final determination of the cause. *Wisecarver & Reynard v. Chicago*, R. I. & P. R. Co. 30: 1059, 122 N. W. 909, — Iowa, —.

RENEWAL.

Of insurance policy, see Insurance, 3, 4.

REPLEVIN.

Damages for loss of time, attorney's fees, and expenses incurred in defending a

replevin action which resulted in defendant's favor, cannot be recovered in a subsequent action on the replevin bond, which bound the replevin plaintiff to "pay all costs and damages that may be awarded against him," where he has paid the judgment in the replevin action in full, and there is an absence of proof of malice, want of probable cause, or bad faith on the part of the replevin plaintiff in bringing the replevin action. *Lake v. Hargis*, 30: 366, 109 Pac. 670, 82 Kan. 711. (Annotated)

REPLY.

Coming to trial without reply being filed to answer, see Pleading, 9.

REPORTS.

Admissibility in evidence, see Evidence, 11.

REPUTATION.

Injury to reputation of property as element of damages in action for waste, see Damages, 10.

Evidence as to reputation of accused, see Evidence, 19.

RESCISSION.

Of insurance policy, see Insurance, 5, 6.

Of contract of sale, see Sale, 4, 5.

Of land contract, see Vendor and Purchaser, 4-6.

RES JUDICATA.

See Judgment.

RESPONDEAT SUPERIOR.

See Master and Servant, 24, 25.

RESTRAINT OF TRADE.

See Contracts; Monopoly.

RESULTING TRUSTS.

Enforcement of, against trustee in bankruptcy, see Bankruptcy, 5.

RETAINING JURISDICTION.

See Equity, 2.

REVERSIBLE ERROR.

See Appeal and Error, 21-32.

REVIEW.

Of order or judgment, see Appeal and Error.

Review of discretion in refusing to permit filing of bill of, see Appeal and Error, 14.

1. A bill of review cannot be filed without leave from the chancellor in whose court the decree was rendered. *Smith v. Rucker*, 30: 1030, 129 S. W. 1079, — Ark. —.

2. A bill of review is a bill or complaint seeking, after the lapse of the term, to reverse or modify a decree that has been made and entered in the cause, and must be based upon error in law apparent on the face of the decree, or on the discovery of new facts 30 L.R.A. (N.S.)

since the decree was entered. *Smith v. Rucker*, 30: 1030, 129 S. W. 1079, — Ark. —. (Annotated)

REVOCATION.

Due process in revocation of license to practise medicine, see Constitutional Law, 8.

Of liquor license, see Criminal Law, 2.

Of will, see Wills.

Of designation of state officer to receive process, see Writ and Process, 2, 3.

ROADS.

See Highways.

RULES.

Of gas company, see Gas.

Violation of, by servant, see Master and Servant, 20.

SALE.

Assignment of contract for, see Assignment, 2.

Parties to contract of sale, see Contracts, 1.

Damages for breach of contract of, see Damages, 3.

When title to assign mortgage passes, see Mortgage.

Of land generally, see Vendor and Purchaser.

Passing of title; delivery.

Review on appeal of findings as to passing of title, see Appeal and Error, 20.

1. Where a specified quantity of grain, identical in kind and uniform in value, is sold from a mass, a separation is not necessary to vest title, where the intention of the parties that title shall pass before separation is clearly manifested. *Seldomridge v. Farmers' & M. Bank*, 30: 337, 127 N. W. 871, — Neb. —.

2. Actual delivery is not a condition precedent to the vesting of title to a specific chattel in a purchaser who has paid the agreed price to the vendor. *Seldomridge v. Farmers' & M. Bank*, 30: 337, 127 N. W. 871, — Neb. —.

Rights and remedies of parties.

3. The vendee of a quantity of corn sold so as to pass title without actual delivery, by accepting a bill of sale for one half thereof, and waiving his right to the other one half of the grain, which the vendor has resold to another person, to whom a bill of sale therefor has been executed, does not renounce his title to the one half for which he accepted a bill of sale. *Seldomridge v. Farmers' & M. Bank*, 30: 337, 127 N. W. 871, — Neb. —.

Rescission.

4. A contract of sale of chattels is not rescinded by stopping payment on a check drawn and delivered in payment therefor, where the check is subsequently honored on presentation thereof. *Seldomridge v. Farmers' & M. Bank*, 30: 337, 127 N. W. 871, — Neb. —.

5. Mere insolvency of the buyer at the time of a sale of chattels is not ground for rescission on the part of the seller. *J. J. Smith Lumber Co. v. Scott County Garbage Reducing & Fuel Co.* 30: 1184, 128 N. W. 389, — Iowa, —.

SALOONS.

Sale of liquor in general, see Intoxicating Liquors.

SCAFFOLD.

Negligence as to, see Master and Servant, 9, 10.

SCENIC RAILWAY.

Operation of, on Sunday, see Sunday, 2.

SCHOOLS.

Contract for installation of heating and ventilating system, see Contracts, 16, 17.

Libel of school teacher, see Libel and Slander, 2, 3.

SEQUESTRATION.

Of property in contempt proceeding, see Appeal and Error, 4.

Of books on refusal of witness to produce them, see Constitutional Law, 3.

SERVANTS.

See Master and Servant.

SERVICES.

Contracts for, see Contracts, 2-7.

Time to file claim for, against decedent's estate, see Executors and Administrators.

SET-OFF AND COUNTERCLAIM.

Application of deposit by bank in the course of business, see Banks, 1.

By garnishee, see Garnishment, 2.

Equity will enforce against a claim of a nonresident for goods sold and delivered, a set-off of a claim of the purchaser against the seller for breach of warranty in another transaction between them, where satisfaction of such claim cannot be secured by action without compelling defendant to seek the courts of the state where the seller resides. *Ewing-Merkle Electric Co. v. Lewisville Light & Water Co.* 30: 21, 124 S. W. 509, 92 Ark. 594. (Annotated)

SHIPPING.

As to ferries, see Ferry.

Proximate cause of burning of vessel, see Proximate Cause, 2.

SHOOTING.

Of passenger, see Carriers, 3, 4.

SIGNATURE.

Of testator, see Wills, 1.

SLANDER.

See Libel and Slander.

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SMALLPOX.

Infecting building with, as waste, see Waste.

SPECIAL DEPOSIT.

Application of, see Banks, 1.

SPECIAL POLICE.

Liability for assault by, see Master and Servant, 2.

SPECIFIC PERFORMANCE.

1. Specific performance of a contract for the purchase of real estate will not be decreed where a reasonable though a debatable doubt concerning the title exists, and to compel performance might visit litigation upon the purchaser in regard to the title, notwithstanding it might be declared good in an action at law. *Van Riper v. Wickersham* (N. J. Err. & App.) 30: 25, 76 Atl. 1020, — N. J. —.

2. A reasonable time after the entering of a decree for the specific performance of a contract for the purchase of land may be allowed the vendor in which to perfect the title to be conveyed, where he has alleged the tender of a good and valid deed, and the vendee has raised no objection thereto until the day of final hearing, and by the interposition of another defense has led the vendor to believe that there was no difference as to the character of the title, if the allowance of such reasonable time, which must not exceed that which the vendor might have had if the vendee had urged a defense of defective title promptly, will not work a hardship to the vendee. *Van Riper v. Wickersham* (N. J. Err. & App.) 30: 25, 76 Atl. 1020, — N. J. —. (Annotated)

SPEED.

Negligence of carrier as to, as question for jury, see Trial, 9.

SPRINGS.

Rights in waters of, generally, see Waters, 1, 4-6.

STALE DEMANDS.

See Limitation of Actions, 1, 2.

STATE COURTS.

Jurisdiction of, see Courts.

STATUTE OF FRAUDS.

In general, see Contracts, 3.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.

Review by Federal supreme court of local laws, see Appeal and Error, 2, 3.

Attaching validity of, in mandamus proceeding, see Mandamus, 3.

Ambiguity.

1. A statute forbidding druggists to sell poisons at retail except under certain conditions, one of which is that they shall

satisfy themselves that they are to be used for legitimate purposes, is not invalid for not defining the meaning of the words "re-tail" and "legitimate purposes." *Katzman v. Com.* 30: 519, 130 S. W. 990, — Ky. —.

2. A statute providing for the revocation of the license of a physician who advertises special ability to treat or cure chronic and incurable cases is not void for uncertainty. *State Medical Board v. McCrary*, 30: 783, 130 S. W. 544, — Ark. —.

(Annotated)

Entitling.

3. A title, "An Act Concerning Liens of Mechanics, Laborers, and Materialmen," is not broad enough to cover legislation extending the lien to contractors who do not themselves perform the labor. *Indianapolis Northern Traction Co. v. Brennan*, 30: 85, 87 N. E. 215, — Ind. —.

4. The right to exercise the police power to fill low land in a city may be conferred by an act the title of which is, An Act Empowering Cities to Fill Low Lands within Their Borders, and for That Purpose to Exercise the Right of Eminent Domain. *Bowes v. Aberdeen*, 30: 709, 109 Pac. 369, 58 Wash. 535.

Construction.

Question for court or jury as to, see Trial, 5.

5. Where the parties to an action involving the validity of a marriage contracted in a foreign country stipulate a translation of the applicable provisions of the foreign law, the courts are restricted in interpreting such law to a consideration of what is the significance of the English words into which the foreign law has been translated, since the stipulation concerns a matter of fact, and not of law. *Re Lando*, 30: 940, 127 N. W. 1125, — Minn. —.

6. Ballots which by statute are required to be "securely sealed in a stout paper or muslin envelop or bag" are not invalid because preserved in a paper envelop with the end merely turned back and sewed down, so as to prevent their being counted on an election contest, where it appears that the ballots produced in court were the identical ballots cast by the electors, and that they are in the identical condition that they were in when placed in the envelop by the election officers, as the statute is not mandatory. *Newhouse v. Alexander*, 30: 602, 110 Pac. 1121, — Okla. —.

(Annotated)

7. Ballots not indorsed with the initials of the poll clerks, as required by a statute providing that in such case they shall not be counted, but shall be designated as mutilated, and preserved separate from the ballots counted, are invalid and should not be counted on an election contest, as the statute, having been enacted to prevent fraudulent voting, is mandatory. *Newhouse v. Alexander*, 30: 602, 110 Pac. 1121, — Okla. —.

8. Ballots are not invalidated by the failure of the county clerk to preserve them "in some secure and safe place," as required by law, but should be counted in an election 30 L.R.A. (N.S.)

contest, where it appears that they are the identical ballots voted, and that they have not been tampered with in any way since the election, as the statutory requirement is not mandatory. *Newhouse v. Alexander*, 30: 602, 110 Pac. 1121, — Okla. —.

STOCK.

Of corporation generally, see Corporations.

STOCKHOLDERS.

See Corporations.

STOPOVER.

Wrongful stopover by passenger as ground for ejection, see Carriers, 14.

STREET RAILWAYS.

As carriers, see Carriers.

Injury to employee, see Master and Servant.

STREETS.

See Highways.

SUBSCRIPTION.

To will, see Wills, 1.

SUCCESSION TAX.

Constitutionality of, see Constitutional Law, 14.

SUNDAY.

Duty to run trains on, see Carriers, 9.

Sale of liquors on, see Constitutional Law, 10; Criminal Law, 2.

1. An amusement that is not *per se* unlawful or criminal, and is not in itself immoral or dangerous, or detrimental to the public health, will not be included within the provisions of a statute prohibiting certain specified public amusements and other like and similar amusements on Sunday, unless the same is forbidden by the statute, either by direct terms or by clear implication. *Re Hull*, 30: 465, 110 Pac. 256, 18 Idaho, 475.

(Annotated)

2. A "scenic railway" is not "any such place of public amusement" as a "merry-go-round," within the meaning of a statute prohibiting the keeping open on Sunday of "any theater, playhouse, dance house, race track, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling alley, variety hall, or any such place of public amusement." *Re Hull*, 30: 465, 110 Pac. 256, 18 Idaho, 475.

3. The term "shows," as used in a statute prohibiting "all shooting, fishing, playing, horse racing, gaming, and other public sports, exercises, and shows" on Sunday, under the rule of *ejusdem generis* refers to out-of-door sports, and therefore does not include a moving-picture exhibition, conducted within a building on a public street, although the public were admitted thereto upon payment of a certain fee by each applicant for admission. *State v. Chamberlain*, 30: 335, 127 N. W. 444, — Minn. —.

4. A statute making it a misdemeanor to run freight or excursion trains on Sunday, but expressly exempting regular trains carrying mail or passengers, is an expression of public policy as to the legality of running the excepted trains on Sunday, and a legislative construction that the running of mail and passenger trains is within the exception of a statute making it a misdemeanor for any person to pursue his business on Sunday, if not a work of necessity or of charity. *Southern R. Co. v. Wallis*, 30: 401, 66 S. E. 370, 133 Ga. 553.

SUPREME COURT OF UNITED STATES.

Jurisdiction on appeal, see Appeal and Error, 2, 3.

SURFACE WATER.

Municipal liability as to, see Municipal Corporations, 3, 4.

TAXES.

Review by Federal supreme court of state construction of, see Appeal and Error, 3.

Impairment of obligations by imposition of, see Constitutional Law, 14.

Liability of tenant to taxation for fixtures erected by him, see Landlord and Tenant, 2.

Equality; uniformity.

1. Stockholders of a bank are not denied constitutional privileges and immunities, uniformity of taxation, or the equal protection of the laws, by a statute allowing a deduction, in fixing the value of its capital stock for taxation, of only the assessed value of real estate held by it, rather than the amount invested in real estate, although it results in the taxation of the real estate to its full value, while such property is assessed to others at only a fraction of its value, if the statute provides that it shall be assessed at its full value. *Smith v. Stephens*, 30: 704, 91 N. E. 167, 173 Ind. 564. (Annotated)

Assessment; enforcement.

For public improvements, see Public Improvements.

2. A nonresident corporation doing business within the state is not within the provisions of statutes requiring inhabitants to bring in a list of their property for taxation and barring resident owners of the right to make application for abatement in case of failure to bring in the list. *John P. Squire & Co. v. Portland*, 30: 576, 76 Atl. 679, 106 Me. 234.

3. If a bank, in making a return of its capital and surplus for taxation, deducts the amount invested in real estate, under a statute providing that the assessed value of its real estate may be deducted from the valuation of its capital stock, it is not entitled to a further deduction of such assessed valuation, such item being eliminated from the account. *Smith v. Stephens*, 30: 704, 91 N. E. 167, 173 Ind. 564. 30 L.R.A. (N.S.)

4. In determining the amount of capital and surplus of the stock of a bank for taxation, under a statute permitting the assessed value of real estate held by the bank to be deducted from the valuation of the capital stock, if the amount invested in real estate is deducted by the bank from its capital and surplus in making its return, the tax officers must treat that sum as disposed of in the real estate assessment, and cannot add it to the amount of capital and surplus returned, and deduct from the total merely the actual value at which the real estate was assessed. *Smith v. Stephens*, 30: 704, 91 N. E. 167, 173 Ind. 564.

TAXPAYERS.

Right to maintain action, see Parties, 7.

TELEGRAPHS.

Parties to contract completed by telegraph, see Contracts, 1.

Presumption and burden of proof as to negligence, see Evidence, 6.

Liability of telegraph company to employee, see Master and Servant.

Failure to deliver as proximate cause of injury, see Proximate Cause, 1.

Duty to receive message.

1. The attachment to a telegram tendered for transmission, of a notice of probable damage in case of negligence in its transmission or delivery, gives the company no right to refuse to receive and transmit it. *Vermilye v. Postal Telegr.-Cable Co.* 30: 472, 91 N. E. 904, 205 Mass. 598.

2. A refusal to receive a telegram for transmission which is both intentional and unreasonable is wilful within the meaning of a statute imposing a penalty for wilfully refusing to accept a telegram for transmission. *Vermilye v. Postal Telegr.-Cable Co.* 30: 472, 91 N. E. 904, 205 Mass. 598.

Failure to transmit; delay.

3. A telegraph company must use a high degree of care and skill in the correct and prompt transmission of messages. *Providence-Washington Ins. Co. v. Western U. Telegr. Co.* 30: 1170, 93 N. E. 134, 247 Ill. 84.

Mistake in telegram.

Measure of damages for, see Damages, 4.

Presumption and burden of proof as to negligence, see Evidence, 6.

Who may maintain action for negligence, see Parties, 6.

Telegraph company as agent of sender of message, see Principal and agent, 1.

4. The sender of a telegram quoting a price at which stock will be sold may hold the transmitting telegraph company liable for damages resulting from its negligence in quoting a lower price to the sendee than that stated in the message delivered to it for transmission. *Strong v. Western U. Telegr. Co.* 30: 409, 109 Pac. 910, 18 Idaho, 389.

Notice of contents or importance of message.

5. The tender by an insurer of a telegram at a transmission office, addressed to a place only a comparatively short distance away, directing the cancellation of an insurance policy, is sufficient notice of the importance of the message to charge the company with liability, in case it fails to deliver the message, for the amount which the insurer is compelled to pay because of destruction of the property after the policy would have been canceled had the message been delivered, but before the cancellation could be otherwise effected. *Providence-Washington Ins. Co. v. Western U. Teleg. Co.* 30: 1170, 93 N. E. 134, 247 Ill. 84.

6. A telegraph company is not charged with knowledge that a message is for the benefit of the addressee by the mere fact that it reads: "Offer thirty thousand three and four ply eighths sixteen half. Quick reply." *Anniston Cordage Co. v. Western U. Teleg. Co.* 30: 1116, 49 So. 770, 161 Ala. 216.

Stipulations and conditions.

7. A stipulation in the blanks of a telegraph company, limiting the amount of damages recoverable for mistakes in unrepeatable messages, is contrary to public policy and void so far as concerns mistakes made because of defective instruments or incompetent operators, or through carelessness or negligence of the company or its servants that, with ordinary care, might have been avoided, even in the absence of a constitutional or statutory provision that such stipulations shall be void, or that telegraph companies are common carriers. *Strong v. Western U. Teleg. Co.* 30: 409, 109 Pac. 910, 18 Idaho, 389. (Annotated)

TELEPHONES.

Taking acknowledgment over, see Acknowledgment.

Construction of contract between telephone company and municipality, see Contracts, 14, 15.

Liability of telephone company to employee, see Master and Servant.

1. A telephone company cannot refuse to serve one who offered to pay its rates and comply with its reasonable rules and regulations, for the purpose of coercing payment of a debt contracted for service rendered in the past. *Danaher v. Southwestern Teleg. & Teleph. Co.* 30: 1027, 127 S. W. 963, — Ark. —. (Annotated)

2. A contract between a municipal corporation and a telephone company seeking to do business within its limits, that the rental rates for instruments shall be a certain amount per annum, merely fixes a mode of computation, and applies to contracts for a portion of the year as well as to yearly contracts, and therefore the company cannot charge at a higher rate for short term contracts than for yearly ones. *Colorado Teleph. Co. v. Fields*, 30: 1088, 110 Pac. 571, — N. M. —.

3. A telephone company whose maxi-

mum rentals are fixed by contract with the municipality in which it is to transact its business cannot enforce a regulation requiring patrons to pay a charge in addition thereto, for installing and transferring instruments. *Colorado Teleph. Co. v. Fields*, 30: 1088, 110 Pac. 571, — N. M. —.

(Annotated)

TENDER.

Evading tender of money by purchaser, see Contracts, 12, 13; Torts.

TESTAMENTARY LIEN.

Limitation period for enforcement of, see Limitation of Actions, 3.

TIME.

For taking appeal, see Appeal and Error, 6.

To present claim against decedent's estate, see Executors and Administrators.

For rendering judgment for costs in state court in case which has been removed, see Removal of Causes, 2.

For election to take under will, see Wills, 8.

TITLE.

Acquired by trustee in bankruptcy, see Bankruptcy, 7.

Of contempt proceedings, see Contempt, 4.

Of personal property, passing of, see Sale, 1, 2.

Of statute, see Statutes, 3, 4.

Sufficiency of title to maintain action for damages for trespass, see Trespass.

Defects in, see Vendor and Purchaser, 1, 2.

TOLL BRIDGES.

Negligence as to, see Bridges, 2.

TORTS.

Lien on assigned claim for, see Assignment, 3.

Master's liability for, see Master and Servant, 24, 25.

Matters as to negligence, generally, see Negligence.

Malicious evasion of a tender of money necessary to prevent a foreclosure of a land contract, by reason of which the purchaser loses the profits on a resale which he had negotiated, does not give a right of action for tort. *Loehr v. Dickson*, 30: 495, 124 N. W. 293, 141 Wis. 332.

TOWN SITES.

On public lands, see Public Lands.

TRADE FIXTURES.

See Fixtures.

TRADEMARK.

1. The words "Crown" and " Jamestown" may, when applied in combination with other words to a manufactured article,

indicate origin and manufacture, and, as so combined, be the subject of a valid trademark. *Virginia Baking Co. v. Southern Biscuit Works*, 30: 167, 68 S. E. 261, — Va. —.

2. One who has applied the words "Crown" and "Jamestown" to crackers and small cakes, respectively, cannot complain that they are respectively applied by another manufacturer to ginger snaps and larger cakes of an entirely different class. *Virginia Baking Co. v. Southern Biscuit Works*, 30: 167, 68 S. E. 261, — Va. —.

(Annotated)

TRADING STAMPS.

Prohibition of use of, as restraint on right of contract, see Constitutional Law, 6.

Regulation of business of, in exercise of police power, see Constitutional Law, 12.

1. A prohibition of the issuance of trading stamps unless the articles to be given as a gift or premium shall be definitely described therein and their character and value shall be known to the customer at the time of his purchase of the goods entitling him to the stamps, and the right to the article becomes absolute when the stamp is delivered without the necessity of acquiring other stamps, is invalid as an unreasonable regulation of a legitimate business. *State ex rel. Simpson v. Sperry & Hutchinson Co.* 30: 966, 126 N. W. 120, 110 Minn. 378.

2. Illegal elements of chance, uncertainty, and contingency do not inhere in a trading stamp business conducted by selling stamps to merchants who, in consideration of their purchase, are given certain advertising, and the redemption of the stamps in specific numbers by giving those presenting them a right to select articles exhibited in a public show room and having the number of stamps necessary to secure them plainly marked on them. *State ex rel. Simpson v. Sperry & Hutchinson Co.* 30: 966, 126 N. W. 120, 110 Minn. 378.

3. The legislature may prohibit the issuing and redemption of trading stamps under contracts which, in practice, depend on chance, uncertainty, or contingency. *State ex rel. Simpson v. Sperry & Hutchinson Co.* 30: 966, 126 N. W. 120, 110 Minn. 378.

TRANSFER.

Of corporate stock, see Corporations, 6.
Of cause, see Removal of Causes.

TRANSFERS.

Making criminal violation of rules as to street car transfers, see Constitutional Law, 1.

TREES.

In city streets as to, see Highways, 5.

Limitation period for action for damages to, see Limitation of Actions, 4.

TRESPASS.

Evidence in action for damages for, see Evidence, 16.

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Question for jury as to defendant's title, see Trial, 14.

Directing verdict in action for damages for trespass, see Trial, 15.

One alleging title and possession may recover damages for trespass on proof of possession and invasion by defendant, without proving a perfect title. *Beaufort Land & Invest. Co. v. New River Lumber Co.* 30: 243, 68 S. E. 637, — S. C. —.

(Annotated)

TRESPASSER.

Ejection of, from train, see Carriers, 12.

TRIAL.

Permitting jury to take written dying declaration to jury room, see Appeal and Error, 30.

Prejudicial error as to instructions, see Appeal and Error, 28.

Sufficiency of objection to introduction of evidence to raise question of right to jury trial, see Pleading, 18.

Effect of demurrer to raise question of right to jury trial, see Pleading, 18.

As to witnesses on, see Witnesses.

1. A dying declaration, although reduced to writing, cannot be taken to the jury room under a statute providing that when the jury retires to consider its verdict it shall be allowed to take the pleadings in the cause, the instructions of the court, and any instruments of writing admitted as evidence, except depositions. *Territory v. Eagle*, 30: 391, 110 Pac. 862, — N. M. —.

Statements and arguments of counsel.

Prejudicial error in, see Appeal and Error, 29.

2. Counsel may, in argument, comment on the interest of a witness in the result of the trial, if his testimony is in conflict with other testimony or established facts in the case. *Dardanelle Pontoon Bridge & Turnp. Co. v. Croom*, 30: 360, 129 S. W. 280, — Ark. —.

Questions of law and fact.

Negligence in operation of automobiles, see Automobiles, 2.

3. The cause of the settling of the earth in a sewer trench is for the jury where there is evidence tending to show that the trench was improperly filled after the laying of the sewer, and there is also much evidence tending to show that the cavity under the pavement might have resulted from natural causes, and from the action of the water from broken service pipes. *Updike v. Omaha*, 30: 589, 127 N. W. 229, — Neb. —.

4. Whether the original improper filling of a sewer trench in a street was the proximate cause of the breaking through into a cavity formed under the pavement by the settling of the earth used in filling, of a wagon, to the injury of the driver, some twenty years after such filling, or whether the accident was proximately

caused by the natural, unavoidable sinking of the earth, and from the action of the water from broken service pipes, is for the jury, where the evidence is conflicting. *Updike v. Omaha*, 30: 589, 127 N. W. 229, — Neb. —.

5. When it is shown by evidence that words used in a penal statute are susceptible of two meanings, depending on the state of facts to which they are alleged to be applicable, the court may instruct the jury in the words of the statute, and leave to it the determination of the question whether or not the statute has been violated. *Katzman v. Com.* 30: 519, 130 S. W. 990, — Ky. —.

6. The sufficiency of the cause for a discharge from service under an existing contract is a question of law for the court, where the facts are undisputed. *McGregor v. Harm*, 30: 649, 125 N. W. 885, — N. D. —.

7. When a petition for damages for libel is sufficient, and there is evidence of malice in fact in making the publication, the question whether or not the defense of qualified privilege has been made out is for the jury. *Tanner v. Stevenson*, 30: 200, 128 S. W. 878, 138 Ky. 578.

8. Where the evidence is such that different persons may reasonably reach different conclusions, the question of the negligence of the defendant and of the contributory negligence of the plaintiff is for the jury. *Solberg v. Schlosser*, 30: 1111, 127 N. W. 91, — N. D. —.

9. The negligence of a street car company in running its car, without warning to its passengers, around a sharp curve at a speed of 20 miles an hour, whereby a passenger riding, because of the crowded condition of the car, and with the consent of the conductor, on the step of the platform, with his back to the street, and holding on to a stanchion with one hand, was thrown to the ground, 10 feet distant from the track, and killed, is for the jury. *Trussell v. Morris County T. Co. (N. J. Err. & App.)* 30: 351, 77 Atl. 535, — N. J. —.

10. The contributory negligence of a passenger in riding on the step of the platform of a street car from which, while he was so riding, with his back to the street, and holding on to a stanchion with one hand, he was thrown and killed, while the car was rounding a sharp curve, at high speed, is for the jury, where the evidence tends to show that he rode on the step because of the crowded condition of the car, and with the consent of the conductor. *Trussell v. Morris County T. Co. (N. J. Err. & App.)* 30: 351, 77 Atl. 535, — N. J. —.

11. The contributory negligence of one injured by the tipping over of his wagon which was loaded in the usual manner with flax straw, 8 feet high, while driving along a public highway, is for the jury, where it appears that he knew of the rough condition of the road, but testified that he could not turn around or avoid it after the discovery of the dangerous condition, 30 L.R.A. (N.S.)

that in driving over it he was attempting to follow the tracks of others who had driven over it about the same time, and that he exercised the greatest care in driving. *Solberg v. Schlosser*, 30: 1111, 127 N. W. 91, — N. D. —.

12. It cannot be said as matter of law that a telephone company acting as the ordinary man should not, when sending a lineman to straighten an angle pole, which it knows had pulled out of the ground, but with nothing to indicate that fact to the employee, who might have reached the conclusion that it had merely driven its brace into the ground, give him further notice of the danger, than simply to tell him to use a guy rope if the pole leaned badly. *Willis v. Plymouth & C. Teleph. Exch. Co.* 30: 477, 75 Atl. 877, 75 N. H. 453.

13. Whether or not a druggist, in selling opium without a prescription, used reasonable care to satisfy himself that it was obtained for a legitimate purpose, as required by statute, is a question for the jury. *Katzman v. Com.* 30: 519, 130 S. W. 990, — Ky. —.

14. The court cannot, in an action to recover damages for trespass to real estate, determine that defendant's title, which is not connected with a grant from the state, is perfect. *Beaufort Land & Invest. Co. v. New River Lumber Co.* 30: 243, 68 S. E. 637, — S. C. —.

Taking case from jury.

Dismissal of pleading, see Pleading, 4.
Prejudicial error in, see Appeal and Error, 31.

15. The court cannot, in an action to recover damages for trespass upon real estate, direct a verdict for defendant in case the *locus in quo* is not covered by plaintiff's written chain of title, if he also relies on adverse possession. *Beaufort Land & Invest. Co. v. New River Lumber Co.* 30: 243, 68 S. E. 637, — S. C. —.

16. The court cannot, in a prosecution for making an unlawful sale of intoxicating liquor, direct a verdict of guilty, and cause the clerk to enter it, without giving the jury a chance to disobey the instruction, although the court acts upon the theory that the facts proved present the question whether or not in contemplation of law there has been a violation of the statute. *People v. Curry*, 30: 892, 128 N. W. 213, — Mich. —.

Verdict.

Review of, on appeal, see Appeal and Error, 20.

Direction of verdict, see *supra*, 15, 16.

17. In an equitable action, where the trial court calls a jury to answer special questions of fact, the answers may be either adopted or ignored, and findings made by the court itself, based upon an independent consideration of the testimony. *Bethany Hospital Co. v. Philippi*, 30: 194, 107 Pac. 530, 82 Kan. 64.

TRUSTEES.

In bankruptcy, see Bankruptcy.

TRUSTS.

- Enforcement of trust as against trustee in bankruptcy, see Bankruptcy, 5.
- Unpaid stock subscriptions as trust fund, see Corporations, 7.
- Liability of trustee on stock subscription standing in his name, see Corporations, 5.
- Estoppel to enforce, see Estoppel, 3, 4.
- Creation of, by conveyance to trustees of religious denomination, see Religious Societies, 6.

UNDUE INFLUENCE.

- Sufficiency of evidence to show, see Evidence, 26.

UNIFORMITY.

- In taxation, see Taxes, 1.

UNITED STATES SUPREME COURT.

- Jurisdiction on appeal, see Appeal and Error, 2, 3.
- Scope of review on writ of error from, see Appeal and Error, 19.

UNREPEATED MESSAGES.

- Stipulations as to liability for, see Telegraphs, 7.

VACATION.

- Of highways, see Damages, 9; Highways, 13.

VARIANCE.

- Between pleading and proof, see Evidence, 33; Trespass.

VENDOR AND PURCHASER.

- Eviding tender of purchase money, see Contracts, 12, 13; Torts.
- Covenants between, see Covenants and Conditions.
- Notice to purchaser of unrecorded conveyance to another, see Records and Recording Laws.
- Specific performance of contract, see Specific Performance.

Defective or unmarketable title.

1. In an action to recover back purchase money for the failure of the vendor to comply with an agreement to furnish a marketable title, where the parties whose possible claims may affect the title are not before the court, the question of law upon which the title turns will not be determined, but the title will be deemed unmarketable if the question is one upon which it is apparent that other courts might entertain a different opinion. *Williams v. Bricker*, 30: 343, 109 Pac. 998, — Kan. —.

2. A title which a reasonably prudent man, familiar with the facts and apprised of the question of law involved, would not accept in the ordinary course of business, or as to which there is a doubt or uncertainty sufficient to form the basis of litigation, is unmarketable, even though the court, on the whole, considers it good. *Williams v. Bricker*, 30: 343, 109 Pac. 998, — Kan. —.

Deficiency in quantity.

3. The purchaser of real estate includ-

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ing an orchard of such irregular shape that it is difficult to ascertain its area without a survey, who is entirely unfamiliar with the fruit business, has a right to rely on the vendor's statements as to area, and may rescind the contract in case a represented area of 70 acres of orchard proves to be less than 49. *Best v. Offield*, 30: 55, 110 Pac. 17, — Wash. —. (Annotated)

Rescission of contract.

By married woman, see Ejectment; Husband and Wife, 1, 2.

Effect of delay in rescinding contract for fraud, see Election of Remedies, 3.

Demurrer to bill seeking annulment for fraud, see Pleading, 14.

4. That a sale induced by the fraudulent representations of the purchaser was made in pursuance of an option, and that, pending the option, the vendor made no effort to ascertain the truth of the representations, will not defeat a bill by the vendor to secure a reconveyance of the property, if the false representations were relied on in making the conveyance, and induced the vendor to forbear making an investigation. *Crompton v. Beedle*, 30: 748, 75 Atl. 331, 83 Vt. 287.

5. A vendor of a farm may maintain a bill to secure a reconveyance, where he had never seen the property and was ignorant of the fact that it contained valuable deposits of stone, and sold the property at one fifth of its value, upon the representation of the vendee, who desired to secure it for the value of the stone, that he knew the value of the property, and that it was only the amount paid; that the property was inaccessible, and that he desired to secure it for another purpose. *Crompton v. Beedle*, 30: 748, 75 Atl. 331, 83 Vt. 287.

(Annotated)

6. One who induces a sale of real property by fraudulent representations as to its value cannot avoid liability to reconvey, on the theory that the vendor has no right to rely on his representations. *Crompton v. Beedle*, 30: 748, 75 Atl. 331, 83 Vt. 287.

VENUE.

Where, by a statute, an action upon an insurance policy is maintainable in the county where the loss occurred, the insurer has no right to a transfer of the cause to the county where its principal office is located, although the action might have been brought there in the first instance. *Jenkins v. Hawkeye Commercial Men's Assn.* 30: 1181, 124 N. W. 199, — Iowa, —.

VERDICT.

In general, see Trial, 17.

VERIFICATION.

Of amendment to affidavit, see Affidavits.

VESTED REMAINDER.

Levy on, see Levy and Seizure.

In general, see Wills, 6.

WAGES.

Of employees, see Master and Servant, 3, 4.

WAIVER.

Of jury trial, presumption as to, on appeal, see Appeal and Error, 11.

Of right to rescind contract for fraud, see Election of Remedies, 3.

By insurer, see Insurance, 7-9.

Of trial by jury, see Jury, 2.

Of reply to answer, see Pleading, 9.

WANTON NEGLIGENCE.

See Negligence, 1.

WAREHOUSEMEN.

Delivery of certificate in form of warehouse certificate as pledge, see Pledge and Collateral Security, 1, 2.

WARNING.

Duty to give to servant, see Master and Servant, 7, 8.

Duty of person calling firemen to warn of danger, see Negligence, 2.

WARRANTY.

Covenant of warranty, see Covenants and Conditions.

WASTE.

Damages for, see Damages, 10.

Jurisdiction of equity of suit to prevent, see Equity, 2.

Infecting a building with smallpox, by a board of health which leases it from a mortgagor, may be found to be waste as against the mortgagee, if the jury finds that it is not reasonable and proper to let the building for this purpose, having reference to the probable effects upon its future, growing out of the presence of disease-producing conditions, in view of the existing state of the art of disinfection or other means of rendering it healthful. *Delano v. Smith*, 30: 474, 92 N. E. 500, 206 Mass. 365.

WATERS.

Ferry over, see Ferry.

Liability of city as to, see Municipal Corporations, 3, 4.

Prior appropriation.

1. Where the doctrine of riparian rights prevails the water of springs appearing on land which has passed out of government ownership is not subject to appropriation. *Mason v. Yearwood*, 30: 1158, 108 Pac. 608, 58 Wash. 276.

2. One who has appropriated water for a mill which he uses only a portion of the time cannot sell to another his right to the water during the time he does not use it, as against the rights of one who has made a valid appropriation of the water when not needed by him. *Windsor Reservoir & Canal Co. v. Hoffman Milling Co.* 30:615, 109 Pac. 422, — Colo. —. (Annotated)

3. Where a mill for which water has been appropriated is idle part of the time, the water not then needed for its purposes 30 L.R.A. (N.S.)

is subject to appropriation by a user above the point of the mill's intake. *Windsor Reservoir & Canal Co. v. Hoffman Milling Co.* 30: 615, 109 Pac. 422, — Colo. —. Springs.

See also *supra*, 1.

4. The owner of land on which a new spring breaks out may make such use of the water as he pleases, notwithstanding it would, if unmolested, cause a stream to flow across the land of another. *Mason v. Yearwood*, 30: 1158, 108 Pac. 608, 58 Wash. 276. (Annotated)

Adverse use; prescription.

5. One who uses water flowing from springs on another's land, through a ditch constructed to connect it with his own land, for a period sufficient to secure an easement in the land of another, has a prescriptive right to such flow. *Mason v. Yearwood*, 30: 1158, 108 Pac. 608, 58 Wash. 276.

6. One who has secured by prescription the right to the water flowing from another's spring has no right to an increase in the flow of the spring beyond that to which his prescriptive right attached. *Mason v. Yearwood*, 30: 1158, 108 Pac. 608, 58 Wash. 276.

Public water supply.

7. A provision in a contract by a water company to furnish service as efficient as that furnished to another city is modified by the act of the municipality in installing smaller mains which make the rendering of the service of equal efficiency impossible, and the company's duty is to use reasonable care to furnish a service as nearly efficient as that of the other municipality, as the difference in size of mains will permit. *Milford v. Bangor R. & Electric Co.* 30: 526, 76 Atl. 696, 106 Me. 316.

8. A municipal corporation which has contracted with a water company for a supply of water for the extinguishment of fire may sue in tort to recover damages for negligent breach of the contract, which results in the destruction of property of the municipality. *Milford v. Bangor R. & Electric Co.* 30: 531, 71 Atl. 759, 104 Me. 233.

9. A water company which has contracted with a municipal corporation to furnish sufficient pressure through its hydrants to extinguish fire within reach of them cannot, in case it negligently fails to maintain the necessary pressure, escape liability for the value of municipal property destroyed through such negligence, on the theory that it did not agree to extinguish fire, or to insure property against loss by fire, or that such damages were not in contemplation when the contract was made. *Milford v. Bangor R. & Electric Co.* 30: 531, 71 Atl. 759, 104 Me. 233.

10. A water company which, in consideration of the payment of a hydrant rental, undertakes to furnish water to a municipality, is not liable for loss of municipal property through its failure to maintain a sufficient pressure to extinguish fires, where its contract does not require it to furnish any particular water pressure, or place it under any obligation with re-

spect to the extinguishment of fires. *Milford v. Bangor R. & Electric Co.* 30: 526, 76 Atl. 696, 186 Me. 316. (Annotated)

11. To avoid liability in tort for loss of municipal property through fire because of its neglect to comply with its contract, a water company which has undertaken to furnish a pressure sufficient to extinguish fires must show that it used ordinary care to comply with the contract according to the exigencies of the situation, having due regard to the nature and importance of the contract, the rights and interests of those to be affected by it, and the manifest consequences of a failure to perform it. *Milford v. Bangor R. & Electric Co.* 30: 531, 71 Atl. 750, 104 Me. 233.

WAY.

Public way, see Highways.

WIDOW.

Right to homestead as against husband's heirs, see Homestead.

Election of remedies by, see Election of Remedies, 1.

Election between legacy and dower, see Wills, 7-9.

WILFUL NEGLIGENCE.

See Negligence, 1.

WILLS.

Effect of deed of insane person to revoke prior valid will, see Incompetent Persons.

Parol evidence to aid in construing, see Evidence, 12, 13.

Right to jury trial in action by devisee to cancel void deed, see Jury, 1.

Right of devisee to sue to set aside void deed by testator, see Parties, 1.

Signature of testator.

1. A signature at the end of testator's disposition of his property complies with a statute requiring signatures at the end of the will, and a signature is therefore sufficient, although the writing in logical order proceeds from the first to the third page and then back to the second, so that the signature is upon the second rather than the third page. *Re Stinson*, 30: 1173, 77 Atl. 807, 228 Pa. 475. (Annotated)

Probate; contest.

2. An attempt to assert title to property embraced in testator's will, under an independent title, is within a provision forfeiting the share of one who contests the will, if its success would effectually upset and destroy the whole plan which testator had formed for the disposition of his estate. *Moran v. Moran*, 30: 898, 123 N. W. 202, — Iowa, —.

3. A provision in a will forfeiting the share of one who contests it is valid and enforceable. *Moran v. Moran*, 30: 898, 123 N. W. 202, — Iowa, —.

Codicil.

4. Where one, after devising property to one for life, remainder to his daughter for life, remainder to her issue in fee, gives 30 L.R.A. (N.S.)

in a codicil certain other property to the first taker, subject to the same conditions as stated in the will, the daughter and her issue take under the codicil the same interest that they took under the will,—at least where the will indicates an intention to dispose of all of testator's estate. *Lewis v. Payne*, 30: 908, 77 Atl. 321, — Md. —.

Nature of estate or interest created.

5. Under a devise in trust to one for life, remainder to his daughter for life, remainder to her children in fee, if she leaves issue, and if she dies without issue to testator's heirs at law, the death of the daughter leaving issue vests the property in such issue, and will destroy all interests of testator's heirs, although such issue dies before the first life tenant. *Lewis v. Payne*, 30: 908, 77 Atl. 321, — Md. —.

(Annotated)

6. An estate created by a devise to one or his heirs after the death of a life tenant, with a provision that, in the event that he shall decease before the life tenant, leaving no heirs, then the estate shall go to another, vests in the first taker, subject to be divested in case he predeceases the life tenant, without leaving heirs. *Walker v. Alverson*, 30: 115, 68 S. E. 906, — S. C. —.

7. The claim of a widow owning a half interest in the homestead property, under the will of her husband, who owned the other half interest, which gives her a life estate in the whole homestead and in other property, does not amount to an election which will destroy her individual right, if she was ignorant of the fact that loss of her right would result from claiming under the will, where the other party can be placed in substantially the same situation as if no election had been attempted, since her act must be regarded as under misconception of fact. *Waggoner v. Waggoner*, 30: 644, 68 S. E. 990, — Va. —.

8. A statute requiring a widow to renounce the provisions of her husband's will within a certain time after his death, if at all, has no application to her duty to elect between the will, which attempts to dispose of her individual property and her independent rights in such property. *Waggoner v. Waggoner*, 30: 644, 68 S. E. 990, — Va. —.

9. Under a will devising by one clause the homestead in which testator had only an undivided moiety, the other moiety belonging to his wife, to her for life, and by other clauses giving the rest of his property to her for life, she is required to elect between her right in the homestead and her rights under the will. *Waggoner v. Waggoner*, 30: 644, 68 S. E. 990, — Va. —.

(Annotated)

Charge upon donee or land devised.

Election of remedies preventing enforcement of lien, see Election of Remedies, 2.

Limitation period for enforcement of lien imposed on property devised, see Limitation of Actions, 3.

10. A provision in a will requiring the

devisee to make certain payments to testator's wife, that they shall be and remain a lien upon the property devised so long as the wife shall live, will permit a recovery after her death of sums accruing during her lifetime. *Stringer v. Gamble*, 30: 815, 118 N. W. 979, 155 Mich. 295. (Annotated)

WITNESSES.

Prejudicial error as to, see Appeal and Error, 26.

Error in excluding questions on re-cross-examination, see Appeal and Error, 26.

Error in admitting evidence for impeachment of, see Appeal and Error, 24.

Discovery by, see Discovery and Inspection.

Comment on interest of, by counsel, in argument, see Trial, 2.

Cross-examination.

1. A witness who has denied being present when an assault was committed for which another person is being tried may, for the purpose of impeachment, be asked on cross-examination if he had not been convicted for an assault on the same person at the same time as that involved in the case on trial, and it is not necessary to prove that fact by the record of conviction. *Dotterer v. State*, 30: 846, 88 N. E. 689, 172 Ind. 357. (Annotated)

Privilege.

2. The mere statement by an officer of a corporation who has been directed to turn its books over to a receiver, that he has been indicted for an offense connected with the management of the corporation, and that the contents of the books may tend to incriminate him, is not sufficient to excuse him from obeying the order of the court, but it is necessary to state facts from which the court can determine that such is the fact. *Manning v. Mercantile Securities Co.* 30: 725, 90 N. E. 238, 242 Ill. 584.

3. An officer of a corporation cannot refuse to comply with an order of an equity court to turn over its books to a receiver, because they may have a tendency to incriminate him, since in such cases the books go into the custody of the court, and the constitutional protection of witnesses does 30 L.R.A. (N.S.)

not apply, because the court can protect the officer from the use of the books against him. *Manning v. Mercantile Securities Co.* 30: 725, 90 N. E. 238, 242 Ill. 584.

(Annotated)

WRIT AND PROCESS.

Writ of error, see Appeal and Error.

Levy of attachment by service of void summons, see Attachment, 1.

1. A published notice to "Dunton" is not sufficient to support an attachment against property of Denton, although a codefendant was correctly named, if no personal service was secured on either. *Schoenfeld v. Bourne*, 30: 122, 123 N. W. 537, 159 Mich. 139. (Annotated)

2. A foreign insurance company, upon withdrawing from the state in good faith, to escape the compulsion of N. C. act of February 10, 1899, requiring it to become a domestic corporation if it desires to continue to do business in the state, may revoke its appointment of the state insurance commissioner as its agent to receive service of process, so far as claims of citizens of other states are concerned, which are assigned after such withdrawal to a resident of the state for collection, although N. C. Laws 1899, chap. 54, continues the authority of the commissioner in force and irrevocable so long as any liability of the company shall remain outstanding in the state. *Hunter v. Mutual Reserve L. Ins. Co.* 30: 686, 31 Sup. Ct. Rep. 127, 218 U. S. 573, 54 L. ed. 1155.

3. An insurance company, upon withdrawing from a state, may revoke its appointment of the insurance commissioner as its agent to receive service of process so far as claims of citizens of other states are concerned which are assigned after the withdrawal to residents of the state for collection, although the power of attorney provides that it is irrevocable so long as any liability of the company should remain outstanding in the state. *Hunter v. Mutual Reserve L. Ins. Co.* 30: 677, 76 N. E. 1072, 184 N. Y. 136. (Annotated)

WRIT OF ERROR.

See Appeal and Error.

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